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**From:** [Matthew Cahill](#)

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**To:** [BLM\\_HQ\\_GRSB\\_Planning](#)

**Cc:** [Tomer Hasson](#)

**Subject:** [EXTERNAL] Comment from The Nature Conservancy on BLM Sage-grouse Amendment Scoping

**Importance:** Normal

**Sensitivity:** None

**Attachments:**

[TNC Comment on BLM Sage-grouse Scoping 2-7-22.pdf](#) 

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Hello Patricia,

I'm writing to submit our comment from The Nature Conservancy on the 2021-2022 Greater Sage-grouse Land Use Plan Amendments Scoping. Please find our letter, attached.

If you have any comments or questions, please reach out.

Many thanks,  
Matt

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Patricia Deibert  
National Sage-grouse Coordinator  
Bureau of Land Management

February 7, 2022  
*submitted via email*

Re: Request for public scoping comments for Greater Sage-grouse Land Use Plan Amendments  
NEPA Register: DOI-BLM-WO-2300-2022-0001-RMP-EIS

Dear Ms. Deibert:

The Nature Conservancy (TNC or the Conservancy) appreciates the opportunity to comment on the Bureau of Land Management's (BLM) 2021 Greater Sage-Grouse Land Use Plan Amendments.

The Conservancy is a global conservation organization dedicated to conserving the lands and waters on which all life depends. Guided by science, we create innovative, on-the-ground solutions to our world's toughest challenges so that nature and people can thrive together. We use a collaborative approach that engages local communities, governments, the private sector, and other partners.

Protecting and conserving sagebrush habitat in the American West and stabilizing and increasing populations of the Greater sage-grouse (sage-grouse) across its range are priorities for the Conservancy. We are working to contribute our expertise in science, partnerships, and hands-on habitat restoration to review and improve the 2015 BLM Greater sage-grouse land use plans (BLM plans) and policies. TNC believes we can help design solutions that preserve sage-grouse populations while at the same time supporting the multiple use mandate of the BLM.

Sage-grouse populations and sagebrush habitat are declining precipitously and are predicted to drop even further. TNC continues to support the overall framework of the BLM plans, which were integral to the U.S. Fish and Wildlife's (FWS) decision not to list sage-grouse under the Endangered Species Act (ESA). It is, however, essential to retain and improve key elements in the BLM plans critical to sustaining and enhancing populations, both for the benefit of the bird, for people, and for other sagebrush-dependent species.

In particular, TNC understands that achieving a balance that secures sage-grouse populations into the future while supporting other uses of public lands is challenging. TNC believes that the key concepts of the 2015 plans, including habitat designations and mitigation requirements, were appropriate actions for sage-grouse conservation. Because many of these elements have not been fully implemented, however, and major ecosystem threats such as invasive annual grass infestations have further degraded important landscapes, the BLM needs to further analyze how spatial application of the 2015 plans should change to ensure the protection, management, and restoration of the sagebrush biome is as effective as possible.

In keeping with the Defend the Core, Grow the Core framework embraced by many stakeholders, TNC believes the scale and speed of threats to sage-grouse and sagebrush ecosystems requires us to protect, manage, and restore ecosystem function with a targeted and prioritized strategy. Using the best available science, we urge the BLM to analyze in a series of alternatives how different spatial combinations of sage-grouse habitat designations can balance strong protection of the most intact landscapes with the need to focus and target what we can maintain or restore.

## I. INTRODUCTION

### A. Sagebrush and Sage-grouse are an Iconic but Threatened Part of the American West

The first written records of the sage-grouse came from Meriwether Lewis in 1806, when he noted he saw the “Cock of the Plains” in “Great abundance”.<sup>1</sup> Sage-grouse populations, however, are today in sharp decline. A 2021 report by the U.S. Geological Survey (USGS), Report No. 2020-1154, prepared in cooperation with the Western Association of Fish and Wildlife Agencies (WAFWA) and BLM, found evidence of severe range-wide population declines. These trends, conservatively determined, imply declines of 37%, 65.2%, and 80.7%, relative to initial population sizes, over the associated time periods since 1966 of 17, 33, and 53 years respectively.<sup>2</sup> Stated another way, the study found sage-grouse declining annually at approximately 3.0% range-wide from 1965-2019.<sup>3</sup>

The declines in sage-grouse populations mirror the decline in sagebrush habitat across the western U.S. Sage-grouse depend on large areas of contiguous sagebrush to meet all their seasonal habitat requirements and are thus considered sagebrush-obligate species.<sup>4</sup> As a result, sage-grouse distribution is strongly correlated with the distribution of sagebrush.<sup>5</sup> While sagebrush systems were historically the most abundant vegetation type in the semidesert vegetation of North America, much of this land has been depleted, and sagebrush now occupies less than 55% of its historical extent.<sup>6</sup>

Moreover, the outlook for the future is no more promising. The USGS Survey Report 2020-1154 found that approximately 46%, 60%, and 78% of all leks possessed an extirpation possibility of greater than 50% for short, medium, and long temporal scales, respectively, into the future. For neighborhood clusters (NCs) of sage-grouse populations, approximately 12%, 19%, and 30% of NCs had an extirpation possibility of greater than 50% for short, medium, and long temporal scales, respectively.<sup>7</sup>

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<sup>1</sup>Journals of Meriwether Lewis (March 2, 1806), <https://lewisandclarkjournals.unl.edu/item/lc.jrn.1806-03-02#lc.jrn.1806-03-02.01>.

<sup>2</sup> Coates, P.S. *et al.*, 2021, *Range-wide greater sage-grouse hierarchical monitoring framework – Implications for defining population boundaries, trend estimation, and a targeted annual warning system*; U.S. Geological Survey Open-File Report 2020-1154, <https://doi.org/10.3133/ofr20201154> at pp. 29, 90(USGS Report 2020-1154).

<sup>3</sup> *Id.* at p. 87.

<sup>4</sup> Remington, T.E. *et al.*, 2021, *Sagebrush conservation strategy - Challenges to sagebrush conservation*. U.S. Geological Survey Open-File Report 2020-1125, <https://doi.org/10.3133/ofr2021125> at pp. 27-29 (USGS Report 2020-1125).

<sup>5</sup> *Id.* at pp. 27-28.

<sup>6</sup> *Id.* at pp. xxxvii, 5.

<sup>7</sup> USGS Report 2020-1154 at p. 52. A neighborhood cluster of sage-grouse is the smallest cluster level that could represent a closed population unit that minimizes immigration and emigration. *Id.* at 12.

## B. Actions to Protect Sage-grouse and Sagebrush Benefit both People and Other Species

A second 2021 USGS Report, No. 2020-1125, prepared in cooperation with WAFA and BLM, as well as the U.S. Fish and Wildlife Service, details the multiple benefits that sagebrush habitat, on which sage-grouse depend, provides:

The sagebrush biome provides water filtration, improved timing of water flows, flood attenuation, irrigation water supply, enhanced connectivity between subsurface and surface water flows, and more. Intact sagebrush ecosystems reduce wildfire return intervals; they also provide forage for both livestock and wildlife, and host many species of wildlife, including animals we hunt, as well as sensitive, threatened, and endangered species. Healthy sagebrush ecosystems [also] sequester carbon...<sup>8</sup>

Healthy sagebrush steppe habitats help support more than 350 plants and animals that are threatened, endangered, or of conservation concern, from pygmy rabbits to pronghorn antelope.<sup>9</sup> Conservation actions for sage-grouse are frequently considered as an “umbrella” - benefitting other sagebrush species that often lack data or resources for development of individual conservation strategies.<sup>10</sup> This is particularly true where areas prioritized for sage-grouse conservation overlap with important habitat for other sagebrush-dependent species.<sup>11</sup> For example, a TNC study in Wyoming revealed that conservation of sage-grouse habitat would *double* the acres available for mule deer habitat, a species in decline throughout much of the West.<sup>12</sup> The Rocky Mountain Elk Foundation also found that more than half of the Natural Resource Conservation Service (NRCS) Sage Grouse Initiative’s easement program<sup>13</sup> falls within elk range, providing permanent habitat protection for sage-grouse, elk and other species.<sup>14</sup>

There are, of course, multiple other benefits deriving from healthy sage-grouse habitat. Hiking, camping, fishing and other non-motorized “quiet recreation” on lands overseen by BLM generated around \$1.5 billion in spending in sagebrush-state communities within 50 miles of the BLM sites in 2014 and supported over 20 thousand jobs in

<sup>8</sup> USGS Report 2020-1125 at p. 11.

