

PATHFINDER RANCHES

December 1, 2017

Erica Husse
BLM Wyoming State Office
5353 Yellowstone Road
Cheyenne, WY 82009

SENT VIA EMAIL TO: ehusse@blm.gov and the GRSG Notice of Intent ePlanning Portal

RE: Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments (NOI)

Dear Ms. Husse:

Pathfinder Ranches, LLC (Pathfinder Ranches) appreciates the opportunity to provide the Bureau of Land Management (BLM) with the following comments related to the NOI.

Background of Pathfinder Ranches

Pathfinder Ranches owns and operates the Sweetwater River Conservancy Greater Sage-Grouse Habitat Conservation Bank (SRC Sage-Grouse Bank), which is the first conservation bank approved by the U.S. Fish and Wildlife Service (USFWS) to offset impacts to the Greater sage-grouse in the United States. The SRC Sage-Grouse Bank is also the largest single bank in the nation. Importantly, no federal or state funds were used to establish and permit the SRC Sage-Grouse Bank. It is an entirely private enterprise aimed at reaching a balance between the development of federal, state and private natural resources and the ongoing threat of listing the Greater Sage-grouse pursuant to the provisions of the Endangered Species Act. Pathfinder Ranches also owns the Dumbell Ranch Mitigation Bank, the first and only wetland, stream and riparian bank approved by the U.S. Army Corps of Engineers in Wyoming. At the urging of senior USFWS officials, Pathfinder Ranches is also working to develop a draft Golden Eagle Conservation Bank proposal for submission to USFWS in early 2018.

Inherent in the multiple banking operations that are present or proposed on Pathfinder Ranches is that our ranches provide a true landscape-scale approach to mitigation. Pathfinder Ranches' banking and agricultural operations are situated on a vast collection of historical, working ranch lands near Alcova, Wyoming. These lands support robust populations of Greater sage-grouse, mule deer, pronghorn, elk, bighorn sheep and many other wildlife species. These properties also benefit from considerable, senior water rights in the Sweetwater and Platte Rivers, which are critical to the support of upland, riparian and aquatic fish and wildlife populations. Last summer, USFWS, BLM and University of Wyoming botanists

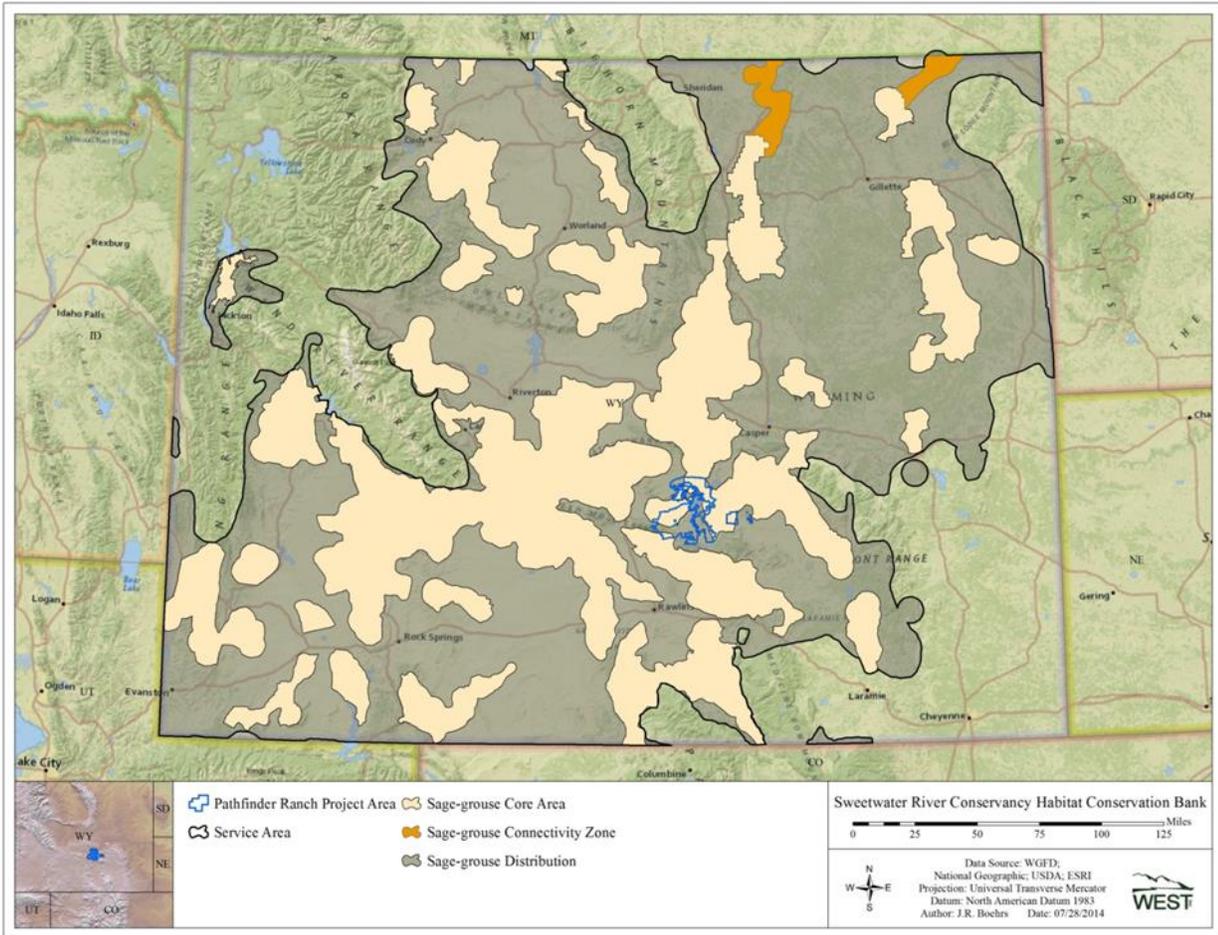
completed plant surveys on portions of Pathfinder Ranches lands and discovered multiple specimens of the federally listed (endangered) Blowout penstemon (*Penstemon haydenii*). Beyond plants and wildlife, our properties are also home to “blue ribbon” segments of the Oregon, Mormon and numerous other historic trails.

