From:	Bean, Michael
To:	Steve Ferrell
Cc:	Bonnie Butler; Brett Brownscombe; Chris Iverson; Chuck Bonham; Claudia Walker; Cynthia Moses-Nedd; Dan Ashe; Dave Risley; David White; Douglas Young; Edwin Roberson; Eric Loft; Eric V. Rickerson; Greg Schirato; Jessica Rubado; Kathleen Clarke; Leo Drozdoff; Maritiza Harris; Marlene Finley; Mike Pool; Nancy Salber; Noreen Walsh; Tamara L. Williams; Terry Steinwand; Thomas Tidwell; Tim Griffiths; Tom Kirschenmann; Ver Steeg Jeff
Subject:	Re: Final Agenda - Sage Grouse Task Force Mtg
Date:	Tuesday, January 22, 2013 7:48:08 AM
Attachments:	Solar mitigation framework.pdf Durability MOU.pdf highway bill mitigation.doc

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As background for our discussion of mitigation at the next meeting of the Task Force, I am attaching three short documents: (1) a discussion of a regional mitigation framework taken from BLM's solar program EIS; (2) an MOU between BLM and the California Dept. of Fish and Game regarding public land mitigation under a proposed Desert Renewable Energy Conservation Plan; and (3) a memo describing new mitigation authority in the Highway Bill (MAP-21).

On Fri, Jan 18, 2013 at 2:22 PM, Steve Ferrell <steve.ferrell@wyo.gov> wrote:

> Sage Grouse Task Force Members
>
> Attached is the final agenda for our January 29-30 Meeting in Denver. See you then.
>
> Steve Ferrell
> 307 214-0890
>
> E-Mail to and from me, in connection with the transaction of public business, is subject to the Wyoming Public Records Act and may be disclosed to third parties.

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Michael J. Bean

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MEMORANDUM OF UNDERSTANDING BY AND BETWEEN THE BUREAU OF LAND MANAGEMENT AND THE CALIFORNIA DEPARTMENT OF FISH AND GAME

A. STATEMENT OF PURPOSE

The Bureau of Land Management (BLM) and the California Department of Fish and Game (CDFG) agree to work with each other and with the United States Fish and Wildlife Service, and the California Energy Commission in an effort to streamline renewable energy project permitting while conserving biological and natural resources within the Desert Renewable Energy Conservation Plan (DRECP) area. The BLM and CDFG have developed this memorandum of understanding (MOU) for the purpose of memorializing and making specific their cooperation and coordination to protect and conserve fish, wildlife, plants and their habitat in the DRECP area.

This MOU is a framework that describes general agency cooperation and coordination commitments. The DRECP will contain the specific implementation strategies and actions to achieve land use goals including conservation of wildlife and natural communities within the plan area, based on factors unique to the particular area and its natural resources, species, geography and other appropriate considerations.

B. STATEMENT OF AUTHORITIES

The BLM and CDFG each have specific administrative responsibility or regulatory authority under Federal and state statutes. These statutes direct them, in part to take into consideration biological and natural resources within the state, including certain species of concern and their habitats, and adverse effects resulting from public, private, and state land use and development actions. These statutes include but are not limited to:

1. BLM. The Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. § 1701 et seq.); the Omnibus Public Lands Management Act of 2009 (OPLMA), Pub. L. 111-11, March 30, 2009; the Consolidated Appropriations Act of 2012, Pub. L. 112-74, December 23, 2011; the Endangered Species Act of 1973, Sec. 2 (c)(1) and Sec. 7(a)(1) and (2) (ESA); the Sikes Act of 1974, 16 U.S.C. § 670g-o; the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (NEPA); Recreation and Public Purposes Act, 43 U.S.C. § 869, et seq. (RPPA); and 43 C.F.R. Part 24, Department of the Interior Fish and Wildlife Policy: State-Federal Relationships.

2. CDFG. The California Endangered Species Act, Fish and Game Code § 2050, et seq. (CESA); the Natural Community Conservation Plan Act, Fish and Game Code § 2800, et seq. (NCCPA); Fish and Game Code § 1600, et seq., the Native Plant Protection Act, Fish and Game Code § 1900, et seq. (NPPA); Fish and Game Code §§ 3511, 4700, 5050, and 5515; Fish and Game Code §§ 3503, 3503.5, and 3513; Fish and Game Regulations, Title 14, Cal. Code Regs.; Fish and Game Code § 1802; and the California Environmental Quality Act, Public Resources Code § 21000, et seq. (CEQA).