<sup>9</sup> U.S. Fish and Wildlife Service. *Identifying Species of Conservation Concern in the Sagebrush Ecosystem*. <https://www.fws.gov/greatersagegrouse/documents/Reports/Appendix%20Species%20of%20Concern.pdf>

<sup>10</sup> USGS Report 2020-1125 at pp. 193, 197.

<sup>11</sup> *Id.* at p. 198.

<sup>12</sup> H. Copeland *et al.*, . *Conserving migratory mule deer through the umbrella of sage-grouse* (2014). *Ecosphere* 5(9):117. <http://dx.doi.org/10.1890/ES14-00186.1>.

<sup>13</sup> For more information about the Sage Grouse Initiative’s easement program, as well as the NRCS’ other programs to conserve and restore sage-grouse habitat, see [Sage Grouse Initiative - Wildlife Conservation Through Sustainable Ranching](#).

<sup>14</sup> Rocky Mountain Elk Foundation Bugle. *Sage Grouse & Elk =Peanut Butter & Jelly* (November/December 2017), pp. 104-5. [http://www.sagegrouseinitiative.com/wp-content/uploads/2017/10/Sage-Grouse-and-Elk-Bugle-Magazine-2017.pdf?utm\\_medium=email&utm\\_source=govdelivery](http://www.sagegrouseinitiative.com/wp-content/uploads/2017/10/Sage-Grouse-and-Elk-Bugle-Magazine-2017.pdf?utm_medium=email&utm_source=govdelivery)

local communities.<sup>15</sup> In Montana, hunters spend over \$110 million annually in the thirty-eight rural counties that contain designated sage-grouse habitat.<sup>16</sup> Indigenous peoples and more recent arrivals also enjoy cultural benefits from sagebrush landscapes.<sup>17</sup> In sum, conservation of sage-grouse and sagebrush habitat benefits everyone, from sage-grouse to people to other sagebrush-dependent species.

### C. A Landscape-Scale Approach to Sage-Grouse Conservation is Critical.

Sage-grouse depend on a variety of sagebrush habitats throughout their life cycle, and exhibit strong loyalty to seasonal habitats (breeding, nesting, brood rearing, and wintering areas). Each of these habitats has various requirements for successful populations. The USGS Report 2020-1125 stated that migratory populations may travel over 62 miles between breeding and wintering areas.<sup>18</sup> Two other studies found long distance dispersal and migration movements of sage-grouse up to 150 miles.<sup>19</sup> The USGS Report 2020-1125 concluded, “Large seasonal and annual movements emphasize the landscape scale nature of the species.”<sup>20</sup>

As a result, the 2015 FWS not-warranted decision found that meaningful restoration requires action on a landscape, watershed, or eco-regional scale, rather than individual, non-connected efforts.<sup>21</sup> BLM must ensure that, viewed as a whole, sufficient conservation practices are employed across the species range, particularly in priority habitat areas. Changes proposed by the states and other stakeholders must be considered in the aggregate, at a landscape scale and across the range, since sage-grouse habitat crosses all ownership jurisdictions in 11 states and federal land comprises nearly two-thirds of remaining Greater Sage-grouse habitat.<sup>22</sup> If the cumulative effect of local or state-specific changes undercuts the underlying framework for sage-grouse conservation, a future listing becomes much more likely.

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<sup>15</sup> ECONorthwest. *Quiet Recreation on BLM-Managed Lands: Economic Contribution 2014* (March 2016). [http://www.pewtrusts.org/~media/assets/2016/03/quiet\\_recreation\\_on\\_blm\\_managed\\_land\\_economic\\_contribution\\_2014.pdf?la=en](http://www.pewtrusts.org/~media/assets/2016/03/quiet_recreation_on_blm_managed_land_economic_contribution_2014.pdf?la=en)

<sup>16</sup> Testimony of John Tubbs, U.S. House Natural Resources Committee (October 25, 2017), p. 6. [https://naturalresources.house.gov/uploadedfiles/testimony\\_tubbs.pdf](https://naturalresources.house.gov/uploadedfiles/testimony_tubbs.pdf)

<sup>17</sup> USGS Report 2020-1125 at p. 11.

<sup>18</sup> *Id.* at pp. 27-29.

<sup>19</sup> For links to the two studies, see Sage Grouse Initiative. *Sage Grouse Need Intact Landscapes For Long-Distance Movement* (March 28, 2017). <https://www.sagegrouseinitiative.com/sage-grouse-need-intact-landscapes-long-distance-movement>.

<sup>20</sup> USGS Report 2020-1125 at p. 29.

<sup>21</sup> *Endangered and Threatened Wildlife and Plants: 12-Month Finding on a Petition to List Greater Sage-Grouse as an Endangered or Threatened Species*. 80 Federal Register 59858, 59888 (Dep’t. of the Interior October 2, 2015) (FWS 2015 Greater Sage-grouse Listing Decision).

<sup>22</sup> *FWS Fact Sheet*.

#### **D. Any Changes to Existing Policy must be Scientifically Supported**

BLM used the best available science, including additional review and analysis from USGS, in developing the 2015 plans.<sup>23</sup> The scientific grounding for the BLM plans, including the level of certainty as to how they were to be applied, was a key part of the foundation for the FWS decision that listing the sage-grouse under ESA was not warranted.<sup>24</sup> Any changes proposed to the plans now by the BLM should meet a similarly high standard, incorporating new, peer-reviewed research, including the two 2021 USGS Reports, as appropriate.

#### **E. The BLM Amendment Process should be Open and Transparent, as in the BLM Notice of Intent**

TNC supports the amendment process laid out by BLM in its 2021 Notice of Intent, which appears to mirror the process used in 2015, including the preparation of a full environmental impact statement for the revised sage-grouse plans. As in the 2021 Notice of Intent, there was a lengthy scoping process in 2015, where many thousands of comments were received. When the draft environmental impact statements for the plans were released, there was a 90-day public comment period, with extensions provided in some cases. Tens of thousands of comments were put forward before the plans were adopted. For example, more than 45,000 unique letters with more than 10,000 substantive comments were submitted on the Rocky Mountain Region draft documents.<sup>25</sup>

It is highly likely that public interest in the 2021 amendment process will be even greater than in 2015, and we support using the 2015 BLM procedures as a model, as it appears BLM will do. This process should include working closely with non-profits, private landowners, and community-led work groups (e.g., Local Area Working Groups, soil and water conservation districts, etc.), as well as native communities and local, state and federal agencies, and other interested stakeholders.

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<sup>23</sup> See, e.g., Bureau of Land Management. *Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region* (September 2015), p. 1-12 (BLM Rocky Mountain Greater Sage-grouse ROD).

[https://eplanning.blm.gov/epl-front-office/projects/lup/36511/63222/68471/RM\\_ROD\\_9.21.15\\_508\\_lowres.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/36511/63222/68471/RM_ROD_9.21.15_508_lowres.pdf)

<sup>24</sup> See, e.g., Department of the Interior. *Historic Conservation Campaign Protects Greater Sage-Grouse* (September 22, 2015).

<https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse>; U.S. Fish and Wildlife

Service. *Literature Cited for Petition to List Greater Sage-grouse* (October 2, 2015).

<https://www.regulations.gov/document?D=FWS-R6-ES-2015-0146-0002>

<sup>25</sup> Dear Reader Letter of Neal Kornze (September 18, 2015), attached to the BLM Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region (September 2015).

[2015 Rocky Mountain Region Record GRSR ROD ARMPA 508.pdf \(blm.gov\)](https://www.blm.gov/2015/Rocky_Mountain_Region_Record_GRSR ROD ARMPA 508.pdf)

## **II. TNC SUPPORTS THE FRAMEWORK OF THE EXISTING BLM PLANS, BUT IMPROVEMENTS THAT RESPOND TO DECLINING SAGE-GROUSE POPULATIONS ARE ESSENTIAL**

The 2015 BLM plans represented an historic effort among a wide variety of partners and a new model for imperiled species: federal, state and local partners working together to design and implement conservation actions for sage-grouse at a landscape scale. It was only because of the BLM plans, together with state plans and actions by private landowners, that the FWS found that sage-grouse did not warrant listing under the ESA. This averted a situation where every major project or permit affecting sage-grouse on federal lands would be required to undergo federal consultation with the FWS. Additionally, a listing would have meant that private landowners and states would have had to get permits from FWS if their actions could harm the bird or its habitat. Put another way, “A listing doesn’t offer compromises for the Western way of life and cares little for state economies.”<sup>26</sup>

The 2015 plans need to be reviewed and updated, however, to account for changes in policy and science over the past seven years. Key tenants of the 2015 plans were not fully implemented, such as comprehensive compensatory mitigation requirements and Sagebrush Focal Area protections. Additionally, ecosystem dysfunction, especially caused by invasive annual grasses and catastrophic wildfire, is the most important factor driving the loss of sage-grouse populations. Reassessing how the 2015 plans can be fully implemented and specifically how protection and mitigation measures can target ecosystem dysfunction is critical. TNC supports changes to the plans supported by new science-based data and research since 2015 that are designed to reverse the trend of decreasing sage-grouse populations. Without such changes, we fear, will inevitably lead to a listing of the species under ESA.