The conservation value associated with Pathfinder Ranches is profound. To safeguard Pathfinder Ranches lands and the millions of other acres of conservable properties like them across the nation, USFWS, BLM and other federal agencies must properly align their regulatory policies, planning rules and project evaluation frameworks with proper incentives for those that seek to permit mitigation programs and those that will use mitigation offsets (i.e. industry). The NOI provides the BLM with a tremendous opportunity to script a course forward to potentially unlock hundreds of millions of dollars of private investment in conservation and secure regional economies that depend on ranching, mineral development and other industries, millions of acres of habitat to support future generations of fish and wildlife populations and myriad recreational opportunities, including hunting and fishing, for the general public.

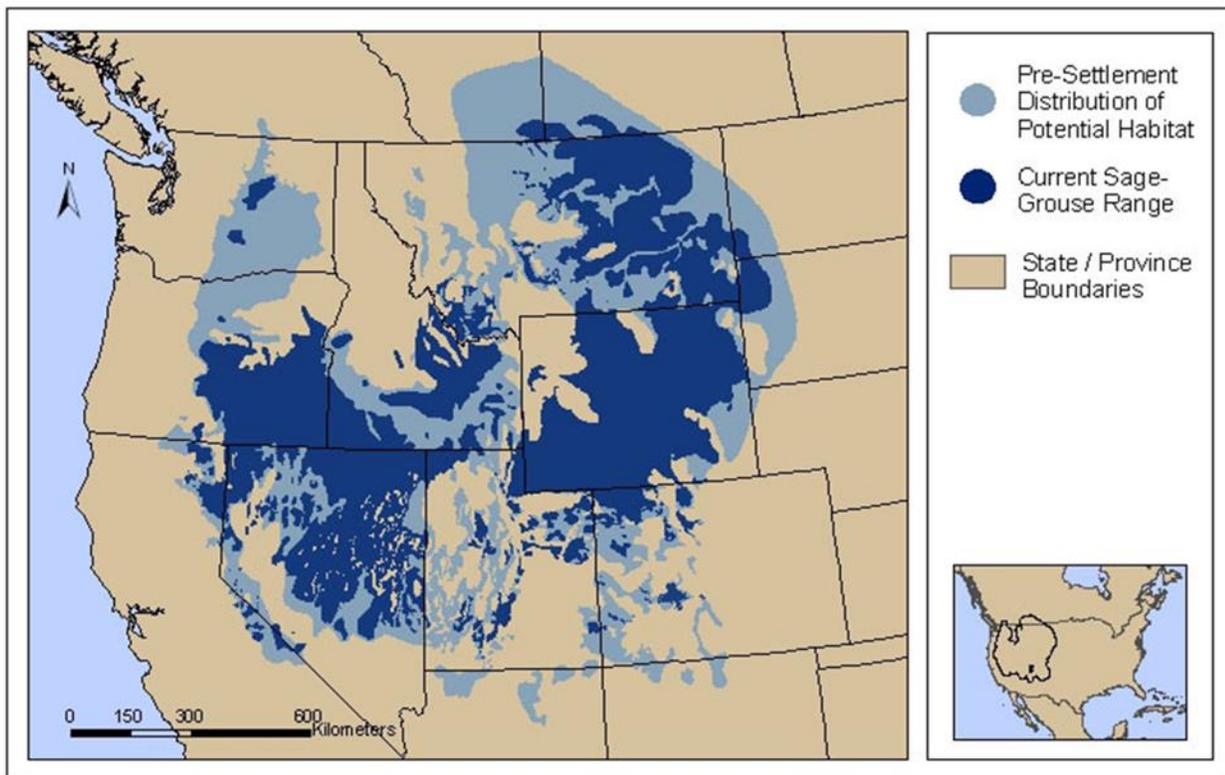
General Overview of Banking

In many areas of the country, habitat conservation and wetland banking are the preferred options to offset impacts to listed species and stream, riparian and wetland habitat that is protected pursuant to the Clean Water Act. Banks undergo extensive federal review prior to being approved and are the subject of rigorous federal – and now state – permitting protocols. In the case of the SRC Sage-Grouse Bank, this review and approval process included intense evaluation by a Conservation Banking Review Team (CBRT), which was empaneled by USFWS and consisted of representatives from USFWS, BLM, U.S. Department of Agriculture – Natural Resources Conservation Service (NRCS), Wyoming Office of State Lands and Investments, Wyoming Game and Fish Department and Wyoming Department of Environmental Quality. USFWS also received significant guidance from its federal Solicitor’s Office leading up to the final approval of the SRC Sage-Grouse Bank.

