

THE HISTORY OF

GREATER
SAGE-GROUSE
MANAGEMENT

IN WYOMING



ACKNOWLEDGMENTS

Author

Esther Wagner | University of Wyoming School of Energy Resources

Contributors

Angi Bruce | Wyoming Game and Fish Department

Bob Budd | Wyoming Wildlife and Natural Resource Trust, and Sage Grouse Implementation Team

Editors & Reviewers

Kara Fornstrom | University of Wyoming School of Energy Resources

Angi Bruce | Wyoming Game and Fish Department

Bob Budd | Wyoming Wildlife and Natural Resource Trust, and Sage Grouse Implementation Team

Rebecca Byram | Devon Energy Corporation, and Sage Grouse Implementation Team

Dave Freudenthal | Wyoming Governor (2003 - 2011)

Joe Scott | Wyoming Oil and Gas Conservation Commission, and Sage Grouse Implementation Team

Paul Ulrich | Jonah Energy LLC, and Sage Grouse Implementation Team

Layout

Sabrina Kaufman | University of Wyoming School of Energy Resources



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SER collaborates with stakeholders at the state, national and international levels to advance energy technologies and policies to grow and support Wyoming's robust energy sector. SER's mission is to promote energy-driven economic development for the state, and it leads the University of Wyoming's talent and resources for interdisciplinary research and outreach, fulfilling Wyoming's promise to be a global leader in a thriving and sustainable energy future.

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DEFINITIONS AND ACRONYMS

ACEC	Area of Critical Environmental Concern
AMWG	Adaptive Management Working Group
BLM	Bureau of Land Management
BOE	Barrels of oil equivalent. A unit of measure that standardizes various energy sources to the energy content found in a barrel of crude oil.
CCAA	Candidate Conservation Agreement with Assurances
CFA	Causal factor analysis
COT	Conservation Objectives Team
CRP	Conservation Reserve Program
DDCT	Density and Disturbance Calculation Tool
DOI	U.S. Department of the Interior
EQIP	Environmental Quality Incentives Program
ESA	Endangered Species Act
Federal Nexus	An event that triggers the requirements for federal environmental review under a host of laws, regulations, and executive orders. Also, a conservation measure implemented on private land that is paid for by the federal government triggers an obligation for funding agency to consult with the USFWS on the impact of the project on listed threatened and endangered species.
GRP	Grasslands Reserve Program

GRSG	Greater sage-grouse
GYE	Greater Yellowstone Ecosystem. One of six USFWS-designated grizzly bear recovery zones. Encompasses northwestern Wyoming, eastern Idaho, and southwestern Montana (outside the Yellowstone National Park boundary).
IM	BLM instruction memorandum
LWG	GRSG Local Working Group
NEPA	National Environmental Policy Act
NPS	National Park Service
NRCS	Natural Resources Conservation Service
NRM	Gray wolf Northern Rocky Mountain Distinct Population Segment. Includes gray wolf populations in Wyoming, Montana, Idaho, the eastern third of Oregon and Washington, and a small portion of north central Utah.
PAW	Petroleum Association of Wyoming
RMP	Resource Management Plan
ROD	Record of decision
ROW	Right-of-way
SGEO	Wyoming Sage Grouse Executive Order
TAWS	Targeted Annual Warning System
USDA	U.S. Department of Agriculture
USGS	U.S. Geological Survey
USFWS	U.S. Fish and Wildlife Service
USFS	U.S. Forest Service
WEG	Wild Earth Guardians
WGFD	Wyoming Game and Fish Department
YNP	Yellowstone National Park

INTRODUCTION

For more than twenty-five years, conservation advocacy groups have filed petitions with the U.S. Fish and Wildlife Service (USFWS) to list the Greater Sage-Grouse (GRSG) as endangered or threatened pursuant to the Endangered Species Act (ESA). As the state with the highest number of GRSG and the most sage-grouse habitat across its 11-state range, Wyoming would be significantly impacted by such a listing. The State's early recognition of this led to an unprecedented collaborative effort to protect the bird and its habitat.

Over the course of six years, starting in 1999, various environmental groups filed eight petitions with the USFWS to list the GRSG.¹ The prospect of a GRSG ESA listing in Wyoming led to widespread concern for several reasons. First, Wyoming's experience with other ESA listings had shown that once a species is listed, it is very difficult, if not impossible, to have the species delisted. Additionally, with approximately 70% of the State consisting of occupied GRSG habitat,² an ESA listing would greatly restrict land use in more than half of the State, including oil and natural gas development, mining, grazing, and construction. With this in mind, the State quickly identified the need to develop a management strategy to protect GRSG and preclude the need for an ESA listing, while maintaining the ability for multiple use and economic opportunities to occur.³



¹ 80 Fed. Reg. 59857 (Oct. 2, 2015).

² Data was provided by Wyoming Game and Fish Dep't (WGFD) based on 2015 Wyoming Sage-Grouse Core Areas version 4 map, available at <https://wgfd.wyo.gov/wyoming-wildlife/sage-grouse-management/sage-grouse-data>. Correspondence with WGFD dated Nov. 20, 2023, is on file with author.

³ Joy Ufford, *Governor, Game & Fish and sage grouse team working to shape larger sage-grouse policy*, BUFFALO BULLETIN (Aug. 3, 2023), https://www.buffalobulletin.com/news/article_b9ec6e3e-3226-11ee-b96b-4b46f13fba43.html (last visited May 20, 2024).

Efforts to develop a statewide conservation strategy for GRSG began in earnest in 2000 with the establishment of the Wyoming Sage-Grouse Working Group. That citizen workgroup, comprised of scientists, county commissioners, and land-use stakeholders, produced the Wyoming Greater Sage-Grouse Conservation Plan that was approved and adopted by the Wyoming Game and Fish Commission in 2003.⁴

In 2005, the USFWS rendered a “not warranted” decision on the petitions to list the GRSG as threatened or endangered.⁵ That decision was promptly challenged in U.S. District Court, and in 2007 the court remanded the decision back to USFWS for further review, ruling that it was arbitrary and capricious because it was not based solely on the best available science.^{6,7} That same year, Wyoming convened stakeholders at a Sage-Grouse Summit in Casper which led to the establishment of the Sage-Grouse Implementation Team (SGIT).⁸ The SGIT was tasked with generating recommendations for GRSG protection based on the goals of the State to preclude the need for a USFWS ESA listing, conserve GRSG populations, and maintain economic opportunities. Based on the recommendations of the SGIT, the first Sage-Grouse Executive Order (SGEO) was penned by Governor Dave Freudenthal in 2008.⁹ As intended, the SGEO has evolved over time, with updated versions released by Governors Matt Mead and Mark Gordon after the first two that were signed by Governor Freudenthal in 2008 and 2010.¹⁰

This white paper explores the history and success of Wyoming’s SGEO, including how the collaborative process allows for the co-existence of habitat protection and oil and natural gas development. Section I outlines the history of the SGEO, including discussion of the factors that led to State executive action and the collaborative approach that produced balanced management policies. Section II describes the role of the SGIT, the development of protections and stipulations that allow for oil and natural gas development, and the process established to ensure adherence to management policies. Section III explains the benefits of Wyoming’s approach to GRSG management, including state-specific protections, regulatory certainty, and stakeholder buy-in. Section IV discusses the Federal approach to GRSG management, including interface with Wyoming’s SGEO, and political influence on GRSG management. Section V concludes with an assessment of the positive aspects and success of the Wyoming SGEO, establishing that Wyoming’s consistent, collaborative, and state-specific approach to GRSG management provides the best protection for the bird. This approach provides a proven process that can be replicated to address species protection while maintaining the ability for multiple use and economic opportunities to occur.

⁴ Wyoming Greater Sage-Grouse Conservation Plan, WGFD <https://wgfd.wyo.gov/media/2456/download?inline> (last visited May 21, 2024).

⁵ 70 Fed. Reg. 2244 (Jan. 12, 2005).

⁶ *Western Watersheds Project v. U.S. Fish & Wildlife Serv.*, Case No. CV-06-277-E-BLW (D. Idaho Dec. 4, 2007).

⁷ *Idaho Federal District Court Vacates Fish & Wildlife Service Decision Not To List Sage-Grouse Under ESA*, Holland & Hart (Dec. 10, 2007), <https://www.hollandhart.com/idaho-federal-district-court-vacates-fish-wildlife-service-decision-not-to-list-sage-grouse-under-esa>

⁸ Emilene Ostlind, *Wyoming’s sage grouse strategy sets bar for rest of the West*, WYOFIL (Aug. 9, 2011), <https://wyofile.com/wyomings-sage-grouse-strategy-sets-bar-for-rest-of-the-west/>

⁹ Wyo. Exec. Order No. 2008-2 (Aug. 1, 2008).

¹⁰ Wyo. Exec. Order No. 2011-5 (June 2, 2011); Wyo. Exec. Order No. 2019-3 (Aug. 21, 2019); Wyo. Exec. Order No. 2008-2 (Aug. 1, 2008); Wyo. Exec. Order No. 2010-4 (August 18, 2010).

HISTORY OF WYOMING SAGE GROUSE EXECUTIVE ORDER

From 1999 to 2005, the USFWS received eight petitions to list the GRSG as threatened or endangered in areas of its 11-state range in the United States.¹¹ The number of petitions filed, decreased GRSG populations, and increased habitat fragmentation across its range all appeared to increase the likelihood that GRSG could be listed in the United States.¹² Canada's decision to designate the bird as endangered in 1998 added to this perception.¹³

From 2005 to the present, USFWS, Bureau of Land Management (BLM), and the courts have taken several notable actions (Table 01).



¹¹ See *supra* note 1.

¹² *Ibid.*

¹³ *Ibid.*

TABLE OI

GRSG Timeline of Events

Year	Action
2005	USFWS “not warranted” decision ¹⁴
2006	Western Watersheds Project sues USFWS on 2005 “not warranted” decision ¹⁵
2007	U.S. District Court decision to remand 2005 “not warranted” decision to USFWS for further review ¹⁶
2010	USFWS “warranted but precluded” decision (precluded by higher priority listing actions) ¹⁷
2010	Wild Earth Guardians sues USFWS on 2010 “warranted but precluded” decision ¹⁸
2011	U.S. Department of Interior enters into settlement agreement with Wild Earth Guardians in which USFWS will make listing decisions on 251 species including GRSG by 2016 ¹⁹
2015	BLM adopts GRSG Resource Management Plans (RMPs) ²⁰
2015	USFWS “not warranted” decision ²¹
2016	Environmental groups sue BLM based on National Environmental Policy Act (NEPA) analysis in 2015 RMPs ²²
2017	DOI initiates 60-day review of the 2015 GRSG RMPs ²³
2017	BLM publishes Notice of Intent to amend GRSG RMPs ²⁴
2019	BLM releases revised GRSG RMPs ²⁵
2019	U.S. District Court issues order precluding BLM from implementing the 2019 RMPs; management reverts to the 2015 BLM RMPs ²⁶
2021	BLM publishes Notice of Intent to revise GRSG RMPs ²⁷
2024	BLM publishes Draft RMP for GRSG Rangewide Planning for public comment ²⁸

¹⁴ See *supra* note 5.

¹⁵ See *supra* note 7.

¹⁶ *Ibid.*

¹⁷ 75 Fed. Reg. 13910 (March 23, 2010).

¹⁸ *Frequently Asked Questions: Greater Sage-Grouse Status Review*, U.S. Dep’t of Agriculture Forest Service (USFS) https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3856256.pdf (last visited May 22, 2024).

¹⁹ *Ibid.*

²⁰ *BLM Sage-grouse plans*, U.S. Dep’t of the Interior Bureau of Land Management (BLM) <https://www.blm.gov/programs/fish-and-wildlife/sagegrouse/blm-sagegrouse-plans> (last visited May 20, 2024).

²¹ See *supra* note 1.

²² Scott Streater, *Enviros sue to force changes to federal plans*, E&E NEWS (Feb. 25, 2016), <https://www.eenews.net/articles/enviros-sue-to-force-changes-to-federal-plans/>

²³ U.S. Dep’t of the Interior Secretarial Order 3353 (June 7, 2017).

²⁴ 82 Fed. Reg. 50666 (Nov. 1, 2017).

²⁵ *Wyoming Greater Sage-Grouse Conservation Land Use Planning*, BLM <https://eplanning.blm.gov/eplanning-ui/project/103347/570> (last visited May 22, 2024).

²⁶ *Greater Sage-Grouse Planning Update Newsletter*, BLM (March 29, 2023), https://eplanning.blm.gov/public_projects/2016719/200502020/20075824/250082006/GRSG%20Planning%20Newsletter-Alternatives%20Summary-final-03-29-2023.pdf

²⁷ 86 Fed. Reg. 66331 (Nov. 22, 2021).

²⁸ 89 Fed. Reg. 18963 (March 15, 2024).

IMPACTS FROM ESA LISTING DECISIONS

The prospect of a GRSG listing in Wyoming was of significant concern to State leaders and stakeholders. Not only is the State home to the most birds and habitat across its range, but Wyoming's experience with ESA listings, such as the grizzly bear and gray wolf, has shown how difficult, if not impossible, it is to have a species delisted. In fact, according to the USFWS, as of February 2023, only approximately three percent of the species listed as endangered or threatened in the U.S. over the last 50 years have been delisted due to recovery.²⁹ In total, Wyoming is home to 13 species currently protected by the ESA.³⁰

Grizzly Bear

The grizzly bear was listed as threatened pursuant to the ESA in 1975. In 1993, the USFWS identified six ecosystems in its Recovery Plan and designated recovery zones in the core of each as areas to focus recovery efforts.

Wyoming is part of the Greater Yellowstone Ecosystem (GYE) recovery zone which encompasses northwestern Wyoming, eastern Idaho, and southwestern Montana (outside the Yellowstone National Park boundary).^{31,32} Even though GYE recovery goals were met for the sixth year in a row in 2003, and despite significant regulatory, litigative, and legislative efforts to have the GYE grizzly bear delisted since that time, it remains on the ESA list (Table 02).



²⁹ *ESA Basics 50 Years of Conserving Endangered Species*, U.S. Fish & Wildlife Service (USFWS) (Feb. 2023), <https://www.fws.gov/sites/default/files/documents/endangered-species-act-basics-february-2023.pdf>

³⁰ *Wyoming Natural Diversity Database*, UNIV. OF WYO., https://wyndd.org/portal/apps/data_explorer/list (last visited May 20, 2024).

³¹ *History of Bear Management*, NAT'L PARK SERVICE (NPS) <https://www.nps.gov/yell/learn/historyculture/bear-management.htm> (last visited May 22, 2024).

