June 15, 2017

Submitted via e-mail to kaelynanfinsen@utah.gov

Kaelyn Anfinsen
Department of Natural Resources
1594 West North Temple
Salt Lake City, Utah 84114

Re: Greater Sage-Grouse Compensatory Mitigation Program

Dear Ms. Anfinsen:

The Utah Petroleum Association and Western Energy Alliance (the Trades) appreciate the opportunity to submit comments on the State of Utah's proposed rule to establish a Greater Sage-Grouse (GrSG) compensatory mitigation program. We support the State of Utah's efforts to establish a framework that will aid the GrSG and prevent a future listing under the Endangered Species Act (ESA), and appreciate your willingness to work with our organizations and other key stakeholders in developing the program. We are supportive of the proposed rule, although we believe some concepts in the proposed rule create unnecessarily strict standards and can be removed or redefined in the final rule.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in Utah and across the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

The Utah Petroleum Association (UPA) is a Utah based trade association representing companies involved in all aspects of Utah's petroleum industry. UPA's members include companies who find, develop, produce, transport, refine and market oil and natural gas resources.

The Trades support Utah's approach to a compensatory mitigation program for the GrSG and believe it will achieve the goals of improved habitat and population numbers for the species. We also appreciate the reasonable mitigation ratios contemplated under the program. However, we want to highlight several concepts in the proposed rule we think are unnecessary to accomplishing the goals of the program.

In Section R634-3-2, the proposed rule establishes a Program Goal of "providing Compensatory Mitigation resulting in a net conservation gain…" Then, under the Definitions in Section R634-3-3, the

rule defines the concept of net conservation gain, as well as the concept of durability, which includes both "direct and indirect impacts." We are concerned the proposed rule incorporates terms such as durability and net conservation benefit that are not envisioned by, and inconsistent with the goals of, the Conservation Plan for Greater Sage-Grouse in Utah, which was finalized in February 2013 and initiated this rulemaking process.
Instead, these terms derive from flawed federal policies that are likely to be rescinded in the near future. The goals outlined in the Conservation Plan are sufficient to prevent a future ESA listing for the species, and the more onerous goals proposed in the rule are unnecessary in a program that has already proven to be successful.

Durability and net conservation benefit are concepts that were required under the Bureau of Land Management and U.S. Forest Service's GrSG land use plans and several mitigation policies that were released by the U.S. Fish and Wildlife Service (FWS) under the previous presidential administration. However, those plans and policies exceed statutory authority, and the mitigation policies are currently under review by the new administration and are likely to be revised or rescinded.

Secretary of the Interior Zinke has also initiated a review of the GrSG land use plans, which include numerous restrictive provisions that ignore the various state plans, and has publicly suggested they will be amended to defer more to the states. As such, it is increasingly important for Utah and other states with GrSG populations to finalize mitigation programs that incorporate rational conservation measures in the least restrictive manner possible.

A net conservation benefit standard is not contemplated in the 2013 Conservation Plan. Instead, the Plan lays out three pillars for conservation: protection of habitat for the year-round needs of the species; perpetuation of conditions necessary to ensure a continuing population; and enhancement of impaired sage grouse habitat. Requiring net conservation benefit would impose a standard that is above and beyond what was envisioned under the Plan, and we believe all references to this standard should be removed from the manual.

We are further concerned by the definition of durability and how disturbance is calculated in the proposed rule. The rule requires durability for "a period of time that is at least as long as the direct and indirect impacts from the permanent disturbance that the mitigation is designed to offset." Once again, this concept was not envisioned under the 2013 Conservation Plan, and is a remnant of the federal mitigation policies.

The Trades are specifically concerned about the use of the term "indirect impacts," which is not elsewhere defined in the proposed rule and is a vague term that does not provide clarity on potential costs to debit project proponents. We request that this term be removed from the final rule, since it was not contemplated in the 2013 Conservation Plan. The rule already incorporates a 4:1 mitigation benefit, which goes beyond the 1:1 ratio that was originally outlined in the Plan, and adding further mitigation requirements above this ratio will only cause confusion and heighten costs.