Important to these comments, in its approval of the SRC Sage-Grouse Bank, the CBRT, including a representative of the BLM, agreed to a service area (the geographic area(s) within which impacts to sage-grouse that occur may be mitigated or compensated through credits from the SRC Sage-Grouse Bank) that covers the entire range of sage-grouse habitat in Wyoming. Pathfinder Ranches’ approved service area is depicted on the map below and is identified as Exhibit H-1 to our Conservation Bank Agreement:



Beyond the statewide service area set forth in Exhibit H-1, Pathfinder Ranches has also been approved for a much larger secondary service area, which includes the current range of the Greater sage-grouse, where federal and/or state regulators in the other ten states with sage-grouse habitat approve the use of Pathfinder Ranches credits. The secondary service area encompasses the dark blue area set forth on the following map and can be found in Exhibit H-2 of the Conservation Bank Agreement:



Pathfinder will vigorously defend its (and any other certified credit provider's) ability to transact and transfer credits for use anywhere in its USFWS and CBRT approved service area.

To support its approval of a statewide service area for Pathfinder Ranches, USFWS relied on empirical data and widely used Resource Selection Function modeling. By pairing expansive vegetation data sets (2-meter hyperspectral imagery that examines Greater sage-grouse relevant considerations for all Pathfinder Ranches banked and adjacent land consistent with *Stiver et al*) and robust sage-grouse collaring data, Pathfinder Ranches was able to clearly demonstrate and validate the value of its habitat to the species. In addition to the scientific rigor demanded by USFWS and the CBRT to support their approval of the SRC Sage-Grouse Bank and a statewide service area, Pathfinder Ranches was also required to commit to long-term monitoring, reporting, bank management (including adaptive management) and financial and other assurances to meet USFWS, State of Wyoming, BLM and Forest Service requirements for durability, additionality and overall credit security.