Management to cooperatively manage lands within the DRECP area on which compensatory mitigation projects are located.

b. Mitigation for Impacts to Privately Owned Land or State-Owned Land. In many cases, CDFG and the BLM anticipate that impacts from renewable energy projects located on privately owned land or state-owned land will be mitigated on privately owned land or state-owned land. However, BLM may agree to authorize mitigation on BLM Lands for impacts caused by development on privately owned land or state-owned land on BLM Lands. In all cases, mitigation on BLM Lands will be managed consistent with Federal law, regulations, and policy, including any applicable site-specific Sikes Act Agreements and Cooperative Agreements for Management.

c. Nesting of Compensatory Mitigation. To the maximum extent possible consistent with Federal and state law, the BLM and CDFG will seek to avoid duplicative mitigation and may each credit compensatory mitigation measures required by the other agency as part of the compensatory mitigation required under its own laws.

d. State Mitigation on BLM Lands. California law typically requires compensatory mitigation above and beyond that required by Federal law. Project proponents or CDFG may seek to locate such additional compensatory mitigation measures for renewable energy projects on BLM Lands. Allowing the mitigation measures to be constructed or implemented on BLM Lands is within the discretion of the BLM consistent with Federal law, regulations, and policy and subject to site-specific analysis and approval by BLM. For mitigation required under state law that exceeds or is different than mitigation required by the BLM, the BLM will coordinate and consult with CDFG regarding the compensatory mitigation and applicable land use designations and will consider, where appropriate, authorizing certain mitigation actions or land use requirements to satisfy state law requirements. Under FLPMA, BLM may authorize compensatory mitigation actions required by CDFG under the NCCPA on BLM Lands which may include, but are not limited to:

i. fencing highways, freeways, and primary county roads;

ii. removing, restoring, or rehabilitating closed roads;

iii. removing of illegal dumps;

iv. removing or controlling invasive or exotic plant infestations;

v. predator control actions;

vi. improving habitat connectivity by increasing the size of existing culverts, increasing the number of culverts, or constructing alternative means of crossings;

vii. additional law enforcement patrols;

viii. restoration of habitat and corridors;

themselves if the application received or activity initiated has the potential to affect the BLM Lands on which the compensatory mitigation action is located. Both the BLM and CDFG agree to meet in a timely manner with the holder of the land use authorization, if a meeting is requested by any of those three parties, to discuss the application or activity and its potential impact to the compensatory mitigation action.

b. Annual Report on Project Approvals within the DRECP Area. Provide each other, on or before January 1 of each calendar year, with a written account of all rights-of-way, permits, authorizations, and other approvals issued by the BLM or CDFG for projects and activities occurring on, or potentially affecting BLM Lands within the boundaries of CDFG's habitat reserve designated under the DRECP.

E. ADMINISTRATIVE PROVISIONS

1. Effective Date. This MOU is made and entered into as of the last date of signature by and between the BLM and CDFG.

2. Unilateral Termination. Either Agency may withdraw from this MOU by delivering to the other Agency a written notice of intent to withdraw at least thirty days prior to the proposed withdrawal date. After the withdrawal date, the withdrawing Agency shall have no further obligations under this MOU.

3. Amendment or Modification. This MOU may be amended with the written agreement of the BLM and CDFG.

4. Applicability of State and Federal Law. Notwithstanding any other provision in this MOU, nothing in this MOU is intended to be nor shall it be interpreted to be inconsistent with any applicable Federal or state law or regulation.

5. Funding. This MOU does not obligate any funds from either Agency. Subject to the availability of funds, the BLM and CDFG each agrees to fund its own expenses associated with this MOU. Nothing contained in this MOU shall be construed as obligating any Federal agency to any expenditure or obligation of funds in excess or advance of appropriations, in accordance with the Anti-Deficiency Act, 31 U.S.C. §1341.

6. Elected Officials Not to Benefit. No member of or delegate to Congress shall be entitled to any share or part of this MOU, or to any benefit that may arise from it.