³² *Grizzly Bear*, USFWS <https://www.fws.gov/species/grizzly-bear-ursus-arctos-horribilis> (last visited May 20, 2024).

TABLE 02

GYE Grizzly Bear ESA Listing Timeline (1975-2018)³⁴

Year	Action
1975	USFWS lists the grizzly bear as threatened under the ESA
1993	Recovery plan implemented that is required to be met for six consecutive years
2000	USFWS Draft GYE Grizzly Bear Conservation Strategy to be implemented when it is removed from the list is released for public comment ³³
2002	USFWS releases approved GYE Grizzly Bear Conservation Strategy
2003	Recovery goals are met for the sixth year in a row
2005	USFWS proposes removing the grizzly bear from the threatened species list
2007	GYE grizzly bear is removed from the threatened species list and the Conservation Strategy is implemented
2007	Several groups file lawsuits challenging the USFWS delisting decision
2009	Delisting overturned by U.S. District Court and grizzly bears placed back on the threatened species list. Reasons for court ruling were: (1) the Conservation Strategy was unenforceable, and (2) USFWS did not adequately consider the impacts of the potential loss of whitebark pine nuts, a grizzly bear food source
2010	USFWS appeals U.S. District Court decision to keep the grizzly bear on the threatened species list
2011	Appeals court rules the grizzly bear should remain on the list, determining that the Conservation Strategy did provide adequate regulatory mechanisms, but USFWS did not sufficiently address the potential impacts from reduction of whitebark pine and other foods
2017	USFWS removes GYE grizzly bears from the threatened species list
2018	U.S. District Court restores protections for the GYE grizzly bears under the ESA

³³ 65 Fed. Reg. 11340 (March 2, 2000).

³⁴ See *supra* note 31.

In January 2022, Wyoming petitioned the USFWS to delist the GYE grizzly bear with Governor Gordon stating:

...there is no biological or legal reason to keep GYE grizzly listed. The states have applied the best-available population models, and the most current data shows grizzly bear populations have grown beyond the edges of the bear's biological and socially suitable range. With refined population estimates, data shows the population numbers more than 1,000 bears in the GYE, far beyond all scientific requirements for a recovered, viable population.³⁵

Once a petition to delist a species is filed, the ESA directs that USFWS has, “to the maximum extent practicable”, 90 days to provide an initial response outlining if the petition has provided substantial information showing that the delisting may be warranted.³⁶ If the USFWS decides a delisting may be warranted, the agency has 12 months from the date the petition was received to determine if “the petitioned action is warranted.”³⁷ If the action is warranted, the USFWS is directed to release the “complete text of a proposed regulation to implement such action” in a Federal Register notice.³⁸

The USFWS released its 90-day finding on Wyoming's 2022 petition to delist the GYE grizzly bear in a Federal Register Notice on February 6, 2023, more than a year after the petition was filed.³⁹ The Federal Register notice further announced that USFWS was initiating a 12-month status review which, under the ESA prescribed timeline, should have been completed by January 21, 2023.⁴⁰ In May 2023, Wyoming filed a petition in the U.S. District Court against the USFWS for failing to make a final determination on the State's petition to delist the GYE grizzly bear within the ESA prescribed timeframe of 12 months from the date of receiving it and requesting that the Court order USFWS to issue its final determination.⁴¹ To date, the USFWS has not released a determination on the State's petition to delist.⁴²

There have also been several pieces of federal legislation introduced in Congress to delist the grizzly bear. For example, in February 2023, Wyoming Senator Cynthia Lummis and Representative Harriet Hageman introduced the Grizzly Bear State Management Act of 2023 (S.443 and H.R.1245) which would delist the GYE grizzly bear.^{43,44} In July 2023, Senator Lummis was also an original cosponsor of the Grizzly Bear Review and Resource Restart Act of 2023 (S.2571) which would delist the grizzly bear in the lower 48 states.⁴⁵ To date, none of the legislation has passed.

³⁵ Michael Pearlman, *Governor Gordon Submits Petition To Remove Greater-Yellowstone Grizzlies from the Endangered Species List* [Press release], OFFICE OF WYOMING GOVERNOR MARK GORDON (Jan. 11, 2022), <https://content.govdelivery.com/accounts/WYGOV/bulletins/3052d15/>.

³⁶ *Endangered Species Act*, USFWS <https://www.fws.gov/laws/endangered-species-act/section-4> (last visited May 20, 2024).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ 88 Fed. Reg. 7658 (Feb. 6, 2023).

⁴⁰ *Ibid.*

⁴¹ Mike Koshmrl, *Wyoming sues over feds' tardiness on grizzly delisting decision*, WYOFIL (June 1, 2023), <https://wyofile.com/wp-content/uploads/2023/06/USFW-Grizzly-bear-petition.pdf>

⁴² Mark Heinz, *Whatever Happened With Delisting Wyoming's Grizzlies?*, COWBOY STATE DAILY (March 15, 2024), https://cowboystatedaily.com/2024/03/15/whatever-happened-with-delisting-wyomings-grizzlies/?utm_source=Klaviyo&utm_medium=campaign&_kx=0cmf4snOQONhlnV81zROptm-R-6pTLTQ4gMWl0WzQdE.UXPtrV

⁴³ S.445 – 118th Congress (2023-2024): Grizzly Bear State Management Act of 2023, S.445, 118th Cong. (2023).

⁴⁴ H.R. 1245 – 118th Congress (2023-2024): Grizzly Bear State Management Act of 2023, H.R. 1245, 118th Cong. (2023).

⁴⁵ *Co-Sponsored Legislation: Senator Cynthia M. Lummis*, Congress.gov https://www.lummis.senate.gov/legislation/cosponsored_legislation/ (last visited May 20, 2024).

Gray Wolf

Another prime example of a difficult to delist species is the gray wolf, which was formally listed under the ESA as endangered in the lower 48 states in 1978, except in Minnesota where it was listed as threatened.⁴⁶ Gray wolves in Wyoming are part of the Northern Rocky Mountain Distinct Population Segment (NRM) which also includes populations in Montana, Idaho, the eastern third of Oregon and Washington, and a small portion of north-central Utah.⁴⁷

While the gray wolf was delisted in Wyoming in 2017, it took significant effort for that to occur (Table O3).⁴⁸

TABLE O3

NRM Gray Wolf ESA Listing Timeline (1973-2017)⁴⁹

Year	Action
1973	NRM wolf listed as endangered under the Endangered Species Preservation Act
1978	ESA enacted replacing the Endangered Species Preservation Act
1978	Gray wolf endangered listings consolidated to list as full species in lower 48 states, except Minnesota where it was listed as threatened
1995	USFWS reintroduced nonessential experimental population of gray wolves in Yellowstone National Park (YNP) in Wyoming
2002	Wyoming wolf population met required recovery criteria by late 2002
2005	Wyoming District Court dismissed case by State of Wyoming challenging USFWS's rejection of its Gray Wolf Management Plan
2010	Wyoming District Court sets aside USFWS requirement that Wyoming designate the entire state as a trophy game area to provide adequate protection for gray wolves upon delisting and remands to USFWS to determine whether Wyoming's management plan with its proposed trophy game area constitutes an adequate regulatory mechanism
2012	USFWS delisted the gray wolf in Wyoming following approval of the Wyoming Gray Wolf Management Plan and eliminated nonessential experimental designation for gray wolves in YNP
2014	D.C. District Court vacated and remanded USFWS delisting of gray wolf in Wyoming based on inadequacy of Wyoming regulatory mechanisms
2015	USFWS reinstates ESA listing for gray wolf in Wyoming as nonessential experimental population for gray wolf
2017	D.C. Circuit Court reversed D.C. District Court 2014 decision and reinstated delisting gray wolf in Wyoming

⁴⁶ Erin H. Ward, *U.S. District Court Vacates Gray Wolf Delisting Rule*, CONGRESSIONAL RESEARCH SERVICE (Feb. 18, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10697>

⁴⁷ Joe Szuszwalak, *Service to Initiate Status Review of Gray Wolf in the Western U.S.* [Press release], USFWS (Sep. 15, 2021), <https://www.fws.gov/press-release/2021-09/service-initiate-status-review-gray-wolf-western-us>

⁴⁸ *Wyoming Gray Wolf Monitoring and Management: 2022 Annual Report*, WGFD <https://wgfd.wyo.gov/media/23929/download?inline> (last visited May 20, 2024).

⁴⁹ *Ibid.*



Since being delisted in 2017, Wyoming gray wolves are managed by separate federal agencies and the Wyoming Game and Fish Department (WGFD) in different geographical areas. The National Park Service manages and monitors the wolves in YNP and Grand Teton National Park; the Eastern Shoshone and Northern Arapaho Tribal Fish and Game Department oversee those on tribal lands; the USFWS manages the wolves on the National Elk Refuge; and the WGFD manages and monitors them everywhere else in the State.⁵⁰

While the State is exceeding gray wolf population targets, and robust management is in place for its protection, ongoing litigation presents the possibility of it being relisted through the courts. This potential was clearly illustrated through court order in 2023 directing USFWS to again designate the gray wolf as threatened in Minnesota and endangered in the lower 48 states and Mexico – with the exception of the NRM population (which includes Wyoming).⁵¹

On February 2, 2024, in response to petitions to list the gray wolf in the NRM and the Western United States, the USFWS determined a listing was not warranted.⁵² On the same date, the USFWS also announced its intention to develop a National Recovery Plan for gray wolves in the lower 48 states.⁵³ USFWS defines a recovery plan as “a road map with detailed site-specific management actions for private, Tribal, federal, and state cooperation in conserving listed species and their ecosystems.”⁵⁴ As justification for developing a National Recovery Plan, the USFWS states it is “recognizing that the national discussion around gray wolf management must look more comprehensively at conservation tools available to federal, state and Tribal governments...to support a long term and durable approach to the conservation of gray wolves.”⁵⁵ Wyoming has questioned its inclusion in a National Recovery Plan given the gray wolf is not listed in the State, and has expressed concern regarding possible impacts to current management on private lands.⁵⁶

⁵⁰ Ibid.

⁵¹ Gray Wolf Recovery News and Updates, USFWS <https://www.fws.gov/initiative/protecting-wildlife/gray-wolf-recovery-news-and-updates> (last visited May 21, 2024).

⁵² U.S. Fish and Wildlife Service completes status review and finding for gray wolves in the Western United States; launches National Recovery Plan, USFWS (Feb. 2, 2024), <https://www.fws.gov/press-release/2024-02/service-announces-gray-wolf-finding-and-national-recovery-plan>. See also 89 Fed. Reg. 8391 (Feb. 7, 2024).

⁵³ U.S. Fish and Wildlife Service completes status review and finding for gray wolves in the Western United States; launches National Recovery Plan [Press release], USFWS (Feb. 2, 2024), <https://www.fws.gov/press-release/2024-02/service-announces-gray-wolf-finding-and-national-recovery-plan>.

⁵⁴ Recovery Planning and Implementation, USFWS <https://www.fws.gov/project/recovery-planning-and-implementation#:~:text=The%20main%20body%20of%20the%20recovery%20plan%20comprises,time%20and%20costs%20to%20achieve%20the%20plans%20goals>. (last visited May 21, 2024).

⁵⁵ Ibid.

⁵⁶ Barrasso, Lummis: Keep Gray Wolf Management in Wyoming, OFFICE OF U.S. SENATOR JOHN BARRASSO (March 8, 2024), <https://www.barrasso.senate.gov/public/index.cfm/2024/3/barrasso-lummis-keep-gray-wolf-management-in-wyoming>.

IMPACTS TO MULTIPLE USE

While the grizzly bear and gray wolf listings have resulted in negative impacts to agricultural operations, the effects of a GRSG listing, due to its extensive range, would be much more impactful, particularly in Wyoming. Wyoming contains approximately 38% of the total number of GRSG and 24% of the total GRSG habitat, making it home to the highest number of birds and the most habitat across its 11-state range.^{57,58} With approximately 70% of the State consisting of occupied sage-grouse habitat, an ESA listing would greatly restrict any type of land use in more than half of Wyoming, including oil and natural gas development, mining, grazing, and construction.⁵⁹ With this in mind, it would be impossible to mitigate the negative economic impact of a GRSG listing in the State.

Under an ESA listing, more restrictive protections and stipulations for land use would apply to all GRSG in any habitat they occupy. As part of the listing process, USFWS conducts a review of GRSG habitat to determine which areas will be deemed critical habitat.⁶⁰ In a worst-case scenario, the agency could designate all suitable habitat as critical habitat, whether occupied or unoccupied by GRSG.⁶¹ Critical habitat designations would not affect activities by private landowners unless federal funding or permits are required to carry out the activity, thereby creating a federal “nexus”.⁶² This would include federal grazing permits and projects that receive U.S. Department of Agriculture (USDA) farm bill funding or monies through programs such as Environmental Quality Incentives Program (EQIP), the Conservation Reserve Program (CRP), or the Grasslands Reserve Program (GRP). Any activity with a federal “nexus” would require ESA Section 7 consultation prior to approval.⁶³

Pursuant to Section 7 of the ESA, “federal agencies must consult with the USFWS when any project or action they authorize, fund, or carry out may affect a listed species or designated critical habitat.”⁶⁴ If an activity is not in designated critical habitat, but may affect a listed species, Section 7 consultation is still required.⁶⁵ The consultation process can be time-consuming and generally begins with an informal consultation wherein the federal agency is required to conduct a biological assessment to determine if the action will adversely affect the listed species.⁶⁶ If it is determined that the activity will likely adversely affect the listed species, the federal agency will request a formal consultation with the USFWS which can last up to 90 days.⁶⁷ The USFWS will have 45 days after that to prepare a biological opinion ascertaining “whether the federal agency has ensured that its action is not likely to jeopardize the continued existence of a listed species and/or result in the destruction or adverse modification of critical habitat,” and outlining conservation recommendations and “reasonable and prudent measures . . . to minimize any ‘take’ of the listed species.”⁶⁸

⁵⁷ Mike Koshmrl, *Revisions to Wyoming’s sage grouse protection map take flight*, WYOFIL (July 5, 2023), <https://wyofile.com/revisions-to-wyomings-sage-grouse-protection-map-take-flight/>.

⁵⁸ Data based on 2015 USFWS current range data layer used during 2015. *See supra* note 2.

⁵⁹ *See supra* note 2.

⁶⁰ *Critical Habitat*, USFWS, <https://www.fws.gov/project/critical-habitat>, (last visited May 21, 2024).

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *ESA Section 7 Consultation*, USFWS <https://www.fws.gov/service/esa-section-7-consultation> (last visited May 21, 2024).

⁶⁵ *See supra* note 60.

