

**An Evaluation of BLM and Forest Service Proposed Plan Amendments
As Adequate, Necessary and Balanced
Conservation Provisions for Greater Sage-grouse**

**State of Utah
July 29, 2015**

The State of Utah was invited, in December 2011, by the then Secretary of the Interior, Ken Salazar, to create and implement a locally-generated conservation plan for the greater sage-grouse (*Centrocercus urophasianus*). In response, Utah, and most of the other states within the range of the species, assembled stakeholder driven teams to review the local ecology, the factors affecting the viability of the species in each separate ecoregion, and the ongoing and potential human uses of the lands in the area. Utah spent a great deal of time, effort and money to create and adopt the Conservation Plan for Greater Sage-grouse in Utah (Conservation Plan).¹ This Conservation Plan is based on an extensive database of knowledge attained through years of scientific research and observation of the greater sage-grouse in Utah.

The Conservation Plan represents the only complete and representative framework which ties together all the necessary tools for effective conservation efforts. Tools available to the state include habitat improvement and rehabilitation, such as the removal of pinyon and juniper trees encroaching into the sagebrush habitats, control of predators placing unnecessary pressure through direct mortality on small populations, the authority and relationships needed to implement effective conservation actions on private and state-owned lands, supplementation of declining populations when necessary, as well as reasonable and responsible mitigation requirements for use of the land.

The lands managed by the Bureau of Land Management (BLM) and the U.S. Forest Service (Forest Service) are a key part of the state's conservation framework, representing a significant portion of the habitat necessary for the year-round needs of the birds. One of the direct contributions of the federal agencies toward conservation of the species is created through reasonable amendments to the provisions of the land use plans of each agency, which can provide for reasonable allocations and stipulations concerning the use of the other resources found on federally managed lands. Other major contributions of the federal agencies is participation in the unified wildfire suppression and rehabilitation program, and participation in the hugely successful habitat improvement programs in Utah, such as the Watershed Restoration Initiative.

Significantly, however, **neither the BLM, nor the Forest Service, controls the remainder of the full conservation landscape**, nor do the two federal agencies control the remaining habitat necessary for the year-round survival and life-history needs of the species.

¹ See Conservation Plan for Greater Sage-Grouse in Utah, February 14, 2013, at <http://publiclands.utah.gov/wp-content/uploads/2013/08/Conservation-Plan-February-14-2013.pdf> . Accessed July 27, 2015.

Neither BLM nor the Forest Service can single-handedly assure the success for conservation of the species in Utah, nor over the entire range of the species.

The State of Utah, therefore, has serious concerns about the proposed plan amendments from the BLM and the Forest Service, because the proposals contain disproportionately severe provisions, including complete elimination of one authorized use, and severe restrictions on others. The state is concerned because these severe restrictions are not balanced by a commensurate gain in conservation measures for the species.

In addition, the plan amendments proposed by the BLM and the Forest Service are more restrictive than the restrictions which would result from a listing under the provisions of the Endangered Species Act (ESA). Recently, senior Interior Department authorities in support of the proposed plan amendments opined otherwise. Unfortunately, these officials have misunderstood the concerns.

The procedure to obtain permission to conduct an activity within the habitat of a listed species is well known and understood, though complicated. The only unknown within the process is the ability of the U.S. Fish and Wildlife Service (FWS) to respond to the demand for approvals. In contrast, the current proposals constitute no more than a power grab by the FWS to obtain a substantive result which far exceeds the scope of authority of the ESA.

The FWS could never eliminate mining, or threaten grazing, or place impossible restrictions on recreation and energy development under the provisions of an ESA listing. Instead, the FWS would work with permittees and landowners to authorize reasonable development through Conservation Agreements, Recovery Plan, Habitat Conservation Plans and the like. This path to conservation, as authorized by the normal ESA process, is, of course, exactly what the state's Conservation Plan achieves.

The precedent of the FWS- lead effort to dominate the BLM and Forest Service planning process is staggering. As a result of this version of agency land planning, in the future, anytime an agency or anyone else wanted to eliminate or severely restrict an activity in any particular area, all they would have to do is petition for a listing. This is a dangerous precedent, because BLM and Forest Service would then be forced to comply with the FWS demands for an overwhelming response far in excess of actual need, or face withering criticism for failing to support the requirements of the species. Fundamentally, BLM and Forest Service have illegally granted *de facto* planning authority to the FWS.

Summary of the State's Consistency Concerns and Recommendations

This Evaluation represents the Governor's Consistency Review² for the BLM and Forest Service plan amendments released as part of the Proposed Land Use Plan Amendments and Final

² This Governor's Consistency Review is submitted to the BLM and Forest Service in a timely manner. See Attachment 14.

Environmental Impact Statement published in the Federal Register on May 29, 2015.³ The Consistency Review is authorized by the Federal Land Policy and Management Act (FLPMA) and implementing regulations.⁴ The BLM and Forest Service must adjust the proposed plan amendments, and publish revised analyses made as a result of, the recommendations contained within this Consistency Review, in order to reach compliance with the statutory and regulatory requirements.

The State of Utah strongly asserts that the proposed plan amendments are inconsistent with the state's Conservation Plan, as discussed in detail below. Unfortunately, the proposed plan amendments by the BLM and the Forest Service do not fully support the framework for conservation of greater sage-grouse established by the state's Conservation Plan. **The proposed plan amendments do not represent success for the conservation of the species in Utah.** The state recognizes and appreciates the efforts of the local BLM and Forest Service employees who have worked with the state, local government, long-standing local working groups and academia to create the foundation of conservation of greater sage-grouse over the last twenty years.

The state's Conservation Plan is based upon an "all-lands" review, and is successful by responding to localized threats to the species, and by conserving the populations which exist today. Unfortunately, the previous cooperative foundation between the state and the federal agencies has been eroded by the creation of cumbersome and counter-productive review and control provisions mandated by national BLM and Forest Service offices, which have no independent knowledge of basic conservation needs in Utah. These nationally mandated provisions fail to support, and actually contradict to the fundamental finding of the best available science regarding conservation of sage-grouse in Utah – **the maintenance and creation of useable space for the species.** Nothing is more important for the ongoing stability of the species in Utah.

Additionally, the state's Division of Wildlife Resources (DWR) estimates that as much as fifty (50) percent of the landscape used by sage-grouse in Utah is privately-owned (DWR, 2009). Thus broad sweeping national conservation actions or regulations promulgated to protect greater sage-grouse and its habitat on federally managed lands under BLM and Forest Service National Strategies may be problematic or even counterproductive in areas where private lands provide important seasonal habitats. The failure of a national strategy to recognize sage-grouse dependence on private lands may result in regulations which ultimately increase sage-grouse habitat loss and fragmentation on private lands if landowners are forced to intensify management actions to offset lost revenues from public land grazing allotments. In such cases, regulations that impose new restrictions may either be viewed as irrelevant or create resentment, if they do not address state, local or loss of income issues.

BLM and Forest Service, driven by these misplaced national strategies, are creating a huge inconsistency with the state's strategy to incentivize conservation on private lands. In order to address FWS concerns regarding "the lack of regulatory mechanisms to protect candidate

³ 80 Fed. Reg. 20711, available at http://www.blm.gov/ut/st/en/prog/planning/SG_RMP_rev/FEIS.html. Accessed July 27, 2015.

⁴ See 43 U.S.C. §1712(c)(9). See also 43C.F.R. §1610.3-2.

species populations and their habitats,” local government in states where candidate species depend heavily on private lands for habitat will need to provide assistance to private landowners regarding local land use plan development designed to balance home development, recreational activities, and other land uses with candidate species conservation. Innovative incentive-based approaches are the path to success, not overwhelming and unnecessary response proposed by the BLM and the Forest Service.

BLM and the Forest Service must truly join in a partnership with the State of Utah in order to achieve successful conservation of the species. The two agencies **must eliminate the Fish and Wildlife Service induced myopia which plagues the proposed plan amendments**, and join in a coordinated effort with the state. The only coordinated effort in existence today is represented by the state’s Conservation Plan.

The Proper Perspective on the Federal Land Use Plans Lack of a Federal Conservation Plan for Greater Sage-Grouse

The federal agencies have not produced, nor have they even attempted to produce, a comprehensive conservation plan for greater sage-grouse in Utah, nor in any other state. The federal agencies’ “Proposed Plan” consists of solely of amendments to existing land use plans, which are described by the Department as “strong.” These amendments are completely dominated by a “Just Say No” philosophy. The proposed amendments are designed solely upon the perceived need to restrict the use of the federally managed lands by the other authorized resource users. In fact, BLM and the Forest Service are proposing to totally eliminate one of the authorized uses, mining, in the name of “certainty” of results.

Unfortunately, **the federal vision for conservation of the species is built upon the incorrect axiom that, once these restrictions are in place, conservation of the bird will follow.** Neither agency has engaged in the creation and implementation of a multi-stakeholder process to achieve buy-in to a comprehensive plan of conservation. Each agency has simply sacrificed human activities, and then obfuscated all the other necessary conservation factors by engaging in a lengthy, but largely irrelevant, NEPA process. NEPA is complex, but is designed solely to provide information to the BLM and the Forest Service concerning the environmental impact of various possible courses of action. NEPA is not, and never was intended to be, a substitute for a multi-stakeholder, partnership driven effort which creates and fosters all the requirements for conservation in a multiple ownership environment.

Specifically, the analyses in the FEIS concerning the strength of the conservation effects of the proposed plan amendments are based, far too simplistically, on a simple additive scheme related, for the most part, to acreage included in a series of more and less restrictive options. Nowhere does the BLM or Forest Service engage in a realistic portrayal of the effects of actual on-the-ground actions which create and maintain habitat in Utah. This lack of analysis of the big picture induces a false sense of accuracy, and causes BLM and Forest Service to incorrectly opine that more is better, when it comes to threats which are non-existent in Utah.

The Primary Factor for the Conservation of Greater Sage-Grouse Populations in Utah

The two biggest threats to the species in the fragmented habitat of Utah are

- **Wildfire**, and the associated movement of undesirable species (weeds) into the land after a fire, and the persistent
- **Encroachment** of conifer trees into the habitat that are required for sage-grouse conservation.

The State of Utah has addressed each of these threats in its Conservation Plan, and the associated Executive Order requiring actions from state agencies to implement the Plan. As a result, the state has instituted a fire suppression plan for the summer of 2015 in concert with the BLM, Forest Service Utah Division of Forestry Fire and State Lands, and local firefighting authorities. BLM and Forest Service plan amendments do address post fire rehabilitation, and the state looks forward to a seamless system of federal and local fire fighting assets to promptly suppress fires threatening sage-grouse habitat.

The state has researched, finalized and is now implementing a statewide conifer reduction program in the highest priority sage-grouse habitat, and has transmitted the implementation plan to the BLM.⁵

However, as an example of the disconnect between the federal agencies and the state, the roll-out of the proposed BLM and Forest Service plan amendments was accompanied by an agency created Fact Sheet, in which a number of the features of the proposal were discussed, including the need for buffers around leks.⁶ The release states “Leks are the heart of the sage-grouse life-cycle...”⁷

While this language certainly waxes poetic, it illuminates the failure of the BLM, the Forest Service, and the FWS to match planning with the actual needs of the species in Utah’s fragmented habitat. The biological life-cycle for sage-grouse in Utah is far more complex than attendance at leks in the spring. Just as vital, in Utah, is a place to survive the dark days and harsh conditions of winter, as one example.

Contrary to the limited scope of the federal agency proposals, Utah’s Conservation Plan is tied to protection of the year-round habitat needs of the species, and to the direct need to create more useable habitat for the birds. In Utah, the scientific facts demonstrate that

Good available seasonal habitat can mitigate the effects of the anthropogenic footprint on the landscape.

⁵ See Attachment 1.

⁶ The state's Conservation Plan defines a lek as an area where two or more strutting males attend the same location for two years or more, not necessarily consecutive years.

⁷ See *Fact Sheet: BLM, USFS Greater Sage-Grouse Conservation Effort*, at p. 3.

For example, the Henefer Divide lek, mentioned in recent media articles,⁸ is located on 300 acres adjacent to a well traveled state highway. This lek area has the highest visitation rate of any lek in Utah - possibly range-wide. Yet the population has persisted well over 100 years. In fact, females are nesting and rearing broods within a few hundred meters of the road. . Similarly, Utah research has demonstrated that female birds are successfully nesting within 100 meters of power lines, contrary to the published literature.

This result is contrary to published literature, but, in fact, demonstrates the adaptability of individuals in a population to the presence of anthropogenic features when surrounded by high quality habitat that provide for the life-history needs of the population.

Case Study – Sheeprocks SGMA

The state’s framework for conservation – the state’s Conservation Plan – identified eleven areas to be the focus of concentrated conservation in Utah. The eleven areas were chosen because they represent both the areas of the highest density of birds and the "best of the best" habitats, and because, in a few locations, the areas represented the opportunity to conserve isolated populations. One of those isolated locations is the Sheeprocks Sage-Grouse Management Area, which is located in the Great Basin portion of central Utah. The inclusion of the Sheeprock Mountain populations as an SGMA is also reflected in the COT Report’s designation of Priority Areas of Conservation (PACs).

The Sheeprocks area was added to the state’s Conservation Plan despite concerns about its small population level, its complete isolation from any other population, and the drought conditions already prevalent in the area. For example, the attached U.S. Drought Monitor report demonstrates the severity of drought conditions in the area during the summer of 2015.⁹

Subsequently, as part of the BLM and the Forest Service planning effort, the state, the BLM, the Forest Service and Utah academic institutions spent a great deal of time assembling population and habitat information in support of “soft” and “hard” triggers. The idea behind the population and habitat triggers is to identify that the population is undergoing stress, to seek the cause of the stress, and then, in subsequent actions, implement an appropriate response to alleviate the stress and restore the population or its habitat. The various population triggers which the agencies agreed to are contained within Appendix B to the FEIS, including the triggers for the Sheeprocks SGMA.¹⁰

The state conducts its annual count of breeding males on leks every spring. This year the statewide count is up, by 19%, leading to a final count of about 5,000 males on leks statewide.

⁸ See Salt Lake Tribune, *Morgan County owners envision resort on sage grouse turf*, September 16, 2014; See also Ogden Standard Examiner; *Birds on the divide: Sage-grouse ruffles resort plans*, March 19, 2015. As it turns out, the lek in question is not on the property mentioned in the articles. (Pers. comm., 2015.)

⁹ See Attachment 2.

¹⁰ As an aside, BLM chose not to include the Sheeprocks area within the Fire and Invasives Assessment Team (FIAT) review, because the population was “too small.” Instead, the FIAT analysis included the large population in the extremely fire-resistant Parker Mountain area. The FIAT analysis looks contrived for this reason.

This is a methodology which is accurate for the purposes of conservation planning,¹¹ contrary to assertions otherwise in the FEIS. However, as a result of the 2015 count, the Sheeprocks population was found to have declined. In fact, the decline was enough to have tripped the proposed hard trigger for the area.

The state's Conservation Plan requires the state to address the situation for the Sheeprocks population. The severe drought is the best explanation for the decline, given the total isolation of the population. The state has already convened meetings of the Plan Implementation Council (PIC), and the Local Working Group to address the possible courses of action. A multi-disciplinary Task Force of local experts is underway and is working toward identifying key limiting factors to this population. Post-fire rehabilitation projects have been completed in the area, habitat improvement projects for the area have been authorized and funded in part, by the State of Utah, and predator control programs have been focused on the area, in order to provide some relief for the individual birds. These actions were implemented immediately. Another action to assure the population's stability is to import additional birds next spring.

It is worthwhile to note, according to the provisions of Appendix B, which the BLM's proposed response to the hard trigger for the Sheeprocks population, i.e., the "immediate action ... necessary to stop a severe deviation," is to move the boundary of the priority habitat for the area to include more marginal, drought-stressed territory.¹² Such an action has little conservation value given the on-the-ground conditions and dynamics of the population.

In contrast, the state's Conservation Plan addresses the conservation needs of the population through the three actions, two of which are not actions which the BLM or the Forest Service has authority to undertake. For example, the population will require immediate relief from the stress of predation, so increased predator control efforts are underway. Second, the population may require some augmentation next spring – planning is underway. Third, habitat improvement projects need to be accelerated, which is also underway.

In short, cooperative actions under the state's framework for conservation are the best path forward. Fortunately, the state and the BLM have cooperated fully on fire suppression during the current summer fire season (2015) in this SGMA (as well as the others), and a small fire has been already suppressed pursuant to the summer's fire plan. The state and the BLM also cooperate in the planning and implementation of habitat improvement projects, and projects have been accelerated in the Sheeprocks area due to the population decline.

Despite the need for cooperation on the ground, and the many existing examples of on-the-ground cooperative projects and actions, the agency's planners continue to insist,

¹¹ Recent research in Utah demonstrates that the count of males on lek is an accurate proxy for the total population of birds. See *Sage-Grouse Conservation and Management Through Science: The Utah Experience*, Utah State University, 2015, at p. 4. (Attachment 3.)

¹² See FEIS, Appendix B at p. B-9. The state previously protested this action as contrary to law in the state's letter of protest dated June 29, 2015.

despite volumes of contrary evidence, that ineffective conservation measures applied in the wrong places, will lead to the conservation of the species.

Neither BLM nor the Forest Service can single-handedly resolve the stressors affecting the Sheeprocks area, and the proposed plan amendments should be adjusted to reflect this fact, and adopt the state's Conservation Plan framework which has proven to be incredibly effective throughout the state, including Parker Mountain and the Strawberry Valley, for example.

Success Based on Utah Management Brief History of the Strawberry Valley Sage-grouse Conservation Project

In March 1998, the Utah Division of Wildlife Resources (UDWR) began collecting seasonal habitat use and life-history information from sage-grouse in Strawberry Valley. Bunnell (2000) immediately documented high rates of adult mortality, and suggested that red fox predation on adult sage-grouse may be limiting population growth. In response to those findings, predator control actions were initiated in December of 1999 in an effort to increase survival rates and cause a subsequent population increase.

