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Governor

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July 8, 2015

Governor Brian Sandoval
State Capitol Building
101 N. Carson Street
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Dear Governor Sandoval,

The Commission on Mineral Resources has a statutory duty under NRS 513.063 to advise and make recommendations to the Governor concerning policy relating to minerals. The Commission supports the 2014 Nevada Greater Sage-grouse Conservation Plan (State Plan) developed by the Sagebrush Ecosystem Program, including the Conservation Credit System.

The Commission has reviewed the Nevada and Northeastern California Greater Sage-Grouse Proposed Land Use Plan Amendment (LUPA) and Final Environmental Impact Statement (FEIS) by the Bureau of Land Management (BLM), and has prepared a list of comments and recommendations for consideration in the Governor's consistency review. The Commission believes that the proposed land use plan is inconsistent with the Federal Land Policy and Management Act (FLPMA), The General Mining Law, and the State Sage-Grouse Conservation Plan. The Commission believes that the Governor should utilize all provisions under 43 Code of Federal Regulations (CFR) 1610.3-2 to ensure that the State Plan is appropriately incorporated in to the LUPA.

I. INCONSISTENCY WITH THE FLPMA

The LUPA fails to comply with the FLPMA's multiple use and sustained yield mandate under § 102(a)(7), and in the land use planning title of the FLPMA at § 202(c)(1), and the directive under § 102(a)(12), to recognize the Nation's need for domestic sources of minerals. Further, the multiple and cumulative restrictions on surface use including: travel and transportation restrictions; allowable surface disturbance; right-of-way (ROW) restrictions; and the constraint related to valid existing rights (VER) creates widespread, and cumulative *de facto* withdrawals across the entire planning area, which violates the multiple-use mandates under the FLPMA § 102(a)(7) that clearly establishes that the FLPMA does not "amend the Mining Law of 1872 (The General Mining Law) or impair the rights of any locators or claims under that Act, including but not limited to, rights of ingress and egress.

A. The LUPA fails to comply with the FLPMA §§ 102(a)(7), 102(a)(12), and 103(c)

The land use restrictions and prohibitions, especially the proposed withdrawals from mineral entry (Sections 2.6.2 and 2.6.3 at 2-25, 2-45, 2-50; and 2-63, respectively),[1] and the widespread travel and transportation restrictions (Sections 2.6.2 and 2.6.3 at 2-52, 53, 54; and 2-70, 71, respectively)[2] are not consistent with the FLPMA's multiple use mandate and raise sage-grouse conservation and aesthetics above all other resources in the planning area, and without providing rationale for placing protection of sage-grouse above all other uses.

Moreover, the cumulative or "layering" of these management actions imposes severe restrictions on all Federal land and split estate land in the planning area. The total amount of habitat located on Federal land in the planning area is 23,310,800 acres (*see* Table ES-1). That means that 42-percent of the decision area (Federal lands within the planning area), are effectively withdrawn as a result of the numerous and cumulative management actions presented in the LUPA.

In addition, the land use restrictions and prohibitions, especially the proposed withdrawals from mineral entry (Sections 2.6.2 and 2.6.3 at 2-25, 2-45, 2-50; and 2-63, respectively), and the widespread travel and transportation restrictions (Sections 2.6.2 and 2.6.3 at 2-52, 53, 54; and 2-70, 71, respectively), are not in compliance with the specific directive pertaining to minerals in the FLPMA § 102(a)(12):

> … the public lands [shall] be managed in a manner that recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including the implementation of the Mining and Minerals Policy Act of 1970 [at] 30 U.S.C. 21a… (43 U.S.C. 1701(a)(12)).

The proposed restrictions, limitations, and withdrawals from mineral entry in the LUPA/FEIS directly conflict with the FLPMA's requirement that the Secretary must manage public lands to respond to the Nation's needs for minerals. Specifically the restrictions that are contrary to the FLPMA's directive include:

- **Section 2.6.2**: Objective SSS 1, Action SSS 2, Action SSS 5, Action, Action SSS 6, Action SSS 7, Action CTTM 2, Action CTTM 3, Action CTTM 5, Action CTTM 6, Action LR-LUA 2, Action LR-LUA 4, Action LR-LUA 5, Action LR-LUA 6, Action LR-LUA 16, Action LR-LUA 19, Action LR-LUA 21, Action LR-LW 1, Action LOC 2; and

- **Section 2.6.3**: GRSG-GEN-DC-002, GRSG-GEN-ST-004-Standard, GRSG-RT-ST-081-Standard, GRSG-LR-SUA-ST-014-Standard, GRSG-LR-SUA-ST-015, GRSG-LR-SUA-ST-016-Standard, GRSG-LR-LW-GL-025-Guideline, GRSG-RT-ST-081-Standard, GRSG-RT-GL-089-Guideline.