⁶⁶ *See supra* note 64.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*



“Take” of a listed species is prohibited pursuant to Section 9 of the ESA and refers to actions that “kill or injure wildlife”.⁶⁹ A take can also include actions that cause “significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁷⁰ Take applies to all birds on all lands, including private land.⁷¹ Landowners and entities seeking to conduct lawful activities on the land that may unintentionally result in take can apply for an exemption or incidental take permit (ITP) pursuant to Section 10 of the ESA.⁷² Congress added this exemption to the ESA in 1982 as a way “to reduce conflicts between listed species and economic development.”⁷³ ITP applications must include a habitat conservation plan (HCP) that “describe[s] the anticipated effects of the proposed taking, how those impacts will be minimized and mitigated, and how conservation measures included in the plan will be funded.”⁷⁴

Once listed, it will most likely be a full five years before the USFWS conducts its first five-year status review of the listed species to determine if it can be removed from the list.⁷⁵ However, experience has shown through the grizzly bear and gray wolf listings, once a species is placed on the ESA list, the agency review process and potential for litigation means it generally takes much longer than five years for a species to be delisted.

⁶⁹ *ESA Basics 40 Years of Conserving Endangered Species*, USFWS (Feb. 2017), https://www.fws.gov/sites/default/files/documents/news-attached-files/ESA_basics.pdf

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Habitat Conservation Plans*, USFWS <https://www.fws.gov/service/habitat-conservation-plans> (last visited May 21, 2024).

⁷⁴ *Ibid.*

⁷⁵ *Five-Year Status Reviews under the Endangered Species Act*, USFWS (Oct. 2019), <https://www.fws.gov/sites/default/files/documents/Five-year-Reviews.pdf#:~:text=A%20five-year%20review%20is%20a%20periodic%20review%20of,the%20appropriate%20level%20of%20protection%20under%20the%20ESA.>

IMPACTS TO ECONOMIC OPPORTUNITIES

With GRSG habitat in more than half of Wyoming, a GRSG ESA listing would greatly restrict not only multiple use, but also economic opportunities in the State. This is particularly true for energy development which generates significant amounts of revenue for the State, so much so that Wyoming ranks as the “second-most energy-intensive state economy” in the nation.⁷⁶

The oil and natural gas industry, which has long been an essential contributor to Wyoming’s economy, would be the energy sector most acutely affected by a GRSG ESA listing. Industry experts in the State generally estimate that 50% of Wyoming’s total revenue is funded by minerals, with approximately 75% of that being attributable to oil and natural gas. In 2022, oil and natural gas production generated approximately \$2.72 billion for the State in the form of property taxes, severance taxes, federal royalties, federal lease revenues, state royalties, sales and use taxes, and conservation mill levies.⁷⁷ Additionally, in 2021, Wyoming’s oil and natural gas industry directly employed more than 20,000 people with an annual payroll of \$3.6 billion.⁷⁸

As the nation’s second largest producer in both oil and natural gas on federal lands, the ESA requirement for Section 7 consultation to take place prior to approval of any activities with a federal nexus that may affect a listed species or designated critical habitat would have a significant impact on oil and natural gas development.⁷⁹ While the consultation requirement would not apply to existing or approved oil and natural gas development, Section 7 consultations would be required for actions in approved development areas submitted after the listing goes into effect, such as Applications for Permits to Drill (APDs), right-of-way (ROW) applications, and sundry applications for surface disturbing activities.⁸⁰ With 574 APDs being submitted to the Wyoming BLM in Fiscal Year 2022, the amount of Section 7 consultations that would be required for APDs alone could overwhelm the USFWS, creating a backlog, delaying project approvals, and increasing costs.⁸¹ Not only that, the mitigation measures and restrictions required through the consultation process would only serve to further restrict development and increase costs.⁸²

Additionally, Section 9 take prohibitions would apply to all existing development and operations opening up the possibility of being heavily fined for take of a GRSG, which includes any habitat modification that may result in impacts to the bird.^{83,84} While operators can apply for Section 10 ITPs, they are not only costly and time consuming to obtain, but if the GRSG were listed, the USFWS would most likely be initially focused on higher priorities, possibly increasing ITP processing timeframes.⁸⁵

⁷⁶ *Wyoming State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (EIA) (May 18, 2023), <https://www.eia.gov/state/?sid=WY#tabs-3>.

⁷⁷ *Oil and Gas Facts and Figures 2023*, PETROLEUM ASS’N OF WYO. (PAW) <https://pawyo.org/facts-figures-2023/> (last visited May 21, 2024).

⁷⁸ *Ibid.* See also *New Analysis: Wyoming’s Abundant Natural Gas and Oil Resources Provide Nearly \$11.9 Billion in Economic, Trade & Job Benefits*, AMERICAN PETROLEUM INST. (API) (May 16, 2023), <https://www.api.org/news-policy-and-issues/news/2023/05/16/api-pwc-wy-2023>.

⁷⁹ *Ibid.*

⁸⁰ Temple Stoellinger, *Implications of a Greater Sage-Grouse Listing on Western Energy Development*, National Agricultural & Rural Development Policy Center (NARDeP) (June 2014), https://www.nardep.info/wp-content/uploads/2020/09/Brief33_ImplicationsListingSageGrouse.pdf.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ See *supra* note 69.

⁸⁵ *Ibid.*

The added delays, increased costs, considerable mitigation measures and restrictions, and risks associated with a GRSG listing would not only make it exceedingly difficult for planned oil and natural gas development to take place, but it would also deter operators from investing in future development throughout much of the State. With these threats in mind, the State executive branch led an effort to develop a management strategy to protect GRSG and preclude the need for an ESA listing, while at the same time working to maintain the ability for multiple use and economic opportunities to occur on the land.⁸⁶ Thus, in 2000, the Wyoming Governor Jim Geringer established a citizen working group that “consisted of 18 Wyoming citizens from diverse backgrounds including agricultural, industrial, governmental, environmental, hunting, and Native American tribal interests” to develop a sage-grouse conservation plan.⁸⁷ Some of the stated goals of the plan were to:

- Increase the abundance and distribution of sage-grouse in Wyoming;
 - Determine and halt the primary causes of sage-grouse population declines in Wyoming;
 - Promote public involvement in planning and decision-making;
 - Provide a framework for the development and implementation of local sage-grouse conservation plans to address and rectify potential impacts;
 - Maintain an atmosphere of cooperation, participation, and commitment among wildlife managers, landowners, land managers, other stakeholders and interested public in development and implementation of conservation actions;
 - Implement conservation actions in a manner that meets the needs of sage-grouse, and are least disruptive to a stable and diverse economic base in Wyoming; and
 - Recognize the need to continually update data and apply them to local situations.⁸⁸

The working group spent approximately two years identifying the threats to GRSG in the State and developing a conservation plan to address them.⁸⁹ In July 2002, the citizen working group presented the draft Wyoming Greater Sage-Grouse Conservation Plan to the Wyoming Game and Fish Commission and opened it up for public comment.⁹⁰ The plan identified existing threats to GRSG and established eleven Local Working Groups (LWGs) to implement elements of the statewide plan on a regional scale (Figure 01).⁹¹ Further research needs were also identified, including mapping to delineate priority areas for GRSG conservation, and additional research and data compilation to address remaining issues and questions. The final draft was then presented to the Commission in May 2003 and adopted in June of that year.⁹²

⁸⁶ See *supra* note 3.

⁸⁷ See *supra* note 4.

⁸⁸ *Ibid.*

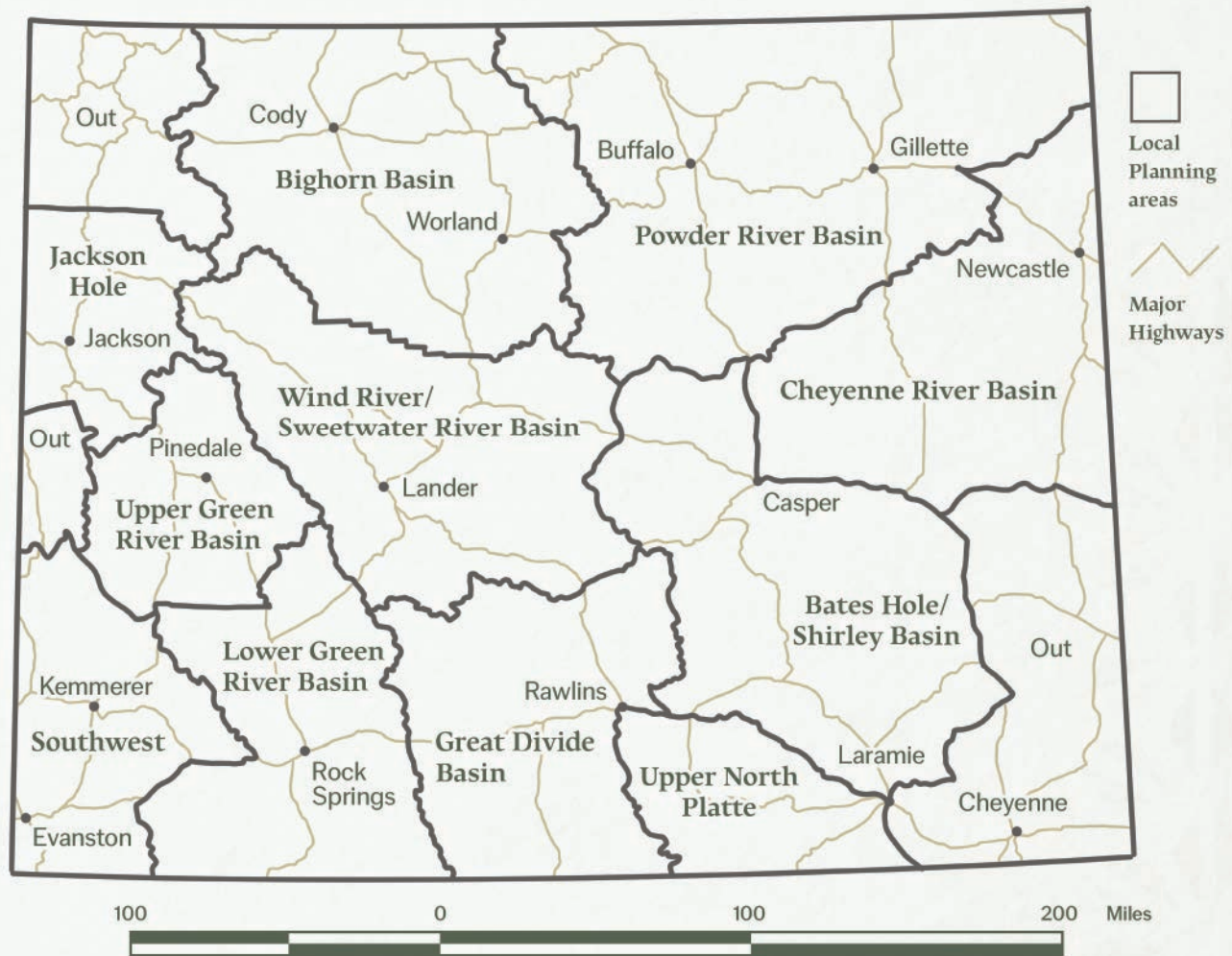
⁸⁹ See *supra* note 8.

⁹⁰ See *supra* note 4.

⁹¹ There are currently eight LWGs. *Wyoming Local Sage-Grouse Working Groups – January 2024*, WGFD <https://wgfd.wyo.gov/media/2434/download?inline> (last visited May 21, 2024).

⁹² See *supra* note 4.

FIGURE 01
2003 GRSG LWG Map⁹³

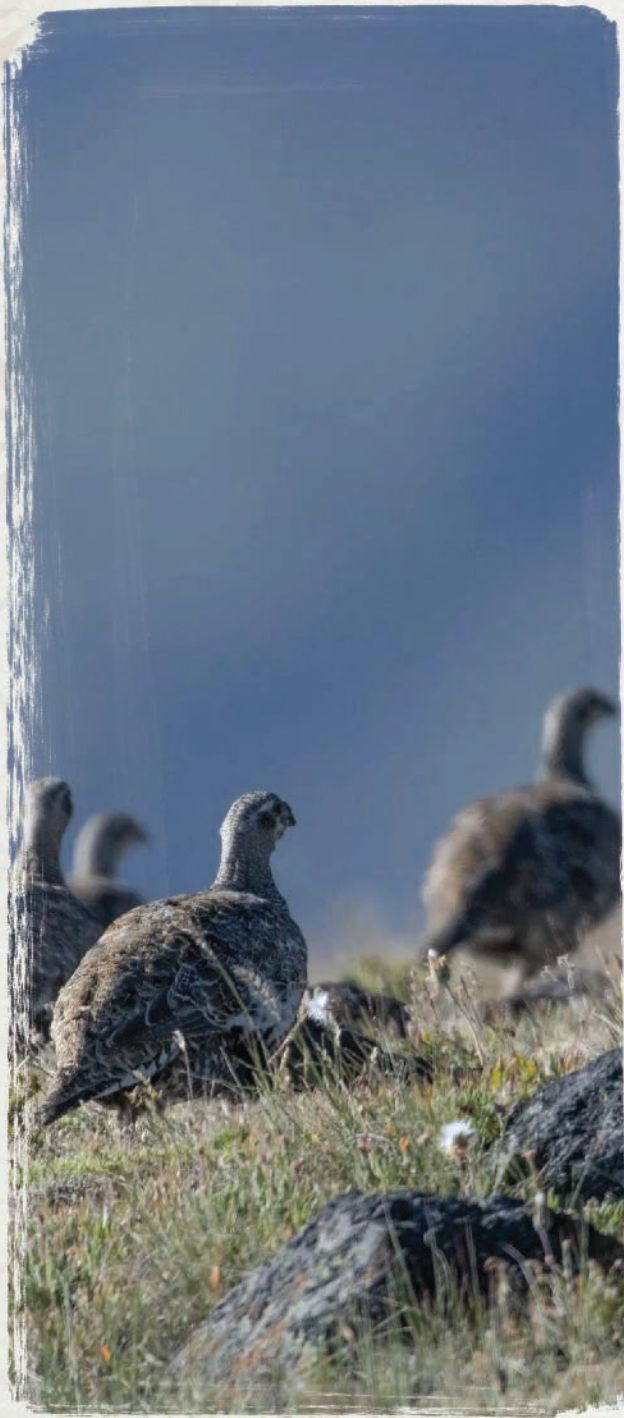


On January 12, 2005, in response to three petitions to list the GRSG as endangered filed by Craig C. Dremann, the Institute for Wildlife Protection, and the American Lands Alliance, the USFWS determined a GRSG ESA listing was not warranted because even though “sagebrush habitat continues to be lost and degraded in parts of the greater sage-grouse’s range..., its numbers are well represented”, and concluding that “the species is not in danger of extinction, nor is it likely to become endangered in the foreseeable future.” This decision was promptly legally challenged by Western Watersheds Project which claimed the USFWS did not “rely on the ‘best scientific and commercial data available as required by...the ESA.’”⁹⁵

⁹³ *Ibid.*

⁹⁴ *See supra* note 5.

