PACIFIC LEGAL FOUNDATION

August 2, 2018

Bureau of Land Management
Idaho State Office
Attn: Jonathan Beck
1387 S. Vinnell Way
Boise, ID 83709

SUBMITTED ELECTRONICALLY

Re: Greater Sage-Grouse Resource Management Plan Revisions and Amendment(s)

Pacific Legal Foundation (PLF) is a nonprofit legal organization with extensive experience in environmental issues, especially in regards to endangered and threatened species and land use management. PLF appreciates the opportunity to comment on the Bureau of Land Management's (BLM) draft Greater Sage-Grouse Resource Management Plan Revisions and Amendment(s)[1] (Amendments).

State involvement is essential to sage-grouse conservation and recovery.[2] Therefore, a federal plan's consistency and support for state efforts should be of utmost importance. Unfortunately, the current federal plans published in 2015 largely rejected state conservation plans and input, leading to significant controversy and litigation.

[1] These comments cover all of the proposed amendments for Colorado, Idaho, Oregon, Nevada and Northeastern California, Utah, and Wyoming. PLF submitted identical comments for each of the individually proposed amendments.

[2] Through its litigation and policy work, PLF has long advocated greater state involvement in species conservation and recovery. For instance, PLF defended the State of Utah's plan to recover the Utah prairie dog against a counterproductive federal regulation that tied its hands. *See* Cert. Petition, *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, No. 17-465 (U.S. cert. denied Jan. 8, 2018). As amicus, PLF has also defended federal policy encouraging state-led collaborative conservation to avoid listing species under the Endangered Species Act. *See* PLF Amicus Brief, *Defenders of Wildlife v. Jewell*, No. 14-5284 (D.C. Cir. filed May 28, 2015). And PLF attorneys have published extensive scholarship urging further reforms to promote state-led conservation. *See*, *e.g.*, Jonathan Wood, *The Road to Recovery*, PERC Policy Report (Apr. 2018), *available at* https://www.perc.org/wp-content/uploads/2018/04/endangered-species-road-to-recovery.pdf.

This was a missed opportunity as the state plans were the result of many stakeholders, including states, industry, property owners, and conservationists, working together to avoid the conflict that ordinarily dominates endangered species issues and, instead, focus on collaborating to recover the sage-grouse.

When the Department of Interior determined that the listing of the greater sage-grouse was warranted but precluded in 2010, the states responsibly developed effective plans to revitalize the bird and its habitat. Exemplifying the benefits of federalism, the states used their unique position to serve as laboratories of innovation. Typically, decisions made closer to the people who benefit from them and bear the costs are more informed because it is easier to know what is going on in the community as opposed to things that occur on a national scale.

Because individuals have the ability to monitor the effects and results of a localized policy, they are in better positions to hold local and state elected officials accountable. Accountability at the federal level is more attenuated; the odds that a single vote will influence a presidential election are infinitesimal, and the odds that the vote will affect the President's selection of the next Secretary of Interior are incomprehensibly small. The state planning process, by contrast, allowed for greater citizen engagement and gave disparate groups (regulators, property owners, and conservationists) a stake in the outcome.

Before the 2015 plans were published, Interior invited the states to undergo individual rulemaking procedures with the promise that state plans would be incorporated into any federal plan for conservation. However, that promise was broken.[3] The states, likely feeling frustrated, highlighted the federal plans' inconsistencies with their own efforts, with Idaho describing the feeling as if being "invited to the prom by the federal government only to be stood-up at the last minute."[4]

Upon announcement of the federal plans in 2015, many stakeholders, state politicians, and congressional members criticized the Department of Interior for not considering the state plans more seriously. The state rules were not only a product of

[3] *See* Cally Younger & Sam Eaton, *Lessons Learned from the Greater Sage-Grouse Land Use Planning Effort*, 53 Idaho L. Rev. 373, 377-80 (2017).