## **III. MITIGATION IS AN IMPORTANT PART OF FEDERAL AND STATE POLICY EFFORTS TO CONSERVE SAGE-GROUSE AND MUST BE MAINTAINED.**

### **A. Mitigation “done right” is a widely accepted regulatory tool and was a critical part of the 2015 decision not to list Greater sage-grouse as endangered.**

Mitigation is based on two principles: (1) it is more appropriate to locate certain activities in some locations than others; and (2) we should restore landscapes damaged by our activities. A simple definition of mitigation is “the process or result of making something less severe, dangerous, painful, harsh, or damaging”.<sup>27</sup>

Mitigation “done right” involves smart planning, efficient and effective decision-making, predictability for project proponents, and fully considers the interests of the proposed project, land management priorities, and stakeholder interests. Applied in a balanced manner, mitigation can result in positive outcomes for all – the

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<sup>26</sup> Richards, Heather and Rosenfeld, Arno. *Wyoming’s quiet governor faces a brash Interior secretary, with a bird in the balance*. Casper Star Tribune (November 4, 2017). [Wyoming's quiet governor faces a brash Interior Secretary, with a bird in the balance | Energy Journal | trib.com](https://www.trib.com/story/news/local/2017/11/04/wyoming-quiet-governor-faces-brash-interior-secretary/1061117001/)

<sup>27</sup> “Mitigation.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/mitigation>

public, communities, businesses, and the environment. Sound mitigation policy provides agencies such as the BLM with a structured, rational, and transparent framework for reviewing use requests and meeting their multiple use and sustained yield mandates.

Good mitigation policy and practice is also one of the best opportunities to meet both sustainable development and conservation goals.<sup>28</sup> Many projects, even those with relatively small footprints, can pose significant impacts to migratory wildlife. When fairly designed and implemented and evaluated at appropriate scales, mitigation policies can reduce conflict between conservation and land use activities and support private land stewardship.

The widely accepted mitigation hierarchy, or sequence, is a well understood concept that has its origins in National Environmental Policy Act regulations and has been embedded in a wide range of existing, successful mitigation programs at both the state and federal level.<sup>29</sup> It is a stepwise framework for evaluating proposed impacts that first considers options for avoiding impacts from development on the most important habitat in the first place. Some places are too sensitive, rare, or irreplaceable to develop and avoidance is the appropriate option. For example, leks or concentrated wintering areas. Several recent studies have confirmed the importance of ensuring conservation of a sufficient amount of these habitats.<sup>30</sup> In other instances, measures to minimize and/or compensate for impacts may not be available or effective, making avoidance the necessary choice.

The next step in the hierarchy is to minimize impacts. A project developer can employ a wide range of actions to lessen the scope and severity of disturbance on wildlife and habitat in the project area. For example, installing markers on fences in sage-grouse habitat has been demonstrated to prevent fence-related mortality or injury that can occur when sage-grouse fly low to the ground over sagebrush range.<sup>31</sup>

If unavoidable impacts occur, the third and final step in the mitigation hierarchy is to compensate for the loss by creating, restoring, enhancing, or preserving habitat elsewhere. This might involve securing a conservation easement on private land or restoring nearby habitat with treatments designed to improve conditions for affected species. Compensatory mitigation for a new road system or transmission line in sagebrush habitat could involve, for example, payments by the developer to reconvert farmland that has replaced sage species' preferred cover and restore native sagebrush habitat.

It may be appropriate to apply flexibility when determining what constitutes appropriate and practicable mitigation at each step in the sequence. Following the steps in sequence, however, provides a predictable

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<sup>28</sup> See generally, Justin R. Pidot, *Compensatory Mitigation and Public Lands*, 61 Boston College Law Rev. 1045, 1058-59 (2020).

<sup>29</sup> 40 CFR 1508.20; see also Dave Owen, *The Conservative Turn Against Compensatory Mitigation*, 48 Envtl. Law Journal 265, 269 (2018); Pidot, 61 B.C.L. at 1059.

<sup>30</sup> See e.g., Dinkins, J.B., et al., 2017, Quantifying overlap and fitness consequences of migration strategy with seasonal habitat use and a conservation policy: Ecosphere, v. 8, no. 11, article e01991, <https://doi.org/10.1002/ecs2.1991>; Smith K.T., et al., 2016, Does Wyoming's core area policy protect winter habitats for greater sage-grouse?: Environmental Management, v. 58, no. 4, p. 585-596.

<sup>31</sup> See Sage Grouse Initiative. New Report: Fence Markers Work To Prevent Sage Grouse Collisions. August 30, 2016, <https://www.sagegrouseinitiative.com/new-report-fence-markers-work-prevent-sage-grouse-collisions/>



framework and helps avoid claims that mitigation is a “pay to play” scheme or any one project proponent or type of development receives different treatment.

At its most basic, mitigation policy is truly about good governance and fairness. When agencies frontload their planning and provide the public and applicants with information in advance about where development should and should not go, they are empowered to make faster, better decisions. Potential conflicts between conservation and development are reduced when developers know in advance what areas should be avoided. Applying the mitigation framework to sensitive species also helps ensure that decisions made today aren’t precluding future use activities or transferring species management challenges from one unit of government to another.

The Western Governors’ Association has recognized that compensatory mitigation plays an important role in fish and wildlife management and conservation<sup>32</sup>. More generally, governments, businesses, and local communities are increasingly acting to improve mitigation policy and practice:

- 108 countries have or are developing national mitigation policies that require offsets or enable the use of offsets. An additional 29 countries have undertaken initial exploration of offset policy options.<sup>33</sup>
- Multi-lateral and private sector financial institutions are requiring projects they finance to avoid, minimize, and compensate for biodiversity impacts in accordance with new performance standards. These standards are intended to guard against unforeseen risks and impacts, improve financial and operational performance, and support “a social license to operate”.<sup>34</sup>
- Annual spending on mitigation worldwide is estimated – on the low end – at between \$6.3 and \$9.2 billion.<sup>35</sup>

BLM has long included compensatory mitigation requirements in a number of land use planning and management decisions.<sup>36</sup> The 2015 BLM sage-grouse plans relied on the mitigation hierarchy to help reach their goal of protecting sage-grouse while also allowing multiple uses to proceed by ensuring associated impacts to habitat are fully offset. The accompanying Fish and Wildlife Service (FWS) Endangered Species Act not-warranted listing decision was based not on the stability of the species’ population, but rather on the “adequacy of regulatory

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<sup>32</sup> Western Governors’ Association. Compensatory Mitigation. Policy Resolution 2022-06 (December 10 2021) WGA-PR-2022-06-Compensatory-Mitigation.pdf(westgov.org) (WGA Policy Resolution 2022-06)

<sup>33</sup> Deutz, A. et al. Financing Nature: Closing the global biodiversity financing gap. The Paulson Institute, The Nature Conservancy, and the Cornell Atkinson Center for Sustainability, at 104.

<sup>34</sup> Id. at 105.

<sup>35</sup> Id. at 107-8.