⁹⁵ *See supra* note 7.



Pending the court's decision on USFWS's 2005 "not warranted" determination, and in the backdrop of a declining State GRSG population and rising concern for negative economic impacts that could result from a listing (particularly through restrictions on energy development), Governor Freudenthal convened a group of stakeholders at a Sage-Grouse Summit in June 2007.⁹⁶ The diverse group of stakeholders included "ranchers, oil and gas producers, biologists, conservationists, and state and federal officials."⁹⁷ During the Summit, the Governor discussed his vision of a balanced and collaborative approach for developing a statewide sage-grouse strategy that would protect the bird while allowing for continued economic development, stating:

"We have a narrow window of opportunity to protect the grouse and prevent it from being listed as an endangered species. My hope is that we can formulate a more unified plan that will balance protection with reasonable energy exploration, grazing and other activities that have and will continue to take place in sage grouse habitat."⁹⁸

The Summit led to the establishment of the Sage Grouse Implementation Team (SGIT) which, led by Bob Budd, Executive Director of the Wyoming Wildlife and Natural Resource Trust, was tasked with developing "realistic" recommendations for protecting the GRSG and precluding the need for an ESA listing.⁹⁹

⁹⁶ Melodie Edwards, *The Pros And Cons Of Not Listing The Greater Sage Grouse*, WYOMING PUBLIC MEDIA (Sept. 25, 2015), <https://www.wyomingpublicmedia.org/open-spaces/2015-09-25/the-pros-and-cons-of-not-listing-the-greater-sage-grouse>.

⁹⁷ *Summit and new study results add to sage-grouse deliberations*, Wildlife Management Institute (July 8, 2007), <https://wildlifemanagement.institute/outdoor-news-bulletin/july-2007/summit-and-new-study-results-add-sage-grouse-deliberations>.

⁹⁸ *Ibid.*

⁹⁹ *See supra* note 8.

SAGE GROUSE IMPLEMENTATION TEAM

To address the increased threat of a GRSG ESA listing by the USFWS, Wyoming established the SGIT to develop recommendations for a statewide strategy to protect the GRSG and preclude the need for it to be listed. SGIT members are appointed by the Governor and represent federal and state agencies, state and local government, and energy, agriculture, hunting, and environmental interests.¹⁰⁰

¹⁰¹The group operates through an open and transparent process and holds public meetings, facilitated by SGIT Chairman Bob Budd, several times a year, as necessary, to ensure adequate regulatory mechanisms are in place to protect Wyoming's GRSG.¹⁰² The Wyoming State Legislature established the SGIT in statute in 2020.¹⁰³

Initially tasked in 2007 with developing recommendations for protecting the GRSG, the SGIT relied on the State's strategy for GRSG conservation:

- Conserve populations and habitats where conservation efforts will have the most effect (core areas);
- Maintain and enhance habitats;
- Maintain economic opportunity, particularly where conflicts are minimal;
- Build a sound ecological and economic model for conservation; and
- Include major stakeholders in the decision-making process.¹⁰⁴

Later that year, the SGIT provided Governor Freudenthal with 21 recommendations for protecting GRSG, and in March of 2008, presented him with a map designating approximately 15 million acres (24% of the State) as GRSG "core population areas" where the greatest conservation efforts should be directed (Figure 02).¹⁰⁵

¹⁰⁰ Sage-Grouse Implementation Team, WGFD <https://wgfd.wyo.gov/wyoming-wildlife/sage-grouse-management/sage-grouse-executive-order#SGIT> (last visited May 22, 2024).

¹⁰¹ Wyoming's Sage-Grouse Implementation Team, WGFD (July 2023), <https://wgfd.wyo.gov/media/28320/download?inline>.

¹⁰² *Ibid.*

¹⁰³ Wyo. Stat. §9-19-101 (2020).

¹⁰⁴ Core area Conservation: Wyoming's Sage Grouse Strategy, from Wyoming Legislature Travel, Recreation, Wildlife and Cultural Resources Committee Meeting PowerPoint, SAGE GROUSE IMPLEMENTATION TEAM (SGIT) (2015), <https://wyoleg.gov/InterimCommittee/2015/06-0810APPENDIX18.pdf>.

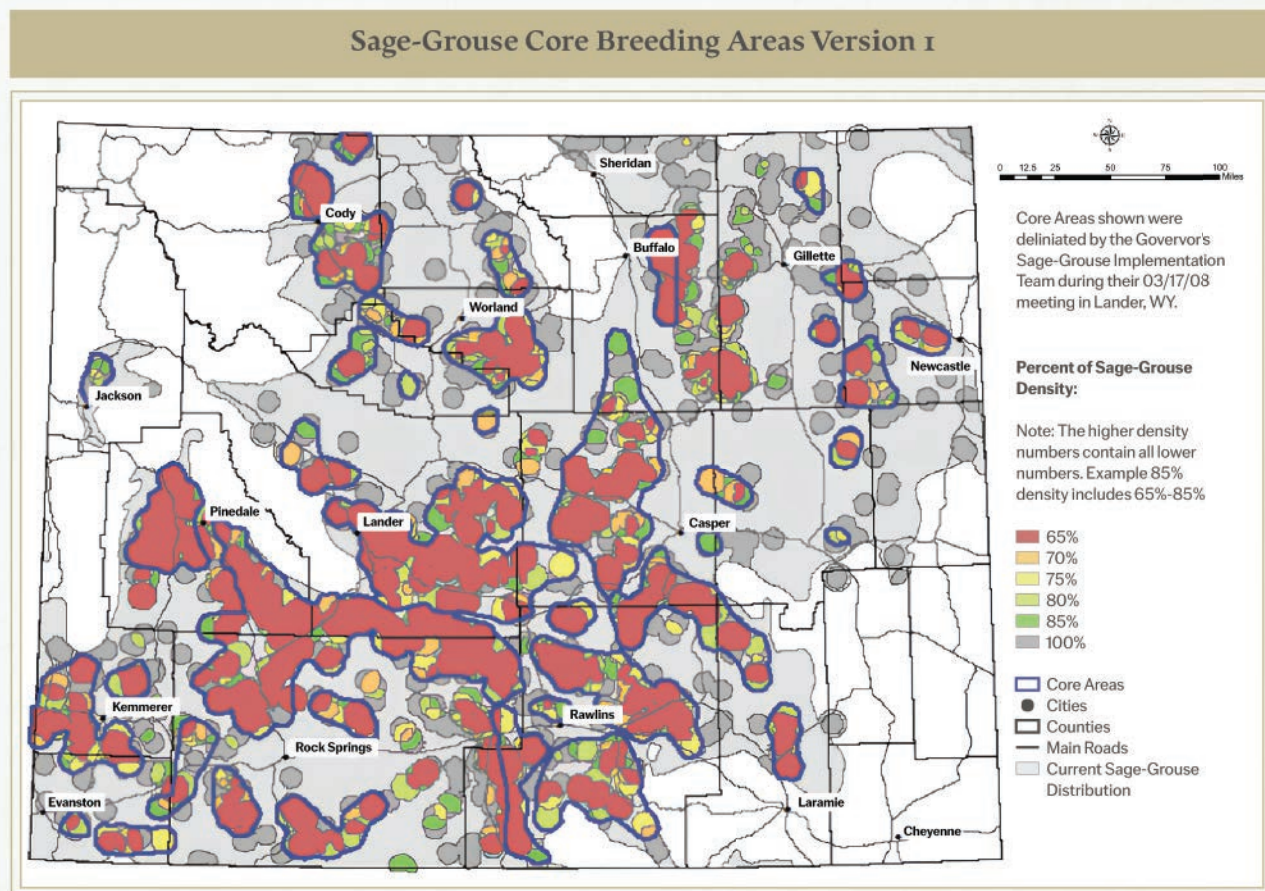
¹⁰⁵ Executive Order coordinates agencies to protect Sage Grouse habitat in Wyoming, Pinedale Online (Aug. 1, 2008), <https://www.pinedaleonline.com/news/2008/08/ExecutiveOrdercoordi.htm>.

CORE AREA MAPS

The SGIT developed the core area map by identifying and mapping leks, winter concentration areas, connectivity, areas of the best GRSG habitat, and other areas of habitat with the potential for “lift” (increased GRSG numbers).¹⁰⁶ Throughout the mapping process, the SGIT also took into consideration existing uses on the land and valid existing rights, particularly areas of increased development potential.¹⁰⁷ The initial goal of the map was to ensure protection of two-thirds of the State’s GRSG population, however, the result has exceeded that goal and provides protection to 83% of the GRSG population.¹⁰⁸

FIGURE 02

Version 1 of Wyoming’s Sage-Grouse Core Area Map¹⁰⁹



¹⁰⁶ See *supra* note 104.

¹⁰⁷ *Ibid.*

¹⁰⁸ Wyo. Exec. Order No. 2019-3 (Aug. 21, 2019).

¹⁰⁹ See *supra* note 104.

While mapping efforts continued, Governor Freudenthal sent the SGIT recommendations and draft map to the USFWS for its review and comments.¹¹⁰ The USFWS responded that it believed “the ‘core population area strategy’ is a sound framework for a policy by which to conserve Greater Sage-Grouse in Wyoming” and encouraged the State to ensure that “all seasonal habitats to sustain the core population areas are identified and incorporated into the strategy, and associated maps”.¹¹¹ With this positive feedback from the USFWS, Governor Freudenthal and others deliberated the best mechanism to codify the GRSG core area strategy, either through executive order, legislation, or rulemaking. Due to the technical and scientific nature of the strategy, and to accommodate the need for timeliness and possible future revisions, Governor Freudenthal decided to move forward with the most nimble and flexible option and drafted an executive order. The first SGEO, Executive Order 2008-2 Greater Sage-Grouse Core Area Protection, incorporated most of the recommendations and the original core area map provided by the SGIT.¹¹² It was signed by Governor Freudenthal on August 1, 2008.¹¹³

On March 23, 2010, in response to a December 4, 2007 court decision remanding the 2005 “not warranted” decision back to the USFWS for further consideration, USFWS published its finding listing the GRSG as warranted but precluded by higher priority listing actions, stating it would develop a proposed rule to list the bird as priorities allow.¹¹⁴ In its decision, the USFWS commended Wyoming stating “[t]he Service believes that the core area strategy proposed by the State of Wyoming in Executive Order 2008-2, if implemented by all landowners via regulatory mechanisms, would provide adequate protection for sage-grouse and their habitat in that State.”¹¹⁵ It further stated the “strategy provides excellent potential for meaningful conservation of sage-grouse.”¹¹⁶ However, the USFWS also expressed its concern that core area protections did not extend to occupied GRSG habitat outside the core areas.¹¹⁷

Also in 2010, the SGIT recommended the core area map and stipulations be updated to reflect new science and on-the-ground information that was becoming available. This led to the work on a revised SGEO to replace EO 2008-2 to adopt Version 3 of the core area map (Figure 03), which added approximately 400,000 acres to core, and to add new stipulations, such as protections for GRSG leks outside core.¹¹⁸ To provide regulatory certainty for stakeholders, the State included a provision that “absent compelling information” the core area map would remain unchanged for a minimum of five years.¹¹⁹ Executive Order 2010-4 Greater Sage-Grouse Core Area Protection was signed by Governor Freudenthal on August 18, 2010.¹²⁰

¹¹⁰ See *supra* note 105.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ See *supra* note 9.

¹¹⁴ See *supra* note 17.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ See *supra* note 8.

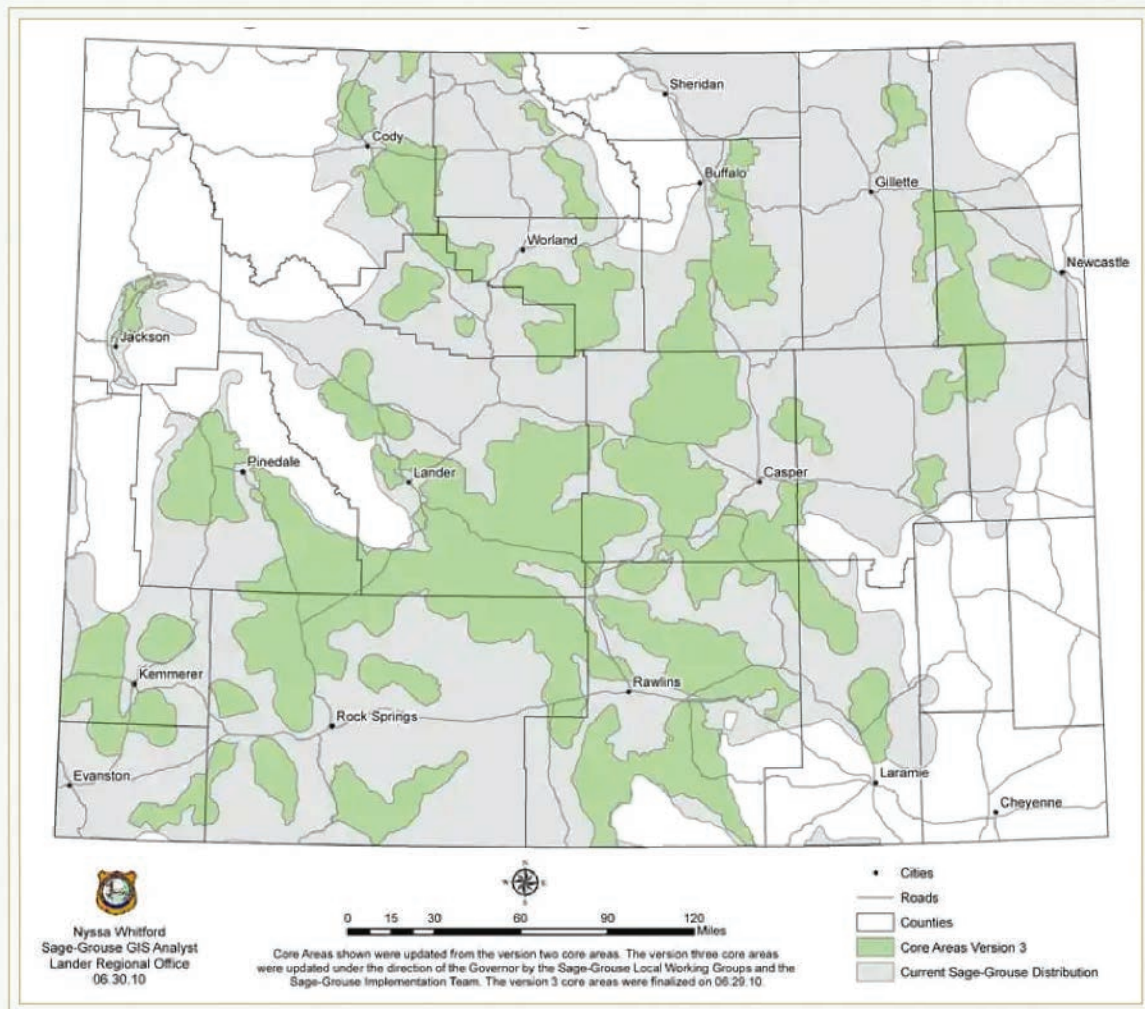
¹¹⁹ Wyo. Exec. Order No. 2010-4 (Aug. 18, 2010).