Federal Compensatory Mitigation

Mitigation, including compensatory mitigation, has been a part of the legal and development landscape since the passage of the National Environmental Quality Act (NEPA) and integrated into the land planning

and permitting process of the Federal Land Policy Management Act since 1976. Mitigation has proven to be generally successful. Unfortunately, mitigation has taken the form of “blackmail” to extract excess resource rents to support other agency missions or political agendas on various occasions. These infrequent aberrations have occurred when three key principles are violated:

- (1) mitigation should be calculated in a manner that is equal to what is necessary to offset the impact to the resource;
- (2) the calculation of mitigation and impacts must be science-based and figured in a similar manner; and
- (3) the mitigation must be that which is best for the species (as a whole) and not limited by the geographic, individual population or process preferences of a particular land manager.

Unfortunately, the Department of the Interior, under the prior federal administration, saw mitigation as a way to supplement the agency’s budget and achieve particular, long-standing objectives; objectives which may or may not have been linked to the goal of avoiding the necessity of an Endangered Species Act listing for the sage-grouse. This approach proved frustrating for Pathfinder Ranches and limited the development of its privately funded conservation bank. Thus, we are pleased that the BLM has chosen to “...solicit public comments on Greater Sage-Grouse land management issues that could warrant land use plan amendments.” We have also included comments on items that can potentially be addressed through other actions such as maintenance action, withdrawal or modification of Instruction Memoranda and general guidance to BLM state and field offices.

Compensatory Mitigation in Wyoming

After considerable negotiation and discussion with BLM, other federal agencies and other parties, Governor Mead issued the *Revised Greater Sage-Grouse – Compensatory Mitigation Framework* (Framework) in July 2017. In pertinent part, that Framework states:

Compensatory mitigation may be accomplished in two primary manners. The first are “conservation credits,” which maintain existing habitats in a landscape context, provide for long-term management consistent with the needs of the species, and remove potential threats to the species from human activities. The second are “restoration credits,” which may be used to restore habitats that have been lost or severely impacted and did not meet the habitat needs of the species. Full suitability of lost or severely impacted sites may take decades. However, to provide incentives to restore habitats impacted by historic activities, restoration credits will be given to sites that have improved from lost or severely impacted to a stable and functional condition that demonstrates a positive trend toward suitability (over a period of 5 years), and

is currently occupied by GSG. Restoration credits must demonstrate the stability, functionality and occupation before any credits are awarded.

The Framework goes on to specify certification requirements for conservation credits and quantification methodologies to calculate the “debits” associated with impacts to both Priority and General Habitat Management Areas. Prior to the adoption of the Framework, the State of Wyoming negotiated and entered into a Memorandum of Understanding (MOU) with USFWS, BLM, NRCS and the U.S. Department of Agriculture – U.S. Forest Service on March 1, 2017, in which the parties agreed that they would use the Framework to compute compensatory mitigation for Greater sage-grouse, where such mitigation is required. The coordinated approach envisioned in the MOU makes great sense, especially for calculating debits associated with oil and gas development, considering that every federal application for permit to drill (APD) must be approved in conjunction with a state APD. To have multiple standards, calculation methodologies and approaches to compensatory mitigation would only lead to confusion and frustration.

In order to ensure that compensatory mitigation can be a cornerstone for keeping the sage-grouse off of the threatened species, the USFWS and CBRT have adopted credit certification requirements that are science-based, demanding and supportable. Understanding that a “like-for-like” approach does not fully account for potential impacts in all of the habitats that sage-grouse use throughout their life cycle and may actually cause immediate harm while we wait for the habitat treatment to “work,” the CBRT approval process that was adopted for the SRC Sage-Grouse Bank requires conservation credit providers to meet a very high standard. Specifically, it requires credit providers to definitively prove the presence of sage-grouse, through radio collaring and telemetry, and secure the habitat necessary to protect sage-grouse throughout their entire life cycle (i.e. breeding, nesting, brood-rearing, summering and wintering) through a perpetual conservation easement and a \$10 million endowment fund.