7. FACA. The parties will comply with the Federal Advisory Committee Act to the extent it applies.

The Highway Bill ("MAP-21") that was signed into law in July has a provision regarding programmatic mitigation that may be worth the attention of the Task Force. Specifically, Section 1311 of that bill (codified at 23 USC 169) authorizes a state or metropolitan planning organization to develop one or more programmatic mitigation plans to address the impacts of future transportation projects. These mitigation plans may be done at any of several scales and may focus on a specific resource, such as wildlife habitat. Tapping resources available to mitigate the impacts of future transportation projects may be helpful in achieving high priority conservation objectives for the sage grouse. I'm no expert on this matter, but it might be useful to hear whether any states are planning to make use of this new authority as part of their sage grouse conservation program. The text of the provision follows.

(a) In General.— As part of the statewide or metropolitan transportation planning process, a State or metropolitan planning organization may develop 1 or more programmatic mitigation plans to address the potential environmental impacts of future transportation projects.
(b) Scope.—
(1) Scale.— A programmatic mitigation plan may be developed on a regional, ecosystem, watershed, or statewide scale.
(2) Resources.— The plan may encompass multiple environmental resources within a defined geographic area or may focus on a specific resource, such as aquatic resources, parkland, or wildlife habitat.
(3) Project impacts.— The plan may address impacts from all projects in a defined geographic area or may focus on a specific type of project.
(4) Consultation.— The scope of the plan shall be determined by the State or metropolitan planning organization, as appropriate, in consultation with the agency or agencies with jurisdiction over the resources being addressed in the mitigation plan.
(c) Contents.— A programmatic mitigation plan may include—
(1) an assessment of the condition of environmental resources in the geographic area covered by the plan, including an assessment of recent trends and any potential threats to those resources;
(2) an assessment of potential opportunities to improve the overall quality of environmental resources in the geographic area covered by the plan, through strategic mitigation for impacts of transportation projects;
(3) standard measures for mitigating certain types of impacts;
(4) parameters for determining appropriate mitigation for certain types of impacts, such as mitigation ratios or criteria for determining appropriate mitigation sites;
(5) adaptive management procedures, such as protocols that involve monitoring predicted impacts over time and adjusting mitigation measures in response to information gathered through the monitoring; and
(6) acknowledgment of specific statutory or regulatory requirements that must be satisfied when determining appropriate mitigation for certain types of resources.
(d) Process.— Before adopting a programmatic mitigation plan, a State or metropolitan planning organization shall—
(1) consult with each agency with jurisdiction over the environmental resources considered in the programmatic mitigation plan;
(2) make a draft of the plan available for review and comment by applicable environmental resource agencies and the public;
(3) consider any comments received from such agencies and the public on the draft plan; and

(4) address such comments in the final plan.

(e) Integration With Other Plans.— A programmatic mitigation plan may be integrated with other plans, including watershed plans, ecosystem plans, species recovery plans, growth management plans, and land use plans.

(f) Consideration in Project Development and Permitting.— If a programmatic mitigation plan has been developed pursuant to this section, any Federal agency responsible for environmental reviews, permits, or approvals for a transportation project may use the recommendations in a programmatic mitigation plan when carrying out the responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(g) Preservation of Existing Authorities.— Nothing in this section limits the use of programmatic approaches to reviews under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

A.2.5 Draft Framework for Developing Regional Mitigation Plans for the BLM's Solar Energy Program

A.2.5.1 Purpose

Comments on both the Draft Solar PEIS and Supplement to the Draft Solar PEIS encouraged the BLM to incorporate a robust mitigation framework into the proposed Solar Energy Program. While the BLM currently employs mitigation for individual projects, commenters recommended that the proposed Solar Energy Program adopt a transparent, systematic, equitable, and cost-efficient approach to mitigation for any priority development areas (i.e., SEZs). The BLM is in a unique position to pre-plan for mitigation for projects in SEZs because, following the designation of any SEZs, it is expected that there will be interest in siting solar energy projects in these areas and their locations will be known. The BLM proposes to accomplish this goal by developing regional mitigation plans for SEZs.

