

**The Wilderness Society * National Audubon Society * National Wildlife
Federation * Montana Wildlife Federation * Wyoming Wildlife Federation *
Nevada Wildlife Federation * Colorado Wildlife Federation *
Conservation Colorado * Wyoming Outdoor Council**

February 28, 2018

The Honorable Ryan Zinke
Secretary of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Secretary Zinke:

We write to express our concerns regarding recent Instruction Memoranda (IM) regarding sage-grouse management that the BLM issued on December 27, 2017, and oil and gas leasing issued on January 31, 2018, as well as Secretarial Order No. 3360 issued on December 22, 2017. Together, these actions jeopardize BLM's legal commitments and obligations related to management and conservation of habitat for the Greater Sage-grouse under the governing land use plans completed in 2015 ("2015 Sage-grouse Plans").

Instruction Memoranda

The new IMs addressing implementation of the 2015 Sage-grouse Plans generally retreat from the protections set out in the guidance issued in 2016 and are not in conformance with the requirements of the Plans. Under the Federal Land Policy and Management Act (FLPMA), any actions taken by the BLM must conform to the governing land use plans. *See* 43 U.S.C. § 1732(a) (public lands shall be managed "in accordance with the [governing] land use plans"); 43 CFR § 1610.5-3(a) ("All future resource management authorizations and actions, . . . , and subsequent more detailed or specific planning, shall conform to the approved plan."). While the BLM is evaluating whether and to what extent to amend the existing plans, the 2015 Sage-grouse Plans remain the approved plans and all implementation actions must conform to those plans.

The existing sage-grouse plans provide important protections relative to managing oil and gas and other types of energy development, as well as other activities that can harm or destroy habitat, and also include hard and soft trigger adaptive management provisions, to ensure these provisions are effective. Language in the new IMs seeks to modify these requirements, but, as prescribed by applicable law, the direction in the IMs cannot supersede or undermine the protection in the 2015 Sage-grouse Plans.

For example, the 2015 Sage-grouse Plans, including the related BLM resource management plan (RMP) amendments, commit to prioritizing oil and gas leasing, and to the extent possible, development on existing leases, outside of sage-grouse habitat. These provisions remain in force. The provision in the new IM 2018-026 stating that, "the BLM does not need to lease and develop outside of GRSG habitat management areas before considering any leasing and development within GRSG habitat," is inconsistent with the plain language and intent of the 2015 Sage-grouse Plans that mandate:

Priority will be given to leasing and development of fluid mineral resources... outside of PHMA [Priority Habitat Management Areas] and GHMA [General Habitat Management Areas]. When analyzing leasing and authorizing development of fluid mineral resources... in PHMA and GHMA, and subject to applicable stipulations for the conservation of GRSG, priority will be given to development in non-habitat areas first and then in the least suitable habitat for GRSG.

While clarification regarding how to apply this clear requirement would be helpful, direction that violates and undermines it is not permissible under FLPMA.

We would also note that, while BLM has looked to direction from Executive Order 13783 (Promoting Energy Independence and Economic Growth) and Secretarial Order 3349 (American Energy Independence) regarding eliminating perceived burdens on energy development, the 2015 Sage-grouse Plans are not imposing any such “burdens.” Other than a small percentage of acres in Colorado, no acres were closed to oil and gas leasing in the 2015 Sage-grouse Plans. In addition, as documented in a report from Western EcoSystems Technology, Inc., there is only a 4 percent overlap between sage-grouse PHMA and existing coal and oil and gas leases on federal lands; approximately 79 percent of federal lands and minerals in PHMAs have a zero to low oil and gas development potential; and approximately 71 percent of federal lands and minerals in the principal sage-grouse states that have a medium to high oil and gas development potential are located outside PHMAs.¹

We are also concerned about the provisions in IM 2018-022 that remove the requirement for public notice and opportunity for comment when conditions worsen and there is a need for action under the adaptive management hard and soft trigger provisions. The prior IM, IM 2016-140, provided for public notice of any hard or soft triggers that had been exceeded and responses that would be implemented. Cutting back on opportunities for public engagement in sage-grouse conservation activities undermines the transparency that is an important part of the governing plans, as well as the substantial stakeholder engagement in developing them.