[4] *Id*. at 374.

local collaboration, but also were sufficient to recover the species to the point at which it no longer needed to be listed under the Endangered Species Act.[5]

The proposed amendments are more compatible with the state plans for sage-grouse conservation (and general habitat conservation). The amendments relax overly aggressive restrictions in many instances, acceding to the state's judgment. Although some activists respond to any change to environmental regulation as if the sky was falling, BLM's proposed amendments are tailored to ensure greater compatibility between the federal and state plans. For example, that the amendments retain sagebrush focal areas in Oregon, where the state supports them, shows that they are not intended to merely sweep away federal regulation.

Generally, there are several broad changes in the amendments that place the federal plans more in line with the underlying state plans: (1) the elimination of Sagebrush Focal Areas;[6] (2) the adoption of a "no-net-loss" standard for evaluating habitat impacts;[7] (3) the addition of clarifying language with regard to various habitat objectives; and (4) allowance for more flexibility in specific conditions. Overall, the amendments represent a meaningful step in the right direction to improve compatibility between the state and federal plans.

Once the amendments have been finalized, PLF encourages BLM to submit the final Amendments to Congress for review as required by the Congressional Review Act (CRA). Passed in 1996, the CRA requires federal agencies to submit every new rule they adopt to Congress before the rule goes into effect. The law was enacted in recognition that excessive delegation had upset the "delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws." By reclaiming that authority, Congress was restoring democratic accountability to the rulemaking process.

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[5] *See*, *e.g.*, Utah Department of Natural Resources, *2014 Annual Report: Implementing Utah's Greater Sage-grouse Conservation Plan* 1-2 (2014), https://wildlife.utah.gov/uplandgame/sage-grouse/pdf/14_annual_report.pdf (noting that Utah's sage-grouse counts increased almost 40% and a quarter million acres of habitat was enhanced or restored within the first full year of implementation).

[6] Excluding Oregon, whose initial state plan had conservation areas akin to Sagebrush Focal Areas.

[7] Excluding Nevada, which has voluntarily adopted the higher net-conservation-gain standard.

The statute provides: "Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule." Once a rule is submitted, Congress can review the rule, and if it disapproves of it, pass a joint resolution voiding the rule using streamlined procedures. According to the statute, the disapproval resolution may only be introduced during "the period beginning on the date on which the report ... is received by Congress and ending 60 days thereafter." If an agency refuses to comply with the CRA's submission requirement, it denies our elected representatives their opportunity to consider the rule. If both Houses of Congress disapprove a resolution, the joint resolution is sent to the President for his signature, and if he signs, the rule "shall not take effect."

The management plans are clearly covered rules within the meaning of the CRA that should be submitted to Congress for its review. The CRA defines "rule" broadly to ensure democratic oversight of much of what administrative agencies do. A rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4); 5 U.S.C. § 804(3)(C). There are only a few narrow exceptions, none of which apply to the sage-grouse rules.[8]

Submitting the final management plans to Congress will solidify the changes and make it possible for the BLM to begin implementation. Submission will give the public certainty that the plans will be implemented, as well as confidence in the democratic nature of the rules. Finally, submission of the plans will ensure that later challenges to the plans, launched after Congress' expedited review period under the CRA, will be unsuccessful.

The proposed Amendments allow the federal government to harmonize their existing regulations with the state level protections already in place for the sage-grouse. They also represent an effort to take seriously the conservation of individual states.

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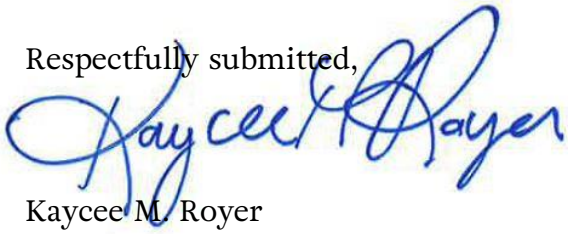
[8] BLM never submitted the 2015 land use management plans to Congress for review as is required under the Congressional Review Act. The failure to do so is now subject to litigation. Unless Interior plans to send the 2015 rules to Congress during the amendment period, it should officially announce that the old rules were never lawfully in effect, because they were never submitted to Congress.

Once the plans are finalized, BLM should submit them to Congress for review as is required by law.

Respectfully submitted,



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