[1] Section 2.6.2, Action SSS 5, Action LR-LW 1, Action LOC 2; Section 2.6.3, GRSG-LR-LW-GL-025-Guideline
[2] Section 2.6.2, Action CTTM 2, Action CTTM 3; Section 2.6.3, GRSG-RT-ST-081-Standard

In the LUPA, 3,319,000 acres (including existing withdrawals at Table 2-14) are recommended for withdrawal from mineral entry including approximately 2.8 million in areas designated as sagebrush focal areas (SFA) (*see* LUPA/FEIS, Figure 2.5), and is inconsistent with the FLPMA's mandate, to recognize the Nation's need for domestic sources of minerals. Further, the proposed travel restrictions, which would apply to over 16 million acres of public lands in the planning area, and co-located in sage-grouse habitat (*see* LUPA/FEIS, Figure 2-14), will significantly interfere with exploration and development of mineral resources on these lands.

The widespread and cumulative restrictions also include seasonal restrictions throughout much of the practical exploration and development season, and include large No Surface Occupancy (hereinafter "NSO") buffer zones leading to *de facto* withdrawal from mineral entry on lands with sage-grouse habitat. The FLPMA does not authorize using restrictions and prohibitions, such as those associated with travel and transportation management, or ROW management to achieve *de facto* mineral withdrawals.

The proposed LUPA is in violation of of Bureau of Land Management (BLM) policy regarding minerals, as described above, as well as the regulations implementing National Environmental Policy Act (NEPA) regarding agency response to comments (40 C.F.R. § 1503.4). For the reasons described herein, the LUPA does not "comply with applicable laws, regulations, policies and planning procedures," (BLM Handbook H-1601-1 at 7), which is one of the criteria needed to uphold a protest.

B. The LUPA fails to comply with the FLPMA § 1732(b)

The FLPMA expressly provides that none of its land use planning provisions, among others "*shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress*" (43 U.S.C. § 1732(b), emphasis added).

In enacting the FLPMA, Congress explicitly acknowledged the continued vitality of the Mining Law of 1872. Section 302(b) of the FLPMA states:

> Except as provided in Section 1744, Section 1782, and Subsection (f) of Section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the act, including, but not limited to, rights of ingress and egress (43 U.S.C. § 1732(b)).

The House Committee on Interior and Insular Affairs described this provision more particularly when it stated:

> This section specifies that no provision of the Mining Law of 1872 will be amended or altered by this legislation except as provided in Section 207 (recordation of mining claims), Subsection 401(f) (regulation of mining in the California desert), Section 311 (wilderness review areas and wilderness areas), and except for the fact that the Secretary of the Interior is given

> specific authority, by regulation or otherwise, to provide that prospecting and mining under the mining law will not result in unnecessary or undue degradation of the public lands. The secretary is granted general authority to prevent such degradation (H.R. Rep. No. 94 1163 at 6 (1976)).

As such, BLM cannot in any way impair the rights of locators or mining claimants or interfere with ingress and egress rights through the land use planning process.[3] Therefore, the LUPA's/FEIS' mineral withdrawals, prohibitions, and restrictions are contrary to explicit statutory language in the FLPMA and § 22 of the General Mining Law.

The widespread travel restrictions (*see generally* Figure 2-14), discussed in Sections 2.6.2, 2.6.3, 2.12; and presented in Table 2-17 in the LUPA/FEIS conflict with the rights of locators of claims including rights of ingress and egress.[4] By limiting travel to existing and designated routes, prohibiting upgrades of existing routes and creation of new routes, and imposing potentially substantial seasonal constraints will substantially interfere with and likely obstruct exploration and development of existing and future mining claims. Unless claims, both existing and future, are located near or adjacent to existing or designated routes, exploration and development of these claims could be impossible.

Further, the inability to create new roads under Sections 2.6.2 and 2.6.3: Action LR-LUA 19, Action LR-LUA 21, Action CTTM 3, Action CTTM 4, and GRSG-RT-ST-081-Standard will make exploration and development of existing or future claims that are not adjacent to existing roads impossible. The BLM's assertion to respect VER, as discussed above does not ensure access to locatable mineral exploration and development. Again, the requirement to have VER will stifle, if not completely thwart, mineral exploration or mineral development prior to discovery of a valuable mineral deposit.

These travel restrictions substantially impair the rights of claim holders to access their claims and are thus completely inconsistent with the FLPMA § 1732(b). In addition to impairing the rights of locators, the travel restrictions also constrain access to claims (i.e., access to the land on which a claim is located). These travel restrictions constitute a *de facto* withdrawal from mineral entry of more than 16 million acres of land in the planning area.

Recommendation:

The Commission recommends that the BLM prepare a Revised LUPA that complies with the FLPMA mandate to balance a wide range of resource values and uses of public lands including the directive in the Mining and Minerals Policy Act at 43 U.S.C. § 1701(a)(12) and 30 U.S.C. § 21(a) to recognize the Nation's need for domestic sources of minerals.

C. The LUPA fails to comply with §§ 202(c)(1), 202(c)(2), 202(c)(7) of the FLPMA

[3] An example of the mandatory language of the General Mining Law is observed even in roadless areas.

[4] *See* LUPA/FEIS at 2-465 "Under the proposed plan, no acres would be open to motorized travel, and the BLM would manage over 16 million acres as limited to existing or designated routes. No new roads would be allowed in Priority Habitat Management Areas (PHMA) or upgrades of existing routes. Seasonal timing restrictions could be applied to roads near leks."