In the Supplement to the Draft Solar PEIS, as part of its incentives for SEZs, the BLM presented the concept of regional mitigation plans. A draft framework for developing regional mitigation plans was posted on the Solar Project Web site (http://solareis.anl.gov) between the publication of the Supplement to the Draft Solar PEIS and this Final Solar PEIS to foster stakeholder engagement on this initiative. The framework presented here has been revised to address the comments received through this outreach effort.

A.2.5.2 Mitigation Hierarchy

The BLM's proposed Solar Energy Program under both action alternatives will employ a mitigation hierarchy to address potential impacts from utility-scale solar energy development—avoidance, minimization, and offset of unavoidable impacts. The BLM first employs avoidance and minimization strategies to eliminate or reduce potential adverse impacts from solar energy development. For those impacts that are not fully avoided or minimized, the BLM determines, in consultation with affected stakeholders, any appropriate measures to offset or mitigate these adverse impacts.

A.2.5.2.1 Avoidance and Minimization

The BLM's approach to mitigation first calls for avoidance of areas where there is a high potential for natural, visual, or cultural resource conflict (e.g., ecologically important and/or sensitive habitats. For the Solar Energy Program, the BLM proposes to accomplish this goal through the identification of extensive exclusions and incentivizing of development in SEZs (i.e., priority areas with low or relatively low resource conflict). Further, the BLM proposes to use landscape-scale ecological assessments and other natural, visual, and cultural resource screening factors in the proposed variance process to identify and determine whether to avoid core, sensitive, and/or intact landscapes outside of priority areas.

- *Integration and consistency* – Address mitigation obligations at multiple levels concurrently (i.e., federal, state, and local) to avoid duplication and/or unintended consequences;

- *Repeatability* – Establish mitigation strategies that are replicable across the Solar Energy Program and adaptable to differences in SEZs, individual projects, and technologies;

- *Land acquisition* – Comprehensively evaluate land acquisition and long-term management strategies for both public and private lands to fully understand impacts on, for example, local jurisdictions and recreational opportunities, as well as regulatory challenges;

- *Restoration* – Allow for the restoration of degraded and previously disturbed public and private lands as appropriate to meet conservation objectives;

- *Fiscal sustainability* – Ensure adequate funding over time to achieve mitigation outcomes;

- *Fiduciary structure* – Employ transparent and accountable third-party-managed endowments to hold and manage regional mitigation funds and direct mitigation investments;

- *Combined investments* – Focus investments from a number of projects collectively to increase the likelihood of achieving an effective and enduring offset of impacts and to reduce overall cost;

- *Strategic prioritization* – Establish priority mitigation activities and locations based on, and consistent with, existing conservation objectives, resource management plans, and other Federal, state, and/or local goals;

- *Mitigation sustainability* – Provide solutions that are as enduring and long-lasting as the impacts; and

- *Monitoring and adaptive management* – Implement monitoring and adaptive management to verify that mitigation strategies are adequate relative to the impacts over time.

As part of the proposed Solar Energy Program, the Solar LTMP will be used to evaluate the effectiveness of mitigation strategies employed through regional mitigation plans (see Section A.2.4 of Appendix A). Regional mitigation plans will be subject to continued review and adjustment by the BLM and its partners to ensure conservation goals and objectives are being met. The BLM expects that future NEPA and planning analyses that support the identification of any new or expanded SEZs (see Section A.2.6 of this appendix) will also include the establishment of regional mitigation plans.

A.2.5.3.2 Baseline upon Which Unavoidable Impacts Are Assessed

As part of a regional mitigation plan, the analysis in the Solar PEIS and other sources of high-quality information are utilized to identify baseline resource conditions in SEZs. The BLM will coordinate its identification of baseline assessments with other federal, state, and local agencies such as the USFWS, state wildlife agencies, and State Historic Preservation Offices, and will identify opportunities for stakeholder engagement.

Data collected through the BLM's proposed Solar LTMP and annual reports from that process are expected to be instrumental in understanding baseline conditions for SEZs. In addition, the BLM expects to utilize information from other efforts, such as BLM Rapid Ecological Assessments, the California DRECP, BLM RMPs, Habitat Conservation Plans and Biological Opinions, State Wildlife Plans, and other plans or assessments. The BLM will incorporate new landscape-scale (and finer-scale, where appropriate) data as they become available to ensure that the established baseline reflects the best available information and changing conditions. Additional data collection for SEZs may be necessary as part of identifying a baseline.