¹²⁰ *Ibid.*

FIGURE 03

Version 3 of the Wyoming GRSB Core Area Map¹²¹

Sage-Grouse Core Management Areas Version 3



The 2010 USFWS “warranted but precluded” decision was challenged in Court by Wild Earth Guardians (WEG). In 2011, WEG entered into a settlement agreement with the U.S. Department of the Interior (DOI) under which USFWS agreed to make listing decisions on 251 species including GRSB by September 2015.¹²² To enable the USFWS to reach a not warranted decision on the GRSB, the BLM and U.S. Forest Service (USFS) under the Obama Administration initiated an effort to develop 98 land use plans to conserve GRSB habitat across its range.¹²³ The states in the GRSB range initiated efforts to update their plans as well.¹²⁴

¹²¹ See *supra* note 8.

¹²² See *supra* note 18.

¹²³ *Historic Conservation Campaign Protects Greater Sage-Grouse*, U.S. DEP'T OF THE INTERIOR (DOI) (Sept. 22, 2015), <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse>.

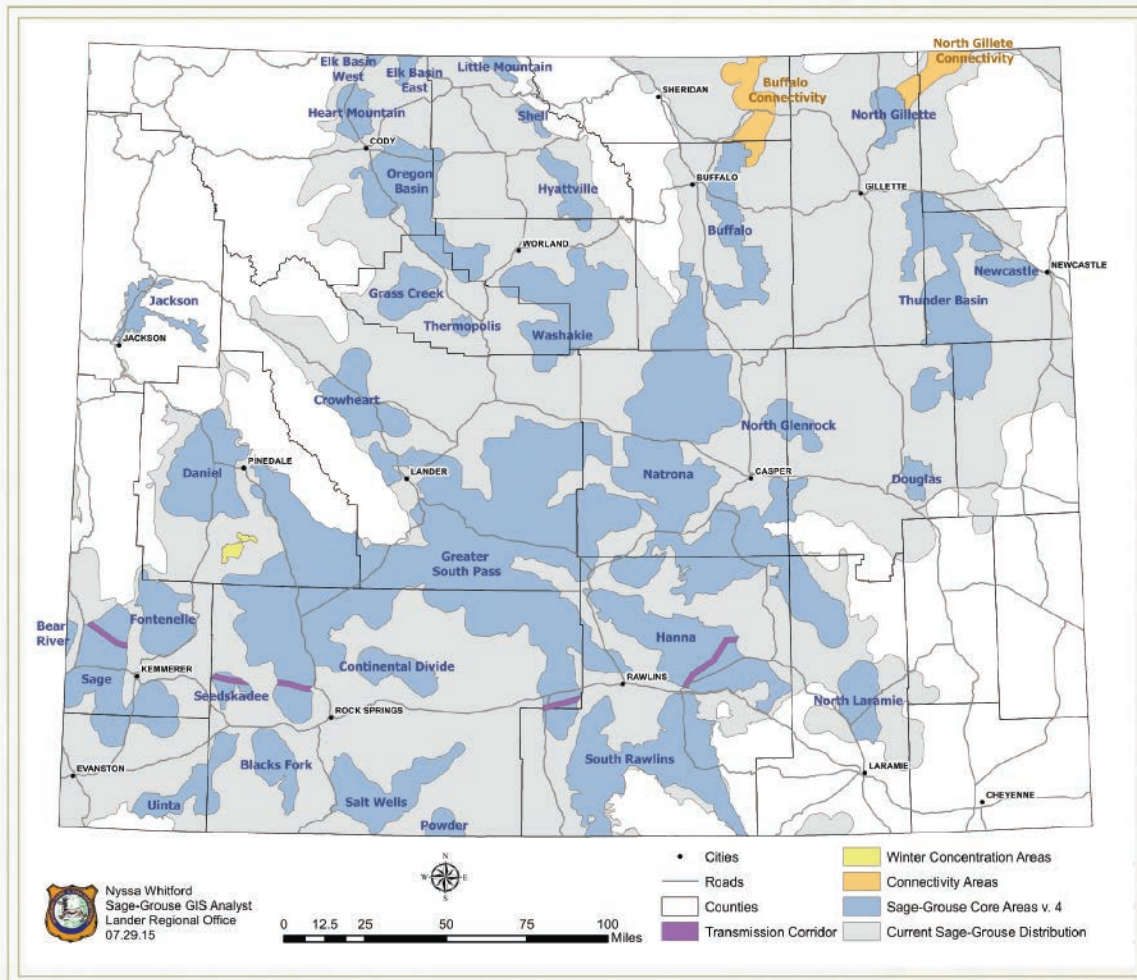
¹²⁴ *Ibid.*

The SGIT devoted significant effort to working with stakeholders to develop an updated core area map and to again update protective stipulations based on the latest science and on-the-ground information. Governor Mead signed Executive Order 2015-4 on July 29, 2015, adopting Version 4 of the core area map (Figure 04) and new protective stipulations as recommended by the SGIT.

FIGURE 04

Version 4 of the Wyoming GRSR Core Area Map¹²⁵

Wyoming Sage-Grouse Core Areas v. 4



¹²⁵ Wyoming Sage-Grouse Core Areas v. 4, WGFD <https://wgfd.wyo.gov/media/2465/download?inline> (last visited May 22, 2024).

On September 22, 2015, the BLM and USFS released Records of Decision finalizing 98 land use plans to conserve GRSG habitat across its range.¹²⁶ Shortly thereafter, on October 2, 2015, the USFWS determined a GRSG ESA listing was not warranted, stating “we have determined that the primary threats to greater sage-grouse have been ameliorated by conservation efforts implemented by Federal, State, and private landowners.”¹²⁷ The USFWS further stated, “[t]he Wyoming Plan has been in place for 8 years, and has demonstrated its conservation value by protecting areas identified as important to sage-grouse conservation.”¹²⁸

In 2016, environmental groups sued the BLM based on the NEPA analysis in the 2015 GRSG RMPs, and in 2017, under the Trump Administration and following a review of the 2015 plans, BLM determined elements of some of the RMPs should be revised and published a Notice of Intent to amend them.¹²⁹ Through this process, Wyoming’s goal was to remedy inconsistencies and achieve alignment between the BLM GRSG RMPs and the State’s core area conservation plan. That was successfully accomplished, and on March 5, 2019, the revised BLM RMPs were finalized.¹³⁰

With the revised BLM GRSG RMPs having been released, Governor Gordon signed the current SGEO, Executive Order 2019-3 Greater Sage-Grouse Core Area Protection, on August 21, 2019.¹³¹ This SGEO updated protective stipulations and adopted the existing Version 4 GRSG core area map.

In 2021, the BLM, under the Biden Administration, subsequently published a Notice of Intent to revise the GRSG RMPs.¹³² In response to this Notice, the SGIT established a Mapping Review Subcommittee, comprised of members representing agriculture, energy, hunting, and environmental interests, and State and federal agencies, to develop an updated map based on changes in the GRSG range by identifying new areas that warrant core area protection and areas that no longer meet the definition of a core area.¹³³

As part of the SGIT process in developing the updated map, a new 182,835-acre core area, consisting of approximately 90% private land and 10% public land, was proposed in northeast Wyoming by the SGIT Mapping Review Subcommittee.¹³⁴ Several landowners in the area were resistant to their property being located in a GRSG core area, and proposed that it should instead be designated as a stewardship area, wherein they can conserve GRSG habitat on their lands by entering into Candidate Conservation Agreements with Assurances (CCAAs) with the USFWS.¹³⁵ CCAAs are voluntary agreements that “provide incentives for non-federal landowners to conserve candidate and other unlisted species likely to become candidates in the future.”¹³⁶

¹²⁶ See *supra* note 123.

¹²⁷ See *supra* note 1.

¹²⁸ *Ibid.*

¹²⁹ 82 Fed. Reg. 47248 (Oct. 11, 2017).

¹³⁰ The 2019 RMPs were challenged in U.S. District Court, resulting in an order precluding BLM from implementing them and reverting GRSG management to the 2015 RMPs. See *supra* note 26.

¹³¹ See *supra* note 108.

¹³² See *supra* note 27.

¹³³ See *supra* note 57.

¹³⁴ SGIT Meeting, Douglas, Wyoming (August 28, 2023).

¹³⁵ *Ibid.*

¹³⁶ *Candidate Conservation Agreements with Assurances*, USFWS <https://www.fws.gov/service/candidate-conservation-agreements-assurances> (last visited May 22, 2024).

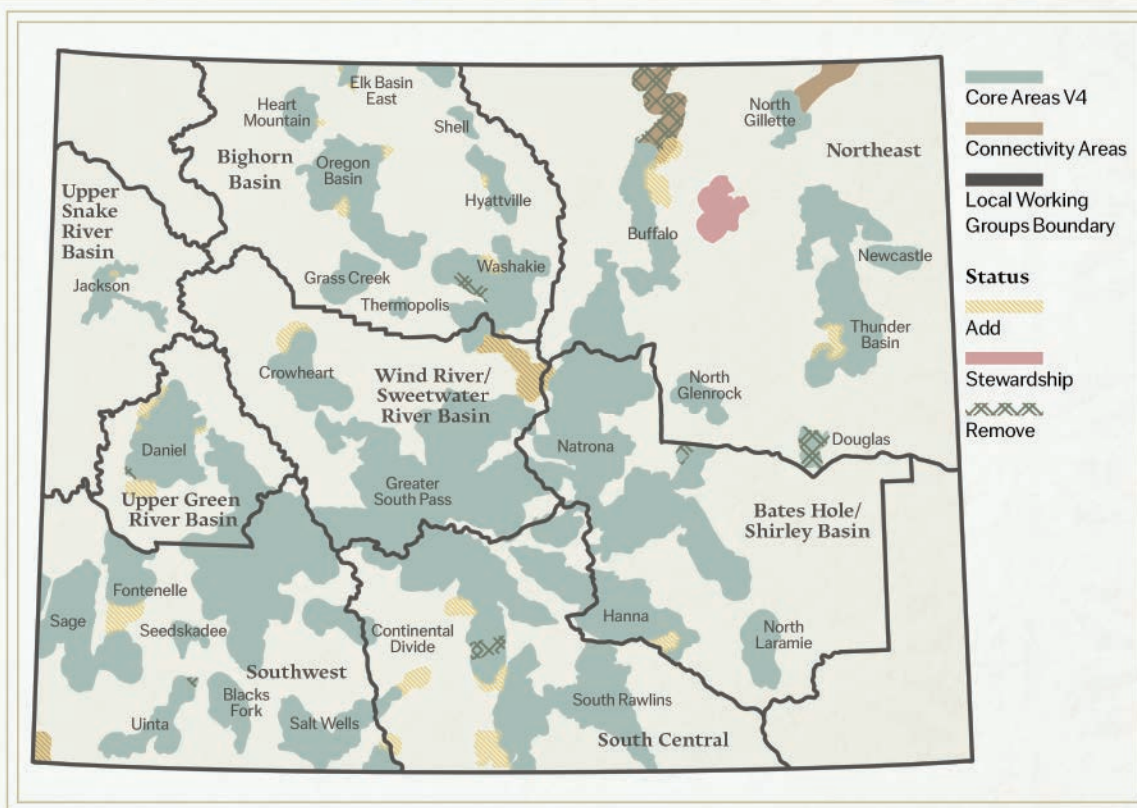
As part of a CCAA, “landowners agree to undertake specific activities that address the identified threats to the target species.”¹³⁷ Conservation measures that landowners can agree to include “protecting and enhancing existing populations and habitats, restoring degraded habitat, creating new habitat, and not undertaking specific, potentially impacting or damaging activities.”¹³⁸ The CCAA process is lengthy and can take more than 12 months to complete.¹³⁹

The State submitted the updated core area map (Figure 05) to BLM in October 2023, asking that the agency consider including it in the revised GRSG RMP.¹⁴⁰ The map is included in the preferred alternative (Alternative 5) in BLM’s Draft GRSG RMP that was released for public comment on March 15, 2024.¹⁴¹

FIGURE 05

2023 Sage Grouse Implementation Team Draft Core Area Map Revision¹⁴²

State of Wyoming Proposed Sage-Grouse Core Revisions 03/22/2024



¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ See *supra* note 133.

¹⁴⁰ Governor Gordon Letter to BLM Director Tracy Stone-Manning (October 30, 2023).

¹⁴¹ See *supra* note 28.

¹⁴² State of Wyoming Proposed Sage-Grouse Core Revisions 3/22/2024, WGFD <https://wgfd.wyo.gov/media/30025/download?inline> (last visited May 22, 2024).

GREATER SAGE-GROUSE PROTECTIVE STIPULATIONS

GRSG protective stipulations were developed based on the latest science to address key threats to GRSG, which in Wyoming has been identified as habitat fragmentation from energy and housing development.¹⁴³ The protective stipulations were put in place to incentivize development outside of core areas, and to avoid, minimize, and mitigate impacts to GRSG from activities that take place inside core areas. The core area map is the guide for where GRSG protective stipulations will be applied, with the most protective ones being applied in core areas. The SGIT re-evaluates and revises the stipulations as new science and information becomes available. In general, the stipulations are comprised of density and disturbance caps, lek buffers, and seasonal restrictions (Table 04). Additional stipulations and protective measures have been included over time, such as noise restrictions, compensatory mitigation (Wyoming Greater Sage Grouse Compensatory Mitigation Act¹⁴⁴), and adaptive management.

