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January 15, 2016

Mr. Neil Kornze, BLM Director
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW., (WO-200)
Washington, DC 20240

Submitted electronically to: sagebrush_withdrawals@blm.gov

Re: Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming, and Notice of Intent to Prepare an Environmental Impact Statement

Dear Mr. Kornze:

The State of Montana provides the following comments on the proposed mineral withdrawal in Fergus, Garfield, Phillips, and Valley Counties, Montana:

The agency's own analysis establishes the proposed withdrawal is neither necessary nor justified.

According to the Notice published September 24, 2015, the agency proposes to withdraw approximately 983,156 acres of public and National Forest System lands in Montana from location and entry under the United States mining laws to protect the Great Sage-Grouse and its habitat from adverse effects of locatable mineral exploration and mining, subject to valid existing rights.

According to the map referenced in the Notice, the vast majority of the acres proposed to be withdrawn in Montana are situated in Phillips and Valley Counties. The planning area included in Hi-Line Proposed RMP/Final EIS includes Phillips and Valley Counties. Total BLM-administered mineral estate in the planning area is 4,239,655 acres (Table 1.2) or 3,763,882 acres (Table P.1). Of this, 1,744,612 acres (Table 1.2) or 1,465,009 acres (Table P.1) are in Phillips County, and 1,351,730 acres (Table 1.2) or 1,229,261 acres (Table P.1) are in Valley County.

Appendix P in the Hi-Line Proposed RMP/Final EIS includes, regarding Locatable Mineral Resources, a Reasonable Foreseeable Development (RFD) Scenario. This RFD projection, for

all the mineral acres in the planning area, shows the mineral development potential for these BLM-administered mineral acres to be:

High: 12,567 acres (.3%)
Moderate: 29,204 acres (.8%)
Low: 95,182 acres (2.5%)
Very Low: 3,636,929 acres (96.4%)
Appendix P, Table P.3

This establishes that, for the entire planning area, not just Phillips and Valley Counties where the vast majority of acres are to be withdrawn, the number of acres of high to moderate mineral development potential is just 41,771 acres. This is roughly 1% of the total mineral lands in the planning area, and is just 4% of the lands proposed to be withdrawn.

The clearest statement of rationale for the Montana proposed withdrawal (and this statement is far from clear) is found in the discussion of Alternatives A and E for the Brazil Creek area, in Appendix P. This discussion for Alternative A says “[I]n the foreseeable future 10 exploration projects are anticipated for the Brazil Creek areas.” The discussion for Alternative E says “[T]he mining claims located within and before the withdrawal would be subject to valid existing rights as determined by a mining claim validity examination. Assuming the mining claims subject to activity are determined to be valid the withdrawal of the Sagebrush Focal Areas would reduce the amount of exploration to six projects due to the additional time it would take to conduct a validity examination.” Apparently, the writer is saying that the withdrawal is necessary to provide for the validity examination, but that is not correct. The Department of the Interior can conduct validity examinations on unpatented mining claims any time it wishes, with or without a withdrawal. The proceeding to do so is called a “government contest.” 43 CFR § 4.451 is entitled “Government contests.” Section 4.451-1 provides: “The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim.” Accordingly, to the extent the proposed withdrawal was deemed necessary to, in some fashion, halt or slow exploration on mining claims, it is not necessary.

More to the point is that the BLM’s own analysis in Appendix P clearly establishes the proposed withdrawal is not necessary because the lands within the withdrawal area simply do not contain the mineral potential to attract prospectors/claimants. The discussion under Brazil Creek alternative E says that, of the 927,074 acres within the Sagebrush Focal Area “[a] total of 6,422 acres of high development potential, 11,453 acres of moderate development potential, and 71,514 acres of low development potential would be withdrawn as indicated on Map P.1.” In other words, just 17,875 acres have enough mineral potential to worry about. And, as indicated above, the agency can initiate validity determinations on any claims actually filed as it deems expedient.

Given the purpose of the proposed withdrawal (“[T]he purpose of the Sagebrush Focal Areas in Priority Habitat Management Areas is to protect the Greater Sage-Grouse and its habitat from adverse effects of locatable mineral exploration and mining subject to valid existing rights”),

there is, according to the agency's own projections, simply no justification for the proposed 983,156 acre withdrawal. (We note another discrepancy in the withdrawal figures, as the acreage to be withdrawn according to the agency's Record of Decision is 971,089, including 20,058 acres of existing withdrawals.)

Sufficient controls exist to effectively address any impacts to Sage Grouse habitat as the result of exploration or development of minerals in the proposed withdrawal areas.