We believe it is ill-advised, at best, to model the state's framework on federal policies that are unlawful and likely to be modified or eliminated altogether under the new presidential administration. The State of Utah has successfully managed GrSG conservation since 2013 via the Watershed Restoration Initiative, and we support the continued use of this Initiative as the primary driver for sage grouse

mitigation efforts in the state. However, the inclusion of additional requirements such as net conservation gain and durability will only impede and overburden State efforts to manage and improve sage grouse habitat. We believe the final program will be stronger if the framework is revised to reflect these principles.

Finally, we have one specific concern relating to split estate properties. Section R634-3-6(2)(viii) states that "the Department may require a mineral report and written guarantee from the owner(s) of the mineral rights that the minerals will not be developed while the Conservation Bank Agreement is in place." This provision suggests that the Department has authority to require the mineral rights owner to provide a report and written guarantee that the mineral rights will not be developed if a Conservation Bank Agreement is in place with the surface owner. Utah Code 79-2-501 does not provide the Department this authority.

The State of Utah follows the common law rule for split estates, which provides that the mineral estate dominates over the surface estate to the extent reasonably necessary to extract the minerals therefrom. The Utah Supreme Court has somewhat modified the dominance of the mineral estate under the "accommodation doctrine," whereby the mineral owner may exercise his right to use the property "only as reasonably necessary for [mineral extraction], and consistent with allowing the [surface] owner the greatest possible use of his property consistent therewith."[1] Under the Utah Oil and Gas Conservation Act, the Utah Legislature codified the Rust decision with respect to oil and gas operations. Specifically, an operator may make reasonable use of the surface, to the extent necessary, "consistent with allowing the surface land owner the greatest possible use of the surface land owner's property, to the extent that the surface land owner's use does not interfere with the owner's or operator's oil and gas operations."[2]

The proposed rule suggests that the surface owner can enter into the Conservation Bank Agreement, and then the mineral owner must provide a mineral report and written guarantee that the mineral rights will not be developed during the term of the agreement. This is not the case, as Utah Code 79-2-501 does not authorize the Department to require a mineral report or a guarantee which prevents mineral development. As an alternative we suggest the following:

1. Modify 649-3-6(2)(a)(ii)(C) to explicitly require the applicant to identify mineral owners and provide a mineral title report when a split estate is involved. The mineral title report should be produced at the application stage, rather than later on after contingent approval to the Conservation Bank Agreement has been granted.

2. Move the requirement for mineral-owner consent from (3)(c)(viii) up to (3)(b) and add a new sentence as follows: "No split-estate property shall receive informal approval unless the applicant provides a mineral report and written guarantee from the owner(s) of the mineral estate that mineral owners or their lessees or assigns will not occupy or disturb the surface in any way for mineral exploration or development while the Conservation Bank Agreement is in place. Such written guarantee shall be recorded, and shall run with the land and be binding on successors and assigns of the mineral owner for the term of the Agreement."

[1] Flying Diamond Corp. v. Rust, 551 P.2d 509, 511 (Utah 1976).
[2] Utah Code § 40-6-20(1).

This new language would ensure no property is added into the conservation bank unless the mineral owner gives consent and takes definite steps to do so. With these modifications, we believe the proposed rule would accord with state law regarding split estates.

The State of Utah can and should craft a sage grouse framework that balances mitigation credit generation projects with development of natural resources within the state. We believe the proposed rule comes close to achieving these goals, and it can do so with the revisions suggested above. Thank you for the opportunity to comment, and please do not hesitate to contact us with any questions.

Sincerely,

Lee Peacock
President
Utah Petroleum Association

Tripp Parks
Manager of Government Affairs
Western Energy Alliance