<sup>36</sup> Justin R. Pidot, *The Bureau of Land Management’s Infirm Compensatory Mitigation Policy*, 30 Fordham Envtl. Law Rev 1, 4 (2018) (article arguing against prior, Trump Administration, policy that disclaims statutory authority for BLM to impose compensatory mitigation); see also, Pidot, *Compensatory Mitigation and Public Lands*, 61 B.C.L. Rev. at 1062.

mechanisms and conservation efforts”.<sup>37</sup> Mitigation – avoidance, minimization and, where appropriate, compensatory mitigation – was an essential tool supporting the decision:

All of the Federal Plans require that impacts to sage-grouse habitats are mitigated and that compensatory mitigation provides a net conservation gain to the species. All mitigation will be achieved by avoiding, minimizing, and compensating for impacts following the regulations from the White House Council on Environmental Quality (e.g., avoid, minimize, and compensate), hereafter referred to as the mitigation hierarchy. If impacts from BLM/USFS management actions and authorized third party actions that result in habitat loss and degradation remain after applying avoidance and minimization measures (i.e., residual impacts), then compensatory mitigation projects will be used to provide a net conservation gain to the species.<sup>38</sup>

The Service then concluded, “Requiring mitigation for residual impacts provides additional certainty that, while impacts will continue at reduced levels on Federal lands, those impacts will be offset”.<sup>39</sup> The 2015 BLM sage-grouse plans thus not only employed the mitigation hierarchy as a regulatory and conservation tool to preclude listing, but the listing decision was, in part, based on the promise of the protections and conservation measures that mitigation would deliver.

## **B. BLM has ample authority to apply the full mitigation hierarchy in the sage-grouse plans.**

Both the Federal Land Policy and Management Act (FLPMA) and case law demonstrate that BLM has ample discretion to apply the mitigation hierarchy and to seek compensatory mitigation to protect sage-grouse.

FLPMA directs that BLM manage public lands to ensure the protection of ecological and environmental values, preservation and protection of certain public lands in their natural condition, and to provide habitat for wildlife.<sup>40</sup> This direction guides every significant aspect of the management of BLM lands, including development of land management plans,<sup>41</sup> project-specific authorizations for the use, occupancy, development of public lands,<sup>42</sup> the granting of rights of way on public lands,<sup>43</sup> and drafting regulations to implement these authorities.<sup>44</sup>

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<sup>37</sup> Endangered and Threatened Wildlife and Plants: 12-Month Finding on a Petition to List Greater Sage-Grouse as an Endangered or Threatened Species. 80 Federal Register 59858, 59927 (Dep’t. of the Interior October 2, 2015).

<sup>38</sup> *Id.* at 59881 (citation omitted).

<sup>39</sup> *Id.* at 59881.

<sup>40</sup> 43 U.S.C. § 1701(a)(8). Among other things, public resources should be managed to “protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values” and “provide food and habitat for fish and wildlife”.

<sup>41</sup> 43 U.S.C. § 1712(a).

<sup>42</sup> 43 U.S.C. § 1732(b).

<sup>43</sup> 43 U.S.C. § 1765(a)(i).

<sup>44</sup> 43 U.S.C. § 1740.

While FLPMA does not elevate certain uses over others, it delegates discretion to the BLM to determine whether and how to develop or conserve resources, including how to require protection and enhancement of resources and values.<sup>45</sup> This language gives BLM discretion to promote environmental and ecological values such as habitat for sensitive wildlife on public lands and flexibility to use compensatory mitigation to protect and preserve habitat for sage-grouse.

In addition, FLPMA directs BLM to “manage the public lands under principles of multiple use and sustained yield”.<sup>46</sup> These principles of multiple use and sustained yield pervade and underpin each of BLM’s authorities under FLPMA, including the policies governing the Act,<sup>47</sup> the development of land use plans,<sup>48</sup> the authorization of specific projects,<sup>49</sup> and the granting of rights of way.<sup>50</sup>

Multiple use means, among other things:

[t]he management of public lands and their various resource values so that they are utilized in the combinations that will best meet the present and future needs of the American people; ... *a combination of balanced and diverse resource uses* that takes into account the long term needs of future generations for renewable and nonrenewable resources, *including, but not limited to, ... range, ... watershed, wildlife and fish, and natural...values; and harmonious and coordinated management of the various resources without permanent impairment of...the quality of the environment...*<sup>51</sup>

Sustained yield means “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use”.<sup>52</sup>

Multiple use/sustained yield principles do “not mandate that every use be accommodated on every piece of land; rather, delicate balancing is required.” *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009); see also, *Theodore Roosevelt Conservation Partnership v. Salazar*, 616 F.3d 497, 518 (D.C. Cir. 2010 (“[T]he Bureau has wide discretion to determine how those principles should be applied”); *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975) (multiple use management “breath[es] discretion at every pore”).<sup>53</sup>

The mitigation hierarchy, including compensatory mitigation, provides an important tool for achieving a balance among the multiple uses allowed on public lands. BLM can authorize a consumptive use, like oil and gas development, but balance that use by providing compensatory mitigation for the unavoidable losses suffered by the fish and wildlife. In other words, the mitigation hierarchy can have the effect of expediting and defending

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<sup>45</sup> P. L. 94-579 (Oct. 21, 1976) (stating an intent “[t]o establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, *and enhancement of the public lands; and for other purposes.*” (emphasis added)).

<sup>46</sup> 43 U.S.C. § 1732(a).

<sup>47</sup> 43 U.S.C. § 1701(a)(7).

<sup>48</sup> 43 U.S.C. § 1712(c)(1).

<sup>49</sup> 43 U.S.C. § 1732(a).

<sup>50</sup> 43 U.S.C. § 1765(a)(i).

<sup>51</sup> 43 U.S.C. § 1702(c)(emphasis supplied).

<sup>52</sup> 43 U.S.C. § 1702(h).

<sup>53</sup> See generally, Pidot, 61 B.C.L. Rev. at 1084-87.

authorized consumptive uses of the public lands while simultaneously protecting fish and wildlife resource values in perpetuity.

Greater sage-grouse and its habitat is without a doubt a wildlife resource that BLM has the authority to protect under the multiple use standard. It is also a resource whose annual and periodic output BLM can achieve and maintain in perpetuity under the sustained yield standard. To protect the present and long-term use of the public land for “wildlife” “without impairment of the quality of the environment,” BLM is granted the authority to use a wide variety of tools, including application of the mitigation hierarchy and compensatory mitigation in appropriate circumstances, in providing protection for species such as sage-grouse.

Beside the principles of FLPMA and its multiple use/sustained yield standards, individual provisions of that Act confer additional authority on BLM to apply the mitigation hierarchy. In the section on land use plans, for example, FLPMA obliges BLM to consider environmental values, such as wildlife like the sage-grouse, in the development of such plans.<sup>54</sup> More particularly, BLM must also “*consider the relative scarcity of the values involved and the availability of alternative means...and sites for realization of those values*”.<sup>55</sup>

Sage-grouse habitat is a wildlife value with relative scarcity, as evidenced by the Fish and Wildlife Service’s consideration of the species for listing under the ESA, its designation as a special status species by BLM, and its active management by numerous Western states. In developing land use plans that account for sage-grouse, BLM can provide for the use of “alternative sites”<sup>56</sup> in appropriate instances, thereby avoiding impacts to sensitive habitat. Similarly, BLM can specify “alternative means,”<sup>57</sup> which can include minimization as well as compensatory mitigation under appropriate circumstances. In short, resources designated as “special” by BLM should be managed through a resource goal that may necessitate compensatory mitigation actions, as appropriate.

Additional authority also exists for the use of the mitigation hierarchy in issuing project-specific authorizations. For example, project-specific authorizations must be “in accordance with the land use plans,”<sup>58</sup> so if the plans identify priority areas for avoidance and appropriate mitigation measures for the sage-grouse under the various authorities described above, the project authorization must address those measures. Moreover, in issuing project-specific authorizations, BLM may attach “such terms and conditions” as are consistent with FLPMA and other applicable law.<sup>59</sup> This general authority also confers broad discretion on BLM to impose mitigation requirements on project applicants, including compensatory mitigation in appropriate circumstances.<sup>60</sup>

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<sup>54</sup> 43 U.S.C. § 1732(b).

<sup>55</sup> 43 U.S.C. § 1712(c)(6)(emphasis supplied).

<sup>56</sup> 43 U.S.C. § 1712(c)(6).

<sup>57</sup> *Id.*

<sup>58</sup> 43 U.S.C. 1732(a).

<sup>59</sup> 43 U.S.C. § 1732(b).