In response to these data, the Strawberry Valley Sage-grouse Conservation Project was developed and its goals were to 1) identify the factors that were limiting population growth and recovery, 2) apply management and conservation actions that mitigate the threat from those factors, and 3) rebuild the population to self-sustaining levels (Bunnell 2000).¹³

Researchers at Brigham Young University (BYU) collected seasonal habitat data to assess habitat conditions from 1998 to present. Bunnell (2000) and Bunnell et al. (2004) suggested that summer occupied habitats were in good condition, and estimated that the population was comprised of approximately 150 birds in 2004. Bambrough (2002) stated that it was crucial to maintain winter habitats in Strawberry Valley and the migratory areas located to the east towards the Fruitland area. Baxter (2003) demonstrated through a population viability analysis that there was a 77% probability that within 11-years (2014) the population would be extirpated without significant management efforts.

In response to those findings, an aggressive translocation program was initiated, as a cooperative process between BYU, the UDWR, and the Forest Service. From 2003 to 2008, 395 female sage-grouse were translocated to Strawberry Valley to augment the existing population and to increase genetic diversity. Hennefer (2007) found this translocation method to be the most successful translocation ever documented for sage-grouse range-wide, and estimated that population numbers had increased from an estimated 150 in 2004 to approximately 400 by 2007, and Baxter et al. (2009) demonstrated that adult summer survival rates increased during the years that intense predator control measures were implemented.

In addition, in 2006 researchers and biologists from UDWR, BYU and the Forest Service jointly identified areas where habitat could be improved by setting late seral sagebrush stands back to an earlier seral stage, wherein brood rearing habitat would be created. Plans called for

¹³ See Attachment 4 for a list of these references.

treatment (i.e., harrow and/or mowing) of seven areas (one every other year starting in 2007) in the Strawberry Valley, paired with subsequent monitoring of habitat use by tracking radio-collared grouse. In 2009, 2011, and 2013 the UDWR conducted habitat treatments in areas near Road Hollow, Badger Hollow, and Chipman Creek, respectively. Preliminary results from a Resource Selection Function (RSF) modeling exercise suggest that grouse are disproportionately using recently treated habitats versus non-treated habitats in the Strawberry Valley (Baxter 2003).

The data collected during this long-term conservation project has been and will continue to be used by the UDWR, Forest Service, the Local Working Group, Wasatch County officials and private landowners to make decisions that will ensure the long-term conservation of sage-grouse in Strawberry Valley. To date, this project is widely considered to be a resounding success and a range-wide model for how best to conserve a population that is declining precipitously. Very few sage-grouse projects across the West have delivered as much information over a continuous period of time. In addition, possibly no other project can document at least a two-fold increase in estimated population size associated with translocation and predator control actions. For this reason, the Strawberry Valley sage-grouse population is now considered one of the core populations in the State of Utah.

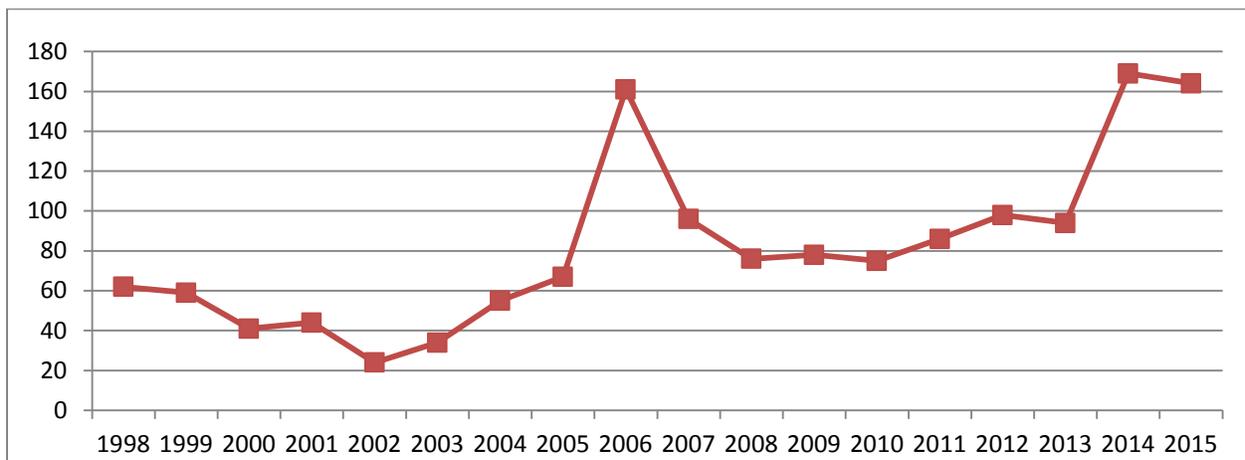


Figure 1. Total males counted within the Strawberry SGMA, Utah, 1998 - 2015.

Federal Agency Consistency Review

The BLM and Forest Service plan amendment process is now to the point in time where the BLM and the Forest Service are required to ask the Governor of the state to provide a Consistency Review of the proposed plan amendments. This provision, like the provisions requiring the BLM to engage in planning, was mandated by Congress as part of the provisions of FLPMA. It is as much a part of the organic charge to BLM as any other BLM operational

feature. This review is one of the last requirements before BLM and Forest Service may sign the necessary Records of Decision, and begin implementing their respective plans as amended.

Previous consistency reviews between the state and the BLM have been resolved in a cooperative manner, largely because of the desire to find mutual solutions, but also because no particular time urgency existed. Unfortunately, due to the *self-imposed deadline* by the FWS concerning the need to make a listing decision for the greater sage-grouse by September 30, 2015, the BLM and the Forest Service have announced that the required Records of Decision are scheduled to be signed by the end of August, 2015, barely 30 days after the submission of the Governor's Consistency Review.

The State of Utah protests this rush to conclude a lengthy, detailed, complicate and critical process, and protests the inaccuracies in the agencies' representations about the scope of a Consistency Review. Both the expedited schedule, and the misrepresentation of the rationale behind a Consistency Review, as presented in the FEIS, are specifically designed to minimize this key procedural aspect of the BLM and Forest Service planning process. The state is the entity constitutionally responsible for the management of wildlife and water, and the opportunity to pause, and consider carefully the effect of the BLM and Forest Service plan amendments on the efficiency and efficacy of the state's Conservation Plan, is essential.

Legal Standard

The Federal Land Policy and Management Act (FLPMA) established a very specific requirement for consistency with state and local plans *as an integral part* of its land and resource planning provisions. Specifically, a breakdown of the FLPMA consistency language demonstrates that

“In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local and tribal land use plans”

and the Secretary shall

“assure that consideration is given to those ...plans that are germane in the development of land use plans for public lands”

As part of the required *consideration* of the state plans, such as the state's very-specific and detailed Conservation Plan for Greater Sage-Grouse, the BLM is required to

“assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans.”

All of these requirements lead to the final operative language concerning the consistency review, which provides that

“Land use plans of the Secretary ... shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.”¹⁴

As a fundamental point, the BLM’s organic law – FLPMA – requires that federal land use plans be consistent with the state plans, to the extent the BLM (for the Secretary) determines that state plans are consistent with Federal law and the purpose of FLPMA. Therefore, the law does not allow the state, or any other entity, the authority to make any final determinations concerning the use of the federal lands. The final decision always rests with the BLM.

BLM does not represent this fundamental point correctly in the FEIS. BLM misconstrues the consistency requirement to be one which somehow *forces* BLM to accept state law and plans, simply because they are state laws or plans. BLM states

*The BLM is aware that there are specific state laws and local plans relevant to aspects of public land management that are discrete from, and independent of federal law. However, the BLM is bound by federal law. Consequently, there may be inconsistencies that cannot be reconciled.*¹⁵

The consistency requirement is *federal*, not state law. This interpretation by the BLM makes the consistency requirement meaningless, because any laws or plans which the state may make are, by definition, not federal laws or plans, and therefore do not need to be adopted in any form. Under the BLM’s interpretation, “consistency” with state plans only applies when there is absolutely no conflict with the prevailing federal policy, which, in this case, is represented by the very choices the BLM and Forest Service are proposing as plan amendments. To emphasize this point, the FEIS states

*Where officially approved state and local plans ... conflict with the purposes, policies, and programs of federal law applicable to public lands, there will be an inconsistency that cannot be resolved.*¹⁶

In sum, therefore, BLM is asserting that if the state plan (in this case the state’s Conservation Plan) *conflicts* with (that is, *differs* from) the “purposes, policies and programs” of federal law (in this case the proposed plan amendments) there is “an inconsistency which cannot be resolved,” and therefore the BLM is free to proceed as it chooses.

This crafty interpretation of FLPMA’s plain language is designed to improperly relieve BLM of its obligation to assist in resolving inconsistencies between the state's Conservation Plan and the proposed plan amendments, as required by Congress. Courts specifically presume that "Congress said what it meant and meant what it said."¹⁷ The Supreme Court has ruled that it always gives words used their "ordinary meaning."¹⁸ Congressional language is always

¹⁴ See 43 U.S.C. §1712(c)(9).

¹⁵ See FEIS at p. 6-10.

¹⁶ See FEIS at p. 6-10.

¹⁷ See *United States v. Steele*, 147 F.3d 1316 (11th Cir. 1998).

¹⁸ See *U.S. v. LaBonte*, 520 U.S. 751 (1997).

presumed to have some meaning, and there is no reason to suspect that Congress did not mean exactly what the language of the statute says.¹⁹

As described above, Congress was clear (in FLPMA) that BLM has an obligation to assist in resolving inconsistencies between Federal plans and non-Federal plans. Congress did not state that BLM can simply write-off or ignore inconsistencies between Federal and state plans simply because inconsistencies exist.

The BLM regulation concerning the consistency review further explains the duty of the BLM. After all the procedural requirements are satisfied, i.e. the 60 day consistency review by the Governor is received and evaluated, and the 30 day written appeal period, if necessary, has concluded, the regulation speaks to the substantive requirements for reconciliation of the inconsistencies by stating

*The Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest.*²⁰

This is not an automatic deferral to the state plan or the state's interests. The regulation requires the BLM's National Director to make a determination that the state's interest provides for a reasonable balance, which the state has the opportunity to present. If the best balance of interest is contained within the Governor's recommendation, the BLM has the opportunity to adopt the recommendations.

The Balance of Interests Concerning Greater Sage-Grouse Conservation

In this case, the ultimate goal of the state and the federal agencies align. The state, the BLM and the Forest Service are in agreement that the **fundamental point** of the state's Conservation Plan, and the federal agencies' soon-to-be-amended land use plans **is to create the proper balance between conservation of the greater sage-grouse, and enjoyment of all the other multiple-uses on the federal lands.**

Economic Sustainability as Part of the Required Balance

Neither Utah, nor any other state, has made any secret of the fact that economic uses of the land, which provide for sustainability of the human population, are part of the proper balance of interests. This balance is also tied to future uses as well. The state recognizes that industries ebb and flow over time, but also recognizes that innovation can lead to new discoveries. These discoveries may lead to new and different land uses. Today's plans must not restrict the need for rapid adjustment based upon future needs. Therefore, the scope and severity of any restrictive terms and conditions should be kept to the absolute minimum necessary.

For example, grazing is a vital use of the public land, supporting many ranching operations on private lands. Grazing by locally-owned operations will contribute to proper

¹⁹ See *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

²⁰ See 43 C.F.R. §1610.3-2(e).

vegetation conditions on the range, and will assist with the proper limitation on excess burnable material, thereby contributing to the resistance of the range to wildfire. Fluid mineral operations, such as oil and gas extraction, can be compatible with sage-grouse conservation, when stipulations such as No Surface Occupancy (NSO) are employed in a reasonable manner. NSO is feasible as a conservation tool through the technological advancements related to directional, and even horizontal, drilling. These techniques allow the surface disturbance to be minimized – which supports the second tier of the basic state conservation principle – avoid, minimize and mitigate. Finally the ability to explore for minerals is essential to a vibrant minerals industry. Of course, valuable minerals cannot be discovered unless lands are open for discovery and appropriation. Closure of lands to appropriation under the mining laws eliminates the ability to explore, which completely negates any ability to revisit area closures in the future.

Inventory and Valuation of Current Economic Activities

The State of Utah has generated a review of the economic interests at stake. This document, *entitled Inventory and Valuation of Current Economic Activities in Greater Sage-Grouse Range in Utah*,²¹ delineates the economic activities within the range of the species in Utah, and places a valuation upon those activities.

This type of study is very important within the context of the economic and environmental analysis required by the provisions of NEPA. Both the BLM and the Forest Service have placed great emphasis on analyzing, within NEPA documentation, the full range of impacts derived from both the “do-nothing” or no-action alternative, and some largest case, or worst case, or best case, or whatever extreme represents the antithesis of doing nothing. However, in this case, the BLM and the Forest Service have not met this standard, in terms of the realistic economic effects of its proposed plan amendments. While BLM and Forest Service myopically analyze the various alternatives in terms of an aggregation of restrictions, and portray the alternative with the most restrictions the best, neither agency performs a similar review upon the economic effects.

The state’s study represents, at a minimum, the full spectrum by providing information directly related to the antithesis of doing nothing in the economic realm. The study must be reviewed by the federal agencies in that light, because the full extent of economic impacts directly relates to the balance of interest review under a Consistency Review, as discussed above.

The study demonstrates **that 13,071 jobs, \$830.8 million in earnings, and \$2.5 billion in value added economic impacts is placed at risk** by the proposed BLM and Forest Service plan amendments.²² Whether or not this amount would, or would not, be realized is irrelevant. The BLM and the Forest Service are required, under the provisions of the consistency review,

²¹ See *Inventory and Valuation of Current Economic Activities in Greater Sage-Grouse Range in Utah*, Bureau of Economic and Business Research, University of Utah, July 2015. See Attachment 5, which is fully incorporated into this Consistency Review.

²² See e.g., *Inventory and Valuation of Current Economic Activities in Greater Sage-Grouse Range in Utah*, Bureau of Economic and Business Research, University of Utah, July 2015, at page xiv (Summary).

and NEPA, to examine the full spectrum of economic impacts of the proposal. The agencies have failed to do so.

The study also demonstrates that there are huge impacts to private property valuation from a listing under the ESA, and possibly from the proposed plan amendments. This information on a similar situation is easily obtainable from the effects of the ESA listing of the Lesser Prairie Chicken in the Midwest. BLM and Forest Service have failed to examine this type of relevant information.

The state recommends the BLM take this highly relevant information, and produce an environmental and economic study which meets the full slate of the requirements of NEPA. The state will work with the details of the analysis, in concert with the recommendation below to analyze a formal cooperative agreement for energy, mining, oil shale and other development in eastern Utah.

Conservation Objectives Team Report

In order to provide guidance to all partners engaged in the conservation effort, the FWS issued the Conservation Objectives Team (COT) Report. This Report represents the definitive statement by the FWS about the conservation needs of the species, including the need to establish Priority Areas of Conservation. Recently the Secretary of the Interior reiterated the importance of the COT Report, stating that the “goal line,” that is, the requirements to reach a not-warranted listing conclusion, “is the scientific information agreed upon between the states and the Fish and Wildlife Service” contained in the COT Report.²³

The COT Report identifies the need for Priority Areas for Conservation (PACs), and contains recommendations for planning actions necessary to protect habitat within the PACs. The Director of FWS, Dan Ashe, wrote a cover letter to the COT Report at the time of its release, and stated:

*Priority Areas of Conservation...were described as key habitats that are essential for sage grouse conservation. PACs were identified using the best available information at the time of...completion of the report. The report acknowledges the uncertainties associated in the delineation of these areas, yet focuses our attention on these areas. These areas were identified as highly important for long term viability of the species and should be a primary focus of our collective conservation efforts.*²⁴

The PACs identified in the COT Report were based upon state maps, because “states have the most complete local information of sage-grouse distribution and habitat use.”²⁵ This is

²³ Response of Secretary Jewell to questions from Senator Risch of Idaho; Hearing before the Senate Energy and Natural Resources Committee, February 24, 2015; reported in E&E News, Phil Taylor, February 24, 2015.

²⁴ U.S. Fish and Wildlife Service; Letter to Interested Readers signed by Dan Ashe, Director, p.1. Accessed February 27, 2015 at <http://www.fws.gov/mountain-prairie/species/birds/sagegrouse/COT/COT-Report-with-Dear-Interested-Reader-Letter.pdf>.

²⁵ Conservation Objectives Team Report, March 2013, p. 13.

more true in Utah than anywhere, as Utah has the most complete database of sage-grouse habitat, movement and local needs in existence.²⁶ In addition, the COT Report fully acknowledges that PACs represent “key areas that states have identified as crucial to ensure adequate representation, redundancy, and resilience for conservation of its associated population or populations.”²⁷

The Director’s cover letter went on to generally discuss other areas, outside of the PACs, which might be later determined to have importance based on new information. The letter states:

*This could be due to their significance for a critical life history phase, or as a link to ensure connectivity to other populations, or to retain opportunities for critical restoration efforts that may come to light in the future. If information comes to light indicating an area outside a PAC is highly important, state and federal partners working to conserve the species should consider its significance as decisions are made that could impact that area.*²⁸

The COT Report itself adds that “additional finer scale planning efforts by states may determine that additional areas outside of PACs are also essential,” and “where consistent with state conservation plans, sage grouse habitats outside of PACs should also be addressed.”²⁹

Finally, the COT Report states:

*There may also be seasonal habitats outside of PACs essential to meeting the year-round needs of sage-grouse within PACs but that have not yet been identified. Therefore, maintaining habitats outside of PACs may be important... Conservation of sage-grouse habitats outside of PACs should be closely coordinated with each state.*³⁰

Concerning oil and gas development, the COT Report states:

If development must occur in Sage-grouse habitats due to existing rights and lack of reasonable alternative avoidance measures, the development should occur in the least suitable habitat for Sage-grouse and be designed to ensure at a minimum that there are no detectable declines in Sage-grouse population trends...

The COT Report requires consultation with the state concerning the establishment of protective areas outside the existing PACs. The state reached the above conclusions about the inclusion of Anthro Mountain as a SGMA (or PAC) as part of the process leading to the 2013 Conservation Plan for Greater Sage-grouse in Utah. The Forest Service has ignored the best available science, and has not provided any new information which might require revisiting the issue.

²⁶ See generally; *Sage Grouse Conservation and Management Through Science – The Utah Experience*, Utah State University, 2015, p. 2.