The currently-approved state Framework doubles down on the importance of a rigorous and comprehensive conservation credit by demanding compensatory mitigation can only be accomplished in Wyoming in two ways: through conservation credits that meet the Framework’s requirements and restoration credits, for which an approval process has yet to be fully fleshed out. No other compensatory mitigation is currently acceptable to offset residual impacts to Greater sage-grouse in Wyoming. Such an approach is only supportable – both as a matter of state and federal development approvals – with a robust credit standard. Should the states or federal agencies diminish or deflate the CBRT standard or accept other forms of historically ineffective mitigation for sage-grouse given the species’ fidelity to specific habitat and the difficulty in re-establishing that habitat and have it re-occupied by birds (i.e. by rectifying the impacts by repairing, rehabilitating, or restoring the affected environment or reducing or

eliminating the impact over time by preservation and maintenance operations during the life of the action), uncertainty and risk of listing under the Endangered Species Act will prevail.

Compensatory Mitigation in the Context of the NOI

Our current circumstance is defined by two sets of litigation, policy preferences of the last administration and significant efforts by Western states, most notably Wyoming, to implement efforts to preserve sufficient birds and habitat to avoid the necessity of listing.

Starting in 2002, petitions were filed with USFWS seeking to list the sage-grouse as threatened or endangered under the Endangered Species Act. In January of 2005, USFWS determined that listing of the species was not warranted. Western Watersheds Project brought suit in Idaho federal district court challenging the determination. In December of 2007, the district court found USFWS had committed three errors in the decision-making process: 1) while it had consulted with experts, the USFWS had excluded them from the listing decision; 2) the USFWS failed to create a detailed record of expert opinions; and 3) those expert opinions which were preserved in the record had been ignored. These flaws were seen as a violation of the Endangered Species Act requirement that decisions be based on the “best science”. Further, the court concluded the decision was tainted by political interference by USFWS management and was therefore arbitrary and capricious. The decision was then remanded back to USFWS for further consideration.

Many Western states, individually and through the Western Governors’ Association, undertook the development of individualized state sage-grouse plans. Wyoming was the “first mover” in this effort. The “Core Population Area Strategy” was developed as a means to protect habitat that supported higher densities of birds, while striking an appropriate balance with resource utilization and development outside of these “core” areas. The premise was to discourage development in prime habitat but recognized that pre-existing rights and resource location would inevitably create conflict. Such conflict would be resolved through compensatory mitigation to assure basic habitat and species population stability over time. This plan was approved by the USFWS in May of 2008 and implemented by Wyoming Executive Order in 2008.

In March of 2010, the USFWS issued a new determination following the 2007 remand. In the new determination, USFWS found the listing of the sage-grouse was warranted under the Endangered Species Act, but precluded by other, higher priority, listing decisions. The decision relied heavily upon the Wyoming plan Executive Order. (See: 75 Fed. Reg. 13910). Western Watersheds Project again challenged the decision in Idaho. On February 2, 2012, the Idaho district court reluctantly affirmed the USFWS determination noting the presence of the Wyoming strategy and the fact that USFWS had entered into a settlement in separate litigation in the Washington, D.C. federal district court requiring it to either list or make a final not warranted decision related to the sage-grouse by the end of fiscal year 2015.

A second, parallel litigation strategy was undertaken by the Western Watershed Project to challenge sixteen separate BLM Resource Management Plans in six Western states. Western Watersheds Project alleged violations of the National Environmental Policy Act (NEPA) and Federal Land Policy and Management Act (FLPMA), arguing the plans and related NEPA analyses failed to properly account for the impacts of grazing and energy development, among other influences, on the sage-grouse. As a case management matter, the court and litigants focused on two Resource Management Plans: the Craters of the Moon plan in Idaho and Pinedale plan in Wyoming. In late September of 2011, the federal court ruled against BLM citing failures to follow its own National Strategy and Special Species Policy in violation of FLPMA and NEPA for failure to conduct cumulative analysis.

The listing and Resource Management Plan litigation outcomes required a response from the Department of the Interior. The logical response would have been to focus the plan revision process on the goal of creating enough protection for the sage-grouse and its habitat to remove the necessity of a listing under the Endangered Species Act. The Department of the Interior, however, took a second course. It essentially chose to implement a strategy to undertake greatly expanded, global landscape level planning, restrict development and implement its vision of a completely protected sagebrush ecosystem across eleven states - all the while using the threat of an Endangered Species Act listing as the justification. This was a policy decision and not rooted in the Endangered Species Act requirement to follow "best science."