Furthermore, the elimination of almost all references to sagebrush focal areas (SFA) in the new IMs is a retreat from the recognition of the importance of these areas, which are still in place under the 2015 Sage-grouse Plans. SFAs are areas identified by the U.S. Fish and Wildlife Service that represent recognized “strongholds” for Greater Sage-grouse, as recognized repeatedly in both the BLM and Forest Service land use plans. The IMs cannot remove these designations or the protections they require under the 2015 Sage-grouse Plans.

The new guidance issued to revise how BLM conducts onshore oil and gas leasing, IM 2018-034, also has troubling implications for BLM’s compliance with the 2015 Sage-grouse Plans. For instance, the IM states that “[i]t is BLM policy that existing land use plan decisions remain in effect until an amendment or revision is complete or approved.” However, the IM also requires

¹ See <http://westernvaluesproject.org/wp-content/uploads/2014/10/Greater-Sage-Grouse-Priority-Habitats-and-Energy-Development.pdf> (report prepared for Backcountry Hunters and Anglers, 2014); https://d3n8a8pro7vhmx.cloudfront.net/backcountryhunters/pages/3172/attachments/original/1497040181/Sage-Grouse_Energy_Overlap_Report_060917_%281%29.pdf?1497040181 (report prepared for Backcountry Hunters and Anglers, 2017).

Washington Office concurrence before any deferral of nominated parcels. Given that the governing land use plans direct BLM to prioritize leasing outside habitat, which necessarily includes discretion to defer proposed leasing in sage-grouse habitat, this provision undercuts compliance with the 2015 Sage-grouse Plans. In addition, IM 2018-034 implies that lease stipulations may be adjusted “consistent with modification criteria found in the RMP.” The stipulations in the 2015 Sage-grouse Plans are key measures put in place to address primary threats identified by the U.S. Fish and Wildlife Service and are not subject to modification. BLM should be clear that these oil and gas lease stipulations are not affected by this new guidance and must be applied in conformity with the governing land use plans.

Secretarial Order 3360

Secretarial Order (SO) 3360 revoked a number of BLM and Department of the Interior mitigation policies, including the Department of the Interior’s Landscape Scale Mitigation Policy and the BLM’s Mitigation Handbook and Manual, as well as the Department of Interior’s guidance related to addressing the impacts of climate change. The SO also orders BLM to “revise and reissue” IM 2008-204, which addresses offsite mitigation.² The SO also purports to be eliminating alleged burdens on energy development, citing Executive Order 13783 and SO 3349.

However, mitigation is both required by federal laws and key to implementation of the 2015 Sage-grouse Plans.

Legal Authority

BLM has broad authority and obligations under FLPMA and the National Environmental Policy Act (NEPA) to require mitigation when exercising its authority to engage in land use planning, approve site-specific projects, or engage in other management activities. *See* 40 C.F.R. § 1508.20 (defining mitigation measures to include avoiding, minimizing, rectifying, reducing or eliminating, or compensating for environmental impacts). In accordance with FLPMA, the Administrative Procedure Act, other laws and case-law, BLM’s decisions regarding mitigation must not be arbitrary or capricious. FLPMA principles of multiple use and sustained yield require consideration of the interests of current and future generations, as well as the requirement that BLM avoid unnecessary or undue degradation of resources and values. 43 C.F.R. §§ 1701(a)(8); 1702(c), (h); 1732(b). While these principles do not elevate certain uses over others, they do impose an obligation and delegate discretion to the BLM to determine whether and how to develop or conserve resources, as well as whether to require enhancement of resources and values to offset impacts through compensatory mitigation.