²⁷ Conservation Objectives Team Report, March 2013, p. 13.

²⁸ *Id.*

²⁹ Conservation Objectives Team Report, March 2013, pp. 13 and 33.

³⁰ Conservation Objectives Team Report, March 2013, p. 36.

The Department of the Interior has proposed an interpretation of the above COT Report language to mean that there is an absolute requirement to provide protections for habitat outside the priority areas, which are generally the SGMAs (or PACs in COT Report parlance) in Utah. The language of the COT Report unequivocally states that conservation of sage-grouse habitat outside the PACs must be coordinated with the state. As discussed in detail below, the state has found that many of the areas outside the SGMAs, especially West Tavaputs, Anthro Mountain and the Uintah Basin, are heavily influenced by federally-authorized energy development, and that the resilience of the populations in those areas may be diminished. In addition, recent research conducted by Utah State University demonstrates miniscule amounts of useable habitat exist near those populations.

The FWS Position on Balance – Positioning from Extremes

Unfortunately, the FWS has completely unhinged any reasonable discussion about the proper balance between conservation and the other multiple-uses. For example, the FWS has posited that conservation absolutely requires elimination of mining on the land through a Secretarial withdrawal of about 9 million acres of land from the application of the mining laws. The FWS supports this drastic measure by arguing that the ‘mother of all leks’³¹ may be present, and therefore must be summarily isolated from not only the possibility of a mine nearby, but also from the threat of mineral exploration companies working the area. When the possibility of the “mother of all leks” sitting on top of the “mother of all lodes” is raised, the FWS simply dismisses the question as irrelevant, because economics are, in the view of the FWS, not a factor to be considered.

Not only is this type of reasoning itself completely irrelevant and unproductive, but represents the skewed sense of balance the BLM and the Forest Service are presenting through the proposed plan amendments. Vast amounts of information are simply assumed to be true by virtue of such reasoning. For example, what exactly is this concept of the “mother of all leks,” and how do we find a scientific definition for one of these? How does such a super-lek differ from the leks already being counted and considered by the state? What scientific information supports this idea? How is this super-lek any different from any of the others within the state’s eleven Sage-Grouse Management Areas? Most importantly, how does inventing this type of analysis skew the plan provisions proposed to deal with the threats to the species?

BLM and Forest Service must reject this type of thinking, because BLM and Forest Service are required to consider the many other multiple-uses within their statutory authorities, and to seek the required balance among all the competing resource demands.

The state’s Conservation Plan, and the basic premise of the proposed BLM and Forest Service plan amendments, is to control the location and scope of disturbance within the identified priority areas to the minimum possible with due regard for valid, existing rights. To continue the mining example, mining is no different than any other disturbance. Both the state Conservation Plan, and the proposed plan amendments can accommodate mining within the

³¹ Personal communication, D. Ashe, 2015.

disturbance cap calculations, and the energy/mining facility cap calculations if adopted, and require compensatory mitigation as necessary. This process can be applied to all leks within the priority areas, not just to some *faux* super-lek.

The primary concept behind the idea of a consistency review is to seek balance in all aspects of the proposed plan amendments, not to overemphasize any one thing.

Consistency Review – Forest Service

The requirement for a consistency review was mandated by Congress as an integral part of the planning portion of FLPMA. This review is an important step before BLM and the Forest Service sign the necessary Records of Decision, and begin implementing the new amendments within each agency's respective plans.

The Forest Service has been an integral part of the preparation of the EIS, and the composition of the proposed plan amendments. Regrettably, the Regional Office of the Forest Service has informed the state that although it has been a full partner with BLM throughout the entire EIS process, it does not intend to participate in a consistency review for the proposed plan amendments. The Forest Service is therefore taking the position that, although it will receive the benefits from being a Cooperating Agency partner with the state during the preparation of the FEIS and the proposed plan amendments, it does not believe the final step in the process - the consistency review – is worthwhile. It is not equitable that the Forest Service should reap the benefits of the plan amendments without fulfilling its responsibility of conducting a consistency review.

As discussed above, the purpose of the consistency review is to examine the most appropriate balance for conservation provisions against the other multiple-use activities upon the federally managed lands. In addition, the Forest Service does not profess any particular discomfort with the consistency review process because it has agreed to conduct a consistency review for proposed plan amendments with the State of Wyoming, and some of the Wyoming lands are involved within the Utah FEIS. The Forest Service has not provided a equitable rationale concerning its choice of consistency review partners – that is, for picking and choosing which states to conduct a consistency review with, and which ones to avoid.

The state holds the expectation that the Forest Service would participate in the consistency review because it has been working closely with the BLM throughout the FEIS process. As discussed in detail within this Evaluation, there are numerous facets of the proposed plan amendments which do not represent the proper balance of interests. In all equity, the Forest Service must consider and provide substantive responses to the Governor's Consistency Review, alongside the other federal partner in the process – the BLM.

Conservation of Greater Sage-Grouse in Utah: 1995 - 2015

Fundamentally, BLM and the Forest Service have failed to understand and support the heart and soul of the state’s on-going conservation measures, and of the most recent Conservation Plan, and so therefore do not even come close to presenting, let alone resolving, an accurate consistency analysis.

Because BLM and Forest Service are blinded by the heavy ‘impact’ (to federally managed lands) analysis mandated by NEPA, both agencies have not spent any time discussing or formulating plans or programs which actually address the threats faced by each population in Utah. Because neither BLM nor Forest Service has spent any effort to understand the nature and scope of the actual threats to the species in Utah, as opposed to the generic ideas presented in the 2010 listing decision of the FWS, neither agency is embracing consistency with the purpose of the state’s Conservation Plan.

History of the State’s Effort

The State of Utah, along with all of the other states within the range of the greater sage-grouse has finalized, and is implementing a Conservation Plan for the species. Utah’s Conservation Plan is a framework for success, based upon a solid foundation of scientific research on the local habitat conditions and populations. Utah’s Conservation Plan is built from the bottom-up, with specific and necessary habitat protections and improvements planned and implemented through the on-going efforts of ten long-standing Local Working Groups. These Local Working Groups represent the best tool for implementation of conservation measures, by virtue of an intimate and thorough understanding of the local topography, hydrologic balance, vegetation composition, predator management, and the many other factors which lead to successful species management.

The state’s Conservation Plan is also tied to the basic fundamental principle that financial and personnel resources are limited, and that those resources should be focused toward the places which offer the greatest return for each conservation measure. This principle is fully supported by the realization that, **in a complex ecological and economic environment, it is not possible to manage for every bird.** The fundamental effort supporting range-wide objectives for conservation of the species – the Conservation Objectives Team (COT) Report – recognizes that choices are necessary, and offers recommendations about objectives, not hard and fast conclusions.

State Conservation Plan and Executive Order

The state has adopted several conservation plans for sage-grouse over the years, and began implementing the most recent, updated Conservation Plan in February, 2013. This updated Conservation Plan was prepared in response to the FWS March 2010 “warranted, but precluded” listing decision,³² and in response to the request of the Secretary of the Interior. In

³² See generally the decision; accessed on July 27, 2015 at <http://www.fws.gov/mountain-prairie/species/birds/sagegrouse/FR03052010.pdf>.

order to provide information about the implementation of the Conservation Plan, the state recently issued the 2014 Annual Report,³³ documenting progress to date.

In addition, Utah Governor Herbert recently signed an Executive Order which specifically tasks state agencies with various duties as part of implementation of the state's Conservation Plan. The Executive Order is a "directive from the chief executive to state agencies [to focus] the efforts and priorities of the state agencies toward coordinated conservation of the species, in order to satisfy the [U.S. Fish and Wildlife] Service's PECE evaluation." Pursuant to this purpose, the Executive Order states, among other things:

*Funding, legal assurance contracts, habitat enhancement, improvement and reclamation efforts, mapping, scientific research, and other proactive efforts to assure viability of greater sage-grouse in Utah should be focused and prioritized to take place within or near Sage Grouse Management Areas, or be designed to facilitate implementation of the state's Conservation Plan.*³⁴

The state's Conservation Plan created eleven Sage Grouse Management Areas (SGMAs) as the focal point for conservation efforts within the state. The choice of these particular areas was based upon several factors. First, the SGMAs were created around the locations with the highest density of birds, based upon the best available science.³⁵ Second, the state required that the geographical extent of each of the specific SGMAs contain all necessary year-round habitat for the biological requirements of the species. In addition, establishment of the SGMAs was tied to recognition of the effects of valid existing rights and future human activities within each area, and the potential for population trend stabilization and growth thorough habitat improvement and enhancement projects.³⁶

In addition, each state agency which was charged with responsibilities under the terms of the Executive Order has now executed a Memorandum of Understanding (MOU) with the state's Public Lands Policy Coordinating Office (PLPCO) and the Division of Wildlife Resources (DWR). The purpose of these MOUs is to assure accountability in the implementation of the state's Conservation Plan, so that transparency of results is apparent. The MOU with the Division of Oil, Gas and Mining is attached as an example of the terms of these MOUs.³⁷

³³ The Report is available at http://wildlife.utah.gov/uplandgame/sage-grouse/pdf/2014_Greater_Sage-grouse_Annual_Report.pdf. Accessed July 27, 2015.

³⁴ Executive Order: Implementing the Utah Conservation Plan For Greater Sage-Grouse, February 10, 2015.

³⁵ The density maps were based upon the work of Doherty, K.E. (2008) and the eleven areas, once completed, aggregated in excess of 94% of the birds in Utah. See Doherty, K.E. (2008) Sage grouse and energy development; integrating science and conservation planning to reduce impacts [Dissertation], University of Montana; Missoula, Montana.

³⁶ The fundamental point concerning the inclusion of year-round habitat needs is not as clearly represented in the conservation plans of other sage-grouse states, and so receives little discussion. However, it is essential in Utah due to the naturally fragmented nature of the habitat, and the difference in ownership of the lands containing the required habitat. The need to provide for all the year-round habitat needs of the species was also the very point of the discussion about additional areas in the Conservation Objectives Team Report, discussed elsewhere in this letter.

³⁷ See Attachment 6.

In addition, the state has been working to study and generate numerous implementation plans. For example, based upon the release of detailed conifer maps by the Natural Resources Conservation Service, and upon a detailed review of the historical data related to wildfire ignition, the state has prepared and begun to implement a 1 to 15 year plan³⁸ for the prioritization of conifer removal within the Great Basin portion of Utah. This plan has been transmitted to the BLM for its use in both the Fire and Invasives Assessment Team (FIAT) planning, and the ongoing efforts to prioritize projects within the Watershed Restoration Initiative. Implementation of the state's conifer removal plan is underway, yet is not mentioned at all within the FEIS or the proposed plan amendments. These meaningful state actions have proven to be successful in protecting sage-grouse habitats and must be sufficiently considered in the FEIS.

Federal Agency Interpretation of the State Conservation Plan

The state has asked BLM and the Forest Service to consider and adopt amendments to the relevant land use plans designed to balance the conservation of greater sage-grouse with the other required uses of the land. In so doing, the amendments must also conform to the general legal requirements regarding the fundamental purpose of BLM lands, such as the requirement for multiple-use and sustained-yield,³⁹ and consistency with state plans.⁴⁰ In addition, because the state is the entity with management authority over the species, the BLM and the Forest Service are required to recognize and correctly make use of state data concerning the species.⁴¹

As the primary focus of the conservation effort, the state's Conservation Plan adopts the long-accepted conservation principle of "avoid, minimize and mitigate" as the various resource uses are authorized and sustained within the habitat of the species. However, the choice of this long-standing principle by the state has led the BLM to assert that the state's implementation of conservation efforts may not be successful if avoidance cannot be achieved. In this regard, the BLM asserts its plans provide superior protection, stating

*...if avoidance was not possible the BLM's Proposed Plan would likely preclude such actions.*⁴²

That is, the BLM would prohibit the action regardless. Of course, this BLM statement completely disregards the difference in authority based upon different ownership of land. BLM does not have to concern itself with the constitutional prohibition against the use of private property for governmental purposes without compensation (the takings clause) on the lands it manages, because the BLM manages public land, not private property. Further, the BLM may not foster any kind of assumption about the efficacy of the state's Conservation Plan on private lands based upon the incorrect assumption that the state manages private lands. Private lands are

³⁸ See Attachment 1.

³⁹ See 43 U.S.C. §§ 1701(a)(7), 1712(a); See also 16 U.S.C. 529.

⁴⁰ See 43 U.S.C. § 1721(c); See also 43 C.F.R. § 1610.3-2.

⁴¹ See e.g., Report in Congressional Appropriations Bill, Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2016, H.R. Rep. No. 114-170, p. 6.

⁴² See FEIS at p. 6-12.

managed by the citizen who owns the lands, not the state. The state and local governments are authorized to protect the health, safety and welfare of the citizens, and based upon that authority, can and do encourage citizens to assist in the conservation of the species. Many citizens are more than willing to do so.

The state's adoption of the conservation principle of "avoid, minimize and mitigate" means that it will, to the greatest extent possible, work with the private landowner to achieve conservation through incentives, and, pursuant to the Governor's Executive Order, provide reasonable regulation as part of the issuance of permits by state agencies within SGMAs.

Of course, both BLM and the Forest Service have to concern themselves with the prohibition against the taking of private property in a different context. This requires both BLM and the Forest Service to provide for similar planning ambiguity. For example, in BLM's discussion about the difference between the state's disturbance cap of 5% on new disturbance, and the BLM's preferred figure of 3% of the entire area, BLM admits

*If the disturbance is exceeded, no new activities would be permitted, **subject to valid existing rights.***⁴³

In other words, BLM must allow certain activities to proceed, even if the proposed density cap would be exceeded, as a direct result of the requirement to allow rights, of whatever type, held by private citizens or corporations, to proceed. The private rights could include the need for roads to access state or private lands, or for pipelines to move valid water rights, or construct powerlines, or any number of uses.

The Forest Service recognizes these legal constraints as well.

The scientifically demonstrated facts constituting the baseline of the management situation regarding sage-grouse conservation needs in Utah means that many of the provisions of the proposed plan amendments are of little impact to the overall conservation of the species. Unfortunately, the myopic focus by the BLM and the Forest Service solely on regulation as the solution dramatically misses the point. **Regulation is an assist to the goal of sage-grouse conservation, NOT the goal itself.** This approach is unacceptable for the conservation of the bird and its habitat. BLM and Forest Service's superficial assessment of Utah's Conservation Plan will ultimately prove unsuccessful for the long term conservation of sage-grouse.

The Federal Review Process Fundamental Lack of Respect for State Sponsored Scientific Research

The state created the proper balance of conservation and human activity through the multi-stakeholder process which led to the adoption of the state's Conservation Plan. The need for grazing, mining, recreation in concert with reasonable conservation measures was recognized. The FWS responded with five criticisms of individual provisions of the plan. In so

⁴³ See FEIS at p. 6-12.

doing, the FWS also indicated its preference for scientific research from outside the state of Utah, and summarily discounted regional research which directly addressed the conservation issues.

Scientific studies subsequently demonstrated the lack of scientific support behind two of the FWS concerns – the need to include the West Tavaputs area and the Anthro Mountain area as priority habitat, and the effect of transmission lines upon the species. As a result of its rejection of the regional science, the FWS specifically indicated it would sidestep the state’s comprehensive Conservation Plan, and work directly with the BLM and the Forest Service to impose restrictions in the West Tavaputs and Anthro Mountain areas. BLM and the Forest Service proceeded to propose restrictions which were not supported by the scientific facts and the authorized level of other human activities.⁴⁴

The federal agencies are selectively employing only the scientific research which agrees with their positions. For example, faced with genetic research which countered their belief that connectivity was important in the West Tavaputs and Anthro Mountain areas, the FWS simply stated that the area was “cool” and “unique” and deserved some type of protection. Similarly, the state demonstrated through scientific research that the Anthro Mountain population would likely not survive on its own, but would require additional translocations of new birds into the area in order to prop up the population. The Forest Service completely ignored this research in favor of generic and locally inapplicable research from other locations. (See e.g., the information presented in Appendix P to the FEIS)

The federal planning effort for sage-grouse has also involved the publication of two new reports by the U.S. Geological Survey.⁴⁵ These reports are simply compilations of existing scientific research, and provide no new scientific conclusions beyond the hypotheses tested in the literature reviewed. Because the new Reports do not present new information, the underlying scientific papers are the best source of information. However, the federal agencies are now according the new Reports status as scientific research, in order to whitewash the underlying studies with a veneer of extra authenticity. The underlying scientific papers are fully capable of standing on their own, and rising or falling according to their own merits. That is, after all, why the rigors of the scientific peer-review and publication processes are in place.

In addition, the underlying papers within the new Reports are favored over the local research conducted in Utah, which has produced contrary results in some instances. Of major significance, the papers from outside Utah are adopted without review, while the papers from within Utah are subject to extra scrutiny. If the outside papers are to be accepted at face value, the regional scientific literature must be accepted at face value as well. Parity of consideration is vital to a solid understanding of the conservation needs in Utah. As currently written, the FEIS

⁴⁴ See the attached letters in Attachment 7 concerning this issue, which letters are hereby incorporated into this Consistency Review. Letters from Kathleen Clarke to Larry Crist, Juan Palma, and Nora Rasure, dated December 22, 2014 and March 3, 2015, sent regarding scientific research and other information concerning the West Tavaputs and Anthro Mountain Regions.

⁴⁵ See Manier, et.al., Summary of science, activities, programs and policies that influence the rangewide conservation of Greater Sage-Grouse, USGS Open-File Report 2013-1098 (2013)

demonstrates a bias toward using regionally produced science over local and sound scientific research.

**Analysis of the Management Situation: Sage-Grouse Conservation Needs
Based Upon
The Utah Scientific Narrative**

The existing and on-going scientific research in Utah demonstrates the solid scientific foundations for the state's Conservation Plan. Utah State University recently provided a summary of greater sage-grouse research in Utah through preparation of a review paper entitled Sage-Grouse Conservation and Management Through Science: The Utah Experience (The Utah Science Narrative).⁴⁶ This paper reviews the scientific and political foundations for the Conservation Plan, stating for example

The Sage-grouse Management Areas (SGMAs) represent the best opportunity for high-value, focused conservation efforts for the species in Utah. They were formulated to reflect the biological and geographical realities of areas currently occupied by a population or populations of sage-grouse. They are specifically designed, using Utah's greater sage-grouse data and research, to address known and documented seasonal movements and uses by Utah sage-grouse.