Section 202 of Title II of the FLPMA, Land Use Planning, Land Acquisition, and Disposition, governs the Department of Interior's (DOI's) land use planning process for developing and amending land use plans. Section 202(c) establishes land use planning directives to accomplish the FLPMA § 102 declaration of policy that the public lands be managed to achieve multiple-use and sustained yield, which are the overarching purpose of the FLPMA. Multiple-use and sustained yield require the Secretary to manage public lands to balance the various resources on public lands to best meet the present and future needs of the American people in a manner that recognizes the Nation's need for domestic sources of minerals including implementation of the Mining and Minerals Policy Act as it pertains to public lands.[5] This balancing requirement puts wildlife and minerals (as well as the other listed resource values) on the same footing.

Many of the FLPMA § 202 land use planning requirements contain explicit provisions to ensure that the Secretary's land use plans achieve an appropriate balance of resource values consistent with the FLPMA's multiple-use and sustained yield mandate.

The LUPA/FEIS does not give adequate consideration to alternative approaches to sage-grouse conservation, as required in § 202(c)(6). As described below, the Nevada Sage-Grouse Conservation Plan is consistent with the multiple-use objectives under the FLPMA (which the LUPA is not) and achieves superior sage-grouse habitat conservation than the LUPA.

The LUPA/FEIS preferred alternative D is sage-grouse centric and focuses solely on sage-grouse habitat conservation; the document does not evaluate benefits or harms to other land users, to the public, or to local or State governments. The document only describes benefits to sage-grouse habitat; it does not discuss the short- or long-term benefits (if any) to the public or adequately consider cumulative impacts to mineral development, exploration, and other rights under the General Mining Law.

Recommendation:

The Commission recommends that the BLM provide the State of Nevada with a socioeconomic and cumulative impact analyses that satisfy the NEPA hard-look requirements that would readily reveal that instead of providing any short- or long-term benefits, LUPA will result in substantial short- and long-term harm to the public.[6] The LUPA in the FEIS does not comply with the FLPMA § 202(c)(7). The Commission recommends that the BLM prepare a Revised LUPA in order to comply with the FLPMA § 202(c)(7).

D. The LUPA fails to comply with § 202(c)(9) and is inconsistent with the Nevada Sage-Grouse Conservation Plan

[5] 43 U.S.C. 1701(a)(12).

[6] Even though not directly applicable to the FLPMA consistency review process, the NEPA analysis for the LUPA is fatally flawed. The socioeconomic and cumulative analysis are those that are most directly applicable to an assessment of the impacts of the LUPA on the State of Nevada's economy and social fabric.

Section 202(c)(9) of the FLPMA mandates that the Secretary coordinate the land use planning process with State and local governments and that the resulting federal land use management plans must be substantially consistent with State and local land management plans.

> Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act (43 U.S.C. 1712(c)(9)).

The FLPMA § 202(c)(9) gives State governments a specific statutory role in the federal land use planning process:

> Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him.

In enacting this FLPMA provision, Congress recognized the unique expertise of state and local governments in land use planning and the scope of the States' long-established police powers over land use.

In December 2011, former Secretary of the Interior, Ken Salazar, complied with the FLPMA § 202(c)(9) requirement to coordinate the land use planning process with State governments when he asked the western governors to develop sage-grouse conservation plans. Secretary Salazar's December 2011 request recognized the States' authority to furnish advice during the federal land use planning process pursuant to the FLPMA § 202(c)(9).[7]

The LUPA/FEIS alternative D is inconsistent with the Nevada Sage-Grouse Conservation Plan and thus does not comply with the FLPMA § 202(c)(9). The BLM should address the inconsistencies identified by the State and local governments with the LUPA and provide appropriate public notice and comment on such changes.

The Nevada Sage-Grouse Conservation Plan is premised upon and fully consistent with the multiple-use and sustained yield purposes of the FLPMA, and also provides effective and comprehensive Sage-grouse conservation measures that include substantial financial mitigation requirements for impacts to sage-grouse habitat that cannot be avoided or minimized. The foundation of the Nevada Sage-Grouse Conservation Plan is the habitat conservation hierarchy of "avoid, minimize, and mitigate," which implements a multiple-use land management objective that strives to balance a variety of land uses including protecting and enhancing sage-grouse habitat.

[7] Just as Secretary Salazar was required to comply with the FLPMA Section 202(c)(9) at the beginning of the sage-grouse land use planning process in 2011, Secretary Jewell is now required to comply with the FLPMA 202(c)(9) at the end of the land use planning to ensure that the LUPAs for each western state are consistent with each state's Sage-grouse conservation plan.

The FLPMA § 202(c)(9) requires the Secretary to develop a federal LUPA that is consistent with State and local plans "to the maximum extent" the State and local plans are consistent with Federal law and the purposes of the FLPMA. Because the Nevada Sage-Grouse Conservation Plan is consistent with the FLPMA multiple use and sustained yield objectives, it fulfills the multiple-use requirements in the FLPMA to a much greater extent than the LUPA. The LUPA should be revised to eliminate its inconsistencies with the State Plan in compliance with the FLPMA § 202(c)(9) and the multiple-use and sustained yield FLPMA mandates.