BLM’s obligation under FLPMA to “take any action to prevent unnecessary or undue degradation of the lands” is an independent source of authority for requiring mitigation, in addition to BLM’s broad authority to manage the public lands under FLPMA’s multiple use and sustained yield principles. 43vU.S.C. § 1701(a). Imposing mitigation measures can prevent unnecessary or undue degradation, and this is another source of BLM’s authority to require mitigation. Title V and Title III of FLPMA also provide mitigation authority. Since Title V, regarding issuing rights-of-way, and Title III, regarding issuing easements and other permits,

² We note too that the Fish and Wildlife Service is reconsidering its Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy so as to review its net conservation gain strategy.

require BLM to determine appropriate measures to protect public interests in the affected lands, these can also be seen as empowering and even requiring BLM to require mitigation of impacts as part of granting these rights. 43 U.S.C. §§ 1765(a)(i), (ii); 1765(b)(i), (iv), (vi).

BLM also has authority and direction to require mitigation under other laws. BLM has authority and/or obligations to ensure all operations protect natural resources and environmental quality, including by imposing mitigation requirements, under NEPA, the Endangered Species Act, the National Historic Preservation Act, the Paleontological Resources Preservation Act, the Clean Air Act, the Clean Water Act and the National Landscape Conservation System Act.

Sage-grouse Plans

The 2015 Sage-grouse Plans depend, in part, on mitigation. The BLM's August 4, 2017, Report states that both the Review Team and the Western Governors Association's Sage Grouse Task Force agree that consistent application of the mitigation hierarchy (avoid, minimize, and mitigate), including compensatory mitigation standards and other requirements between State and Federal plans, policies, and procedures, is desirable. Most recently, the Task Force's January 12, 2018, letter reiterates the states' interest in ensuring mitigation measures can be implemented. The December 2016 Report on compensatory mitigation measures also demonstrates the importance of mitigation to the success of the plans. In addition, the 2015 Sage-grouse Plans incorporate many specific mitigation measures that remain in effect and cannot be overridden or undermined through guidance.

Moreover, the 2015 Sage-grouse plans were the result of an extensive effort seeking input from all stakeholders, including those in the energy industry. Western governors, professional wildlife managers, premier scientists and the hundreds of thousands of Americans who commented during the BLM's scoping period all urged BLM to maintain the current plans. Given the support from affected stakeholders and the BLM's obligations to comply with the governing 2015 Sage-grouse Plans, we urge the Department of the Interior and the BLM to acknowledge their commitment to the governing land use plans and applicable laws, and clarify the content and application of the instruction memoranda and Secretarial Order accordingly.

Secretarial Order 3362

SO 3362 (Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors) highlights the importance of elk, deer and pronghorn and commits to "work with our State partners and others to conserve and/or improve priority western big-game winter range and migration corridors in sagebrush ecosystems and in other ecotypes as necessary." The SO also recognizes the need to address energy development and to use mitigation measures, committing to: "[r]eview and use the best available science to inform development of specific guidelines for the Department's lands and waters related to planning and developing energy, transmission, or other relevant projects to avoid or minimize potential negative impacts on wildlife."

Some of the most important tools already in place to conserve and improve habitat in the sagebrush ecosystem are contained in the 2015 Sage-grouse Plans; there is a substantial overlap between sage-grouse habitat and big game habitat, including winter range. In light of this recent statement of policy, we reiterate the importance of not reducing protections and implementing the current plans, which are designed to protect and improve habitat throughout the sagebrush

ecosystem, including for elk, deer and pronghorn. In addition, the new SO 3362 provides important opportunities to support the goals of the 2015 Sage-grouse Plans to safeguard, restore and enhance habitat, working closely with western states. We hope to see actions under SO 3362 that support these complementary goals and approaches.

Thank you for your consideration of our concerns. We would welcome the opportunity to discuss these issues further.

Very truly yours,

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