TABLE 04

Wyoming SGEO Protective Stipulations¹⁴⁵

Stipulations for Development in Core	Stipulations for Development in Non-Core
Surface Disturbance	
<p>Limited to 5% of DDCT assessment area</p> <p>Find opportunities to co-locate new disturbance with existing disturbance features</p> <p>Minimization</p> <ul style="list-style-type: none"> • Find areas of least suitable habitat for appropriate siting of infrastructure • Co-locate or cluster development in “low impact” areas • Place infrastructure adjacent to previously disturbed locations • Conduct additional reclamation/restoration or management of invasive species to reduce the amount of overall disturbance <p>Compensatory Mitigation</p> <ul style="list-style-type: none"> • New disturbance exceeding 5% disturbance threshold and occurring more than 0.6 miles from an occupied lek (5 debits/acre) 	<p>No surface disturbance stipulation</p>

¹⁴³ See *supra* note 104.

¹⁴⁴ WYO. STAT. ANN. §§9-19-201 - 9-19-204 (2024).

¹⁴⁵ *State of Wyoming Executive Order Greater Sage-grouse Core Area Protection 2015-4 Avoidance, Minimization and Compensatory Mitigation for Development in Core vs. Non-Core*, WGFD (Oct. 29, 2018), <https://wgfd.wyo.gov/media/30004/download?inline>.

TABLE 04 (Continued)

Stipulations for Development in Core	Stipulations for Development in Non-Core
Surface Occupancy	
<ul style="list-style-type: none"> • NSO within 0.6 miles of the perimeter of an occupied lek • Move development outside of NSO buffer • No new surface occupancy within the NSO buffer <p>Minimization</p> <ul style="list-style-type: none"> • Co-locate new disturbance within existing disturbance or within unsuitable habitat • Place infrastructure adjacent to previously disturbed locations <p>Compensatory Mitigation</p> <ul style="list-style-type: none"> • Any new disturbance within 0.6 miles from occupied lek (10 debits/acre) 	<ul style="list-style-type: none"> • NSO within 0.25 miles of the perimeter of an occupied lek • Move development outside of NSO buffer • No new surface occupancy within the NSO buffer <p>Minimization</p> <p>Co-locate new disturbance within existing disturbance or within unsuitable habitat</p> <p>Place infrastructure adjacent to previously disturbed locations</p> <p>Compensatory Mitigation</p> <p>Any new disturbance within 0.25 miles from occupied lek (2 debits/acre)</p>
Seasonal Use/Human Activity	
<p>(Production and maintenance activities are exempt)</p> <ul style="list-style-type: none"> • Activities allowed July 1 – March 14 outside the 0.6 mile buffer of an occupied lek • Conduct activity outside of seasonal stipulation period in core area <p>Minimization</p> <ul style="list-style-type: none"> • Minimize human activity within breeding, nesting, and/or early brood rearing habitat through project planning that may include traffic management and on-site activity reduction <p>Compensatory Mitigation</p> <ul style="list-style-type: none"> • Short term impact (seasonal stipulation relief) 10 debits/activity/year 	<p>(Production and maintenance activities are exempt)</p> <ul style="list-style-type: none"> • A 2-mile seasonal buffer applies to occupied leks from March 15 – June 30 • Conduct activity outside of seasonal stipulation period within 2 miles of an occupied lek <p>Minimization</p> <ul style="list-style-type: none"> • Minimize human activity within breeding, nesting and brood rearing habitat through project planning that may include traffic management and on-site activity reduction • Conduct activities in unsuitable habitat <p>Compensatory Mitigation</p> <ul style="list-style-type: none"> • Short term impact (seasonal stipulation relief) 10 debits/activity/year

TABLE 04 (Continued)

Stipulations for Development in Core	Stipulations for Development in Non-Core
Noise	
<ul style="list-style-type: none"> • New project noise should not exceed 10 decibels above baseline noise levels at the perimeter of a lek from 6pm-8am March 1 – May 15 • Conduct development and production activity outside of breeding season time period • Collect baseline noise levels before the disturbance or activity occurs; continue noise monitoring during development and after • If noise levels exceed 10 decibels, stop activity or muffle activity to acceptable levels <p>Minimization</p> <ul style="list-style-type: none"> • Develop travel management plan to prohibit and reduce human presence between 6 pm and 8 am from March 1 to May 15 • Muffle or otherwise control exhaust and engine noise from all new equipment • Consolidate/centralize production facilities and or use liquids gathering systems to minimize truck traffic and wellsite visits • Use noise shields 	<p><i>No noise stipulation</i></p>
Oil and Gas	
<ul style="list-style-type: none"> • Oil and gas pads and associated infrastructure not to exceed an average of 1 disturbance per square mile (1/640) • Locate new disruptive activity outside of core area or co-locate new pads and associated infrastructure with existing disruptive activities <p>Minimization</p> <ul style="list-style-type: none"> • Cluster new pads with existing development and/or consider multi-well pads <p>Compensatory Mitigation</p> <ul style="list-style-type: none"> • Greater than 1 activity per 640 acres (10 debits/activity/year) 	<p><i>No density stipulation</i></p> <p><i>See surface occupancy and seasonal use general stipulations</i></p>

TABLE 04 (Continued)

Stipulations for Development in Core	Stipulations for Development in Non-Core
Mining	
<ul style="list-style-type: none"> • Active mining development areas not to exceed an average of 1 site per square mile (1/640) • Locate new disruptive activity outside of core area or co-locate new mines and associated infrastructure with existing disruptive activities <p>Minimization</p> <ul style="list-style-type: none"> • Cluster new development in low impact areas <p>Compensatory Mitigation</p> <ul style="list-style-type: none"> • Greater than 1 activity per 640 acres (10 debits/activity/year) 	<p><i>No density stipulation</i></p> <p><i>See surface occupancy and seasonal use general stipulations</i></p>
Wind Energy	
<ul style="list-style-type: none"> • Not recommended • Site wind energy development outside of core 	<p><i>See surface occupancy and seasonal use general stipulations</i></p>
Solar Energy	
<ul style="list-style-type: none"> • Not recommended • Site solar energy development outside of core 	<p><i>See surface occupancy and seasonal use general stipulations</i></p>

Initially, the stipulations only applied inside core areas, but have been extended on a lesser scale in GRSG habitat outside core areas, connectivity areas (“areas important for maintaining the transmission of genetic material between populations”), and winter concentration areas (“places where large numbers of core populations area great sage-grouse congregate and persistently occupy between December 1 and March 14.”)¹⁴⁶ When combined, core areas, connectivity areas, and winter concentration areas protect approximately 83% of the Wyoming GRSG population on approximately 24% (15.2 million acres) of the State’s surface.¹⁴⁷

¹⁴⁶ See *Supra* note 108.

¹⁴⁷ *Ibid.*

PERMITTING REQUIREMENTS

The SGEO requires that all State agencies comply with Wyoming's core area strategy when permitting activities in core areas. The permitting process for projects inside core areas was developed by the SGIT and places an emphasis on evaluating whether the activity will cause undue harm to GRSG. The process begins with the project proponent notifying the WGFD of the planned activity, ideally 45 to 60 days before the permit application is filed.¹⁴⁸ As part of the process, project proponents must run their project specifications through the State's Density and Disturbance Calculation Tool (DDCT), "a spatially based tool that calculates both the average density of disruptive activities and total surface disturbance within the area affected by the project."¹⁴⁹ Once the DDCT assessment has been completed and the results sent to the WGFD for review, the WGFD works collaboratively with the project proponent to determine necessary avoidance and minimization measures to protect GRSG populations and habitat in the area. The WGFD sends the resulting project analysis and recommendations to the permitting agency for review and processing.¹⁵⁰

Throughout the permitting process, State agencies are required to collaborate with relevant stakeholders, promoting GRSG conservation by:

- Using protective measures to avoid, minimize and mitigate impacts to the species with compensatory mitigation employed only where avoidance and minimization are either inadequate or impossible;
- Prioritizing the maintenance and enhancement of GRSG habitats and populations inside core areas, connectivity areas and winter concentration areas;
- Considering incentives, prioritization of projects outside of core areas and coordinated permit processes;
- Recognizing that adjustments to stipulations may be beneficial based upon local conditions, opportunities and limitations; and
- Working collaboratively to ensure uniform and consistent application of SGEO requirements to maintain and enhance GRSG habitat and populations.¹⁵¹

While projects have been authorized to occur in core areas, the permitting process is rigorous and often expensive. This is consistent with the core area strategy's intent to incentivize development outside of core areas and, in the case of oil and natural gas development, it has worked not only due to the protective stipulations, but also due in large part to the serendipitous timing of advancements in drilling technology that drastically reduced the footprint of development.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*; See also *Density Disturbance Calculation Tool*, WGFD <https://wgfd.wyo.gov/wyoming-wildlife/sage-grouse-management/sage-grouse-executive-order#DDCT> (last visited May 22, 2024).

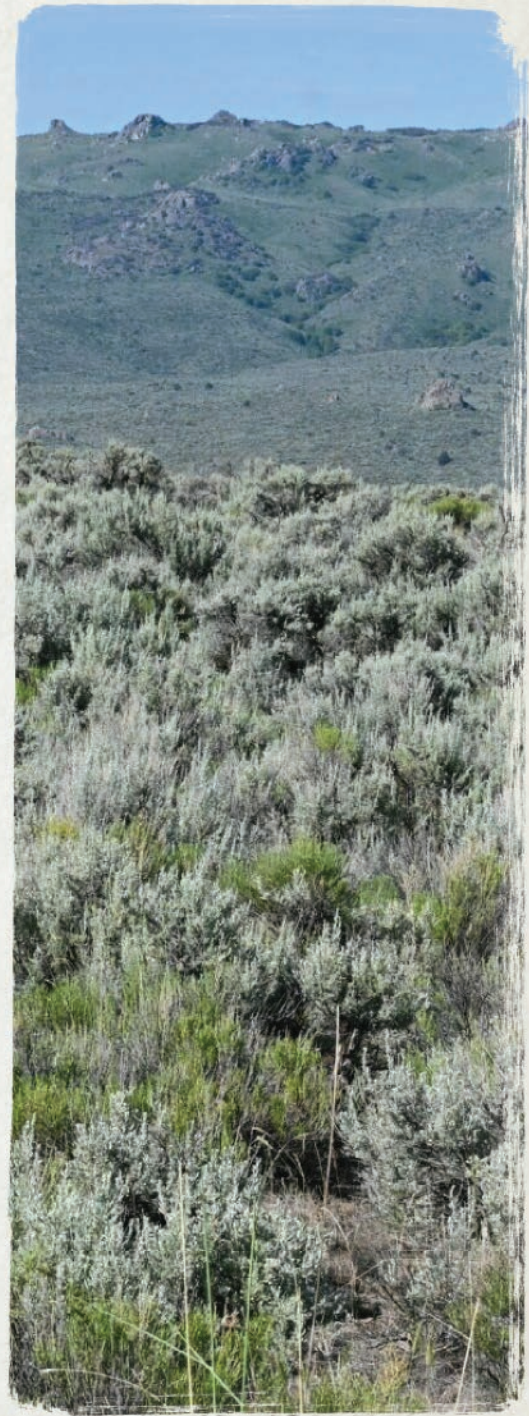
¹⁵⁰ See *supra* note 108.

¹⁵¹ *Ibid.*

Prior to 2010, oil and natural gas development predominantly took place through the use of vertical wells that were drilled on single-well pads.¹⁵² After 2010, directional and horizontal wells with multiple wells per pad became more prevalent.¹⁵³ Through further development of this technology, some wells in Wyoming are now being drilled two miles deep with laterals approaching four miles long.¹⁵⁴ This technological advancement has significantly reduced the surface disturbance associated with oil and natural gas development and allows operators to access lease parcels with no surface occupancy, timing limitation, or conditional surface stipulations.¹⁵⁵ In fact, the USFWS noted in 2015 that “the number of oil and gas wells permitted in Core Areas has...declined as industry seeks to avoid conflict with sage-grouse. Between 2006 and 2012, vertically drilled single well permits declined 65 percent, while directionally and horizontally drilled wells, from outside the Core Areas, increased by 66 and 1,337 percent, respectively.”¹⁵⁶ The USFWS also stated that through “the use of new horizontal and directional drilling technologies, multiple wells can be placed on one pad, thereby reducing the amount of surface disturbance associated with wells, roads, powerlines, and pipelines.”¹⁵⁷

This reduced surface disturbance is further illustrated by the Petroleum Association of Wyoming (PAW) and Western Energy Alliance in their May 1, 2023, letter to BLM comparing the significant decrease in the number of wells drilled in Wyoming from 2000 to 2019, with no corresponding decrease in the amount of production. In the letter, the associations state that in 2000, over 4,000 wells were spud in Wyoming and the following year saw combined oil and natural gas production of 327 million barrels of oil equivalent (BOE). In 2019, just over 650 wells were spud and the production in 2020 was 334 BOE. Despite one-sixth as many wells being spud, production of oil and natural gas in 2020 exceeded that of 2001.¹⁵⁸

See Figure 06.



¹⁵² PAW and Western Energy Alliance Letter to BLM Wyoming State Director Andrew Archuleta, WESTERN ENERGY ALLIANCE (May 1, 2023), https://www.westernenergyalliance.org/uploads/1/3/1/2/131273598/paw-alliance-protest_wy_blm_q2_2023_lease_sale.pdf.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ Dave H. Applegate and Nick L. Owens, *Oil and gas impacts on Wyoming's sage-grouse: summarizing the past and predicting the foreseeable future*, 8 HUMAN-WILDLIFE INTERACTIONS 284 (2014).