Properly implemented mitigation was one of the casualties of this federal approach. Federal mitigation became a tool to prohibit development or a means to get long-standing issues, such as abandoned well pads or unfunded fieldwork addressed, no matter whether such efforts could be considered true mitigation for impacts to the species. Two devices were used to move in this direction. First, the language of the Resource Management Plans was interpreted to mean that mitigation would only qualify as such if it was achieved within the field office or district office boundary, rather than focusing on the species and habitat requirements to avoid a listing.¹ This approach functionally made the sagebrush habitat "prime" whether it was valuable to the species or not. Additionally, it made the individual sage-grouse bird the focus rather than the entire sage-grouse population as directed by the Endangered Species Act.

¹ In a recently released Environmental Impact Statement, BLM signaled that only conservation credits generated within a specific field office could be used as compensatory mitigation. Beyond the obvious scientific infirmities of such a requirement, to arbitrarily constrain the areas from which a project proponent can secure certified credits potentially subjects them to a captive market dynamic (assuming there is a certified conservation credit provider in the area) and extreme costs while not affording the proponent adequate control over its ability to defend its project approval and adequately limit its future liability.

Secondly, BLM invoked the hierarchy of mitigation contained in the Council on Environmental Quality (CEQ) guidance and BLM handbook to essentially preclude compensatory mitigation, even though such mitigation is scientifically preferable and more likely to avoid the necessity of a listing.

The CEQ regulations (40 CFR 1508.20) set forth the logical sequence of mitigation as follows:

“Mitigation” includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impacts by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

As opposed to the BLM’s robotic, sequential application of the CEQ guidance, the mitigation hierarchy should be tailored to fit the habitat and other needs of the species in question. Avoidance and minimization are relatively straight forward in the context of sage-grouse and should be considered as a first line of mitigation in nearly every circumstance. Unfortunately, rectifying (c) and reducing or eliminating the impact over time (d) become very problematic, specifically for the well-being of the sage-grouse.

The overwhelming evidence signals that repairing, rehabilitating or restoring the affected environment cannot be accomplished in a time frame that is useful to the sage-grouse or its habitat. Sagebrush is a slow growth species and the sage-grouse has peculiar attachments to specific parcels of land. These two realities make (c) difficult and/or less than useful to implement. Similarly, reducing or eliminating impacts over time (d) does not address the site fidelity issues or the biology of sagebrush or the sage-grouse. It has been argued that over a span of 50 or 75 years, these approaches will restore or improve the sagebrush ecosystem and the sage-grouse. Unfortunately, such an approach does not account for or address the impacts to the species during the intervening 50 to 75 years, during which time the next listing petition for the species will undoubtedly be filed.

Compensatory mitigation (e) is the most effective form of mitigation for precluding a listing in those cases where avoidance and minimization do not entirely resolve the resource conflict. However, as noted earlier, compensatory mitigation is only useful if the impact and credit are calculated in a similar manner, expressed in similar metrics and science-based. If the impact, including the time it takes for the impacted habitat to be re-occupied by birds, is 50 years, the offset must last at least 50

years. Further, the protections for the offset must be real and financially supported for the life of the impact.

Through the Framework, the State of Wyoming has adopted a thoughtful and serious policy on compensatory mitigation. While Pathfinder Ranches may reserve judgment on how the state is approaching some of the implementation details, the theory of assuring the impact is properly calculated and the offsetting credits appear sound. To be sure, USFWS and BLM assert, even today, that Wyoming's Executive Order and Framework are sound and correct. The issue seems to be translating those words into decisions within the land management agencies. Even though the MOU has been executed between BLM and the State of Wyoming, implementation on federal lands has not occurred. Meanwhile permits on state and private lands in Wyoming have been issued and properly and fully mitigated development activity is underway. Giving meaning to the MOU on federal lands does not require amendment of the Resource Management Plans in Wyoming. It requires direction from the Department of the Interior.