The withdrawal proposal seems to assume that the withdrawal is necessary because, without it, even given the agency's clear authority to implement such measures as are necessary to prevent undue impacts to surface resources, there are no sufficient means to control any mining activities which may occur despite the established dearth of mineral potential in the withdrawal area. This assumption is unwarranted. The agency itself, in its Appendix P in the Hi-Line draft RMP/Final EIS, recognizes the controls exercised over mining operations conducted on all lands within the state, private, state or federal, under Montana's mine reclamation laws. Montana has separate statutes regulating coal and uranium mining (Montana Strip and Underground Mine Reclamation Act, Montana Code Annotated (MCA) 982-4-201 *et. seq.*), metal mining (Montana Metal Mine Reclamation Act, MCA 882-4-301 *et. seq.*) and bentonite, sand and gravel mining (Opencut Mining Reclamation Act, MCA 882-4-401 *et. seq.*). When proposed mine exploration, development or mining operations are on federal lands, the state controls are exercised in conjunction with federal controls. While focused on reclamation, Montana's laws take into account all potential operational impacts of mining, including those on air and water resources, fauna and flora. The Montana Department of Environmental Quality (and its predecessor the Montana Department of State Lands) has been considering impacts on sage grouse habitat in its mine permitting decisions, and mandating protective and mitigative measures for any such impacts, since at least 1977.

In addition to requirements of the referenced mining statutes, Montana administers other environmental protection laws on lands within the state, including federal lands. Those include Montana's Water Quality Act, Air Quality Act, aquatic ecosystems protection laws, solid and hazardous waste laws. In addition, all permitting decisions by the Montana Department of Environmental Quality and other administrative agencies implementing these laws are subject to environmental review under the Montana Environmental Policy Act. The combination of these laws, and the regulations promulgated pursuant to these laws, means that the proposed withdrawal is not necessary to accomplish the stated purposes of the withdrawal.

The Agency has no legal authority to make the proposed withdrawal.

Given the September 30, 2014 ruling of the United States District Court for the District of Arizona in consolidated civil cases CV11-8171 PCT-DGC, CV12-8038 PCT DGC, CV12-8042 PCT DGC and CV12-8075 PCT DGC, currently on appeal to the Ninth Circuit Court of Appeals (National Mining Association v. Jewell, No. 14-17350 and consolidated cases 14-17351, 14-17352 and 14-17374, finding the congressional veto provision for land withdrawals

unconstitutional, the authority upon which the Secretary relies for making the proposed withdrawal is invalid.

Conclusion:

The large scale mineral withdrawal in Montana, covering the sagebrush focal area (SFA) in Phillips, Valley, Garfield and Fergus counties was new in the agencies' final EIS for its revised management plans. Because, by the agency's own analyses, the potential for mineral exploration and development in the area of the proposed withdrawal is minimal, the withdrawal of the sagebrush focal area appears to have been a last-minute, "belt and suspenders" measure for the protection of sage grouse habitat in the SFA. However, because the controls on any mineral exploration or development of federal minerals in the SFA, both under federal law and regulation, and state law and regulation, are competent to protect sage grouse habitat in the area, particularly given the implementation by Executive Order of Montana's Management Plan and Conservation Strategies for Sage Grouse in Montana, the withdrawal serves no purpose and the proposal should be withdrawn.

Some supporters of the proposed withdrawal might suggest that the State of Montana should not care about the BLM's action if there is not enough potential for mineral development to worry about. Such a suggestion is specious for at least three reasons. First, the suggestion that needless federal action should be condoned even if it is not supported scientifically flies in the face of reason, and only adds to the volumes of government regulations and policies that unduly burden our citizens and businesses. In addition, Federal action that is so obviously intended merely to cater to political special interests without providing any substantive protections violates our State's sovereignty and upsets the principles of Federalism so firmly planted in our Constitution. And finally, I note that thousands of acres of state-owned lands and minerals lie within the boundaries of the proposed mineral withdrawal, and Montana has already taken significant measures to protect sage grouse on and off our state trust lands. Needless and inconsistent federal mineral withdrawals jeopardize our State's ability to effectively manage sage grouse protection measures on a comprehensive state-wide basis, and prevent us from fulfilling our fiduciary duties to manage state trust lands as required by Art. I, § 1 (Federal Enabling Act), Art. X, § 11 (Public land trust, disposition), of the Montana Constitution.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Fox', with a long horizontal line extending to the right.

TIM FOX
Attorney General