<sup>60</sup> BLM also has authority and/or obligations to ensure that all its operations protect natural resources and environmental quality, through statutes such as the Mineral Leasing Act of 1920, 30 U.S.C. 181 et seq.; see *Independent Petroleum Assn. of America v. DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002) (Act grants “rather sweeping authority” to BLM, or NEPA, 42 U.S.C. 4321; see also 40 C.F.R. § 1505.2(c), which requires consideration of mitigation alternatives where appropriate. In addition, BLM’s authority under FLPMA is broader than that exercised by purely land use or regulatory agencies such as EPA or zoning

Finally, as a distinct authority, FLPMA states that BLM “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”<sup>61</sup> Courts have found generally that BLM has substantial authority in carrying out this provision. As the Ninth Circuit Court of Appeals stated in *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1044, while section 302 “does not mandate specific action”, BLM has discretion “to choose appropriate measures.”<sup>62</sup>

This point was confirmed in *Western Exploration, LLC v. U.S. Department of the Interior*, 250 F.Supp.3d 718 (D.Nev. 2017), where the court stated:

The FEIS states that if actions by third parties result in habitat loss and degradation, even after applying avoidance and minimization measures, then compensatory mitigation projects will be used to provide a net conservation gain to the sage-grouse. The Agencies’ goals to enhance, conserve, and restore sage-grouse habitat and to increase the abundance and distribution of the species, they argue, is best met by the net conservation gain strategy because it permits disturbances so long as habitat loss is both mitigated and counteracted through restorative projects. If anything, this strategy demonstrates that the Agencies allow some degradation to public land to occur for multiple use purposes, but that degradation caused to sage-grouse habitat on that land be counteracted. The Court fails to see how BLM’s decision to implement this standard is arbitrary and capricious. Moreover, the Court cannot find that BLM did not consider all relevant factors in choosing this strategy...

In sum, Plaintiffs fail to establish that BLM’s challenged decisions under FLPMA are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>63</sup>

Thus, BLM has ample discretion to go beyond the prevention of unnecessary or undue degradation to seek compensatory mitigation that will meet “the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, . . . wildlife and . . . natural scenic, scientific and historical values.”<sup>64</sup> In fact, BLM has numerous authorities supporting its discretionary use of mitigation more generally, including case law and the policies and principles underlying FLPMA, the foundational multiple use and sustained yield standards, the authority to promulgate regulations, and the specific authorities applicable to land use plans and project-specific authorizations. Moreover, none of these authorities distinguish between avoidance, minimization, and compensatory mitigation or prohibit or circumscribe compensatory mitigation; rather, the authorities are broad and support the use of each aspect of mitigation when appropriate.

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boards, because BLM [has authority] to act as both a regulatory and as a proprietor. Accordingly, BLM can take action using all the tools provided by FLPMA for managing the public lands, including issuing regulations, developing land use plans, implementing land use plans or in permitting decisions. 43 U.S.C. §§ 1712(a), 1732(a), 1732(b).

<sup>61</sup> 43 USC § 1732(b).

<sup>62</sup> See also, *Pidot*, 61 B.C.L. Rev. at 1090-93.

<sup>63</sup> 250 F.Supp.3d at 747 (citations omitted).

<sup>64</sup> 43 U.S.C. § 1702(c).

**C. BLM should incorporate, implement, and enforce mitigation programs, including state sage-grouse mitigation programs, that meet a recognized set of principles.**

The 2015 Records of Decision for sage-grouse included a commitment to develop compensatory mitigation strategies in each sage-grouse management zone.<sup>65</sup> As the 2015 land use plans were completed and implementation efforts began, however, some states had already completed or had begun efforts to develop compensatory mitigation strategies to implement conservation measures for the species on state and private lands. It thus became apparent that developing federal mitigation strategies for each management zone would be redundant and could, in fact, create conflicts between state and federal mitigation approaches. Given BLM's broad authority to adopt and impose compensatory mitigation to protect sage-grouse, it makes sense for BLM to adopt, implement, and enforce well-designed state mitigation programs on federal land wherever possible.

We support efforts of the states to design and apply different geographically appropriate mitigation approaches that are based on best available science. Variability from state-to-state allows for experimentation and, eventually, the ability to compare the effectiveness of different approaches across states. Application of strict avoidance and minimization principles in these programs is critical because we cannot begin to reduce impacts to sagebrush habitat if development continues to occur on the best habitat. In addition, a voluntary approach to mitigation, employed by states such as Utah<sup>66</sup>, is not acceptable, however, since it provides no certainty that any new habitat will be created in response to development of existing habitat.

We also believe that if these programs are to be adopted by BLM and applied on federal lands, they should meet a common set of defined principles and standards designed to meet a federally established conservation goal for the species. Examples of such standards and principles can be found in the Bureau of Land Management's Mitigation Manual (1794-M) and Mitigation Handbook (H-1794-1) and The Nature Conservancy's 2015 report, *Achieving Conservation and Development: Applying the Mitigation Hierarchy*.<sup>67</sup>

BLM should coordinate and work with the states to ensure that the state programs incorporate appropriate principles and standards. Important features to be included in these policies include:

1. Loss/gain methodology:

Mitigation programs should have in place loss/gain methodologies to quantify all adverse impacts, both long-term and short-term, and offsets. These methodologies should ideally be based on a measure of the capacity of areas lost and offset. There are large variations in the quality of habitat for sage-grouse, and it is important to address the variation in habitat quality by including measures of habitat functionality and using adjustment factors to account for the risk of project failure. These measures need not be overly precise, but rather should strive to yield a roughly equivalent amount and type of replacement resources.

<sup>65</sup> See e.g., ROD for the Rocky Mountain Region (Sept. 15, 2015), pp.1-27-8.

<sup>66</sup> Utah Admin. Code R634-3 et seq.

<sup>67</sup> McKinney and Wilkinson. *Achieving Conservation and Development: Applying the Mitigation Hierarchy*. (April 2015). [TNC Mitigation Principles WEB FINAL.docx.pdf \(conservationgateway.org\)](https://www.nature.org/usa/pdfs/20150415_mitigation_principles_web_final.docx.pdf)

Risk, uncertainty, and time lag can be addressed through the inclusion of appropriate adjustment factors<sup>68</sup>.

2. Site selection, service areas, scale-appropriate decision making, appropriate actions, and habitat types:

Mitigation programs should provide guidance on appropriate criteria for selecting offset sites, including distance from impact site, boundaries within which impacts may be offset, and any requirements for identifying offset areas based on relevant scale-appropriate conservation information, should be included. Specific actions that may be used to provide offsets (e.g., restoration, preservation, enhancement, creation) and types of habitat that are appropriate (e.g., equivalent habitat types) should also be described.

3. Performance standards:

Mitigation programs should have in place performance standards that are clear, science-based, measurable, and designed to track compliance, effectiveness, and inform any needed adjustments for improvement. They should also clearly specify the conservation outcomes (impacts minimized, functional units of offsets delivered) that are expected. Minimization and offset actions should be required to meet ecological performance standards and adhere to provisions for adaptive management, monitoring, and enforcement measures to ensure long-term and sustainable outcomes for conservation.

4. Emphasize principles of durability, duration, additionality, and equivalency:

Mitigation programs should provide guidance on the following important issues.

a. Durability:

All mitigation measures should be designed to be durable. Durability of offsets should be secured through designation mechanisms, management, and funding.

b. Duration:

Measures should be designed to be in place at least as long as the duration of the direct and indirect impacts<sup>69</sup>.

c. Additionality:

Offsets should provide a new contribution to conservation, additional to what would have occurred without the offset. Offset actions that restore, enhance, manage, and/or protect values and functions should be a genuinely new contribution to conservation with a strong probability of success.

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<sup>68</sup> As Western Governors' Association Policy Resolution 2022-06 notes, programs should "encourage the application of compensatory mitigation *prior* to the impact occurring to ensure no time lag occurs between impacts and offsets". *Id.* at p. 3.

<sup>69</sup> WGA Policy Resolution 2022-06 states, "Where effects are permanent, perpetual mitigation is ideal." *Id.*

d. Equivalency:

Decisions about the compensatory mitigation measures (amount and type) should strive to deliver offsets that are “in kind” in terms of habitat type, functions, values, and other attributes.

5. Provide for certainty and transparency to regulators, developers and the public:

Mitigation programs should strive to maximize consistency in implementation and provide predictability for project proponents, participating agencies, and mitigation providers. To the maximum extent possible, the BLM should identify and provide consistent guidance on those areas of sage-grouse habitat that are most sensitive and where avoidance is warranted and those minimization and restoration practices that have been demonstrated to be successful.

6. Establish a mitigation goal:

Sound mitigation policies are guided by a clear goal statement. Such goals provide a driver for the avoidance and minimization of impacts and clarity to agencies on the appropriate type and quantity of compensatory mitigation that should be recommended or required. This clarity supports efficient project review and approval and helps ensure that mitigation measures are not arbitrary but rather follow from a structured, predictable decision-making process.