In addition to being far more consistent with FLPMA than the LUPA, the Nevada Sage-Grouse Conservation Plan is also more consistent with other Federal laws of significant importance to Nevada, including the General Mining Law, than the LUPA. Moreover, the Nevada Sage-Grouse Conservation Plan provides superior sage-grouse habitat conservation because it can be applied throughout the state on public, private, and state lands. In contrast, the LUPA cannot be applied to private or state lands, and conflicts with County Master Plans that regulate use on private lands. The LUPA thus, creates the adverse situation in which sage-grouse conservation measures may be different on adjacent lands in Nevada's checkerboard or elsewhere where the land ownership pattern consists of adjacent sections of public and private lands.

The BLM's regulations at 43 C.F.R. § 1610.3-2 implement the FLPMA § 202(c)(9) State Consultation and Consistency Requirement and reiterate that the Secretary must develop federal land use plans that are consistent with those State and local plans that satisfy the purposes of the FLPMA and other Federal laws:

> Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands… (43 C.F.R. § 1610.3-2(a))

Pursuant to these regulations, the Secretary cannot lawfully ignore or reject a state plan, like the Nevada Sage-Grouse Conservation Plan, which satisfies the FLPMA multiple-use principles and achieves an appropriate balance between various land uses including, but not limited to, agriculture, livestock grazing, mineral exploration and development, energy development, wildlife protection, and habitat conservation. Moreover, the Nevada Sage-Grouse Conservation Plan specifically focuses on reducing the key threats to Sage-grouse habitat in Nevada (e.g., wildfires and invasive species infestations). In comparison, the LUPA does not focus on reducing threats to habitat; it mainly focuses on regulating (by restricting and prohibiting) public land uses in sage-grouse habitat areas.

The BLM's regulations also require a reasonable balance between national and state interests:

> 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" 43 CFR Section 1610.3-2(e).

That is precisely what the Nevada Sage-Grouse Conservation Plan does; it provides the required "reasonable balance." In fact, as discussed above, the State's Plan provides considerably more balance than the Proposed LUPA which fails to comply with the multiple use and resource balancing requirements of the FLPMA, more specifically the statutory mandate in the FLPMA § 202(c)(9) and the 43 CFR 1610.3-2 regulations.

Recommendation:

The Commission recommends that the BLM prepare a Revised LUPA that complies with the FLPMA and incorporates the Nevada Sage-Grouse Conservation Plan as the mechanism for protecting sage-grouse and sage-grouse habitat.

II. INCONSISTENCY WITH THE GENERAL MININNG LAW

A. The LUPA fails to comply with § 22 of the General Mining Law

Several of the goals, objectives, management actions, standards, and guidelines (listed below) contained in the LUPA/FEIS are not consistent with rights under the General Mining Law which allows citizens of the United States the opportunity to enter, use, and occupy public lands open to location to explore for, discover, and develop certain valuable mineral deposits (30 U.S.C. § 22), subject to the FLPMA mandate to prevent unnecessary and undue degradation of public lands.

30 U.S.C. § 22 ensures *pre-discovery* access, use, and occupancy rights to enter lands open to location for mineral exploration and development. Prohibiting or restricting mineral exploration and development on lands co-located with sage-grouse habitat, by way of limits placed upon surface disturbance,[8] travel and transportation management (roads),[9] ROW avoidance and exclusion areas,[10] and mineral withdrawals[11] is contrary to the rights granted by § 22 of the General Mining Law.

The Commission believes that the BLM has a legal obligation to comply with the General Mining Law, Mining and Minerals Policy Act, and the FLPMA to recognize the Nation's need for domestic sources of minerals and the right to explore. Despite, and in direct

[8] Specific part of the Proposed Plan being protested: Section 2.6.2, Action SSS 2; Section 2.6.3, GRSG-GEN-DC-002, GRSG-GEN-ST-004-Standard.
[9] Specific part of the Proposed Plan being protested: Section 2.6.2, Action CTTM 2, Action CTTM 3; Section 2.6.3, GRSG-RT-ST-081-Standard.
[10] Specific part of the Proposed Plan being protested: Section 2.6.2, Action LR LUA 2, Action LR-LUA 4, Action LR-LUA 5, Action LR-LUA 6, Action LR-LUA 19; Section 2.6.3, GRSG-LR-SUA-ST-014-Standard, GRSG-LR-SUA-ST-016-Standard.
[11] Specific part of the Proposed Plan being protested: Section 2.6.2, Action SSS 5, Action LR-LW, Action LOC 2; Section 2.6.3, GRSG-LR-LW-GL-025-Guideline.

conflict with this legal obligation, the LUPA/FEIS Alternative D recommends severe restrictions, prohibitions, withdrawals, and *de facto* withdrawals including:

- **Section 2.6.2:** Objective SSS 1[12] Action SSS 2, Action SSS 5, Action, Action SSS 6, Action SSS 7, Action CTTM 2, Action CTTM 3, Action CTTM 5, Action CTTM 6, Action LR-LUA 2, Action LR-LUA 4, Action LR-LUA 5, Action LR-LUA 6, Action LR-LUA 16, Action LR-LUA 19, Action LR-LUA 21, Action LR-LW 1, Action LOC 2, Action LOC 4; and

- **Section 2.6.3:** GRSG-GEN-DC-002, GRSG-GEN-ST-004-Standard, GRSG-RT-ST-081-Standard, GRSG-LR-SUA-ST-014-Standard, GRSG-LR-SUA-ST-015, GRSG-LR-SUA-ST-016-Standard, GRSG-LR-LW-GL-025-Guideline, GRSG-RT-ST-081-Standard, GRSG-RT-GL-089-Guideline.