The Utah Science Narrative references the primary goal of local work to enhance the species well-being in Utah. It states

Currently, there are 10 regional Local Working Groups (LWGs) operating in Utah. Each LWG has developed a local conservation plan which fed into the development of the Utah Plan (2013). In fact, the LWG and their plans provided the basis of implementation of sage-grouse actions in Utah. The CBCP facilitators worked closely with LWG members, state and federal, and private partners to implement the Utah's Plan (2013) goal of protecting high-quality sagebrush habitat to address and ameliorate the threats facing the sage-grouse while balancing the economic and social needs of the residents of Utah through a coordinated program. The Utah Plan (2013) incorporates and enhances the earlier efforts of LWGs to protect sage-grouse and their habitats.

The concept of focused conservation in Utah through the use of SGMAs is fully supported by the Utah Science Narrative.

The Utah Plan (2013) synthesized UDWR sage-grouse lek location data and seasonal movement information, obtained by two decades of research to delineate eleven SGMAs. This approach, based on the best available research and data, recognized and accepted

⁴⁶ See *Sage-Grouse Conservation and Management Through Science: The Utah Experience*, Utah State University, 2015, at p. 4. (See Attachment 3.) This paper is the equivalent in function, on a statewide basis, of an Open Report publication by the U.S. Geological Survey, such as those authored by Manier, et.al. 2013., and Manier, et.al 2014.

*current land uses and identified potential future uses which may conflict with species conservation (Utah Plan 2013, Dahlgren et al. 2015a, in press).*⁴⁷

Based on the scientific data achieved through decades of work, the creation of SGMAs was crucial, because

Utah's SGMAs achieved the COT report recommendations of targeting conservation efforts in priority areas (USFWS 2013). For comparison, Fedy et al. (2012) reported that 85% of summer and 65% of winter locations are within Wyoming's core area boundaries. If the sage-grouse habitat restoration objectives in the Utah Plan are met, usable space within SGMAs will increase over time benefitting the state's sage-grouse populations.

It is important once again to state that ***Utah is not a sea of rolling sagebrush***. As a result, the existing management situation requires detailed attention to the actual nature of the habitat and its relationship to nearby human activities. The most important measure the state, the BLM and the Forest Service can employ, in order to fully promote the state's goals and objectives for the conservation of the species, is to promote the continued **expansion of the habitat base**. It also bears constant and continual repetition to remember that the scientific evidence in Utah demonstrates that, once again

Good available seasonal habitat can mitigate the effects of the anthropogenic footprint on the landscape.

The direct result of this conclusion is that many generic conclusions drawn through research based in other regions, or using outdated information from Utah, have minimal applicability in Utah, and are superseded scientific results derived from the Utah research. Fundamentally, the baseline management situation for effective conservation measures in Utah is represented by the information in the Utah Science Narrative, which forms the baseline for the analysis within this Consistency Review, the state's Protest Letter of June 29, 2015, and the comments on the Administrative Draft, dated May 13, 2015.⁴⁸ Specific excerpts from the Utah Scientific Narrative provide

Increasing Useable Space for Sage-grouse

Sage-grouse occupied habitat in Utah largely reflects the topography and geography of Utah. The geography is characterized by mountainous terrain, separated by broad valleys in the Great Basin, and by deeply incised canyons in the Colorado Plateau (West 1983). Sage-grouse habitat may be found in intact blocks or natural fragments in the Great Basin, or in disconnected "islands" of habitat in the Colorado Plateau (Perkins 2010).

⁴⁷ *Id.* at p. 5.

⁴⁸ Specifically, to the extent the information in the Utah Science Narrative represents a different conclusion than the underlying scientific papers found in the two USGS Open Reports (see footnote 30 above), the information and conclusions found in the Utah Science Narrative should be employed as representing the best available science.

*The Utah Plan (2013) has placed emphasis on increasing usable space for sage-grouse in naturally fragmented habitat as a means of increasing both production and connectivity. The reduction and removal of juniper (*Juniperus spp.*) and pinyon pine (*Pinus edulis*; PJ) encroachment in SGMAs where the sagebrush and herbaceous understory is relatively intact may provide the greatest potential to create and enhance sage-grouse habitat in Utah.*⁴⁹

Seasonal Movement

The seasonal movements of Utah's sage-grouse populations reflect availability of habitat space. Populations occupying smaller isolated habitats moved shorter distances than populations occupying larger contiguous habitats, which are more typical of habitats in other states (Beck et al. 2003, Schroeder et al. 2004). The seasonal movement distances for Utah sage-grouse populations were generally less than those reported range-wide but were reflective of localized and the naturally non-contiguous nature of many sagebrush habitats in the southern Great Basin and Colorado Plateau. Fedy et al. (2012) reported nest to summer range movement averages of 8.07 km and a 90th percentile of 19.04 km for sage-grouse populations in Wyoming. For the Utah populations studied, the same movements averaged 5.88 km and a 90th percentile of 13.65 km.

The Utah Science Narrative continues with one of the most significant results, as follows:

Tracking Population Response to Management Using Lek Counts

Obtaining valid population estimates is essential to understanding the effects of management and conservation strategies on population trajectories (Connelly et al. 2004). The Utah Plan (2013) proposes specific strategies to protect, maintain, improve, and enhance sage-grouse populations and habitats within the established SGMAs. Unlike other state plans, the Utah Plan (2013) establishes specific annual population and habitat objectives. Specifically for sage-grouse populations, the Utah Plan proposes to sustain an average male lek count of 4100 males (based on a ten-year rolling average on a minimum of 200 monitored leks) and increase the population of males to an average of 5000 (based on the same ten-year rolling average on a minimum of 200 monitored leks) within the established SGMAs.

*The validity of lek counts for monitoring changes in population numbers remains suspect (Walsh et al. 2004, Guttery et al. 2011). However, their utility as a measure of population production has never been evaluated. Dahlgren et al. (2015b, Under Review) evaluated using standard lek count protocols which followed range wide guidelines (Emmons and Braun 1984, Connelly et al. 2003) to determine if they reflected lambda. **They concluded that male-based leks counts of sage-grouse can be an effective index to overall population change. These results have range wide implications as they provide a basis***

⁴⁹ Id. at p. 6.

*for states to track sage-grouse population responses to management and conservation actions. (Emphasis added)*⁵⁰

Management of Predators

Predation is often tied to habitat quality, particularly in areas where an interface exists between human disturbance and the remaining habitat (Utah Plan 2013). Many of Utah's sage-grouse populations inhabit naturally-fragmented habitats. Robinson and Messmer (2013) studied sage-grouse populations that inhabit the Sheeprock and Ibaph SGMAs in Utah's West Desert. These areas are geographically separated by the Great Salt Lake. Livestock grazing by domestic cattle was the dominate land use, and mammalian predator control for livestock protection was conducted in both SGMAs. However corvid control was conducted only in the Sheeprock SGMA. During the study, they also documented 6 new leks that had not been previously surveyed.

Habitat structure was similar at brood-rearing and random sites for both SGMAs. They also reported higher nest and brood success and the ratio of chicks per successful brood for both populations in 2005 than 2006. Spring precipitation in 2005 was twice the 30-year average following a 5 year drought. However, chick recruitment estimates for both populations regardless of year were lower than reported in the published literature. Adult sage-grouse survival rate estimates in Sheeprock and Ibaph SGMAs were lower and higher, respectively, than published reports indicated. They believed these observations reflected difference in meso-predators communities.

Grazing

Dahlgren et al. (2015c, under review) analyzed 24 years of sage-grouse population data collected across 3 large landscapes in northern Utah and southwestern Wyoming to assess sage-grouse responses to corresponding land management in the Rich SGMA. During this period sage-grouse populations on Deseret Land and Livestock (DLL), a privately-owned ranch, increased compared to surrounding populations that inhabited BLM allotments as small scale sagebrush removal treatments (< 200 ha) were being conducted within a prescriptive grazing management framework (Danvir et al. 2005). The increased sage-grouse populations were maintained for nearly 15 years where after they declined to approximate levels reported in surrounding populations. The declines were attributed to prolonged, adverse winter weather conditions accompanied increased snow accumulations.

Tall Structures – Transmission Lines

Stakeholders reviewed published information to evaluate the scientific basis for the potential impacts of tall structures on sage-grouse. At the time of the UWIN review there were no peer-reviewed, experimental studies reported in the scientific literature that specifically documented increased avoidance or predation on sage-grouse because of the

⁵⁰ Id. at p. 14.

construction, operation, and maintenance of tall structures (UWIN 2010). A review of the scientific literature regarding sage-grouse since completion of the 2010 review produced no new published information, but recent unpublished reports have begun to address the issue (Messmer et al. 2013).

These excerpts from the Utah Scientific Narrative are relevant to the Consistency Review of the proposed plan amendments, because they are representative of the specific ecological conditions found in Utah. This information, and information of a similar type, forms the basis for the emphasis upon habitat improvement for the populations which have the highest population density, and the best opportunity for conservation efficacy. This information specifically supports the Utah conservation principles which require the creation of additional useable habitat to support the isolated populations. Additionally, despite some of the dire predictions of the scientific literature, the locally generated research fully supports the Utah Conservation Plan's support for the truism that

Good available seasonal habitat can mitigate the effects of the anthropogenic footprint on the landscape.

Specifically, this truism means that the availability of good habitat will provide a home for the birds, despite the nearness of what otherwise may be considered negative influences. This is demonstrated by the populations at Henefer Divide, the Alton Valley, and by the population featured in recent radio-collared literature studies near Panguitch, Utah.⁵¹

Effectiveness of the State Conservation Measures

Recently the Pew Foundation released a report⁵² it had commissioned related to studies of the individual populations in Utah. The study directly asserted that all conservation efforts instituted since the 2010 listing decision have been ineffectual. The Report has been widely discredited throughout the scientific, regulatory and conservation community since its distribution. The state immediately responded to the unsupported conclusions of the highly-biased study as follows:

Utah's wild life professionals and conservation managers are implementing the solutions that matter most for sage-grouse in the state of Utah, and our state's conservation efforts for greater sage-grouse are a ready paying significant dividends. The state's conservation plan addresses the specific threats affecting the species in Utah - wildfire and the encroachment of trees -and significantly improves the life-cycle needs of the species by improving and creating useable

⁵¹ This study is cited by the BLM as demonstrating that the population can survive otherwise adverse conditions. The state agrees. The state would propose conifer removal work in the area, and suggests this work will have huge benefits, just as the conifer removal work already conducted south of Alton, Utah.

⁵² See Garton, E.O., A.G. Wells, J.A. Baumgardt and J.W. Connelly, Greater Sage-Grouse Population Dynamics and Probability of Persistence, Final Report to Pew Charitable Trusts, March 18, 2015, at <http://www.pewtrusts.org/~media/Assets/2015/04/Garton-et-al-2015-Greater-SageGrouse-Population-Dynamics-and-Persistence-31815.pdf> . Accessed July 27, 2015.

habitat adjacent to areas of natural fragmentation. To this end, Utah has successfully completed over 560,000 acres of habitat improvement projects since 2006.⁵³

Unfortunately, in spite of these criticisms, the federal agencies are according some credibility to the Report. For example, the Forest Service lists the Report as a reference as part of the scientific literature within its Biological Evaluation (Appendix P), where it is listed as Garton, et al. 2015. The state strongly disputes these unsupported claims, and requests BLM and Forest Service reject this statistical study in favor of the more accurate and useful lek count statistic employed by the state.

Pew Report – Unfounded and Unsupported Assertions

First and foremost, Garton et. al. (2011), a statistical study co-authored by the same lead researcher as the PEW report, the authors note that sage-grouse populations in Utah and surrounding states “increased from about 6,500 males in 1965 to a peak at 14,000 males in 1970, followed by cycles of declines and peaks at 9- to 12-year intervals.” These data and conclusions, which again, were derived by the same lead author as the PEW report, were based on robust range-wide sage-grouse lek count data that was collected from 1965 through 2007. That study recognized and validated the understanding that range-wide sage-grouse populations are naturally cyclical.

Unfortunately rather than adding new data from 2008 to 2013 to the earlier dataset and drawing new conclusions based on the entirety of the historical dataset, the latest study chose to employ only selective data incorporating only periods of cyclical decline (2007-2013) in the natural 9-12 year sage-grouse population cycles (see Figure 2 below). These data and conclusions clearly present biased and misleadingly negative outcomes and conclusions about the effectiveness of sage-grouse conservation actions in Utah. Had the authors analyzed a longer-term dataset, including the data from 2014 and the newly collected 2015 lek count data in Utah, the conclusions of this study would likely have been much different. This is why the *Conservation Plan for Greater Sage-Grouse in Utah* (2013) relies heavily on a 10-year rolling average of population abundance when assessing population trends over time.

⁵³ See letter to Rep. Rob Bishop, Chairman, House Resources Committee, from Greg Sheehan, Director, Utah Division of Wildlife Resources, April 28, 2015. This letter is attached as Attachment 8.

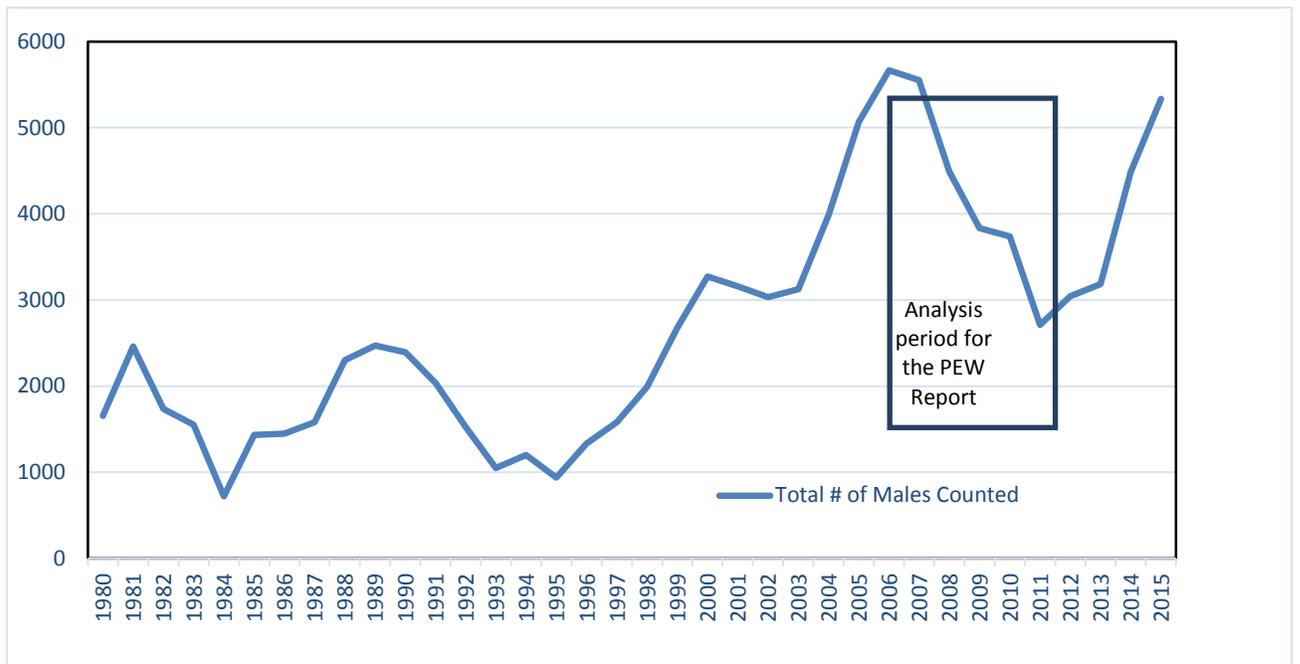


Figure 1. The annual total (blue line) of male sage-grouse counted per lek in Utah, 1980-2014.

Second, the 2015 Pew Report has not been subjected to a rigorous peer-review process, which is widely accepted as the most reliable process for generating the best available science. The state did not have an opportunity to review the PEW Report prior to its distribution. Had local biologists from the Utah Division of Wildlife Resources been given that opportunity, they would have recommended that a longer-term dataset be incorporated into the study.

Further, the areas that were evaluated in the PEW Report do not correspond at all with Utah's SGMAs, which are outlined in the Conservation Plan, and provide the basis for state-wide sage-grouse conservation in Utah. More specifically, the Rich-Morgan-Summit and Uintah SGMAs are only a small portion of the Greater Wyoming Basin modeling area in the Pew Report, the Box Elder SMGA is only a small portion of the Northern Great Basin modeling area, and the Ibapah and Hamlin Valley SGMAs are only small portions of the Southern Great Basin modeling area. As a result of this poor spatial correspondence, conclusions that are based on efforts that span multiple states' jurisdictions do not accurately represent the effectiveness of sage-grouse conservation actions in Utah, which, again, are tied to reasonable regulatory restricts and extensive efforts to enhance and create useable space for the isolated populations.

Finally, the Pew Report authors make unfounded extrapolations of the marginally relevant statistics, which are tied exclusively to the decline portion of the natural cycle into unconnected conclusions about the effectiveness of on-the-ground conservation efforts. The authors specifically suggest that the conservation actions implemented since 2007 appeared to have had no effect on the isolated populations. A realistic and scientifically supportable study of

this type of conclusion would require a null hypothesis based upon a comparison of sage-grouse lek count trends in areas where conservation actions were completed, and areas where no actions were conducted. Such an analysis of a null hypothesis tied to lek counts, or other relevant statistics, was not even considered as part of this study.

Use of the Faulty Pew Report

The Forest Service specifically and erroneously accords the Pew Report credibility and validity. On page 28 (Section 7.1.2) of the Biological Evaluation (Appendix P), the assertion is made that “the evaluation for each alternative carefully considers the context provided by the Garton et al. (2011) and Garton et al. (2015) analysis for those population[s] using NFS lands.” This use of the Pew Report (i.e., Garton, et al. (2015)) study as a primary source for evaluation of the relevant scientific literature is just one example of the fundamentally flawed nature of the Biological Evaluation, and the selective rejection of the best available science throughout not only the Biological Evaluation, but also throughout the FEIS and the proposed plan amendments.