Attributes that make up the baseline will include, but are not limited to, the ecological status of the landscapes to be developed; habitat quality and level of intactness; species occurrences, population status, and viability; presence/absence and abundance of rare, sensitive, endemic, threatened, or endangered species; status of aquatic, surface water, and groundwater resources; location of wildlife migratory corridors; connectivity of habitats; and ecological trends underway, such as those that may be attributed to climate change. Baseline information on nonbiological resources will also be collected as necessary to assess impacts on resources such as recreation and access.

A.2.5.3.3 Methodology for Assessing and Quantifying Unavoidable Impacts

In coordination with stakeholders, the BLM will establish a methodology to assess and quantify unavoidable impacts associated with future development in SEZs. Best available scientific techniques will be employed to assess impacts. Consideration will be given to cumulative impacts and the temporal nature of the impacts. Impacts to be assessed in regional mitigation plans will go beyond biological and ecological impacts to include, for example, cultural resources, scenic resources, and socioeconomic factors. Through the proposed pilot efforts, the BLM will seek to establish a single and transparent methodology that would be used to quantify impacts across all SEZs in the Solar Energy Program.

A.2.5.3.4 Methodology for Determining Mitigation Obligations or Costs for Individual Projects

The BLM will employ transparent and standardized methods to value impacts and translate those impacts into mitigation obligations or costs (e.g., a cost per acre mitigation fee). Coordination with other federal, state, and local permitting agencies will be required so that

investments would typically be limited to the affected basin and/or target aquifer). In order to retain manageability, the BLM will give priority to consideration of geographic scales in the range of 2–3 million acres (8,000–12,000 km^2) as an appropriate scope for regional mitigation planning.

In meeting regional objectives, regional mitigation plans will give consideration to the full range of mitigation tools available to the agency including but not limited to land acquisition, mitigation banking, withdrawing BLM-administered lands from other uses, changing land designations or uses, and restoration and enhancement activities. Through the proposed pilot efforts, the BLM will investigate further the regulatory authority associated with such tools. In establishing mitigation priorities, the BLM will give consideration to acquiring, protecting, and/or restoring areas or resources that have one or more of the following attributes:

- Surrounding land uses are likely to enhance mitigation benefits over time.
- Biotic factors, climatic factors, or physical gradients will allow adaptation to changing conditions.
- Areas can provide movement corridors between ecologically defined and effectively protected landscape units or habitat blocks.
- Areas feature desert aquatic and riparian habitats supplied by perennial, protected sources of water.
- Areas feature distinct or unique assemblages of species or communities or locations that provide valuable ecosystem services (e.g., rare plant assemblages, desert washes);
- Sites feature high-quality habitat for, and healthy populations of, both target species (especially special status species) and nontarget species;
- Areas contribute to the permanence of conservation protections, and offer assured long-term protection of conservation values.

A.2.5.3.7 Monitoring and Adaptive Management

Mitigation investments will need to be measurable to support monitoring and adaptive management activities. The BLM's proposed Solar LTMP (see Section A.2.4 of this appendix) will develop management questions and conceptual models to evaluate the effectiveness of mitigation investments employed through regional mitigation plans. Through Solar LTMP data analysis and annual reports, the BLM will ensure mitigation investments being undertaken through regional mitigation plans are adequate relative to impacts over the life of the impacts. The BLM will consider ways to track and report the effectiveness of mitigation investments and develop mechanisms to feed information back into regional mitigation plans to assure that the actions taken and fees collected appropriately offset impacts.

5. Thresholds or triggers that indicate when changes in timing, frequency, and location of mitigation investments is needed.

Results of the pilot will aid the BLM in refining the framework for regional mitigation plans and associated plan elements. Lessons learned from the pilot will allow for replication of a sound process across the remainder of the SEZs and will inform future BLM mitigation policy and/or directives for the Solar Energy Program. The BLM will make information about the pilot(s) available through the Solar PEIS project Web site (http://solareis.anl.gov). This will include notification of opportunities for public and stakeholder involvement.