The 3-percent disturbance threshold (Action SSS 2 and Appendix F) puts an overly restrictive and unrealistic burden on mining operators exercising their rights under the General Mining Law, and creates a *de facto* withdrawal.

Further, if public lands needed for ROWs for roads, power lines, pipelines, etc. are no longer available for development, as described throughout the LUPA/FEIS preferred alternative, and listed above, including "limited" areas, or avoidance/exclusion areas in SFAs, Priority Habitat Management Areas (PHMA) and General Habitat Management Areas (GHMA), the unpatented mining claims, patented claims, fee lands, and associated private property rights could be rendered worthless and could subject the federal government to a Fifth Amendment takings claim. To that end, the BLM's numerous references to VER has the potential to interfere with the access, use, and occupancy of lands open to location for mineral purposes, which are rights granted under the General Mining Law and Surface Use Act (30 U.S.C. § 612(b). These rights apply both to unpatented mining claims prior to discovery and to unclaimed lands open to mineral entry, *independent of the discovery status of these lands*. The numerous references to VER to these management actions is in fact a restriction, not an expansion of rights to use land for mineral purposes under the General Mining Law and Surface Use Act, and as such does not comply with the FLPMA, the General Mining Law, or the Surface Use Act.

The BLM's proposed prohibition against mineral development in sage-grouse habitat areas is disproportional to the amount of land used for mineral development and the impacts associated with mineral exploration and development, especially considering that the projected long term, unclaimed surface disturbances (i.e., open pit mines that are stabilized at closure but remain as features on the landscape) are small in the context of the habitat area.

Recommendation:

[12] "All BLM use authorizations will contain terms and conditions regarding the actions needed to meet or progress toward meeting the habitat objectives. If monitoring data show the habitat objectives have not been met nor progress being made towards meeting them, there will be an evaluation and a determination made as to the cause. If it is determined that the authorized use is a cause, the use will be adjusted by the response specified in the instrument that authorized the use (Stiver et. al 2015, in press)" at 2-17.

The Commission recommends that the BLM prepare a Revised LUPA to remedy the surface use restrictions, withdrawals, and *de facto* withdrawals described under the LUPA.

B. BLM's Proposed Recognition of valid existing rights are in violation of § 22 of the General Mining Law

Throughout the LUPA/FEIS, the BLM condition several objectives, goals, management actions, and standards and guidelines subject to VER with the implication that the impact of these restrictions on claim holders would be mitigated because their rights to their claims would be protected. *See*:

- **Appendix F** at F-1;
- **Section 2.4.3** at 2-11;
- **Section 2.6.2**: Action SSS 2, Action SSS 3, Action SSS 5, Action LR-LW, Action LR-LUA 6, Action LR-LUA 19, Action LR-LUA 21, Action LOC 2, Action LOC 4, Action D-LR-W 4;
- **Section 2.6.3:** GRSG-GEN-DC-002-Desired Condition, GRSG-RT-ST-081-Standard;
- **Section 2.7** hard and soft triggers; and
- **Section 2.9**: Action B-CTTM 7, Action D-CTTM 6, Action D-CTTM 7, Action B-LR-LUA 1, Action D-LR-LUA 1 Action F-LR-LUA 1.

For example, while the BLM asserts that mining is exempt from the 3-percent cap, the proposed action is conditioned with the constraints to "applicable laws and regulations, such as the 1872 Mining Law, as amended and *valid existing rights*"[13] (emphasis added). Another example can be found in Section 2.7 in the discussion of hard and soft triggers at 2-84, "Limit ROW authorizations, leases, and permits to those needed for public safety and valid existing rights." The requirement for there to be VER puts an overly restrictive and unrealistic burden on mining operators exercising their rights under the General Mining Law, and creates a *de facto* withdrawal which is outside the BLM's authority and contrary to law.

For locatable minerals the term "valid existing right," is a specific term that is reserved for those claims after a "discovery" of a valuable mineral deposit has been made. Therefore, the proposal to honor VER, fails to protect the rights associated with claims prior to a discovery of a valuable mineral deposit. Very few mining claims can withstand the rigorous economic evaluation, required by a claim validity examination (hereinafter "validity examination") to which they would be subjected as a result of this constraint.