Agency Rejection of Relevant Scientific Literature

Making matters worse is the disregard and outright rejection of the best available science that has been developed in Utah, including those studies that were conducted prior to and after 2013. For example, the proposed plan amendments discuss vegetation objectives,⁵⁴ and states that “These objectives (Connelly et al. 2004) were used with additional adjustments made, based on local nesting and brood-rearing data that have been collected in conjunction with research projects in Utah.” However, despite conducting as thorough a review of the FEIS and proposed plan amendments as was possible in the short time provided, the Forest Service has not, in fact, made any locally-based adjustments to the general vegetation suggested by Connelly. The BLM and the state collaborated upon the best available science, and generated vegetation standards accordingly. The Forest Service must adopt these locally generated vegetation standards, generated from the best available science.

Further, under the subheading *Ashley National Forest*,⁵⁵ the FEIS describes the Anthro Mountain population as an example of an isolated population with low levels of connectivity, and goes on to state:

“Although the population, and its associated habitats, are isolated from other populations, there is evidence that i[n] may be important in providing connectivity between populations to the west (e.g., Strawberry) and to the east (e.g., East Tavaputs – Deadman Bench).⁵⁶”

This statement is not only **not** supported by any reference to relevant scientific literature and is therefore conjecture at best, it completely rejects the scientific literature which

⁵⁴ See Section 4.6, FEIS.

⁵⁵ See Section 7.1.2, FEIS.

⁵⁶ See research by Breidenger et al. (2013). This paper is listed within the Utah Scientific Narrative discussed above.

demonstrates, through genetic analysis, that the Anthro Mountain population does *not* provide connectivity between populations to the west and east.⁵⁷

Specifically, the state found that the Anthro Mountain population did not warrant the focus of conservation efforts as an SGMA, stating

Anthro Mountain, did not qualify as an SGMA for several reasons. First, the Anthro Mountain population is susceptible to rapid decline due to a wide variety of ecological factors. Second, experimental translocations on the mountain have proven inconclusive in supporting long term population stability. Sustaining this population over time will require additional translocations. Third, the Forest Service had already authorized full-field oil and gas development pursuant to an agency executed Record of Decision.⁵⁸ Fourth, the necessary winter habitat on nearby BLM lands was similarly covered by an executed Record of Decision authorizing oil and gas development. Finally, the area provides limited opportunity for habitat improvement or enhancement because of extensive Class III conifer stands, thereby limiting the chances for population stabilization or growth.

Incredibly, the Biological Evaluation prepared by the Forest Service does not mention any of these factors, despite their relevance to the proposed resolution of management for the area. Finally, the scientific literature generated in Utah, despite its relevance to the conservation measures necessary for success in Utah, is not mentioned. This information has been made available to the federal planning effort repeatedly, yet the information does not appear in the Biological Evaluation, or any of the portions of the FEIS attributable to the Forest Service.

Certainty of Outcome

The FWS has made it clear that “certainty,” as that term is defined in the Service’s Policy for the Evaluation of Conservation Efforts (PECE) demands only one solution for management of three of the major resource uses on the land – mining and mineral exploration, fluid mineral development, and grazing, within the new construct of Sagebrush Focal Areas (SFAs).⁵⁹ The effect of the proposed plan amendments to the balance of interests in a Consistency Review are discussed in detail below.

This position by the FWS – demanding a particular solution - is not consistent with the intent of the Service’s own COT Report, and is not supported by judicial caselaw. For example in *Defenders of Wildlife v. Jewell*,⁶⁰ the FWS was sued for withdrawing a proposed rule to list

⁵⁷ See the analysis within the state’s letter to the Forest Service dated March 3, 2015, which letter is hereby incorporated into this Consistency Review in its entirety. See Attachment 7.

⁵⁸ See e.g., Record of Decision, South Unit Oil and Gas Development and Final Environmental Impact Statement, signed February 21, 2012. Accessed on July 27, 2015 at: <http://www.fs.usda.gov/project/?project=21014>.

⁵⁹ The state’s opposition to the creation of SFAs is contained within the state’s Protest Letter of June 29, 2015. See Attachment 9.

⁶⁰See F. Supp. 3d---, WL 4829080 (D.C. Dist. 2014).

the dunes sagebrush lizard under the provisions of the ESA. FWS had relied on a Texas state plan to protect the dunes sagebrush lizard. The district court found in favor of FWS (and the state of Texas as Intervenor), holding that the Texas Conservation Plan met the PECE criteria of “certainty of implementation” and “certainty of effectiveness.”

Although the Texas Conservation Plan was still in its infancy when the FWS withdrew its proposed listing decision, causing allegations that FWS failed to verify the “certainty of the plan’s implementation and effectiveness,” the Court agreed with the FWS that the Texas Plan “put in place conservation efforts that have been implemented by the States, BLM, private landowners, and have a high degrees of certainty of continuing to be implemented in the future and of being effective.”

In addition, the premise of the COT Report, as discussed above, was to set the standards for conservation measures. Recommendations were made, but the states were specifically invited to create conservation mechanisms which fit the local ecology and economic uses of the land. The current interpretation of required measures within the SFAs has certainly ossified the provisions of the COT Report.

The achievement of the necessary level of certainty with respect to the state’s Conservation Plan, and those of the other states, is not tied to absolute solutions such as withdrawal, no-surface occupancy without exception and prioritization of the review of grazing permits. The FWS is overstating the interpretation of its own PECE guidance, in favor of a power grab which it could never achieve under the provisions of the ESA. The state’s Conservation Plan, as implemented by the Governor’s Executive Order and the accompanying MOUs with each state agency, along with reasonable regulatory measures within the land use plans of the BLM and the Forest Service provide more than sufficient certainty as discussed in the PECE guidance.

The balance of interest favors elimination of the concept of SFA, and reliance on the state’s Conservation Plan to address the issue. The state Conservation Plan, in turn relies upon the authority of the BLM and Forest Service to address mining, mineral exploration, fluid mineral development and grazing in a reasonable manner, with due regard for valid existing rights and disturbance caps.

The Primary Threats to Greater Sage-Grouse in Utah

Based upon the scientific literature relevant to the Utah greater sage-grouse populations, and the observations and locally planned habitat improvement work undertaken by the Local Working Groups, and the management of the species by the state pursuant to the Conservation Plan, the major threats to the isolated populations in Utah are

- Wildfire and the associated invasion of weeds
- Encroachment of conifer trees into sagebrush habitat

All other threats discussed in the literature and other studies, e.g., the COT Report, are of minor importance in Utah. The state will evaluate the proper balance of interest with respect to the ability of BLM and Forest Service to address these threats.

On a positive note, the state would like to recognize and support the efforts of the Department of the Interior to address fire suppression and the associated rehabilitation of burned area. The recent Secretarial Order, and the accompanying reports, provide great assistance to the coordinated fire suppression effort in Utah. As discussed above, as a result of successful coordination involving the prioritization of fire suppression activities, two ignitions within the SGMAs were immediately suppressed so far this summer (2015).

The Proper Balance of Interest BLM and Forest Service Inconsistencies with State Plans

The State of Utah specifically identifies the following inconsistencies with the language and intent of the state's Conservation Plan for Greater Sage-Grouse. These inconsistencies are generated by the failure of the BLM and the Forest Service to correctly follow the law and regulatory requirements, as outlined in the state's letter dated May 13, 2015, and the State's protest letter, filed June 29, 2015. In addition, the following inconsistencies are generated by the failure of the BLM and the Forest Service to find the best possible balance of interests between the need for conservation of the species, and the other multiple-uses upon the lands.

The Proper Balance of Interest Failure by BLM and Forest Service to Adopt Goals and Objectives

The FEIS identifies several goals and objectives, which goals and objectives do not have specific, measurable metrics for success. For example the BLM proposes the following objective:

Objective GRSG-1

Designate PHMA for each WAFWA Management Zone across the current geographic range of GRSG that are large enough to stabilize populations in the short-term and enhance populations over the long-term. Protect PHMA from anthropogenic disturbances that will reduce distribution or abundance of GRSG. Enhance or improve GRSG habitat (e.g., through restoration or rehabilitation activities) within PHMA that has been impaired or altered.

In contrast, the state's Conservation Plan contains objective five metrics for success, and employs relatively simple, yet elegant, calculations to demonstrate population trends on an ongoing basis. These metrics are based upon the best available science. As part of the primary objective for success of the plans in Utah, the BLM and Forest Service should demonstrate agreement with the state metrics, and start movement toward adoption of them.

The WAFWA (Western Association of Fish and Wildlife Agencies) Management Zone concept has very little utility in Utah. The original construct placed Utah in four different management zones. The fact that the originators of the WAFWA management zones did not know what to do with the Utah populations fortifies the fact that Utah's populations are disconnected, both naturally, and due to human activities. The primary conservation need for these populations is to maintain and create more useable space in each location and measure results accordingly. It makes no scientific sense to connect the majority of Utah populations to other areas in the much larger Wyoming Basin or Great Basin mega-populations.

More significantly, because the objective does not contain metrics designed to demonstrate success. How does the BLM propose to determine that populations are “stabilized” or “enhanced” as the Objective suggests without appropriate metrics? How will BLM know if population trends are up, down or level? What are the appropriate time frames for measurement?

Appropriate metrics are vital to demonstrate the efficacy of conservation or the need for action. Metrics based upon localized conditions and scientific information are best for this purpose. For example, recently, the Pew Foundation issued a report, as discussed above, on sage-grouse population levels which made conclusions based upon selectively chosen data. The authors of the report generated some statistics which purported to show the greater sage-grouse populations were in decline in Utah. The study then made an incredulous jump to conclude that existing conservation measures were inadequate at preventing the decline, without discussing the conservation measures in place, or the threats to the species within Utah. In response to this deeply flawed work, the state indicated that the state's Conservation Plan was showing positive results, based upon 30 years of data. In addition, the state's more direct measure of population trends, a ten year rolling average, more accurately removes the effects of the cyclical nature of population figures.⁶¹

In addition Utah-based research verifies that lek counts are an appropriate way to measure population trends. BLM and Forest Service must work with the state to incorporate this research into the appropriate metrics.

Objective GRSG-2

“In all GRSG habitat, manage activities that result in habitat loss and degradation to provide a net conservation gain of GRSG habitat, unless there's conflict with other special status species (e.g., Utah prairie dog and black footed ferret).”

This objective must focus on priority habitat, as the state's Conservation Plan does. For example, black footed ferrets are found only within experimental, non-essential populations in eastern Utah, an area currently within the BLM's general habitat category. These areas, and the

⁶¹ In fact, the authors of the Pew study selected a time frame in which population were undergoing a cyclic decline. If the authors had simply included an additional two years of lek counts in the analysis, the reported outcomes would not be supported, and there would be no story to tell.

management of the ferrets, are covered by the provisions of the existing Vernal Resource Management Plan.

However, more importantly, no metrics are proposed for this objective. The Utah Conservation Plan has the objective to increase the overall habitat base by 75,000 acres a year – a net conservation gain – ***which meets the basic point of successful conservation in Utah by generating more useable habitat for the species.*** The state strongly requests that the BLM move to adopt the state’s metrics for success, instead of leaving results to chance and misunderstanding.

Objective GRSG-3

In all GRSG habitat, where sagebrush is the current or potential dominant vegetation type or is a primary species within the various states of the ecological site description (ESD), maintain or restore vegetation to provide habitat for lekking, nesting, brood rearing, and winter habitats.”

The state sponsored Local Working Groups have site-specific data regarding habitat-vegetation data. The state appreciates the BLM’s use of this information to develop Utah sub-region specific habitat guidelines. However, the Forest Service has failed to employ this basic information, as demonstrated in Table GRSG-17 GEN-DC-003. The state strongly requests that the Forest Service recognize that this vegetation data represents the best available science, and amend the draft amendments in order to use it.

In addition, none of the proposed goals or objectives mention the highly successful Watershed Restoration Initiative as a model approach to sage-grouse conservation, even though the BLM and Forest Service have been partners in the process for over the past decade. The draft amendments do not mention Utah’s implementation plan for addressing wildfire, or its 15 year plan for conifer removal. These are items the BLM and Forest Service must adopt, according to lawful procedure, because they are based upon the best available science and firefighting procedures.

The State of Utah finds that a lack of specific goals and objectives within the proposed plan amendments creates a severe inconsistency with the state’s Conservation Plan. The state’s goals and objectives are vital to success, because they lead to the creation of additional useable habitat near existing populations. This, in turn, increases the resilience of the populations. The proposed plan amendments by BLM and Forest Service do not address these issues at all, focusing instead on minor threats to the birds. The state request the BLM and the Forest Service adopt the state’s goals and objectives within the proposed plan amendments.

**The Proper Balance of Interest
Proposed BLM and Forest Service Restrictive Zones that Conflict
with Authorized Human Activities
Unwarranted Creation of General Habitat**

The State of Utah engaged in a detailed review of all the populations of greater sage-grouse during the 2012 stakeholder-driven Working Group review of individual populations in Utah. The Wyoming model, which features “core” and “non-core” areas, was reviewed, particularly in relation to those populations which were accompanied by a high level of nearby and surrounding human activity. Specifically, the Wyoming model demonstrated that populations with a high level of oil and gas development nearby were not appropriate to be designated as a core population, and were instead placed into the non-core category.

As has been stated before, **Utah is not a vast sea of sagebrush**, as in Wyoming. The Utah populations are isolated by natural and human-initiated fragmentation. The state’s Conservation Plan recognized this by establishing eleven specific Sage-Grouse Management Areas to be the focal points for conservation efforts. These SGMAs are physically separate from each other, and represent about 95% of the birds in Utah. The state’s Conservation Plan is consistent with the provisions of the Conservation Objectives Team (COT) Report issued by the U.S. Fish and Wildlife Service.

The remainder of the Utah populations are very small, and in a situation direct analogous to that in Wyoming, are bordered and surrounded by large amounts of human activity and associated disturbance. The human activity surrounds these populations in amounts which would violate any proposed buffer restriction, disturbance cap or other restrictive zone established by the state, or proposed by the federal agencies, for habitat. Therefore the state made the practical decision to focus its conservation efforts (though the state is expending a great deal on the conservation of the species, the funds do have limits) in areas more suitable for positive conservation results.

These areas outside the SGMAs in the Uintah Basin are authorized for extensive energy development, are, in fact, already robustly developed, and are moving toward increased development densities. By any measure under the Wyoming sage-grouse plan, these areas would qualify as non-core, and therefore not qualify for restrictive stipulations or conditions. Under the Utah Conservation Plan, conservation measures for these areas are derived from the protective measures already in place pursuant to the Records of Decision for each project, which protective measures represent the gold standard of the day.

However, rather than recognizing the wisdom of this approach, BLM and Forest Service rejected the state’s specific mapping data which delineated the SGMA (priority or core) and non-SGMA (other) categories, which were both generated as a result of the state’s 2012 planning

process.⁶² Instead the BLM and Forest Service self-created a new category of habitat, which the agencies chose to label “General Habitat.” The direct result of this unnecessary labeling is that BLM and Forest Service have created a direct inconsistency with the state’s Conservation Plan in terms of additional areas proposed for restrictive management. These areas include, among others, the West Tavaputs region, the Anthro Mountain region, and extensive geographic areas in eastern Utah.⁶³

BLM and Forest Service then compound the error by proposing additional restrictions within this category of General Habitat, restrictions which add no additional value for conservation, and add unnecessary incremental costs to the development in progress in these areas. The proposed plan amendments within the General Habitat category are unfocused in purpose, and are simply tossed randomly into the mix. **This decision does not represent the proper balance of interest between the need for conservation and the need for multiple-use on the land.**

In order to fully understand the contradictions created by the proposed general habitat restrictions, the nature of the conflict between the resident sage-grouse population and the ongoing human activity must be fully transparent. For example, the scientific literature suggests that oil and gas development and sage-grouse do not mix well together, and that sage-grouse populations tend to decline faced with large amounts of such development. This result lead to the creation of proposals to limit energy development in and around sage-grouse populations, and, in fact, caused planners in Wyoming to place many of the developed areas into the non-core category. The current proposed plan amendment to create energy density cap restrictions within the proposed Priority Habitat follows this line of thinking.

The proposed density and energy cap restrictions, in and of themselves, have no meaning or purpose. The core function of these caps and buffer zones is to promote the *resiliency* of a particular sage-grouse population (isolated as they are in Utah) by keeping development to a minimum in and around the population. Conversely, if the current level of development, and the anticipated level of development based on already existing authorizations, violates the maximum level of development allowed under the cap, then the resiliency of the population is already affected. **As a result, the appropriate response is to focus intensive and immediately effective conservation efforts elsewhere.**

The West Tavaputs, the Anthro Mountain and the eastern Utah populations in Uintah and Grand County have already exceeded, or will upon completion of federal agency authorized projects, the limits of energy development suggested by the energy density cap. The GIS generated maps of the oil and gas wells, and associated disturbance, per section (640 acres)

⁶² The non-SGMA populations, by definition, live outside the SGMAs. As discussed extensively in the state’s protest letter (June 29, 2015) previous mapping efforts for these populations will not support extensive conservation efforts.

⁶³ As mentioned further below, the proposal for additional protections for the West Tavaputs and Anthro Mountain areas were based upon an erroneous dataset involving the connectivity of these areas to other populations, and a simplistic desire by the FWS to impose further illegal restrictions upon valid, existing rights in the area.

around leks in eastern Utah in the East Tavaputs and Deadmans Bench area illustrate this point.⁶⁴ The mapped display demonstrates that each of these leks is surrounded by sections containing energy development far in excess of the recommended standard.

Therefore, the impacts to the populations represented by these leks, which the energy density cap is designed to prevent, have already occurred, or will occur upon fully authorized, full-field development. **The resiliency of these populations is already affected, and possibly diminished.**

What then, is the purpose for additional conservation measures in these areas as proposed by the BLM and the Forest Service? What increment of conservation value does the BLM and the Forest Service believe can be eked out in the face of reduced or possibly lost resiliency, and at what cost to the human activities already authorized to make use of the land?