With specific regard to the use of compensatory mitigation to receive timing stipulation relief, the existing exception criteria in the Resource Management Plans are currently being used as justification to limit conservation bank credits from being used to grant exceptions to seasonal stipulations. As a result, the Resource Management Plans should be amended to permit BLM to grant relief pursuant to and consistent with the Framework without the need for additional NEPA analysis. As it currently stands, exceptions from seasonal timing stipulations are only allowed as follows:

The authorized officer may grant an exception if an environmental record of review determines that the action, as proposed or conditioned, will not affect reproductive displays, nest attendance, egg or chick survival, or early broodrearing success. Actions designed to enhance the long-term utility or availability of suitable Greater Sage-Grouse habitat may be exempted from this timing limitation. The BLM can and does grant exceptions to seasonal restrictions if the BLM, in coordination with the WGFD, determines that granting an exception would not adversely impact the population being protected.

See Casper, Kemmerer, Newcastle, Pinedale, Rawlins, and Rock Springs Field Offices Approved Resource Management Plan Amendment for Greater Sage-Grouse, September 2015, Appendix B - Fluid Mineral Stipulations, page 124.

Other Comments

Net Gain

The Obama Administration's shift from a "no net loss" standard to net gain or "conservation benefit" is clearly on questionable or non-existent legal grounds. As a practical matter the addition of "net gain" to mitigation analysis simply muddies the water, particularly since "net gain" is truly in the eye of the beholder. BLM, USFWS, federal agencies and project proponents will invest time and money in an

exercise unsupported by the organic acts supporting the federal action under review, namely FLPMA. The concept of “net gain” is contrary to every common sense, prior policy or dictionary definition of mitigation. BLM’s inclusion of “net gain” may reflect a preference for how it thinks the law should work, but it does not reflect what the law actually requires.

Noise

While Pathfinder Ranches might seemingly skip a discussion on noise, the reality is that arbitrary and scientifically unfounded impediments to development impact our work. To this end, many of the Resource Management Plan requirements related to noise appear to be based in less than solid science. For instance, the noise restrictions are based on very limited information and reflect primarily the preference of the researchers. In this area, BLM should go back to the drawing board and engage a process that is founded in not only sound science, but a true and proper administration of the scientific method.

Livestock Grazing

As a holder of extensive federal grazing permit rights, Pathfinder Ranches sees the “stubble height” requirements that were built into the Resource Management Plans for sage-grouse as being arbitrarily established and a poor specific indicator of range health. As opposed to a narrow focus on stubble height, the BLM should adopt a trend-based metric that values a multitude of forage and other range use parameters. This issue could be resolved by consulting with range conservationists and defining a more scientifically based standard through both instruction memoranda and plan amendments.

In addition, the Resource Management Plan objectives should reflect the realities of wild horse use and its impact on sage-grouse and other wildlife. Pathfinder Ranches federal, state and private lands, in particular riparian areas, have been devastated by nearly uncontrolled use by wild horses. Irrespective of any changes that the BLM may consider related to domestic livestock utilization, the agency must imbed specific management actions to counter the impacts that wild horses are having on the West. The BLM’s inability to effectively manage wild horse populations (due to budgetary, statutory or other limitations) must be reversed or significant impacts to sage-grouse will persist and intensify.

Miscellaneous Comments

Beyond these specific considerations, BLM should evaluate other impediments that are slowing permitting (raptors, cultural and archaeological clearances, etc.) and resulted in unnecessary impacts to sage-grouse and private landowners. Recent experience suggests that BLM has directed development into sage-grouse habitat, including sensitive habitat, to address raptor, cultural and/or archaeological issues elsewhere. Until BLM management is implemented consistent with the underlying organic authorization for raptors, migratory birds and historical/archaeological sites, such impacts will persist.

BLM should also modify the "Required Design Features" to only "require" such features when the agency can show that the action benefits the sage-grouse consistent with the state core area strategy and stipulations. Most Required Design Features have no tie to sage-grouse management/conservation. Where there is a connection to sage-grouse, these measures should actually be framed as best management practices, to be deployed by industry at its discretion as avoidance and minimization efforts to reduce or eliminate compensatory mitigation requirements.

Thank you for the opportunity to comment on the NOI. Pathfinder Ranches looks forward to actively engaging in whatever plan amendment, instructional memoranda development/modification and other administrative processes that are initiated as a result of this scoping effort.

Sincerely,



Ryan M. Lance
Senior Vice President and General Counsel