Validity examinations are used to determine whether a claim has a discovery of a valuable mineral deposit that qualifies as VER that the federal government must exclude from the various restrictions, prohibitions and withdrawals. Thus, the many references to VER in the LUPA/FEIS are misleading because they create the false impression that the rights of mining claimants with claims in areas subject to restrictions, prohibitions,

[13] Action SSS 2 at 2-21; Appendix F at F-1, 2, 3, 4

withdrawals and *de facto* withdrawals from future mineral entry would be respected and that claimants could continue to explore and develop their claims.

Only *after* a claim is found to be valid as a result of a validity examination is it considered VER. However, mineral validity examinations create such a high threshold of proof that a claim can be mined at a profit that very few claims can demonstrate sufficient profitability to satisfy the criteria for a valid claim and VER. Generally speaking, some (but not all) claims at operating mines may meet the claim validity examination test and be treated as having VER. However, claims that are being actively *explored* almost never qualify as valid claims with VER. Even claims at advanced exploration projects that are being proposed for mine development may not qualify as VER.

The repeated and incorrect use of the term "Valid Existing Rights (VER)" when discussing the applicability of the conservation measures that restricts and prohibits land uses actually has the exact opposite effect on mining claims. It can be read to mean that the proposed land use restrictions apply to all mining claims in the planning area except those few claims that have a valuable discovery that can meet the economic tests to create VER. Thus, rather than limiting or exempting mining claims from the draconian land use restrictions, the references to VER throughout the LUPA/FEIS broaden the impact of these restrictions to nearly all mining claims in the State of Nevada.

Interestingly, the Disturbance Cap Guidance (Appendix F) omits any reference to VER and appears to recognize the rights of mining claimants under the 1872 Mining Law stating:

> Although locatable mine sites are included in the degradation calculation, mining activities under the 1872 mining law *may not* be subject to the 3-percent disturbance cap. Details about locatable mining activities will be fully disclosed and analyzed in the NEPA process to assess impacts to sage-grouse and their habitat as well as to BLM goals and objectives, and other BLM programs and objectives (LUPA/FEIS, Appendix F at F-2, emphasis added).

However, this statement does not go far enough. Instead the guidance should state: "…*shall* not be subject to the 3-percent disturbance cap" in order to be consistent with rights under the General Mining Law.

In addition, M 37012 "*Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operation*" (November 14, 2005) establishes that the BLM has no legal obligation to determine claim validity; rather validity examinations for mining claims are a tool used to confirm claim validity for mineral patenting purposes to ensure that fraud is not perpetrated on the government when claims pass from public to private ownership or after land has been withdrawn. Although, the lack of "validity" (discovery; passing the prudent man test, etc.) may prevent mineral patenting, *it does not preclude the claimant's right to pursue discovery* under § 22 of the General Mining Law, which is VER.

Finally, exempting the few claims that do have a discovery of a valuable mineral deposit that constitutes VER, that must be respected by the federal government, is a hallow

gesture because the right would be restricted to the four corners of that mining claim. The land use restrictions would apply to the surrounding lands without a discovery and VER. Thus, the valid claims would become isolated islands essentially withdrawn on a *de facto* basis because access to them and the rights to use adjacent lands for mining facilities would be constrained or eliminated. In this manner, the additional requirement of VER to these management actions is in fact a restriction, not an expansion of rights to use the land for mining purposes under the General Mining Law.

The BLM should evaluate the substantially adverse consequences of making it impossible to explore and develop *pre-discovery unpatented mining claims* and lands that are currently open to location on which there are no unpatented mining claims and lands on which there are claims without a discovery that would be severely restricted or withdrawn from mineral entry and location of mining claims. The rights granted in § 22 of the General Mining Law and the § 22 statutory rights associated with access to, and use and occupancy of pre-discovery claims and unclaimed lands open to mineral entry should be recognized and evaluated in the LUPA. These rights cannot be extinguished by executive fiat.

The BLM have not documented the rationale for its decisions regarding the management of minerals. Specifically, those decisions associated with how the widespread land use restrictions (including those associated with improper use of the term VER), prohibitions, withdrawals, and *de facto* withdrawals (e.g., travel restrictions) recommended in the LUPA/FEIS comply with § 22 of the General Mining Law.

Recommendation:

The Commission recommends that the BLM prepare a Revised LUPA that does not violate § 22 of the General Mining Law. The Revised LUPA should discuss how the objectives, goals, management actions, standards and guidelines, as well as the proposed land withdrawals, validity examinations, and surface use restrictions are in compliance with rights under the General Mining Law to allow access to public lands for prospecting, mining and processing and uses reasonably incident thereto. In addition, the Commission recommends that the BLM remove all objectives, goals, management actions, standards, and guidelines including the restriction associated with VER that infringe upon the rights granted to citizens under § 22 of the General Mining Law and the Surface Use Act.

C. The proposed withdrawals are in violation of § 22 of the General Mining Law

The maximum number of acres authorized for disturbance within Notices and Plan of Operations boundaries in the entire state of Nevada is only 191,374 acres, *some of which are not co-located within sage-grouse habitat*. By contrast the proposed withdrawals within SFAs are almost 2.8 million acres; 15 times larger than the total footprint of existing mining activities in the state of Nevada. Therefore, the proposal to withdraw almost 2.8 million acres of land in Nevada from mineral entry is grossly out of proportion with the maximum potential impact that mineral activities might have on sage-grouse and its habitat. Consequently, the proposed withdrawal within SFAs is not justified, is unreasonable and unnecessary, and is therefore, arbitrary and capricious. In addition, the

proposed withdrawals of the SFA are a new development in the LUPA/FEIS preferred alternative, and thus are subject to the Governor's consistency review.