Proposed General Habitat Restrictions

For example, the proposed plan amendments provide that general habitat is open for fluid mineral leasing. The FEIS states⁶⁵

MA-MIN-16

Unleased Areas within GHMA

Manage fluid mineral leasing in GHMA as follows (Map 2.53)

- open to leasing, subject to standard stipulations: 228,100 acres
- open to leasing, subject to CSU and/or TL stipulations: 279,100 acres
- open to leasing, subject to NSO stipulations: 22,500 acres
- closed to leasing: 27,800 acres
- planning decision not mapped: 89,600 acres

(GHMA translates to General Habitat Management Area)

However, Objective MIN-1, concerning fluid minerals, directly contradicts MA-MIN-16 (above) by stating

*Priority will be given to leasing and development of fluid mineral resources... **outside** of PHMA and **GHMA**.*⁶⁶ (Emphasis added)

⁶⁴ See Attachment 10.

⁶⁵ See FEIS at p. 2-37.

⁶⁶ See FEIS at p. 2-35.

In addition, immediately following the language of MA-MIN-16 above, the FEIS states⁶⁷ *In GHMA, new development of fluid mineral leases could be considered if they apply the pertinent management for discretionary activities in GHMA identified in MA-GRSG-5. (Emphasis added)*

Continuing the long and involved chained series of physically scattered (within the FEIS) yet directly related provisions, proposed management provision **MA-GRSG-5** (listed within MA-MIN-16 above) provides that BLM and Forest Service must implement sage-grouse measures already in place as part of duly-authorized Resource Management Plans, which is a positive point.⁶⁸ However, the BLM and Forest Service then propose additional requirements. Specifically, the proposed plan amendments would require the addition of mitigation required at the net conservation gain level, which, BLM and Forest Service do not have the authority to require.⁶⁹

The Requirements Continue....

The physical chain of additional administrative requirements for authorized activities within General Habitat continues. Proposed management provision MA-GRSG-5 (above) further requires that existing authorizations must also meet the provisions listed in **Appendix F**. These provisions are directly based upon the newly authored USGS Open Report⁷⁰ concerning buffers, and require⁷¹ BLM and Forest Service to

- 1) consider moving the activity outside the buffer area, and
- 2) engage in very detailed (NEPA) studies concerning greater or equivalent sized buffers, minimization of effects from the proposed activity, or compensatory mitigation before anything may occur within the buffer distance.

⁶⁷ See FEIS at p. 2-36.

⁶⁸ This is, in fact, represents exactly the state's position on sage-grouse management in the area. BLM and Forest Service should stop the proposal at just this point.

⁶⁹ See e.g., Protest Letter by the American Petroleum Institute and Western Energy Alliance ("the Trades") dated June 29, 2015 (FLPMA does not authorize BLM to require land users to offset their impacts to achieve a net conservation gain), at p. 17. See also Protest Letter by XTO Energy and others dated June 29, 2015 (While operators must mitigate impacts, and can commit to conservation measures that would result in a benefit to the species, FWS and BLM cannot impose requirements that require species recovery.) at p. 12. These sections of these two protest letters are hereby incorporated into this consistency review. See additional discussion elsewhere within this Consistency Review.

⁷⁰ See Manier, et.al., Summary of science, activities, programs and policies that influence the rangewide conservation of Greater Sage-Grouse, USGS Open-File Report 2013-1098 (2013) This Open Report was issued after the Draft EIS, and must be reviewed through publication of an SEIS prior to a Record of Decision. See Utah's Protest Letter dated June 29, 2015, at p. 28.

⁷¹ The buffer-distances listed in Appendix F are "mandatory conservation measures" in Priority Habitat, but only "required conservation measures" within General Habitat. The distinction is only hypothetical, as the difference in definition is negligible. See Appendix F at p. F-2.

Other Proposed Requirements for General Habitat

Within the discussion of other planning topics, the proposed plan amendments for General Habitat also require that

*Lands classified as PHMA and GHMA for GRSG will be retained in federal management unless: (1) the agency can demonstrate that disposal of the lands will provide a net conservation gain to the GRSG or (2) the agency can demonstrate that the disposal of the lands will have no direct or indirect adverse impact on conservation of the GRSG.*⁷²

BLM and Forest Service also propose to require limitations on availability of non-energy leasable minerals, only offering lands for leasing if the requirements of MA-GRSG-5 (discussed above) were met.⁷³ Similar restrictions for mineral materials are proposed.⁷⁴

Cost of the Proposed Restrictions Within the General Habitat Category

The required adoption of the best balance of interests requires an examination of the costs of the proposed restrictions against the anticipated conservation benefits. The costs of the proposed restrictions are high. The confusion caused by the internally inconsistent requirements, and the list of long and detailed studies required come at a high incremental cost of operation and direct expenses to the companies which already have authorization to proceed with development.

With regard to the effect on existing, authorized projects, the Department of the Interior, the BLM and the Forest Service have continually touted their respect for “valid existing rights,” and have repeatedly intoned that “valid existing rights” will be protected. This statement is, however, simply a reflection of the truism that none of the governmental agencies can violate the constitutional prohibition against the taking of private property. In this case, the protected private properties are the leases and authorizations to proceed contained in the respective Record of Decision for the various projects. However, under these authorities, each well must receive permission to proceed through the granting of an Application for Permission to Drill. According to the proposed plan amendments, the restrictions on development discussed above would be applied at his point in the long process of approval.

One of the many companies with valid interests in approved projects within general habitat has protested these proposed plan amendments, for this reason, among others. Their reasoning is instructive concerning the balance of interest. The protest states

XTO does not believe that BLM can revise or restrict XTO’s valid existing lease rights through imposition of COAs for drilling permits that were not contemplated at the time the leases were issued. Colorado Environmental Coalition, 165 IBLA at 228.

and notes further that

⁷² See FEIS at p. 2-33.

⁷³ See FEIS at p. 2-34.

⁷⁴ See FEIS at p. 2-35.

[T]he Agencies are, in effect, disregarding economic impacts and instead planning to revise and restrict XTO's valid existing lease rights through the imposition of a net conservation gain standard, development and disturbance caps, and additional restrictive measures added to the proposed LUPA since release of the draft document.⁷⁵

A recent study of the economic impacts of the proposed plan amendments indicated that economic effects could range between 9,170 to 18,250 jobs range-wide, and from \$2.5 billion to \$4.8 billion in reduced economic growth, just from the oil and gas industry.⁷⁶

Conservation Gain to Be Achieved

In order to examine the possible offsetting conservation benefits, which might be derived from the proposed plan amendments concerning general habitat, Utah State University researchers examined the amount of life-cycle habitat contained within the BLM's category of General Habitat. The calculations demonstrate the presence of miniscule amounts of useful habitat. For example, only an additional .2 to .5 percent habitat is added in the categories of brood-rearing, nesting, summer/fall and winter habitat. Functionally, BLM's choice to ignore the state's mapping has dramatically overstated the situation with regard to useful habitat, and therefore dramatically overstates the conservation benefit to be gained.

The state again asks the federal agencies to recognize the full extent of the factual and practical limitations to the inclusion of, and the ineffectual nature of the management provisions proposed for, the category of general habitat. The resilience of these populations is likely already diminished, and the cost of compliance completely overshadows the benefit of inclusion of miniscule additional amounts of habitat. The balance of interests favors the state's Conservation Plan provision for these areas.

The Proper Balance of Interest Lack of Balance in the Proposed Treatment of Mining and Mineral Exploration

Based upon the stated goal of the FWS to achieve "certainty" of outcome as a result of the proposed plan amendments, BLM and Forest Service are poised to recommend a massive withdrawal of land from the federal mining laws. The federal agencies are proposing that the areas within the newly proposed Sagebrush Focal Areas (SFAs)⁷⁷ be withdrawn. BLM and Forest Service then propose to kick the can down the road, by asserting that all issues which might be raised in opposition to this excessive move, including the possibility of a subsequent revocation of the withdrawal, can be raised within the actual process to conclude a withdrawal,

⁷⁵ See Protest Letter by XTO Energy and others dated June 29, 2015, at p. 10.

⁷⁶ See Final Analysis of the impact of Greater Sage Grouse Restrictions on Oil and Natural Gas Development and Production, John Dunham and Associates, May 14, 2015, at p. 2.

⁷⁷ The opposition of the State of Utah to the creation and adoption of the Sagebrush Focal Areas is presented in the state's comments on the Administrative Draft, dated May 13, 2015, and in the state's letter of Protest to the publication of the Final EIs/Proposed Plan, dated June 29, 2015, which letters, as noted above, are fully incorporated into this Governor's Consistency Review.

rather than as part of the current review.⁷⁸ Kicking the can down the road is not within the requirements of NEPA, and certainly creates an inconsistency with the state’s Conservation Plan.

The effects of the proposed withdrawal on the mineral exploration industry, and subsequent effects upon the ability to mine valuable minerals in the areas proposed for designation as SFAs must be examined at this point in time, both as a substantive provision and as part of the required public discussion about the newly-proposed SFAs. BLM and Forest Service must provide information sufficient to allow the public to comment on the proposed withdrawal process, not simply upon the effects of a withdrawal itself. This is because the effects are felt immediately. The withdrawal process is initiated by an immediate segregation of the lands involved, which will cause an immediate effect on the mineral exploration industry, and places unpatented mining claims on federal lands at risk.

BLM and Forest Service must first disclose clearly the effects of a withdrawal upon unpatented mining claims, and the required mine permit process. Statements such as “valid, existing rights will be honored” are not sufficient for this purpose, because such simplistic pronouncements obfuscate the detailed methodology involved with, for example, validity determinations. Validity determinations involve a very high standard of proof, one which is difficult to achieve without actual production. Because mining claims are also held to support future needs, the segregation and subsequent withdrawal, if approved, place many reserve deposits at risk. BLM and Forest Service need to clearly portray the steps involved in a claim validity determination, and the process for approval of a mine development permit. All steps in that process involving other resources, including sage-grouse, need to be disclosed, and disclosed as part of the current analysis.

Second, the process of revocation of the withdrawal in the face of the need for specific minerals needs to be reviewed and published for public comment. The Interior Department has opined that a withdrawal has minimal effect, because it can always be revoked if the development of some particular mineral, such as lithium, helium or the so-called rare earths is required. However, how will the exploration which will lead to the knowledge of these rare earths or other minerals be initiated? How will the investment of capital be justified, if not supported by the ability to stake a claim?

The statement by the Interior Department that revocation is a viable solution is, once again, a simplification which obfuscates vital procedural information. For example, who would initiate such a revocation proposal? What assurances would they have of obtaining rights to the property if a revocation process were requested?

Minerals covered by the Mining Law are, by definition, not available for leasing. Therefore, the option to initiate a leasing process, such as that provided by the Lease-by-Application for coal, does not provide a path for any potential exploration company to control the resource within a withdrawn area for purposes of development. Because locatable resources may only be allocated through the process of physically staking a claim on the ground, followed

⁷⁸ This is because the federal agencies believe they are out of time, due to the impending, self-imposed deadline of September 30, 2015, for the FWS to make a decision on the need to list the greater sage –grouse.

by recordation with the BLM, it is highly likely that any request for revocation would simply result in a land rush, similar to the historical land rush in Oklahoma, once the request is reviewed and approved. The moment the revocation is effective, claimants would be all over the landscape. Such an uncontrolled migration of potential claimants would not be good for the species.

In addition, mining is not a major threat to the greater sage-grouse. Individual mines are a small part of the vast sagebrush landscape, and can be addressed like any other disturbance on the land. For example, if the proposed mine would cause the disturbance cap to be exceeded, permission would be withheld until compensatory mitigation is completed.

BLM and Forest Service have the tools to protect the environment, including the habitat required for sage-grouse. The existing authorities of the BLM and the Forest Service are more than adequate to address mining activities within the disturbance caps envisioned in the proposed plan amendments. The Department of the Interior's regulations regarding the surface management of hardrock mining, 43 C.F.R. subpart 3809 (3809 regulations), carefully balance FLPMA's goal of recognizing "the Nation's need for domestic sources of minerals,"⁷⁹ with protection of the environment by preventing "unnecessary or undue degradation of the lands."⁸⁰ The primary purpose of the 3809 regulations is to further FLPMA's statutory purpose in preventing unnecessary or undue degradation of the public lands by operations authorized by the Mining Law.

The BLM regulations⁸¹ state that prevention of undue degradation is presumed by

“Complying with §3809.420 as applicable; the terms and conditions of your notice or approved plan of operations; and other federal and state laws related to environmental protection and protection of cultural resources.”

Among others, the regulations advance the conservation of greater sage-grouse by:

- Section 3809.420 details 10 performance standards applicable to notice or plans of operation for locatable minerals. Among those performance standards are requirements to comply with all pertinent federal and state laws, 3809.420(a)(6); to take such action as may be needed to prevent adverse impacts to threatened or endangered species and their habitat which may be affected by operations, 3809.420(b)(7); and to take mitigation measures specified by BLM to protect public lands, 3809.420(a)(4);

In addition, the 3809 regulations include several provisions specific to protecting wildlife, wildlife habitat, and wildlife habitat reclamation:

- 3809.5 - the definition of reclamation includes "rehabilitation of fisheries or wildlife habitat;"

⁷⁹ See 43 U.S.C. § 1701(a)(12).

⁸⁰ See 43 U.S.C. § 1732(b).

⁸¹ See 43 CFR Section 3809.415(a).

- 3809.401(b)(3)(v)- a reclamation plan must include "wildlife habitat rehabilitation;"
- 3809.401 (c)(1) - requires site-specific environmental baseline data on vegetation and wildlife;
- 3809.420(b)(3)(E) - the performance standards mandate “rehabilitation of fisheries and wildlife habitat;" and
- 3809.420(b)(7)- requires" ... operators shall take such action as may be needed to prevent adverse impacts to threatened or endangered species and their habitat which may be affected by operations."

The state’s Conservation Plan endorses the conservation requirements of the above regulations. These regulations provide a regulatory structure which is adequate to protect greater sage-grouse commensurate with the threat posed by mining, and are therefore consistent with the state’s Conservation Plan. This regulatory construct is an adequate regulatory mechanism that had been undervalued – if not wholly ignored – by the proposed plan amendments.

In addition, concerning mining, the COT Report recommendation is:

*To maintain stable to increasing GRSG populations and no net loss of GRSG habitats in areas affected by mining.*⁸²

The COT Report recommendation is important. Rather than demanding one particular solution over another, the recommendation suggests that agencies monitor mining within important areas, and find solutions which promote stable to increasing populations. Stable to increasing populations are driven by habitat work in Utah, not by a complete withdrawal of the lands from mineral exploration. This COT Report recommendation is consistent with a balanced approach to human activity within sagebrush habitat, one which finds solutions commensurate with the nature of the threat. The Utah state agency which issues permits for mining activities features this type of approach pursuant to the state Conservation Plan, and the provisions of the Executive Order implementing the Plan.

The proposed BLM and Forest Service response to the possibility of mineral exploration and mining within the sagebrush environment is far out of balance with the threat to the species. The proper balance between the state plan and the federal proposal weighs heavily in favor of the state Conservation Plan, and the application of existing BLM regulations.

The Proper Balance of Interest Lack of Balance in the Proposed Treatment of Grazing

The proposed amendments recommend a major shift in the treatment of livestock grazing. The Executive Summary of the FEIS lists grazing as one of the "major threats identified by the USFWS in the March 2010 listing decision,"⁸³ which is simply untrue. The FWS did not determine that grazing is a "major threat" to the species in its 2010 listing decision, and in fact,

⁸² This quote is the COT recommendation as it is phrased in the FEIS. See e.g., FEIS at p. 5-67.

⁸³ See FEIS at p. ES-4.

FWS recently issued a guidance letter discussing the importance of grazing and ranching operations to the health of the range.

On February 5, 2015, the Fish and Wildlife Service (FWS) issued a memorandum⁸⁴ to clarify its perspective on the relationship between livestock grazing and the conservation of sagebrush ecosystems on private lands within the range of greater sage-grouse. The memorandum is meant to provide more specific guidance to FWS staff as they carry out their conservation mission. In the memorandum, the FWS recognizes that well-managed grazing practices can be compatible with long-term sage-grouse conservation.

In addition to scientific information, another important consideration is the potential positive and negative impacts of its policies on land management decisions of private landowners. The FWS recognizes that the conservation of fish and wildlife on working rangelands directly impacts the economic and social stability of ranching communities. It is good for conservation across the range of sage-grouse to have healthy, economically stable private rangelands. Additionally, intact rural communities provide local services, expertise and infrastructure to help address important landscape level conservation challenges. Loss or decline of these local communities can make achieving these goals more difficult.

The FWS commits itself to working with landowners to improve habitat conditions wherever possible. The memorandum encourages FWS to develop relationships with landowners and their representative organizations and to better understand their concerns and operational constraints. The FWS hopes that these strong relationships will increase the likelihood of landowners actively allowing or implementing conservation on their private lands. The FWS will also work with the BLM and Forest Service on ensuring areas of high priority to sage-grouse are not experiencing poorly managed grazing practices, but instead use well-managed grazing practices to improve existing conditions.

With this backdrop of the relationship of grazing operations to conservation of sage grouse, the proposed plan amendments, featuring increase emphasis on livestock operations, are out of balance. Grazing should be treated as any other use of the land. The BLM does not set forth any conclusive evidence that livestock grazing has a negative impact on the species even though BLM insists on treating it as a major threat throughout the FEIS.

The entire grazing section of Chapter 4, Environmental Consequences, merely sets forth examples of guesswork as to the impacts that grazing may or may not have on habitat. These various speculative theories all seem to be based on conjecture rather than knowledge or conclusive scientific data. Some examples of the type of meaningless information provided in chapter 4 of the FEIS include:

⁸⁴ See Memorandum: Service Position on Livestock Grazing and Working with Rangeland Owners to Conserve Sage-Grouse, February 5, 2015, at http://www.fws.gov/greatersagegrouse/documents/Landowners/20150205_FWS%20Sage%20grouse%20and%20Ranching.pdf. Accessed July 27, 2015.

