August 28, 2015

Delivered via Facsimile and U.S. Certified Mail

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RE: Need to Extend Deadline for Sage Grouse Listing and Related Decisions

Dear Officials and Public Employees:

We are writing on behalf of our client the BlueRibbon Coalition (BRC), which has been engaged in a wide range of public lands planning issues, emphasizing responsible and managed recreational access. BRC is a national nonprofit organization that champions responsible recreation and encourages a strong conservation ethic and individual stewardship, while providing leadership in efforts to keep outdoor recreation alive and well – all sports; all trails.
With members in all 50 states BRC is focused on building enthusiast involvement with organizational efforts through membership, outreach, education and collaboration among recreationists. BRC has been actively involved in Greater Sage Grouse (GRSG) management efforts for many years, notably including recent participation in the Bi State decision and resolution objection process, as well as filing protests in several of the recent land use plan amendment processes (LUPAs) for Idaho, Montana, California, Nevada, Utah and/or Oregon.

BlueRibbon has weathered numerous litigatory storms associated with or created by the exit of a Presidential administration, such as occurred over winter use in Yellowstone Park, or various incantations of a “roadless” rule on our National Forest System. We are writing today to ask you break the GRSG issue off the pathway that will lead it to avoidable litigation along the lines of the aforementioned eleventh hour Presidential campaigns.

Driving the GRSG issue is the deadline established through In Re: Endangered Species Act Section 4 Deadline Litigation – MDL No. 2165, Case No. 10-mc-377-EGS (D.D.C.), which ostensibly creates a duty to make a determination decision relating to GRSG listing under the Endangered Species Act on or before September 30, 2015. However warranted the judicially-sanctioned deadlines may have once seemed in that case, the fact has become that the GRSG deadline has imposed constraints on the substance of the decision making process. A “not warranted” decision on GRSG will presumably be predicated, in part, upon the vigor of existing regulatory mechanisms, which seem all but certain to be soon announced, not coincidentally, on the eve of the Service’s listing decision.

A supposed “victory” on such a listing determination seems likely to come with unjustified and unacceptable conditions. The LUPAs contain multiple and untested prescriptions, which at this point we must admit we do not completely understand. BRC fears this approach is designed to chart a course between allegedly intractable foes for political convenience. Most importantly, central components of the LUPAs were announced only through the Draft RODs and Final EISs, and thus were not made available for public comment. BRC members, and other engaged publics, were unable to receive proper notice and be meaningfully engaged in the public planning process in accordance with the most basic tenets of the National Environmental Policy Act (NEPA).

BRC particularly notes its frustration with the apparent trajectory of the Bi State Grouse decision process, as is detailed in our letter to Humboldt-Toiyabe Forest Supervisor Bill Dunkelberger dated August 5, 2015. Under the Bi State decision’s Draft ROD, element B-ARS-S-03 for off-highway vehicle events would have prescribed that between March 1 and May 15, routes that pass within 3 miles of active leks could only be traversed during daylight hours after 10 a.m. BRC generally supported the Bi State Draft ROD, and thus did not object to it. However, under the guise of the objection resolution process the Forest Service has indicated it will change the above-described prescription to extend the effective date from May 15 to June 30, to nearly double the lek buffer distance from 3 miles to 4 miles, to put the closure in effect all day, and to apply said closures to “active and pending leks.” These modified prescriptions were
not identified or made available for public comment during the NEPA process. Prior to considering, let alone adopting, a new alternative of this nature the agency must conduct a supplemental NEPA analysis.

The Bi State process is symptomatic of the fact that significant new information has developed only recently in the planning process. Specifically, there are additional developments that independently warrant conduct of a supplemental analysis under NEPA. These include: (1) the USGS report entitled “Conservation Buffer Distance Estimates for Greater Sage-Grouse – a Review,” Open-File Report 2014-1239; (2) inclusion of multiple new concepts and regulatory mechanisms in the LUPAs, such as changes in allocations between habitat management areas, creation of entirely new areas such as Sagebrush Focal Areas, modified adaptive management triggers, monitoring and mitigation components, and other significant re-tooling of the basic decision structure; see, e.g., Idaho and Southwestern Montana Proposed LUPA/FEIS at 2-1 through 2-5 (changes between DEIS and FEIS); (3) “Greater Sage-Grouse Population Trends: An Analysis of Lek Count Databases 1965-2015,” Western Association of Fish and Wildlife Agencies (August, 2015) (copy enclosed). We hereby and formally state our request that the various agencies, in their now obviously interrelated processes, prepare and make available a supplemental NEPA analysis for additional circulation to the public to incorporate this significant new information.

BRC requests that you conduct the supplemental analysis required by NEPA. BRC further requests that you move for an extension from the District Court for the District of Columbia, at least as regards the deadline for making a GRSG listing decision. A decision made under the guise of complying with the impending deadline will encounter unnecessary challenges. This deadline has acquired a substantive effect. It will advance the interests of any party in the debate about GRSG biology/management to create distance between the illogic of an arbitrarily imposed deadline on listing, and a well-reasoned decision that might address evolving science and on-the-ground truth. The Court will find it difficult to deny a good faith request to extend the deadline for a listing decision. Such requests are routinely granted, as has already occurred on multiple occasions to extend other deadlines in the MDL litigation.

Please consider our observations and requests in this letter. We are happy to discuss this matter further, or otherwise explore options for addressing these challenges. If those efforts do not materialize or are unsuccessful, BRC will participate as necessary in the flurry of litigation that we have predicted.

Sincerely,

MOORE SMITH BUXTON & TURCKE, CHTD.

[Signature]

Paul A. Turcke

/PAT:kmd
Enclosure