It is appropriate to apply a higher goal of net conservation gain, of the type provided for in BLM’s 2015 plans, where mitigation is being relied upon to preclude a listing under section 7(a)(1) of the Endangered Species Act (ESA). Actions that offset species and habitat loss to a no net loss standard do not advance recovery, but rather, at best, maintain the status quo, which, given the documented decline in sage-grouse populations, increases the likelihood of a decision to list Greater sage-grouse under ESA in the future. As noted above, the court in *Western Exploration, LLC* upheld BLM’s use of a net conservation gain standard for sage-grouse.<sup>70</sup>

It is critical that BLM have a high degree of confidence that direct, indirect, and cumulative impacts of infrastructure development will be offset with high quality, durable, timely, and additional compensatory mitigation projects that also consider the risk of failure and provide conservation uplift. Without effective mitigation that ensures a sustainable sage-grouse population, important habitat will be lost by the proverbial “death by a thousand cuts” from development and other types of conversion.

7. Mitigation on Public Lands:

BLM should have the policy prescriptions and tools available to allow for compensatory mitigation on public lands to offset private or public activities. Impacts to key sage-grouse habitat located on private land, particularly in states such as Nevada, often necessitate the need for compensatory mitigation on public lands, given the limited availability of private land for use as offsets. Maintaining this capability will be critical to conservation success.

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<sup>70</sup> *Western Explorations LLC*, 250 F.Supp.3d at 747.



8. Field Guidance and Training:

Last, but far from least, providing agency field staff with guidance and training is an important mechanism to accelerate permitting and project review. By committing resources to training field staff, BLM could increase the technical capacity of local staff to implement mitigation policies effectively and do so consistently across field offices. Providing clear direction to project proponents on how the agencies will make avoidance, minimization and compensatory mitigation decisions will help streamline and accelerate project review.

**IV. NEEDED ADJUSTMENTS TO 2015 PLAN ELEMENTS INCLUDING DISTURBANCE CAPS, LEK BUFFERS, EXCEPTIONS, AND HABITAT OBJECTIVES TABLES**

**A. Evaluate if Disturbance Caps are Effectively Limiting Disturbance to Sage-grouse**

The 2015 plans sought to minimize new or additional surface disturbance with caps for anthropogenic disturbance within PHMAs. Once that disturbance cap is reached, additional development would not be permitted. The plans designate also limit oil and gas production to one well pad per 640-acre section. TNC is concerned that these caps are not being implemented effectively or are being made irrelevant by landscape-scale disturbance caused by wildfire.

We ask the BLM to review its definitions as to what accounts for “disturbance”. Best available science should be used to determine the accuracy of the sources of disturbance in calculations, to consider if natural disturbances such as fire should be included, and if the 3% disturbance cap is still appropriate given current conditions.

**B. Increase Buffers Around Leks**

Sage-grouse leks are invaluable resources that should have high levels of protection to prevent their loss. To develop relevant and practical lek buffer distances for the BLM plans, the U.S. Geological Survey reviewed the scientific information on conservation buffer measures for sage-grouse leks. The resulting study<sup>71</sup> recommended there be 5 km (3.1 miles) between leks and infrastructure related to permitted development. It is important to stress here that this distance does not result in 100% protection for sage-grouse:

[T]he minimum distance inferred here (5 km [3.1 miles]) from leks may be insufficient to protect nesting and other seasonal habitats. Based on the collective information reviewed for this study, conservation practices that address habitats falling within the interpreted distances may be expected to protect as much as 75 percent to 95 percent of local population’s habitat utilization.<sup>72</sup>

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<sup>71</sup> Manier, D.J., Bowen, Z.H., Brooks, M.L., Casazza, M.L., Coates, P.S., Deibert, P.A., Hanser, S.E., and Johnson, D.H., 2014, Conservation buffer distance estimates for Greater Sage-Grouse—A review: U.S. Geological Survey Open-File Report 2014–1239, 14 p., <http://dx.doi.org/10.3133/ofr20141239>.

<sup>72</sup> *Id.* at p.2.

### **C. Limit Use of Waivers, Exceptions and Modifications**

The 2015 plans provided for waivers, exceptions and modifications to the stipulations in the plans with requirements for public notice. TNC understands that careful and limited use of these exceptions can allow for localized, science-based decisions that serve the overall conservation purpose of the plans. However, we are concerned that confusion caused by differences between the 2015 and 2019 amendments, and among state plans makes it difficult to know for which instances the BLM is allowing these changes to plan stipulations. We ask the BLM to review and clarify when a waiver, exception, or modification may be granted.

In the interest of transparency, TNC requests the BLM require consultation with the relevant state wildlife agency and the USFWS before granting a waiver, stipulation or modification. We also ask the BLM to publish regular reports documenting the location and basis for exceptions, modifications and waivers. The use of waivers, exceptions and modifications should be limited as intended in the 2015 plans to ensure that these provisions do not undercut the purpose of the plans.

### **D. Clarify Use of Habitat Objectives Tables in Adaptive Management Processes**

Habitat Objectives Tables (HOTs) or Table 2-2 were intended to describe desirable sage-grouse seasonal habitat characteristics but were not intended to prescribe how managers must intervene to improve conditions relative to achieve desirable conditions. TNC believes the BLM has been clear that HOTs are intended to guide BLM specialists in understanding seasonal habitat quality, and that no single indicator within the table should be considered in isolation from the rest. However, in addition to updating table indicators with best available science, we ask the BLM to assess if these tables can be simplified with fewer indicators and that the BLM reiterate clearly how HOTs are utilized in planning decisions.

## **V. MONITORING AND ADAPTIVE MANAGEMENT**

The Nature Conservancy is a strong proponent of the need for both a strong monitoring and adaptive management program for sage-grouse. Monitoring provides information about how resources change through time in response to management or whether resource objectives are met following a management action. It also can help maximize efficiency of conservation spending.<sup>73</sup>

Adaptive management essentially means learning by doing and adopting management strategies based on what has been learned from past practices and monitoring.<sup>74</sup> A basic premise of adaptive management is that while uncertainty exists in all decisions, learning about the effects of those decisions and taking appropriate corrective action will result in more rapid and cost-effective attainment of those outcomes.

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<sup>73</sup> USGS Report 2020-1125 at p. 223.

<sup>74</sup> USGS Report 2020-1125 at pp. 224.

The 2015 BLM plans provide for monitoring and include “triggers” that provide for remedial actions when populations or habitat are at risk.<sup>75</sup> A typical synopsis of the current process under the plans is set out in the Utah BLM plan:

This plan establishes soft and hard triggers for both [Greater Sage-grouse] population and habitat.... If monitoring indicates the soft-trigger is met, the BLM will determine if there is a specific cause or causes that are contributing to the decline. If it is determined that the decline is related to a natural population variation, no specific management actions will be required. However, if BLM management actions are determined to cause or contribute to the decline, the BLM manager will apply measures within their implementation-level discretion to mitigate the decline of populations and/or habitats to the area where the trigger has been met. These measures will apply more conservative or restrictive implementation conservation conditions... If monitoring indicates the hard trigger is met, a set of specific management actions from the BLM Proposed Plan will immediately be replaced with or adjusted by different management actions in the area where the trigger has been met.<sup>76</sup>

In addition, a good summary of the types of the types of monitoring and adaptive management currently being practiced in sagebrush habitat is found in Chapter S of USGS Report 2020-1125.<sup>77</sup>

Efforts to effectively monitor sagebrush habitat, on which sage-grouse are dependent, can be problematic, as that USGS Report explains:

Most management actions provide insufficient funding to perform monitoring for more than a few years, and thus most project-level monitoring falls into implementation monitoring and not effectiveness monitoring. Some restoration outcomes take years to discern, so a commitment to longer term monitoring efforts is often needed. Monitoring programs used by different agencies, and sometimes within the same agency, are rarely integrated... Ultimately, monitoring programs, whether distributed across the sagebrush biome or at the project level, are constrained by limited funding.<sup>78</sup>

The Report concludes that one way to increase sagebrush monitoring efficiency is through better data sharing,<sup>79</sup> a goal that BLM should certainly be working towards in its sage-grouse plans. Another approach to monitoring which can increasingly be used is based on the development of new technology and statistical design. Advances in remote sensing and data management processes now provide opportunities not previously available,<sup>80</sup> and should also be considered as part of the scoping process.