Research has shown that livestock grazing in GRSG habitat may either improve or decrease habitat quality, depending on the type of habitat, spatial and temporal scale, and how the grazing is administered (Beck and Mitchell 2000).⁸⁵

There is little scientific data directly linking grazing practices to GRSG population levels (Knick et. al. 2011).⁸⁶

In some areas, the environmental conditions combined with livestock use strategies and levels could result in decrease or loss in GRSG habitat functionality, in other areas there could be no loss of functionality, and in other areas specific grazing practices could result in improvement of GRSG habitats. Due to the complexity of these systems and site-specific nature of how these factors may interact, it is not possible to make simple assumptions.⁸⁷

Clearly, these sort of indecisive statements do not support BLM's negative treatment of grazing in the FEIS. It is troubling that the proposed plans rely so heavily on the unfounded conclusion by the BLM that grazing is harmful to the species and are used to apply management actions to "adjust grazing practices as necessary based on GRSG habitat objectives, Land Health Standards, and ecological site potential."⁸⁸ BLM gives no explanation as to what exact management actions it will take or what standards it will use to determine when management actions are deemed appropriate.

The state requests that grazing be presented as a benefit to the range, and that improper grazing be placed in the proper context of a localized concern. Specifically mentioning grazing in the discussion of the proposed SFAs is not acceptable. For example, BLM proposes that BLM will "prioritize the review of grazing permits/leases, in particular to determine if modification is necessary prior to renewal, and the processing of grazing permits/leases in SFA first followed by PHMA outside the SFA."⁸⁹ It is unclear to the state what this management action means. For example, will these management actions apply to current grazing permits or only new permits. What exactly does prioritization mean? Will permits be reviewed out of order, meaning permits which are not yet ripe for review will be moved forward in the schedule? The state objects to the use of SFA to prioritize any action relating to grazing without giving an explanation justifying the need to do so.

Instead, the BLM plans for priority habitat should emphasize satisfying the primary conservation need in Utah - the maintenance and creation of more useable habitat - and protection of the existing populations through emphasis on wildfire prevention, wildfire rehabilitation and conifer encroachment. This is the path to conservation of the species in Utah, not the vague reference to increased review of conservation measures.

The BLM's proposed plan amendments do not reflect a balanced approach concerning the effects of grazing upon habitat or specific populations of greater sage-grouse. BLM has not

⁸⁵ *Id.* at p. 4-41.

⁸⁶ *Id.* at p. 4-41.

⁸⁷ *Id.* at pp. 4-41, 4-42.

⁸⁸ *Id.* at p. ES-10.

⁸⁹ *Id.* at p. 2-27.

drawn a connection between grazing and any particular mechanism for a decrease in the population trend for any particular population.

A balance between the national and state interests with respect to the conservation of sage-grouse and the use of the range for grazing requires a step back in perspective. Neither the state, nor the COT Report identifies grazing as a threat. Localized effects due to improper grazing may cause localized issues, therefore the state framework for successful conservation – the state’s Conservation Plan – requires the relevant parties to identify the cause of a decline in one of the specifically identified populations, and to take steps to rectify the declining trend.

The identification of grazing as the culprit, by emphasizing the need to review grazing permits out of schedule, is totally unnecessary, and not supported by the facts. The proper balance is found by requiring monitoring of the population levels, and responding to specific causes. The BLM’s current proposal identifies one particular permitted activity, out of the many possible, for highlighted review, which is completely unsupported by the facts.

The Proper Balance of Interest Anthro Mountain

The state is frustrated that the Forest Service has continued to impose excessive priority habitat standards, desired conditions, and guidelines on the habitat within the Anthro Mountain area throughout the FEIS and proposed plan amendments. The Forest Service is not promoting conservation of the species in light of a balanced, multiple-use plan.

Anthro Mountain does not qualify for priority habitat for several reasons. First, the Anthro Mountain population is susceptible to rapid decline due to a wide variety of ecological factors. Second, experimental translocations on the mountain have proven inconclusive in supporting long term population stability. Sustaining this population over time will require additional translocations. Third, the Forest Service has already authorized full-field oil and gas development pursuant to an agency executed Record of Decision.⁹⁰ Fourth, the necessary winter habitat on nearby BLM lands was similarly covered by an executed Record of Decision authorizing oil and gas development. Finally, the area provides limited opportunity for habitat improvement or enhancement because of extensive Class III conifer stands, thereby limiting the chances for population stabilization or growth.

The state informed the Forest Service of this scientific error published in the Draft EIS in a letter dated March 3, 2015⁹¹ (hereby incorporated into this letter), and in the state's protest letter dated June 29, 2015⁹² (hereby incorporated into this letter). As a result of the state’s comments on the DEIS, the Forest Service agreed to a series of stipulations specific to the Anthro Mountain area. These stipulations are listed in Appendix P to the FEIS.⁹³

⁹⁰ See e.g., Record of Decision, South Unit Oil and Gas Development and Final Environmental Impact Statement, signed February 21, 2012. Accessed on July 27, 2015 at: <http://www.fs.usda.gov/project/?project=21014>.

⁹¹ See Attachment 7.

⁹² See Attachment 9.

⁹³ See FEIS, Appendix P, GRSG-M-FML-ST-082-Standard, p. 50.

Unfortunately, the remainder of the Forest Service's proposed plan amendments are not consistent with the consensus stipulations.⁹⁴ In numerous sections of the proposed plan amendments,⁹⁵ the Forest Service proposes numerous extra conditions, which in the aggregate, essentially create a priority habitat designation. With very few exceptions, Anthro Mountain is included with PHMA, SFA, and GHMA in standards, desired condition and guidelines, including 61 provisions of Section 2.6.3 of the FEIS. This type of mischaracterization of Anthro Mountain clearly does not follow the Forest Service agreement and commitment to the state. The state protests the Forest Service's attempts to blur the categorization of Anthro Mountain throughout Section 2.6.3 of the FEIS. The provisions in Section 2.6.3 of the FEIS completely undermine the agreement between the state and the Forest Service to not treat Anthro Mountain as priority habitat.

The state requests the Forest Service recognize the scientific and regulatory facts concerning the population of sage-grouse found on Anthro Mountain. The state requests the Forest Service restore the balance of interests in the Anthro Mountain region by adjusting the proposed plan amendments for the area solely to those represented by the agreed list on page 50 of Appendix P.

The Proper Balance of Interest Appendix P

Appendix P is essentially the functional equivalent of a new EIS that requires NEPA review. The Forest Service has placed a voluminous amount of information out for public review at the very last moment. The state challenges the entirety of Appendix P as it makes substantial changes outside the existing NEPA alternatives, which action requires a full supplemental draft analysis under NEPA.⁹⁶ Numerous substantial changes were made throughout Appendix P, including the creation of the new category of "Sagebrush Associated Species" or "SAS."⁹⁷ This new concept of sagebrush associated species was not discussed in the Draft EIS.

The information and analysis published within Appendix P is not consistent with the best available science, or the state's Conservation Plan. None of the locally generated and relevant science is presented or included within the analysis presented in Appendix P.⁹⁸ This research demonstrates the isolation of Anthro Mountain, discounts the Pew Report, and sets the state for the habitat work which is so essential for conservation of sage-grouse in Utah.

⁹⁴ See FEIS, Section 2.6.3.

⁹⁵ *Id.* see: GRSG-LR-LOA-GL-023, GRSG-WS-ST-025, GRSG-WS-ST-026, GRSG-R-ST-063, GRSG-M-FML-ST-081, GRSG-M-FML-GL-083, GRSG-M-FML-GL-085, GRSG-M-NEL-GL-099, GRSG-LR-LW-GL-024, GRSG-LR-SUA-ST-013, GRSG-LG-ST-036, GRSG-LG-GL-038, GRSG-R-GL-065, GRSG-RT-GL-071, GRSG-M-FMUL-ST-075, GRSG-M-FML-ST-077, GRSG-M-FMO-ST-086, GRSG-M-FMO-GL-088, GRSG-M-CMUL-ST-092, GRSG-M-CML-ST-093, GRSG-M-MM-ST-100, GRSG-LR-SUA-GL-021.

⁹⁶ See 40 C.F.R. § 1502.9.

⁹⁷ See FEIS, Appendix P, pg. 52.

⁹⁸ See Attachment 3.

The analysis of the management situation contained within Appendix P is highly biased, and fails to make use of the best available science. The state finds Appendix P does not represent the proper balance of interests, because of the faulty information and analysis. The state requests that Appendix P be reworked to bring it into balance with the Forest Service's responsibility to not include Anthro Mountain as priority habitat, and to present the management situation for sage-grouse on Forest Service lands in light of the best available science.

The Proper Balance of Interest Disturbance Cap and Estimations of Disturbance

The state of Utah has asked the BLM and the Forest Service to adopt a disturbance cap which reflects the best available information, the best localized science, and which will actually work in the local environment. Together, the state, the BLM and the FWS worked to create workable vegetation standards, and workable triggers to demonstrate the existence of a decline in population or habitat for each relevant population. Unfortunately, this cooperative spirit has not extended to the information necessary for an accurate disturbance cap. BLM and Forest Service are proposing to employ information from generic data sets which do not represent the latest information about local disturbance or habitat.

As part of the review discussed above about conditions at West Tavaputs, Anthro Mountain and eastern Utah, the state ran a comparison of calculations using BLM's data, and the state's data. The state reviewed the BLM procedures and methodologies to estimate baseline disturbance, as outlined in Appendix L, as well as baseline disturbance monitoring protocols as outlined in Appendix C. The state has identified inconsistencies which raise serious concern about the implementation of the BLM and Forest Service proposed plan amendments.

Neither the state, nor either federal agency will generate any support for the required conservation efforts if the data employed is not the best available, and is not capable of adjustment in category to reflect actual on-the-ground findings. The appropriate balance of interest between the state and national interests is not found by employing less accurate data, as BLM and Forest Service are proposing, simply because that data also extends into other regions. As the state has repeatedly pointed out, the populations of the species in the state are, in fact, isolated from those in nearby states. Information to determine the best course of action for each local population must be derived locally. The Sheeprocks example discussed above demonstrates vividly the consequences of failing to heed this message.

Of course, both BLM and Forest Service recognize the need to base the percentage calculation on a baseline created on some arbitrary date. The state chose the date of finalization of its Conservation Plan, the BLM and Forest Service are proposing to start on the date the various Records of Decision are signed. However, the state is proposing to survey the actual on-the-ground situation, while the BLM and Forest Service are proposing to use remotely sensed data. Resource users who will request authorizations from the state, the BLM or the Forest Service will be bringing actual survey data to the table. The state will review the request while employing like data, while the BLM and Forest Service apparently will be employing, yet again,

less accurate and less relevant data. Trust in the public agency to make reasoned decisions will suffer.

First and foremost, in 2014, the State of Utah invested considerable resources to estimate baseline disturbance in all Sage-grouse Management Areas in Utah.⁹⁹ This effort was conducted in consultation and close coordination amongst leading sage-grouse researchers at Utah State University, biologists at the Utah Division of Wildlife Resources, and professional GIS staff at Utah State University and the Utah Division of Wildlife Resources. The goal of that project was to determine the baseline disturbance throughout all of Utah’s Sage-grouse Management Areas as of February 14, 2013. This represents the effective date for the Conservation Plan.

This detailed dataset was not used in the BLM and Forest Service analysis, nor were the methodologies considered or repeated.¹⁰⁰ Had the BLM and Forest Service reviewed that report, they would have recognized that much of the *up-to-date geospatial data “required editing to increase accuracy* to be consistent with the digitized polygons” in order to complete that study in a thorough, rigorous and scientifically defensible manner.

With those results and implications in mind, the state reviewed Appendices C and L within the FEIS, along with a careful review of the methodologies and datasets used by BLM and Forest Service to estimate disturbance. The state coordinated this work with local BLM staff in order to retrieve the GIS datasets used by the BLM and Forest Service and ensure the consistency of the data sources used for this analysis, which included the data sources identified in Appendix C, Table C.6.

During the state's review, it was discovered that the BLM and Forest Service relied heavily, if not solely, on the most recent digitized spatial data, and ignored in some instances, the actual disturbance that is occurring on-the-ground. For example, according to Table C.6, the BLM and Forest Service relied on the ESRI StreetMap Premium dataset to estimate the disturbance associated with roads and related infrastructure. Close examination of this dataset reveals incomplete or outdated spatial coverage of linear road disturbance features across portions of the landscape.

In addition, the state reviewed the spatial distribution of all oil and gas wells and development facilities as projected by the BLM and Forest Service. Although the state did not ultimately have access to the HIS and BLM (AFMSS) shapefiles as described in Table C.6, the state was able to overlay the federal agency projections of those data with similar spatial data retrieved from the Utah Division of Oil, Gas and Mining (DOG M). The state was not able to identify any discernable difference across datasets, and thus we used the DOGM dataset as a proxy for the data used by the agencies. Further close examination of this dataset revealed, again, inconsistencies in the way the point features and spatial data were projected and most importantly, how those data were interpreted and used by BLM and Forest Service to estimate baseline disturbance.

⁹⁹ See Gifford, et. al., 2014; attached as Attachment 11.

¹⁰⁰ The detailed methodologies used for that analysis are described in Gifford et al. (2014).

In addition to our data concerns, the state also identified inconsistencies between the protocol of the calculation of baseline disturbance in the present, versus how it will be calculated and monitored in the future. More specifically, in Appendix L, Table L.1, the chosen “area of influence” and “estimated disturbance” for each oil and gas well is 3-acres. This 3-acre area is consistent with the state review of the spatial data, which revealed that the BLM and Forest Service did in fact, apply a 3-acre area of “estimated disturbance” to each oil and gas well, as described in Table L.1.¹⁰¹ However, Appendix E, Greater Sage-grouse Disturbance Cap Guidance, Table E.3, suggests, in contrast, that disturbance will be calculated using a 5-acre area of “estimated disturbance” from each oil and gas well, rather than the previous 3-acre value.

To better understand and quantify the implications of this inconsistency, the state reviewed four areas of concern (Figure 1) to conduct advanced geospatial analyses using the BLM and Forest Service methodologies, paired with an analysis of those same areas using methodologies similar to those in Gifford et al. (2014), with particular emphasis on further digitizing on-the-ground disturbances that were not included in the baseline datasets. Although it would have been much easier, quicker and less expensive to adopt a similar approach to that of the BLM and USFS, the state strongly asserts that the approach to estimating disturbance created by the Conservation Plan is far more robust, and represents the best available estimation of the current conditions and disturbance on-the-ground.

Upon review, additional acreage of newly developed roads and pipelines was discovered, acreage which was not included in the BLM and Forest Service datasets. After the addition of these new road centerlines and pipeline routes, based on manual interpretation of aerial imagery, the routes were buffered conservatively with widths of 10-feet for pipelines, 15-feet for graded roads, 30-feet for improved roadways and 45-feet for further improved and heavier traveled roads. In addition to those roads and pipelines, small amounts of disturbance related to small buildings and equipment staging areas was identified, adding to the new assessment. These additional roads, pipelines and related infrastructure, along with the highly conservative disturbance areas were merged with the initial BLM and Forest Service disturbance data to project a more accurate assessment of baseline disturbance.

In addition to the above review of existing roads, pipelines and related infrastructure, oil and gas well location data was reviewed. BLM apparently employed all categories of oil and gas wells for the baseline disturbance and density cap estimates, including those well site locations that were labeled as “abandoned locations” and “returned unapproved.” This category includes 810 well sites that were categorized as “location abandoned” and 54 well sites that were categorized as “returned unapproved.”¹⁰² BLM and Forest Service may have had a purpose for inclusion of these features in their analysis, as described in Appendix C.¹⁰³ However, when the aerial imagery is examined closely, it becomes apparent that nearly all of those 864 sites are actually undisturbed and shows absolutely no evidence of having ever been disturbed.

¹⁰¹ When estimating baseline disturbance it is important to carefully consider and document the methodology used to ensure that future monitoring efforts of baseline values are conducted using the exact same methodologies.

¹⁰² See Figure 2; attached as Attachment 12.

¹⁰³ See Appendix C; Additional Measure: Reclaimed Energy-related Degradation Section, atp.C-19.

The state is concerned that the BLM and Forest Service are underestimating the baseline disturbance from roads, pipelines and related infrastructure, and overestimating the baseline disturbance from oil and gas wells. As a result, in our assessment the baseline disturbance increases markedly in one of the four Assessment Areas. In addition, if future monitoring is conducted using the criteria that are currently proposed in Appendix E,¹⁰⁴ the results will reflect a significant change in baseline disturbance, even if zero additional disturbance occurs on the landscape. The implications of this inconsistency are significant, as the initial criteria will not result in an exceedance of the proposed 3% disturbance threshold, but when the future monitoring criteria are used, the proposed 3% disturbance threshold will be exceeded in two of the four Assessment Areas.

These above discrepancies are significant, and need to be resolved in order to minimize disputes between the state, the BLM and the Forest Service as implementation proceeds. The balance of interest favors using the data which is tied directly to actual on-the-ground features, rather than remote data alone. The state requests the BLM and the Forest Service reject the need to connect with the populations in neighboring states, and therefore reject the use of data simply because it is also present in neighboring states.

The State of Utah has repeatedly demonstrated the isolation of most of its SGMAs, the irrelevance of the WAFWA Management Zone designations, and the conservation measures necessary for success in Utah. The federal agencies are attempting to use broad-scale data to make fine-scale decisions, and attempting to use coarse data to make detailed decisions. This course of action violates all basic precepts of proper data collection practices. As a fundamental point, the resolution of the data must match the resolution of the question addressed.

The data sets proposed for use within the proposed plan amendments does not support the state's Conservation Plan, so the state again requests the BLM and Forest Service adopt the baseline data created by the state, and adjust the data usage provisions to make the best management practices of GIS data collection and usage.

¹⁰⁴ See Appendix E; Greater Sage-grouse Disturbance Cap Guidance, Table E.3.

Assessment Area	Total Acres	BLM Baseline	State of Utah Baseline	BLM Proposed Monitoring
East Tavaputs	113,776	2,845	2,876	4,023
Disturbance		2.5%	2.5%	3.5%
West Tavaputs	150,191	1,253	1,253	1,609
Disturbance		0.8%	0.8%	1.1%
Little Mountain	152,190	1,763	3,323	2,592
Disturbance		1.2%	2.2%	1.7%
Deadmans Bench	134,670	3,443	3,399	4,531
Disturbance		2.6%	2.5%	3.4%

Table 1. Total acres and the estimated percent disturbance in all four Assessment Areas using three different methods and criteria.