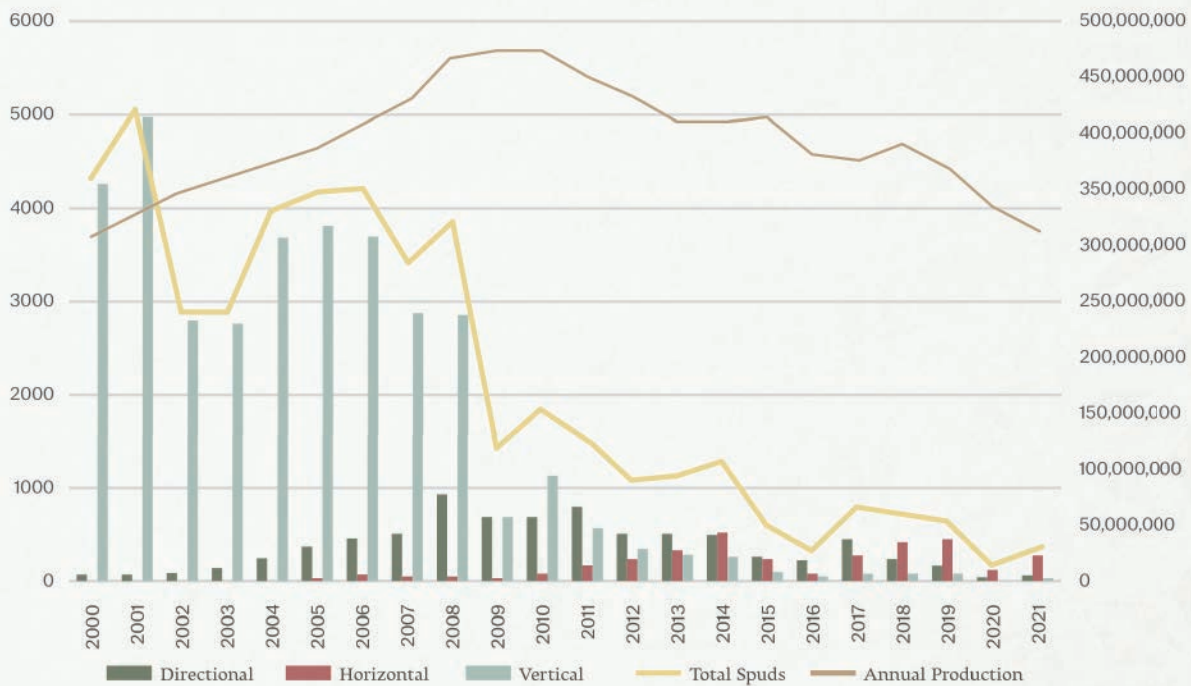
¹⁵⁶ See *supra* note 1.

¹⁵⁷ *Ibid.* (citing Applegate and Owens, *supra* note 155).

¹⁵⁸ See *supra* note 152.

FIGURE 06

Wyoming Oil and Natural Gas Wells and Production¹⁶⁰



SAGE GROUSE IMPLEMENTATION TEAM

ADAPTIVE MANAGEMENT

SGIT developed an adaptive management plan to address and respond to “unintended negative impacts to Greater sage-grouse and their habitat before consequences become severe or irreversible.”¹⁶¹ It is an important aspect of Wyoming’s GRSG core area strategy that was added in the 2010 executive order. Since that time, the State’s science based GRSG adaptive management plan (Figure 07) has been further refined.¹⁶²

¹⁵⁹ *Ibid.*

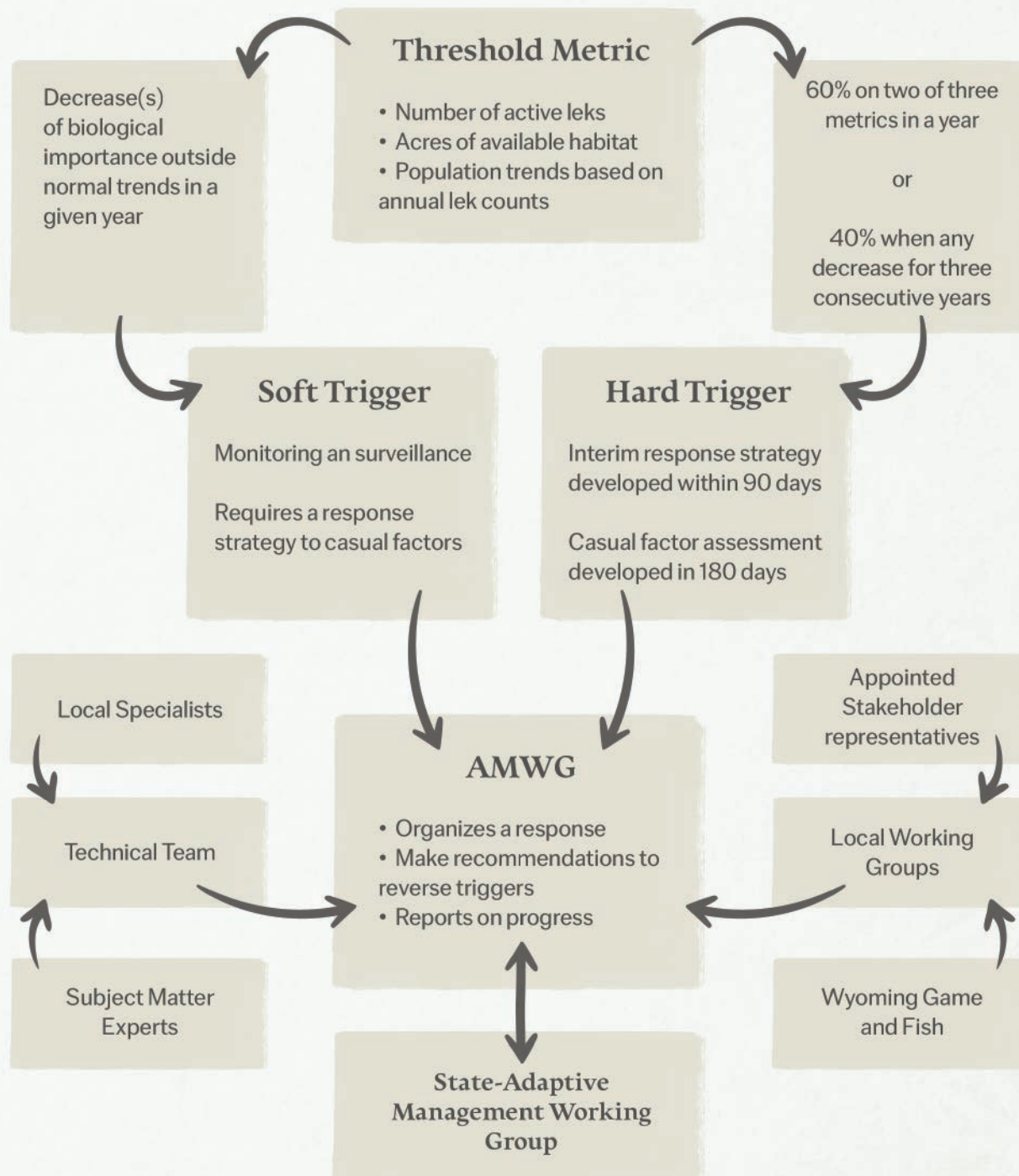
¹⁶⁰ *Ibid.*

¹⁶¹ *See supra* note 108.

¹⁶² *Ibid.*

FIGURE 07

Wyoming Adaptive Management Workflow Diagram¹⁶³



¹⁶³ Ibid.

There are three metrics used to ascertain when a GRS population is being negatively impacted, namely: number of active leks, acres of available habitat, and population trends based on annual lek counts. The negative impact is classified as a “soft trigger” or a “hard trigger” based on its severity and addressed accordingly. The SGEO defines a soft trigger as “any departure from normal trends in habitat or population in any given year”, and a hard trigger as “a catastrophic indicator that the species is not responding to conservation actions, or that a larger-scale impact or set of impacts is having a negative effect.”¹⁶⁴

The SGIT established the Adaptive Management Working Group (AMWG) as the entity tasked with assessing and addressing negative variances in habitat or population trends. Members of the AMWG include representatives from the BLM, USFS, USFWS and the Natural Resources Conservation Service (NRCS), and an equal number of representatives from the State.¹⁶⁵ Once the AMWG is notified when and where a trigger may have been “tripped”, it will review and assess the situation, and a technical team may be assembled to evaluate causal factors and recommend response strategies.¹⁶⁶

A soft trigger response begins with attempting to determine causal factors through monitoring and surveillance. Once the causal factor has been identified, a strategy will be developed to address it. The relevant land management agency will lead implementation of the interim strategy.¹⁶⁷

In the case of a hard trigger response, an interim response strategy is developed and implemented while the causal factor assessment is being conducted. Once a causal factor is identified, a strategy is developed to specifically address the causal factor. The interim strategy remains in effect until a causal factor can be identified.¹⁶⁸ The AMWG holds annual meetings to review and refine assessments and responses until the trigger is no longer being tripped.¹⁶⁹

An important part of the State’s adaptive management plan is that once a causal factor(s) has been determined, the remedy will specifically address that issue in a targeted manner. The State does not take a broad-brush approach toward adaptive management.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

STATE APPROACH TO GREATER SAGE- GROUSE MANAGEMENT

Many triumphs underlie Wyoming's current approach to GRSG management, not the least of which is the unprecedented collaborative process through which it occurred. This process has resulted in a GRSG conservation strategy with stakeholder buy-in that works expressly for Wyoming and focuses on addressing the specific threats to GRSG in the State. Similarly, other states across the bird's range have crafted management plans to target their own threats. Table 05 lists the primary threats identified by the 2013 Conservation Objectives Team (COT)¹⁷⁰ Report in six of the states where GRSG are located, clearly illustrating how they differ across its range.¹⁷¹ In Wyoming, according to SGIT Chairman Bob Budd, subdivision still remains a key threat; however, the threat from mineral development did not materialize as much as expected due to operator compliance with the SGEO, and invasive grasses and renewable energy development have emerged as greater threats in the last decade.

TABLE 05

Key Threats to GRSG in 2013 by State¹⁷²

State	Key Threats in 2013	State	Key Threats in 2013
Wyoming	Mineral development, subdivision	Nevada	Invasives, wildfire, mineral development
Idaho	Invasives, wildfire	Utah	Wildfire, invasives, conifer encroachment
Montana/ Dakota	Ag conversion, mineral development	Oregon	Renewable energy development, ag conversion

In addition to the collaborative process, the State plan provides for the co-existence of habitat protection and energy development. GRSG are managed by the WGFD, and that management has remained relatively consistent over the past 15 years. While necessary adjustments have been made over time to address new science or information, the State plan has provided regulatory certainty to support continued economic activity, such as oil and natural gas development. Under a GRSG ESA listing, management of the bird would transfer from the WGFD to the USFWS, reducing regulatory certainty and increasing the risks and costs associated with energy development, thus discouraging significant economic opportunities from occurring and removing management responsibility from those closest to the bird.¹⁷³

¹⁷⁰ The Conservation Objectives Team (COT) consisted of state and USFWS representatives and was assembled by the USFWS to determine threats to GRSG that need to be reduced or ameliorated in order to keep the bird from becoming extinct.

¹⁷¹ *Greater Sage-grouse Conservation Objectives: Final Report*, USFWS (Feb. 2013), https://www.conservationtraining.org/pluginfile.php/2072/mod_resource/content/18/topic4/PDFs/USFWS_2013_COT_report.pdf. See also *Sage Grouse Conservation: Wyoming's Core Area Strategy PowerPoint*, Bob Budd (Chairman, Governor's Implementation Team, State of Wyoming) (2012).

¹⁷² *Ibid.*

¹⁷³ See Budd *supra* note 171.

BLM APPROACH TO GREATER SAGE-GROUSE MANAGEMENT

Wyoming is responsible for management of the bird statewide and GRSG habitat on State and private lands, while management of GRSG habitat on federal lands in the State falls to the BLM and the U.S. Forest Service. Most elements of the State and federal plans have aligned, however, there have been inconsistencies, particularly as political administrations and preferences have had an influence on the BLM plans. With this in mind, it is not surprising that some aspects of the BLM's range-wide approach to management of GRSG differ from the State's approach.

Several differences have existed between the State and BLM GRSG plans. For example, the BLM uses a system of leasing prioritization which places priority on oil and gas leasing and development taking place outside of GRSG habitat.¹⁷⁴ Even though the USFWS stated as part of its support for Wyoming's core area strategy in its 2010 listing decision that, "Wyoming's executive order does allow oil and gas leases on State lands within core areas, provided those developments adhere to required protective stipulations, which are consistent with published literature (e.g. 1 well pad per section)", BLM included leasing prioritization in the 2015 RMPs with the intent of precluding oil and natural gas development from occurring inside core areas.¹⁷⁵

Wyoming believes, much like the USFWS, that the protective stipulations in the core area strategy provide sufficient protection for core area birds and habitat.¹⁷⁶ Not only that, but the permitting process for oil and natural gas activities inside core areas includes stringent analysis to ensure the bird will not suffer undue harm as a result of the activity, including efforts to site projects in the least disruptive locations and seek ways to reduce disturbance through co-location of facilities, roads, and transmission infrastructure.



¹⁷⁴ 80 Fed. Reg. 57639 (Sept. 24, 2015).

¹⁷⁵ See *supra* note 17.

¹⁷⁶ Michael Pearlman, *Governor Gordon Appreciates BLM's Sage Grouse Management Plan Alternative, But Says More Work is Needed* [Press release], OFFICE OF WYOMING GOVERNOR MARK GORDON (March 14, 2024), <https://content.govdelivery.com/accounts/WYGOV/bulletins/390a0f8>.

Adaptive management is another area of divergence between Wyoming and BLM approaches to GRSG management. While the State uses targeted responses to adaptive management to specifically address the causal factor(s) of the negative impact, the BLM uses a broad-brush approach by precluding any activities from taking place in an area where soft or hard triggers have been tripped. For instance, BLM deferred four parcels outside of core in southwest Wyoming from its Third Quarter 2023 oil and gas lease sale, stating “[t]he rationale to defer these parcels is based upon concerns and/or recommendations from the different Sage-Grouse Local Working Groups regarding sage-grouse population status on certain leks within the area and/or to help preserve movement between leks, habitats or genetic diversity.”¹⁷⁷ During the public comment period on BLM’s Draft Environmental Assessment on the 2023 Third Quarter Lease Sale, the WGFD commented that although a trigger was tripped in 2021 based on GRSG populations in the area of the four deferred parcels, the AMWG report did not identify oil and natural gas leasing as a causal factor, nor did it recommend that oil and gas leasing not occur in the area.¹⁷⁸ BLM’s final decision was to not offer the parcels for lease based on its prescribed adaptive management response to deny any activity, regardless of whether it is a causal factor, from taking place in an area where a trigger has been tripped.

In addition to these overarching plan inconsistencies, targeted mismatches have existed between Wyoming’s core area strategy and the BLM GRSG RMPs. As an example, the 2015 BLM GRSG RMP adopted Version 3 of the Wyoming’s core area map while the State was using Version 4. This resulted in misalignment in the application of Federal and State protective stipulations in portions of the Powder River Basin in northeast Wyoming. This was particularly frustrating for oil and natural gas operators in the area. In an attempt to address the issue, on August 24, 2016, almost a year after the RMPs were finalized, BLM released Instruction Memorandum No. WY-2016-024 (IM) outlining that it could only adopt the Version 4 core area map through the land use plan amendment process.¹⁷⁹ In the meantime, the IM instructed Wyoming BLM field offices to treat areas inside core in Version 3, but outside core in Version 4, as inside core, and to also treat areas outside core in Version 3, but inside core in Version 4, as inside core.¹⁸⁰ This was not an ideal solution and did not resolve the underlying issue. The BLM resolved the issue on October 27, 2017, through a categorical exclusion and maintenance action updating the habitat management areas in the 2015 Wyoming GRSG RMPs and adopting the State’s Version 4 map.^{181, 182}

¹⁷⁷ *Environmental Assessment DOI-BLM-WY-0000-2023-0003-EA 2023 Third Quarter Competitive Lease Sale*, BLM (March 10, 2023), https://eplanning.blm.gov/public_projects/2022737/200540615/20075014/250081196/2023-09.20230310.1545.WSO.921.draft%20WY%202023-09%20Lease%20Sale%20EA.pdf.