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<sup>75</sup> Bureau of Land Management. Utah Greater Sage-Grouse Approved Resource Management Plan Amendment (September 2015), Appendices D and I. [https://eplanning.blm.gov/epl-front-office/projects/lup/68351/87600/104856/Utah\\_ARMPA.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/68351/87600/104856/Utah_ARMPA.pdf)

<sup>76</sup> *Id.* at p. 2-14).

<sup>77</sup> USGS Report 2020-1125 at pp.223-38.

<sup>78</sup> *Id.* at p. 231.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 235.

An added wrinkle comes about in trying to distinguish between population declines caused by factors such as climate change as opposed to those caused by development such as conversion of habitat or energy production. As set forth in USGS Report 2020-1154, the key components to detecting changes in population trends include both (a) identifying when declining trends at nested local scales are below trends at broader scales most likely governed by climatic factors and (b) targeting leks or small clusters of leks in a neighborhood early enough to allow management intervention to be effective. The Targeted Annual Warning System (TAWS) proposed in that Report uses two categories for multi-year signaling events termed “watches” and “warnings”:

We assigned watches to populations that exhibited evidence of population decline below those of the [broad spatial scale] (slow signal) over 2 consecutive years. We assigned warnings to populations that had slow signals in 3 out of 4 consecutive years or a relatively strong magnitude (fast signal) of evidence for 2 out of 3 consecutive years. Watches may identify the need for intensive monitoring whereas warnings may identify the need for management intervention aimed at stabilizing populations.<sup>81</sup>

In keeping with prior discussed evidence of sage-grouse population declines, the Report found 63% of leks experienced watches and 47% experienced warnings.<sup>82</sup> As the Report concludes,

[I]nsights [from TAWS] can highlight areas on the landscape that require additional field investigations to understand why populations are declining and whether managers can increase those populations through various management actions. Accordingly, the TAWS also helps fulfill information needs for sage-grouse populations identified under existing land-use planning amendments. This is a rigorous framework for adaptive management solutions tied directly to performance of identifiable population units.<sup>83</sup>

We thus recommend BLM consider incorporating the TAWS into its monitoring and adaptive management procedures as part of the scoping process. The State of Nevada has already done so, showing the potential of this tool.

Finally, effective monitoring and adaptive management processes require adequate resources. As noted above, USGS Report 2020-1125 states that monitoring and adaptive management programs are constrained by limited funding.<sup>84</sup> In any final plan, BLM must ensure sufficient funding is provided for these processes. In addition, recognizing that the amount of funding for these programs will always be a concern, coordinating monitoring efforts and information among stakeholders such as federal, state, tribal and local agencies and non-profit organizations is also critical.<sup>85</sup>

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<sup>81</sup> USGS Report 2020-1154 at p. 3; see also pp. 56-59.

<sup>82</sup> Id. at p. 59.

<sup>83</sup> Id. at p. 91 (citation omitted).

<sup>84</sup> USGS Report 2020-1125 at pp. 231, 235.

<sup>85</sup> Id. at pp. 223, 231.

## VI. Proposed Analysis for Alternative Consideration: Assessing Protections for Remaining Intact Landscapes

### A. Background on Sagebrush Focal Area Protections

Sagebrush Focal Areas (SFA) were included in the 2015 BLM plans as requested by the U.S. Fish and Wildlife Service<sup>86</sup> to provide the highest levels of protection for the most important sagebrush landscapes. In addition to withdrawing designated public land acres from new mineral location and entry, SFA designation would have also entailed No Surface Occupancy restrictions on new development and prioritized review and processing of grazing permits and leases. SFA designation was halted when the mineral withdrawal application was cancelled in 2017<sup>87</sup>, a decision that was vacated by federal courts in 2021<sup>88</sup> and has since been reinitiated.

While the mineral location and entry withdrawal is being analyzed in a separate and concurrent NEPA effort<sup>89</sup>, the BLM asked for comment in this scoping effort on:

The identification, management, and conservation of the most important GRSG and sagebrush habitat, referred to as “Sagebrush Focal Areas” in the 2015 and 2019 Sage-Grouse Plan Amendments.

Given the continued decline in sage-grouse populations and the fragmentation and loss of intact sagebrush ecosystem landscapes to major threats, especially invasive annual grasses and associated wildfires, TNC believes the remaining “best of the best” sagebrush ecosystem landscapes require the strongest level of protection conferred by a unique designation. We recommend that the BLM revisit the science on which this designation should be based and pursue a transparent and inclusive process for refining range-wide analyses to state-specific plans. Further, we recommend the BLM ensure that the Land Use Allocation Decisions originally referenced in the 2015 BLM plans confer strong protections for this designation and enable needed restoration in and around these areas. We describe our request for BLM analysis below.

### B. Proposal for New Analysis for Unique Protection-Oriented Designation

TNC recommends using range-wide analyses to identify the landscapes that would benefit from protection-oriented measures alone, versus needing extensive management or restoration intervention to reverse declines in ecological function. The recent push by agencies, nonprofits, and state

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<sup>86</sup> U.S. Fish and Wildlife 2014. Memorandum: Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes. (October 27, 2014). <https://www.fws.gov/greatersagegrouse/documents/ESA%20Process/GRSG%20Strongholds%20memo%20to%20BLM%20and%20USFS%20102714.pdf>

<sup>87</sup> *Notice of Cancellation of Withdrawal Application and Withdrawal Proposal and Notice of Termination of Environmental Impact Statement for the Sagebrush Focal Area Withdrawal in Idaho, Montana, Nevada, Oregon, Utah and Wyoming*  
82 Federal Register 47248 (10/11/2017)

<sup>88</sup> *Western Watersheds Project v. Bernhardt*, Case No. 1:16-cv-00083-BLW Document 264 (D.Idaho 2/11/21).

<sup>89</sup> *Notice to Re-Initiate Proposed Withdrawal; Sagebrush Focal Areas* 86 Federal Register 44742 (8/13/2021)

governments to focus sagebrush conservation efforts on ecosystem function, for example through Threat-based Land Management<sup>90</sup> or the Defend Core Framework<sup>91</sup>, are excellent examples of this approach. We encourage the BLM to identify and implement this protection-oriented designation in each state where significant intact sagebrush landscapes remain.

While we are identifying SFA designations to build continuity with the 2015 plans, we understand that flaws in that mapping effort and subsequent controversy indicates a new or different designation may be preferable. Whether or not “Sagebrush Focal Area” is the best name or designation option for this purpose should be part of the BLM’s analysis. We encourage the BLM to rename SFAs, consider different designations like Areas of Critical Environmental Concern, or create a new designation and retire SFAs to distinguish this analysis effort from the 2015 if doing so will improve how stakeholders engage on the merits of this proposal versus their memory of past efforts.

We believe the BLM has the authority and obligation to use this designation as an application of the Avoidance principle in the Mitigation Hierarchy. TNC believes the BLM can defer to state-specific mitigation plans when they meet the panoply of standards (as we outlined in section IV of this letter) necessary for an adequate compensatory mitigation program. We also believe, however, that the BLM has the responsibility to define where avoidance from development is the only warranted mitigation principle. We believe that this level of protection is appropriate for the most ecologically intact landscapes.

By ecological integrity, we mean that the BLM consider spatial and temporal patterns of functional vegetation groups, including maximizing indicators of desirable ecological conditions such as native perennial herbaceous vegetation and woody sagebrush species, while minimizing undesirable ones such as invasive annual herbaceous vegetation and trees encroaching on rangeland sites. Analysis of these indicators should use best-available science for identifying meaningful thresholds, ratios, or other relevant metrics based on regional differences between the Great Basin, Rocky Mountain, and Great Plains portions of the sagebrush biome. Taken together, these indicators should allow the BLM to identify landscapes where a protection-oriented designation would prevent further loss of ecosystem function.

TNC asks that the BLM reconsider remotely sensed datasets, mapping platforms, and other landscape-scale science products to identify the largest and most intact sagebrush ecosystem landscapes in each state<sup>92</sup> by ecological integrity (inclusive of all landownerships). We ask the BLM to select a designation to cover as many of the identified BLM-managed acres as practical (including PHMA, GHMA, and Non-

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<sup>90</sup> Johnson, D. et al. 2019. *Threat-Based Land Management in the Northern Great Basin: A Manager’s Guide*. Oregon State University Press, Corvallis, USA. <https://catalog.extension.oregonstate.edu/pnw722>

<sup>91</sup> Maestas et al. 2022. *Defend the core: Maintaining intact rangelands by reducing vulnerability to invasive annual grasses*. Rangelands.10.1016/j.rala.2021.12.008 .