The Proper Balance of Interest Lands and Realty Actions – State Trust Lands Exchanges and Selections

In order to maintain consistency with the State of Utah’s Resource Management Plan (the State Resource Plan”) for federal lands, and binding decisions of federal courts, the proposed Management Action LAR-9¹⁰⁵ with respect to Land Tenure Adjustments should be modified to consider state-federal land tenure adjustments more flexibly. Under the State Resource Plan, the United States has an obligation, as the grantee of lands under the Enabling Act land grants, to not unreasonably interfere with or devalue the granted lands through restrictions on use, access, etc.¹⁰⁶ Where this is unavoidable, compensation of the school trust, or exchange for other land, is necessary.

The State Resource Plan in this regard is directly consistent with applicable federal judicial decisions concerning the relationship between the United States and the state trust lands grantees.¹⁰⁷ In many cases, the state is exchanging lands to the United States to protect other valuable scenic, wildlife, cultural resource and wilderness values. LAR-9 should not unduly discount such values, even while protecting greater sage-grouse. LAR-9 should be modified to recognize the special relationship between the United States and the state with regard to state trust lands, as contrasted with realty actions applicable to private parties. For consistency with the State Resource Plan and applicable law, the state suggests the following modification to LAR-9:

¹⁰⁵ See Section 2.6.2; Page 2-33.

¹⁰⁶ See Utah Code §53J-8-104(k).

¹⁰⁷ See *Andrus v. Utah*, 446 U.S. 500 (1980) (United States subject to “solemn agreement” to give state benefit of Enabling Act bargain); See also *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979)(compensation required where reasonable use of trust lands is limited).

Land Tenure

Lands classified as PHMA and GHMA for GRSG will be retained in federal management unless (1) the agency can demonstrate that disposal or exchange of the lands will provide a net conservation gain to the GRSG; (2) the agency can demonstrate that the disposal of the lands will have no direct or indirect adverse impact on conservation of the GRSG; or (3) with respect to state trust land exchanges and selections, there will be no significant adverse impact on conservation of the GRSG, and scenic, wildlife, cultural resource, recreation or wilderness values will be enhanced.

For the same reasons, standard GRSG-LR-LOA-ST-033¹⁰⁸ should be revised as follows:

In PHMA and SFA, do not approve land ownership adjustment that would result in a net loss or degradation of GRSG habitat. Exceptions include (1) when there is mixed ownership and adjustments would allow for additional or more contiguous federal ownership patterns that support improved GRSG population trends or habitats; or (2) where state trust land exchanges or selections do not have a significant adverse effect on PHMA or SFA, and other scenic, wildlife, cultural resource, recreation or wilderness values would be enhanced by the adjustment.

The discussion of land tenure at page 4-272 should also be conformed accordingly.

The Proper Balance of Interest Utah Compensatory Mitigation Program

Utah began implementing its compensatory mitigation program formally beginning August 1, 2015, but the program will actually account for disturbance since the signing of the Conservation Plan in February, 2013. The purpose of the program is to compensate for all permanent disturbances within Sage-grouse Management Areas, at the ratios called for in the Conservation Plan, in order to provide a net gain (lift) to greater sage-grouse populations and habitat in Utah.

The Utah Program has two components:

- 1) Establish a mechanism to allow conservation banks to operate in Utah. This would be effective where a regulatory mechanism requires a developer to complete compensatory mitigation – for example on federal lands, and
- 2) Establish a state mitigation program to provide compensatory mitigation for permanent disturbance where a regulatory mechanism does not exist to require the mitigation, for example

¹⁰⁸ See FEIS at page 2-60.

on private and SITLA ownerships. This state mitigation program is established in the Department of Natural Resources, Species Recovery Program.

Because the conservation banking program will take longer to establish,¹⁰⁹ compensatory mitigation for all disturbance can be completed in the interim with the state mitigation program.

The state contracted with Utah State University to establish a baseline for permanent disturbance in place within SGMAs as of the effective date of the Conservation Plan. The analysis will be rerun as is feasible, likely on 2 -3 year intervals in order to verify changes in permanent disturbance, or as updated high-resolution aerial imagery becomes available. In addition, local government and SITLA will be contacted to identify any permanent disturbance projects they have approved within the SGMAs. Permanent disturbance size and intensity will be verified by a site-visit by biologists, as necessary. Calculation of the area disturbed will include a disturbance buffer when appropriate.

Utah's Watershed Restoration Initiative will be generate the compensatory acres for the Utah program. To date, numerous projects have been completed on SITLA and other state lands to convert areas from non-habitat or opportunity areas to sage-grouse habitat. These projects have been completed adjacent to occupied sage-grouse habitat, in direct support of Utah scientific literature which demonstrates that sage-grouse immediately move into these newly regenerated. Most of these projects were completed by removing Stage I and II pinyon-juniper encroachment into sagebrush habitat within all types of seasonal habitat, or by restoring wet meadows for brood-rearing habitat. These projects are tracked in the WRI geo-database.

The currency of the Utah Program is acres. At this time, no quality modifier is employed. The mitigation rate for almost all habitat is 4:1, meaning that 4 acres of compensatory mitigation will be completed for each acre disturbed. If a permanent disturbance is proposed under a regulated activity, the regulator and project proponent will work with the state program to determine which project in the state bank will be used for mitigation. The developer will repay the project costs incurred by the WRI to complete the project. Those funds will be reinvested in additional mitigation projects. If the disturbance does not have a regulatory nexus to mitigation, the state will attempt to solicit contributions from the developer for the acres disturbed but in any case will contribute the acres needed for mitigation with the state assuming the cost of the project acres. Compensatory mitigation acres will be tracked separately from other habitat projects completed by WRI to meet the habitat objectives called for in the Utah Plan.

The Proper Balance of Interest Alton Coal Lease-by-Application

Alton Coal Development, LLC operates the Coal Hollow Mine, the only surface coal mine in the Utah Sub-region planning area, and seeks to expand the mining operation into adjacent BLM lands located within the South Panguitch Population planning area pursuant to a

¹⁰⁹ Statutory authority is required, and will be sought during the 2016 General Session of the Utah Legislature. Also rule-making by DNR will follow, and an agreement negotiated with the FWS.

federal lease application filed in 2004.¹¹⁰ In the BLM’s Draft EIS for the LUPA, BLM determined that the sage-grouse population in the Panguitch Population Area was “low risk” and therefore the Panguitch Population Area was General Habitat which would allow for future mine expansion.¹¹¹ The state commented previously on this issue in letters to the BLM dated March 27,¹¹² April 9th,¹¹³ and June 17,¹¹⁴ 2015 concerning the Alton Coal Lease-by-Application Supplemental EIS. The state incorporates these letters by reference.

However, in the FEIS the BLM arbitrarily and capriciously changed the classification of the Panguitch Population Area from General Habitat to highly restrictive Priority Habitat, which may block Alton Coal from expanding its operations on to BLM land.¹¹⁵ The BLM failed to provide any evidence or analysis in the FEIS explaining why this change is proposed. The BLM’s unexplained and unsupported reclassification is arbitrary and capricious and therefore unlawful, as well as inconsistent with the state’s Conservation Plan. The state requests that BLM eliminate the priority habitat designation for the Panguitch Population Area.

The Proper Balance of Interests WAFWA Zones

The state has repeatedly asked the federal agencies to drop the management connections to the WAFWA Management Zones. These zones were created without regard for the actual ecological conditions in Utah, that is, Utah areas were simply attached for convenience to zones covering larger areas of habitat. Asking Utah personnel to attend meetings considering issues far from the Utah populations is a task of minimal benefit. The state requests that all mitigation and other management provisions be limited to the Utah population areas (SGMAs).

The Proper Balance of Interest Interaction with State Agencies

In numerous locations throughout the FEIS, the federal agencies refer to consultation with state agencies, rather than the Governor, or the Public Lands Policy Coordinating Office. This choice is not consistent with state law. The state requests that the federal agencies adjust the nomenclature to reference consultation with the “state,” rather than with particular agencies or classes of employees.

Other Consistency Issues

The State of Utah also finds that the additional issues raised in the state's protest letter of June 29, 2015, and the state's letter concerning the Administrative Draft, dated May 13, 2015, also constitute inconsistencies with the state's Conservation Plan, and other state plans, policies and programs. The Protest Letter issues were raised for the reasons stated in the letters, but

¹¹⁰ See Utah Greater Sage-Grouse Proposed LUPA/Final EIS (“FEIS”), p. 3-214; 4-116.

¹¹¹ See FEIS, at p. 3-34.

¹¹² See Attachment 13.

¹¹³ See Attachment 13.

¹¹⁴ See Attachment 13.

¹¹⁵ See FEIS, at p. 2-1, 2-14.

resolution of those issues also requires a consideration of the balance of interests required in a Consistency Review. Resolution of the state's fundamental concerns, as expressed in all letters since the Draft EIS was produced in a manner inconsistent with the state's Conservation Plan and relevant state law, will generate an imbalance of interests away from the best possible mix for the conservation of the species.

In addition, numerous counties in Utah also submitted letters of protest concerning the proposed plan amendments. To the extent the issues raised by the counties are consistent with the state's position, as stated in this consistency review, the state's protest letter and the letter of May 13, 2015, the county issues are incorporated into this Consistency Review.

Recommendations for Federal Agency Action

Based upon the above information and analysis, the Governor of the State of Utah recommends the BLM and the Forest Service make the following adjustments to the proposed plan amendments, and conduct the additional analysis requested, in order to resolve the numerous inconsistencies noted between the federal agencies proposed plan amendments and the state's Conservation Plan and other state law:

● Recognize the Complexity of Actions Required for Successful Conservation within a Multi-Ownership Landscape

- Adopt the state's Conservation Plan as the framework for coordinated success in Utah.
- Adjust the proposed plan amendments in detail and scale in order to recognize the state's framework.
- Recognize and specifically affirm through proposed BLM and Forest Service principles of successful conservation, within the adjusted proposed plan amendments, that actions taken on federally managed lands will have repercussions on state and privately managed lands, and that conservation success may suffer without a coordinated conservation plan.
- Review, analyze and publish, before a Record of Decision is signed, (in addition to the NEPA work already completed concerning regulatory restrictions), evaluations of the impacts to the environment and the economy from the habitat rehabilitation work, population augmentation, and other non-regulatory factors leading to successful conservation in Utah. This new work must include an analysis of the impacts from both the regulatory features, and the conservation implementation measures, upon the full range of economic valuations found with the state's inventory and valuation study.

● Eliminate Absolute Deference to Unnecessary and Overbroad Conditions Imposed by the Fish and Wildlife Service

- Assert the independent agency authority derived under FLPMA and NFMA to make land use plan choices based upon a multiple-use, sustained yield principles, and choices designed to achieve the proper balance between conservation and resource use which properly considers cost

and commensurate conservation gain. Adjust proposed plan provisions to eliminate the counterproductive category of Sagebrush Focal Areas as demanded by the FWS.

- Publish for public review, before a Record of Decision is signed, all scientific and other information related to the alleged need for the FWS generated concept of conservation strongholds (Sagebrush Focal Areas). Publish for public review all materials related to the process and analysis leading to the delineation of the stronghold areas, and all material related to the alleged distinction between the strongholds and the COT Report areas delineated as Priority Areas of Conservation (PACs).
- Publish for public comment and review, before a Record of Decision is signed, a detailed statutorily based, explanation of the planning deference accorded the Fish and Wildlife Service, deference which allows the proposed adoption of management choices which far exceed the authority of the Endangered Species Act and the recommendations of the Conservation Objectives Team Report, and which are far in excess of the minimum necessary to address the threat to the species.
- Publish for public comment and review, before a Record of Decision is signed, a detailed explanation concerning the interpretation of the required “certainty” of result which leads to the need for a massive withdrawal of lands from the applicability of the federal mining laws, including an explanation of why the general process for approvals of projects, including density and disturbance caps, is less preferable, and therefore, less certain, than the proposed withdrawal.

● **Goals and Objectives:**

- Review, evaluate and consider, respond to and provide the public the opportunity, before a Record of Decision is signed, to comment upon the primary conservation lessons learned in Utah derived from years of research, including the lessons in habitat and population management from the Strawberry Valley, West Tavaputs and Anthro Mountain regions.
- Support the lessons learned from years of local research, and adjust the proposed plan amendments by adopting specific management goals and objectives consistent with those contained in the state’s Conservation Plan, subject, of course, to budget, NEPA compliance and such other federal agency requirements that may be necessary.

● **Research Specific to Utah**

- Adopt the scientific research developed in Utah as the best available science by adjusting the proposed plan amendments to use lek counts as the primary source of population information, and adopting the rolling ten year average employed by the state as the best indicator of population trends.

● **Proposed General Habitat Category**

- Recognize the actual on-the-ground situation derived from natural causes and human activity in the areas proposed for general habitat;

- ◇ Specifically recognize the implications of locally-derived scientific literature concerning the populations within and near BLM-generated general habitat, including the Anthro Mountain, West Tavaputs, Alton, and the entire Uinta Basin regions;
 - ◇ Specifically recognize the high likelihood of reduced resilience among many of these populations, due to the existing and already authorized developments;
 - ◇ Specifically recognize the minor amounts of important habitat included within the proposed general habitat;
 - ◇ Specifically recognize the minimal conservation benefit derived from additional requirements within these areas; and
 - ◇ Specifically recognize that the unwarranted extra costs of the proposed general habitat management provisions are high, and completely out of proportion to the expected conservation benefit.
- Adjust the proposed plan amendments to reflect the minimal conservation benefit, and maximal unwarranted cost, derived from the proposed general habitat category by eliminating the existing proposed provisions and adopting instead provisions from the no-action alternative (Alternative A) of the FEIS directly linked to each geographic region.

- **Anthro Mountain and Appendix P – Forest Service**

- Revise the Biological Evaluation (Appendix P) and all other proposed plan amendments to properly reflect the best available scientific literature, and adjust the proposed plan amendments concerning Anthro Mountain to properly reflect the agreement with the state.
- Adjust the mapping for the habitat at Anthro Mountain which was part of the agreement with the state to reflect its status as “Other” habitat.

- **Support for Reasonable Application of the Federal Mining Law**

- Achieve the proper balance of interest throughout the proposed plan amendments for the continued application of the mining law by eliminating the proposal for a massive withdrawal, and substituting provisions which provide for the flexibility to address the locally relevant disturbance of a specific mine through mine plan approval and disturbance cap provisions, accompanied by appropriate mitigation.
- Publish for public review and comment, before a Record of Decision is signed, a full explanation of the alternatives to withdrawal, including a detailed explanation of the requirements for protection of valid, existing rights, and an application of those requirements, in both worst and best cases, to unpatented mining claims within withdrawn areas.

- **Disturbance Cap and Estimations of Disturbance**

- Achieve the proper balance of interest and consistency with the state’s Conservation Plan by amending the proposed plan amendments to employ data which direct relates, in scale and purpose, to the anticipated decisions to be made as a result of the plan. Adopt the state’s 2013

baseline maps as the best available information for this purpose, and as the baseline for disturbance cap calculations.

- **Reflect Support for Grazing As a Positive Influence on the Range**

- Adopt the philosophy that grazing is a positive influence upon the land, and that localized habitat concerns that may be tied to grazing can be addressed locally. Achieve the proper balance of interest by adjusting the proposed plan amendments to adopt the vegetation standards collaboratively generated by the state, the BLM, the FWS and academia statewide, including the forests, and following the normal schedule for the review and reauthorization of allotment permits.

- **Best Available Science**

- Make use of the best available science by basing the proposed plan amendments on the research discussed within the Utah Science Narrative. Reject the use of studies which do not meet this standard, including the recently released Pew Report. Move toward consistency with the scientific basis of Utah’s Conservation Plan by removing all references to unsupportable, or less relevant, research, including the Pew Report, and substituting scientific research based on the Utah Science Narrative.

- **Address the Issues Affecting the Operations of the Military in Utah**

- Adjust the terms of the proposed plan amendments to reflect the provisions in the state’s Conservation Plan addressing the operations of the Department of Defense in Utah.

- **Eliminate the use of WAFWA Management Zones**

- Adjust the terms of the proposed plan amendments to create consistency with the state’s Conservation Plan, and eliminate management review or choices tied to the WAFWA Management Zones.

- **Employ the term “the state”**

Adjust the terms of the proposed plan amendments to reflect use of the term “the state” whenever consultation or communication is proposed with the state, state agencies, or state personnel.

- **Alton Coal Lease-by-Application**

- Adjust the proposed plan amendments to reflect the state’s Conservation Plan with respect to the Alton Coal Lease-by-Application, and the lack of status of the habitat within the area encompassed by the LBA as either “essential” or “priority” or anything similar.

- **Lands and Realty Actions**

- Achieve the proper balance of interest by adjusting the proposed plan amendments to reflect prioritization for beneficial land tenure adjustments for the school trust lands, as discussed further above.

- **Support A Cooperative Solution For Eastern Utah**

- Achieve consistency with the state's Conservation Plan in eastern Utah by building upon the state's Compensatory Mitigation Program to support a Landscape Cooperative Management Agreement among the state, the energy industry and the federal agencies. Finalize and publish for public comment, before a Record of Decision is signed, the concept and terms of a landscape scale cooperative framework for review of concerns related to the actual siting of a project, and monitoring and mitigation for greater sage grouse and various plant species in the greater Uintah Basin area. The concepts and terms should consider examples such as the agreements for the Lesser Prairie Chicken and the Dune Lizard. The state will work with the BLM on the proposal, as a viable alternative reflecting the current situation regarding development and resiliency of the species in the greater Uintah Basin Region. The state has offered a program of population augmentation before, as part of the discussion related to West Tavaputs and Anthro Mountain, but the federal agencies rejected the offer. The state will offer the idea again as part of this landscape scale program.

- **Other Consistency Issues**

- Adjust the proposed plan amendments to resolve all other issues raised within this Consistency Review letter not reflected in these recommendations, and for all issues raised in the state's Protest Letter of June 29, 2015 and the state's Administrative Draft letter dated May 13, 2015.