The proposal to withdraw almost 2.8 million acres (over 3.3 million acres total) from mineral entry demonstrates a general lack of understanding of geology and mineral occurrence by the BLM. Mineral deposits do not occur everywhere; they are located in small areas where geologic conditions are favorable. Mineral deposits are difficult and expensive to find. Therefore maintaining access for future mineral exploration and development is a planning issue that cannot be ignored.

Withdrawals of the magnitude proposed under the LUPA, 3,319,000 acres (including existing withdrawals at Table 2-14) conflict with § 22 of the General Mining Law, and the Mining and Minerals Policy Act and cannot be implemented through the land use planning process. Withdrawal of this magnitude can only be made by an Act of Congress or by the Secretary pursuant to the requirements and procedures of the FLPMA § 204(c) for a period not to exceed 20 years, discussed in detail below. The BLM has not documented the rationale for its decisions regarding the management of minerals. Specifically those decisions associated with how the withdrawals, and *de facto* withdrawals recommended in the LUPA/FEIS comply with § 22 of the General Mining Law.

Recommendation:

The Commission recommends that the BLM prepare a Revised LUPA that appropriately addresses the withdrawals described under the LUPA to ensure that the LUPA does not violate § 22 of the General Mining Law.

D. The BLM's travel and transportation management is in violation of § 22 of the General Mining Law

The Commission believes that Sections 2.6.2 and 2.6.3: Action CTTM 2, Action CTTM 3, Action CTTM 5, Action CTTM 6, GRSG-RT-ST-081-Standard, GRSG-RT-ST-083-Standard, GRSG-RT-GL-089-Guideline are inconsistent with the General Mining Law. Under the LUPA, the BLM states:

> … no acres would be open to motorized travel, and the BLM would manage over 16 million acres as limited to existing or designated routes. No new roads would be allowed in PHMAs or upgrades of existing routes. Seasonal timing restrictions could be applied to roads near leks" (LUPA/FEIS at 2-465).

The restrictions on motorized travel will have an inadequately defined and significant adverse effect on the hardrock mining industry, and will significantly interfere with exploration and development of mineral resources on these lands. Limiting access to public lands to existing or designated routes may make economic exploration and development of some mineral deposits impossible. Maintaining lands available for mineral entry is a hallow gesture if the lands are inaccessible or surrounded by lands on which infrastructure, such as roads, cannot be located.

These travel and transportation management restrictions are unlawful because they conflict with the rights granted by § 22 of the General Mining Law and 30 U.S.C. 612(b) (Surface Use Act), which guarantee the right to use and occupy federal lands open to mineral entry, *with or without a mining claim*, for prospecting, mining and processing, and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of and associated with ingress and egress.

The LUPA/FEIS preferred alternative proposes to authorize new roads only for administrative access, public safety or access to VER (Section 2.6.2 and Section 2.6.3 Action LR-LUA 19, GRSG-RT-ST-081-Standard), which does not go far enough to maintain access, use and occupancy associated with unpatented mining claims prior to discovery, and unclaimed lands open to mineral entry for prospecting, mining and processing and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of and associated with ingress and egress. By limiting the potential for access to only VER the agencies fail to maintain access and thus, conflict with § 22 of the General Mining Law.

Further, a primary objective of the travel and transportation management program is to ensure access needs are balanced with resource management goals and objectives in resource management plans (BLM Manual 1626 at .06). However, the BLM has not balanced access needs associated with minerals, or any other use, and instead places a preference on aesthetic values and protection of sage-grouse; despite the fact that the science surrounding the impact of roads on sage-grouse has been shown to contain serious flaws.[14]

Recommendation:

The Commission recommends that the BLM prepare a Revised LUPA to address the travel and transportation restrictions described under the LUPA to remove the *de facto* withdrawals and thus the violation of § 22 of the General Mining Law. As previously discussed, the misuse of the term "Valid Existing Rights (VER)" in the context of the travel and transportation restrictions does not ensure pre-discovery access to public lands with or without mining claims. The BLM must maintain access to all federal lands that are not withdrawn under the FLPMA, for the right of ingress and egress, the use and occupancy of federal lands for prospecting, mining and processing, and all uses reasonably incident thereto, including but not limited to ancillary use rights.

E. The BLM's lands and realty management is in violation of § 22 of the General Mining Law

[14] *Garfield County et al. v. BLM*, Data Quality Act Challenge to U.S. DOI Dissemination of Information Presented in the Bureau of Land Management's National Technical Team Report (March 18, 2015). Incorporated by reference and available at: http://www.blm.gov/wo/st/en/National_Page/Notices_used_in_Footer/data_quality.html Hereinafter, "NTT Report DQA Challenge." *See also, Garfield County et al. v. USFWS*, Data Quality Act Challenge to U.S. Department of the Interior Dissemination of Information Presented in the USFWS Conservation Objectives Team Report (March 18, 2015) at Incorporated by reference and available at: http://www.fws.gov/informationquality/. Hereinafter "COT Report DQA Challenge"

The following management actions associated with the lands and realty program interfere with the rights granted to citizens under § 22 of the General Mining Law.