<sup>92</sup> Including Colorado, Idaho, Montana, Nevada, Oregon, Utah, and Wyoming, but not California, North Dakota, South Dakota, or Washington given the small number of BLM-managed acres and special considerations of those states’ small and distinct sage-grouse populations.

habitat). The actual boundaries of proposed polygons with this protection-oriented designation should be adjusted to accommodate important considerations including:

- a) Where high breeding or nesting densities, or other critical habitat of sage-grouse occur,
- b) Where a preponderance of current federal ownership or adjacent state-owned land or protected areas serve to anchor conservation importance,
- c) Where designation would result in fewer, larger, more contiguous SFAs, and
- d) Where distance from existing development and infrastructure can be maximized.

TNC understands that balancing the extent of these protection-oriented designations with other, noncompatible uses is extremely challenging and requires trade-offs. For transparency, we ask the BLM to propose several different alternatives that allow stakeholders like TNC to understand and comment on those trade-offs. For example, we recommend the BLM offer an alternative where this protection-oriented designation covers acres representing the highest 20% of ecological function in each state, and one where the same designation instead covers 50% of active leks in each state.

Major advances in remotely-sensed datasets and mapping platforms will allow the BLM to conduct this analysis with a transparent and empirical approach that was not available to the agency in 2015. Products including the Rangeland Assessment Platform<sup>93</sup> and especially the Western Association of Fish and Wildlife Agencies (WAFWA) Ecological Integrity Map<sup>94</sup> are ideally suited to facilitate this analysis at a statewide-scale. Implementing a protection-oriented designation will be in keeping with the Defend the Core framework to pragmatically orient sagebrush ecosystem management and restoration around the largest remaining intact landscapes.

TNC believes this designation should confer the highest levels of protection possible and we support implementation of the Land Use Allocation Decisions for SFAs in the 2015 BLM plans including:

- a) Exclusion of solar development
- b) Exclusion of wind development
- c) Avoidance of major and minor rights-of-way (Including pipelines and transmission lines)
- d) Closure to non-energy leasing
- e) Withdrawal for locatable minerals
- f) Managed as No Surface Occupancy for fluid mineral leases
- g) Prioritized for wild horse and burro management actions
- h) Prioritized for assessment and processing of grazing leases and permits

Additionally, TNC asks the BLM to strictly limit the exceptions or waivers to these stipulations to limit surface disturbance as much as possible in these intact landscapes. These strong protections are needed

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<sup>93</sup> Jones, M.O. et al. *Innovation in rangeland monitoring: annual, 30 m, plant functional type percent cover maps for U.S. rangelands, 1984-2017*. Ecosphere 9:e02430. <https://doi.org/10.1002/ecs2.2430>

<sup>94</sup> Doherty, K. et al. 2022 *Threat-Based Landscape Conservation Framework*. Western Association of Fish and Wildlife Agencies. In Review.

to prevent new fragmentation creating vectors for invasive species spread or anthropogenic wildfire ignitions.

## **VII. Analysis for Associated Buffer Designation to align with “Grow the Core” Prioritization**

Without adequate restoration and management along their boundaries, intact sagebrush ecosystems are likely to experience decline as major threats including invasive annual grass infestations and encroaching conifer woodlands continue to spread. To re-enforce the protection-oriented designated landscapes described in the previous section, TNC asks the BLM to also consider analyzing and including in alternatives an additional unique designation to create buffers around protected landscapes aligned with “Grow the Core” principles.

We do not think the BLM needs to create new restrictions with this designation beyond what is conferred by PHMA or GMHA. Instead, we ask the BLM to use this buffer designation to spatially identify where new restoration investments, flexible management practices, and prioritized mitigation credit siting will be most impactful. To arrest the decline in sage-grouse populations, the pace and scale of restoration must increase, and spatially explicit and goal-oriented buffers will help the BLM and stakeholders advocate for and implement the needed ramping up of restoration activities.

Methods for identifying these buffers are likely to vary depending on region, and we encourage the BLM to propose buffers balancing several considerations including:

- a) Adequate width to create a sufficiently large area where management and restoration practices can slow the spread of major threats,
- b) Proximity to existing fuel-reduction infrastructure including fuel breaks,
- c) Connectivity between SFAs, non-SFA PHMA, or other important designations or existing protected areas.
- d) Considerations for how climate change will likely impact the resilience and resistance of landscapes to invasive annual grasses

The point of these new buffers is to further insulate SFAs from ecological threats through restoration and improved management that improves ecosystem function within these “Grow the Core” buffers. To accomplish this, we ask the BLM to link buffer designation with the following conditions and incentives:

- a) Continue to require compensatory mitigation in cooperation with state plans
- b) Prioritize oil and gas leasing and development siting outside of buffers
- c) Work with state mitigation programs to incentivize mitigation credits generated within buffers
- d) Develop a restoration plan for BLM-administered land within buffers to be supported with new federal appropriations
- e) Develop a flexible livestock grazing management plan to be supported with new federal appropriations



By restoration plan, we mean that, for each “Grow-the-Core” buffer, the alternatives analyze or require a subsequent planning process to identify the spatial extent of major threats that have effective and available restoration actions<sup>95</sup> including:

- a) Phase I conifer encroachment with cutting,
- b) Invasive annual grass infestations with an appreciable native perennial bunchgrass component with herbicide spraying,
- c) Denuded herbaceous understories with native plant seeding, and
- d) Impaired mesic or riparian resources with fencing and active restoration projects including low-tech rock structures and beaver dam analogues.

We ask the BLM to use these restoration plans to set restoration goals (for example, addressing 100% of Phase I conifer encroachment) and secure sufficient new federal appropriations, ideally to address these threats by 2030. We also ask the BLM to propose policy and regulatory tools that can expedite implementing these priority projects.

By flexible livestock grazing management plan, we mean that, for each “Grow-the-Core” buffer, the BLM identify permit renewals, season-of-use adjustments, range improvements, water infrastructure improvements, or other adjustments that would facilitate permitted livestock operators to better extend growing season rest, respond to annual growing conditions, manage fine fuels, or otherwise manage livestock grazing operations to prioritize native perennial vegetation.

### **C. Considerations outside of SFA and Buffer Designations**

While SFA designations and associated protections were part of the original intent of the 2015 amendments, TNC recognizes that, in the intervening years, the states have developed policies and frameworks that will need to adjust to changes in designations. In the interest of creating fair, effective, and durable policy, TNC asks the BLM to work with the states to ensure that changes to SFA designations are as compatible with state mitigation plans as possible while still protecting the most intact remaining sagebrush ecosystem landscapes. We ask the BLM to consider changes to GHMA extent and restrictions outside of SFAs to balance overall changes in regulatory requirements. Where a science-based review can show, in a case-by-case basis, that GHMA designated landscapes are highly impacted by major threats but do not provide for critical connectivity or other specific sage-grouse needs, TNC supports the BLM considering removing GHMA designation and rely on other existing policies for restoration or adaptive management to address threats. TNC does not support a categorical removal of GHMA designation over any entire state or region in a state.

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<sup>95</sup> For example, through use of the 2020 Categorical Exclusions on conifer cutting and covered practices within the 2020 Fuels Reduction and Rangeland Restoration PEIS



## Conclusion

The Nature Conservancy appreciates the BLM's efforts both to address the immense challenges causing declines in sage-grouse populations and sagebrush ecosystems and to support the lives and livelihoods of people who equally depend on the biome. We need swift action to reverse these declines and TNC believes that by fully implementing the 2015 plans, recommitting to the mitigation hierarchy, implementing protection-oriented designations, and explicitly identifying urgent restoration needs can meaningfully move us towards success.

We also need to stress that none of this work will be possible without adequate staffing and support for talented, collaborative, and long-term professionals filling BLM specialist and manager positions. The shortfall in capacity and related chronically acting rotations deprives both the agency and stakeholders. In this process, we hope that the BLM can clearly articulate its needs for appropriations and positions to adequately support this immense effort. It will help TNC be the best partner we can be if we know what the agency needs, and what it will cost.

We look forward to reviewing the draft Environmental Impact Statements.

If you have any questions, or there is any further information we can provide, please contact either myself at [matthew.cahill@tnc.org](mailto:matthew.cahill@tnc.org) or Tomer Hasson, Senior Policy Adviser – Western States, at [tom.hasson@tnc.org](mailto:tom.hasson@tnc.org).

Thank you again for the opportunity to comment.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Matt Cahill", written in a cursive style.

Matt Cahill

Sagebrush Sea Program Director

The Nature Conservancy