¹⁷⁸ *BLM-Wyoming Response to Public Comments 3rd Quarter (September) 2023 Competitive Oil and Gas Lease Sale Environmental Assessment (DOI-BLM-WY-0000-2023-0003-EA)*, BLM (June 16, 2023), https://eplanning.blm.gov/public_projects/2022737/200540615/20080767/250086949/2023-09.20230616.1106.WSO.921.Response%20to%20Public%20Comment.pdf.

¹⁷⁹ BLM INST. MEMO WY-2016-024, BLM (Aug. 15, 2016) (*Greater Sage-grouse Habitat Management Policy on Bureau of Land Management (BLM) Wyoming Administered Public Lands Including the Federal Mineral Estate*).

¹⁸⁰ *Ibid.*

¹⁸¹ 43 C.F.R. §1610.5-4.

¹⁸² *Maintenance Action for Greater Sage-grouse Habitat Management Areas*, BLM <https://eplanning.blm.gov/eplanning-ui/project/92317/570> (last visited May 22, 2024).

INFLUENCE OF LITIGATION AND POLITICAL ADMINISTRATION ON FEDERAL PLANS

Unlike the Wyoming GRSG SGEO, the BLM plans have been susceptible to change due to litigation and federal political administrations. This has led to regulatory uncertainty for activities occurring in GRSG habitat on federal lands located in Wyoming and elsewhere.

The BLM has developed two GRSG RMPs, one in 2015 and one in 2019, both of which were challenged in court by environmental groups. The 2015 BLM GRSG RMPs, which are currently in effect, were released during the Obama Administration and, as discussed previously, contain inconsistencies with the Wyoming core area strategy. The Trump Administration revised the BLM GRSG RMPs in 2019 to align with State GRSG plans; however, because the court precluded BLM from implementing the 2019 RMPs, inconsistencies between the BLM and State plans persist.

In 2021, the BLM, under the Biden Administration, published its Notice of Intent to again revise the GRSG RMPs. In an attempt to ensure the BLM's use of the latest science and information in its plan, the SGIT developed an updated map (Figure 05) and changes to management actions, such as adaptive management, fluid mineral leasing and timing stipulation exceptions, for BLM's consideration and inclusion in the RMP amendments.¹⁸³ Cooperating agencies commented on the administrative draft of the revised BLM GRSG RMP in December 2023, and the BLM released the Draft RMP for public comment on March 15, 2024.¹⁸⁴

GRSG litigation brought by environmental groups has not been limited to the BLM RMPs, as it has also targeted BLM oil and gas leasing in GRSG habitat. Hundreds of BLM oil and gas leases in Wyoming have been challenged in court, causing many leases to remain unavailable for use pending resolution of the litigation. In response, BLM has deferred all parcels located inside core areas from being offered at oil and gas lease sales in Wyoming since the Biden Administration took office in 2021.



¹⁸³ See *supra* note 139.

¹⁸⁴ See *supra* note 28.

2024 REVISED BLM GRSG RMP

The BLM released the range-wide GRSG Draft RMP on March 15, 2024, covering ten states (all states in the GRSG range except Washington). This is a change from the previous GRSG RMPs, with the 2015 plans being done on a regionwide basis, and the 2019 versions being state-specific.¹⁸⁵ The BLM will release state-specific Records of Decision (RODs) once the Final RMP is approved.

The Draft RMP considers six alternatives, identifying Alternative 5 as the preferred alternative:

Alternative 1 (No Action Alternative)

Represents a continuation of current management under the 2015 BLM RMPs

Alternative 2

Represents a continuation of management under the 2019 BLM RMPs

Alternative 3 (Preservation Alternative)

Includes the most restrictions on resource uses to preserve GRSG

Alternative 4

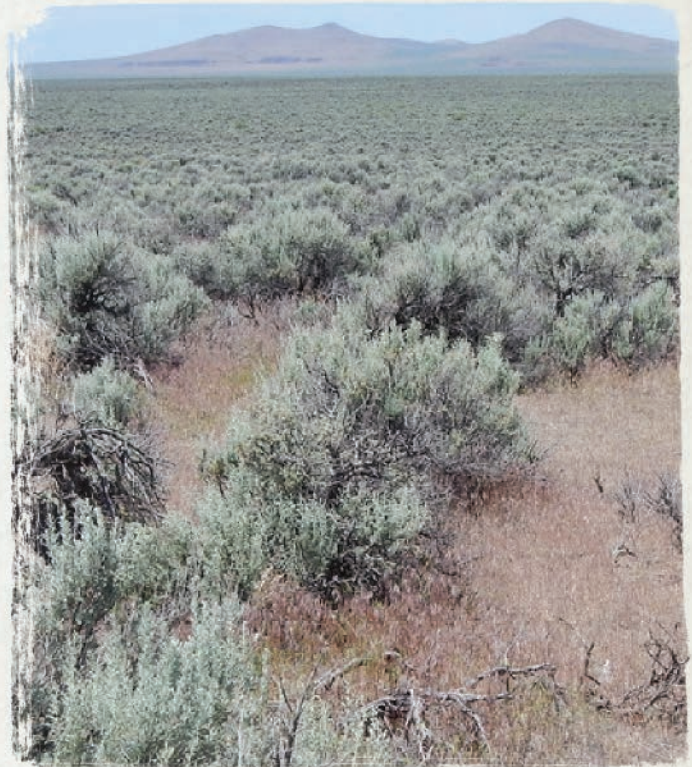
Updates habitat management area boundaries and associated management based on new information and science that has become available since the 2015 and 2019 planning efforts

Alternative 5 (Preferred Alternative)

Developed to consider other potential alignments of habitat management areas and associated management to try and balance GRSG conservation with public land uses

Alternative 6

The same as Alternative 5, but with the addition of Areas of Critical Environmental Concern (ACECs)¹⁸⁶



Initial review by the State has revealed that Alternatives 3 and 4 include significant deviations from the SGEO, while the stipulations and protective measures proposed in Alternative 5, the preferred alternative, are similar to those in the SGEO. BLM also considers adoption of the State's proposed updated map (Figure 05) in Alternative 5, including the stewardship area in northeast Wyoming.¹⁸⁷

¹⁸⁵ See *supra* note 25.

¹⁸⁶ See *supra* note 28.

¹⁸⁷ *Ibid.*

The State has identified inconsistencies between management actions in the SGEO and BLM's Draft GRSG RMP. Of particular concern is the BLM's proposed adaptive management plan which continues to take a broadbrush approach. Unlike the State's adaptive management strategy, BLM does not develop an interim strategy to allow for activities to continue until the causal factor analysis (CFA) is completed, which can take six months or longer.¹⁸⁸ The BLM will allow newly permitted activities to take place if a soft trigger is tripped and the activity is not contributing to GRSG mortality. However, if a hard trigger is tripped, no newly authorized activities will be permitted. Existing activities will be permitted if they are not contributing to GRSG mortality in the area.¹⁸⁹

Once the causal factor(s) has been identified, any new activities in the area will be subject to "project level NEPA [to] specifically evaluate if the proposed new activity could result in contributing to sustaining the threshold or result in the threshold being met again."¹⁹⁰ Also, new permits may be subject to more stringent restrictions as deemed necessary by BLM. In the case of inconclusive CFAs, newly permitted activities may not be authorized, and existing authorizations may be subject to additional restrictions.¹⁹¹

In addition, the BLM's adaptive management plan relies on monitoring through the Targeted Annual Warning System (TAWS). TAWS is a model developed by the U.S. Geological Survey (USGS) that relies upon population data from the WGFD to determine if habitat conditions are influencing populations.¹⁹² The State has two concerns: 1) its experience with TAWS is that the model often provides inaccurate results; and 2) the model relies on population data which is under State jurisdiction and, as such, BLM does not have the authority to determine when population-related adaptive management triggers have been tripped.

Another item of concern for the State in the Draft GRSG RMP is the BLM's consideration of 839,229 acres of ACECs in Alternatives 3 and 6. Any area designated as an ACEC would be subject to increased restrictions on mineral development and rights-of-way (ROWs). The State believes sufficient protections for GRSG are already in place through the SGEO, and adding more designations and restrictions will only create unnecessary confusion. Governor Gordon clearly communicated to BLM that the State will not support any of the ACECs the agency is considering, reasoning that 1) one-fourth of the State is designated as core habitat; 2) Wyoming-specific development requirements are in place to protect important sage-grouse habitat; and 3) the State has "dedicated hundreds of millions of dollars to habitat improvement."¹⁹³

The public comment period on the Draft GRSG RMP concluded on June 13, 2024, and BLM will review the comments and prepare the Final GRSG RMP. Although BLM has identified Alternative 5 as the preferred alternative, it can incorporate provisions from any of the other alternatives into the preferred alternative, including any of the ACECs from Alternatives 3 and 6, or it can choose to move forward using one of the other alternatives as the Final GRSG RMP.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ Michael Pearlman, *Governor Gordon Touts State Leadership on Sage Grouse in Comment Letter to Feds* [Press release], OFFICE OF WYOMING GOVERNOR MARK GORDON (June 24, 2024) <https://content.govdelivery.com/accounts/WYGOV/bulletins/3a4af46>.

CONCLUSION

As the state with the highest number of GRSG and GRSG habitat across its 11-state range, the threat of a GRSG ESA listing has been of significant concern among Wyoming leaders and stakeholders for many years. Not only is it very difficult, if not impossible, to have a species delisted, but with approximately 70% of the State consisting of occupied GRSG habitat,¹⁹⁴ an ESA listing would greatly restrict land use in more than half of the State, including oil and natural gas development, mining, grazing, and construction.

Knowing that it would be impossible to mitigate the negative economic impact of a GRSG listing, the State established a collaborative process to develop a GRSG management strategy to conserve GRSG habitat and preclude the need for an ESA listing, while at the same time maintaining the ability for multiple use and economic opportunities to occur on the land. The resulting SGEO represents a balanced, science-based approach utilizing the latest research and on-the-ground information.

Contrary to the BLM's one-size-fits-all approach to GRSG management that has been prone to change due to litigation and political administrations, Wyoming's state-specific approach has been generally consistent for more than 15 years during both Democrat and Republican state-level administrations. Through a collaborative process that provides all relevant stakeholders with a seat at the table, Wyoming's core area strategy continues to be successful, meeting its goal of protecting GRSG by incentivizing development disturbance to occur outside of core areas. Also, based on the WGFD's lek count index and taking into consideration the cyclic nature of Wyoming GRSG population trends, the State's GRSG population appears to have remained relatively stable since the SGEO was established in 2008 (Figure 08). The process of developing the core area strategy, along with adjustments for lessons learned over the years, provides a proven roadmap to protect species while maintaining multiple use and economic opportunities.



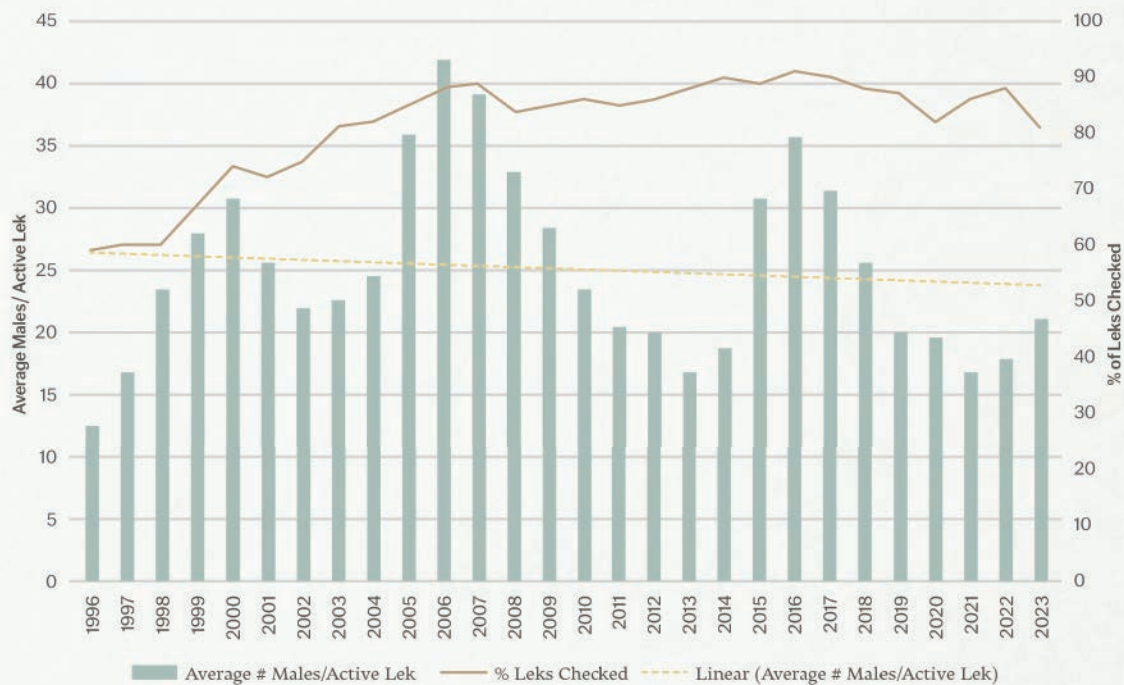
¹⁹⁴ See *supra* note 2.

With the application of protective stipulations and the development of a core area map to guide where the most protections should occur, the SGEO successfully fulfilled the State's GRSG strategy and averted a listing determination in 2015, with the USFWS stating "[t]he Wyoming Plan has been in place for 8 years and has demonstrated its conservation value by protecting areas identified as important to sage-grouse conservation."¹⁹⁵

Through the work of the SGIT, Wyoming's core area strategy continues to evolve to better protect GRSG and its habitat, while meeting the needs of stakeholders in the state.

FIGURE 08

Wyoming Lek Count Index 1996-2023¹⁹⁶



¹⁹⁵ *Ibid.*

¹⁹⁶ Graph was provided by WGFD based on Nyssa Whitford, *Sage-Grouse Job Completion Report June 2022-May 2023*, WGFD (2023) <https://wgfd.wyo.gov/media/30118/download?inline>.



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1000 E. University Avenue, Dept. 3012
Laramie, Wyoming 82071