- **Section 2.6.2**: Action LR-LUA 16, Action LR-LUA 19, Action LR-LUA 21; and

- **Section 2.6.3**: GRSG-LR-SUA-ST-014-Standard, GRSG-LR-SUA-ST-015-Standard, GRSG-LR-SUA-ST-016-Standard

By limiting approval of ROWs to existing corridors or VER could make exploration and development of a claim prior to discovery impossible. Access roads, water supply pipelines, and power or utility services are necessary to develop a mine. Unless a claim is located adjacent to, or is relatively close to a utility corridor these restrictions could preclude development of minerals. Again, the BLM's proposal to honor VER in the context of the ROW restrictions does not ensure pre-discovery access to public lands. Maintaining lands "available" for mineral entry is disingenuous if the claims cannot be developed because they are inaccessible or surrounded by lands on which infrastructure cannot be located.

These ROW restrictions are unlawful because they conflict with the rights granted by § 22 of the General Mining Law and 30 U.S.C. 612(b) (Surface Use Act), which guarantee the right to use and occupy federal lands open to mineral entry, with or without a mining claim, for prospecting, mining and processing, and all uses reasonably incident thereto, including but not limited to ancillary use rights, and rights of and associated with ingress and egress.

The BLM has not documented the rationale for its decisions regarding the management of minerals. Specifically, those decisions associated with how the ROW restriction create *de facto* withdrawals recommended in the LUPA/FEIS comply with § 22 of the General Mining Law.

Recommendation:

The Commission recommends that, the BLM prepare a Revised LUPA to address the ROW restrictions described under the LUPA that create *de facto* withdrawals and thus, violate § 22 of the General Mining Law. As previously discussed, the misuse of the term "Valid Existing Rights (VER)" does not ensure pre-discovery access to public lands

F. The BLM's required design features are in violation of § 22 of the General Mining Law

The BLM states in Appendix D of the LUPA/FEIS "Required Design Features (RDF) are required for certain activities in all GRSG habitat" (Appendix D, LUPA/FEIS at D-1). The BLM also states, "The following RDFs would apply to development *in all programs* within PHMA, GHMA and OHMA consistent with applicable law (*Id.* at D-1); and "In addition to the General RDFs, the following resource programs will include the following program specific RDFs applicable to PHMA, GHMA and OHMA consistent with applicable law" (Id. at D-3). The Commission believes that the BLM does not have the

authority, outside of the regulations at 43 C.F.R. § 3809 (Surface Management Regulations) to impose RDF on operators exercising their rights under the General Mining Law. Moreover, the RDF specific to locatable minerals are not appropriate and demonstrate a general lack of knowledge by the BLM of how locatable minerals are explored and developed.

Recommendation:

The Commission recommends that the BLM prepare a Revised LUPA that removes or revises the following RDF found in Appendix D:

- RDF LOC 1;
- RDF LOC 2;
- RDF LOC 3;
- RDF LOC 4;
- RDF LOC 5;
- RDF LOC 6;
- RDF LOC 7.

G. The LUPA fails to comply with § 21(a) of the Mining and Mineral Policy Act

The LUPA/FEIS preferred althernative should recognize that the need for mineral development to reduce the Nation's reliance on foreign sources of minerals, to maintain our way of life and defend the country, may in fact be greater than the need to conserve millions of acres of sage-grouse habitat. Compliance with the mandate under the Mining and Minerals Policy Act (30 U.S.C. § 21(a)), and the FLPMA (43 U.S.C. § 1701(a)(12)) to recognize the Nation's need for domestic minerals is required. The rationale for decisions regarding the management of minerals is lacking. Specifically, those decisions associated with how the widespread land use restrictions, prohibitions, withdrawals, and *de facto* withdrawals recommended in the LUPA/FEIS comply with the mandate under § 21(a) to recognize the Nation's need for domestic sources of minerals.

The LUPA/FEIS preferred alternative is in violation of § 21(a) of the Mining and Minerals Policy Act, its own policy regarding minerals (*See* Exhibit 3), as well as the regulations implementing the NEPA regarding agency response to comments (40 C.F.R. § 1503.4).

Finally, the Commission recommends that the Governor utilize all provisions necessary under 43 CFR 1610.3-2(e) to ensure the LUPA is consistent with federal and state law, as well as the State Plan.

Recommendation:

The Commission recommends that the BLM prepare a Revised LUPA that comply with the directive under the Mining and Minerals Policy Act § 21(a) to recognize the Nation's need for domestic sources of minerals and the rights of ingress and egress to locators and claims.

The Commission appreciates the opportunity to make these recommendations and stands ready to assist in the consistency review process. Please contact the Chairman of the Commission or the Administrator of the Division of Minerals should you have any questions or require additional maps or information.

Sincerely,

Richard F. DeLong, Chairman
Nevada Commission on Mineral Resources