

**BEFORE THE DIRECTOR
UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT**

In the Matter of:)	
Issuance of Rules Adopting Permanent Program)	
Environmental Protection Performance)	
Standards for the Protection of Greater Sage)	
Grouse From the Impacts of Coal Mining)	
Under 30 C.F.R. §§ 815, 816, and 817)	
)	Petition for rulemaking under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1211(g), and Administrative Procedure Act, 5 U.S.C. § 553(e)

**PETITION FOR THE ISSUANCE OF RULES TO THE OFFICE OF SURFACE
MINING RECLAMATION AND ENFORCEMENT**

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4. U.S. Fish and Wildlife Service, “Greater sage-grouse (*Centrocercus urophasianus*) conservation objectives: Final report” (Feb. 2013).
5. Wyoming Department of Environmental Quality, Air Pollution Permit AP-2989, Carbon Basin Mines (Nov. 9, 2005).
6. OSM, Dear Reader Letter in re: Collom Permit Expansion Area (Sept. 26, 2013) and Map of Proposed Permit Expansion Area (Nov. 1, 2013).
7. “Interagency Agreement Between the United States Department of Agriculture Natural Resources Conservation Service, and the USDA Forest Service, and the United States Department of the Interior Bureau of Land Management and the Fish and Wildlife Service,” FS Agreement Number: 11-IA-11132400-104.

INTRODUCTION

WildEarth Guardians hereby petitions the Director of the Department of Interior, Office of Surface Mining Reclamation and Enforcement (“OSM”) for the issuance of a rule pursuant to Section 201(g) of the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1211(g), and the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e). Specifically, we petition the Director to issue rules, consistent with the best available scientific information, adopting performance standards pursuant to SMCRA that protect the greater sage grouse (*Centrocercus urophasianus*), a species that warrants listing under the U.S. Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, from surface and underground coal mining and coal exploration operations.¹ See Figure 1.



Figure 1. Male greater sage grouse.

We petition the Director to promulgate such rules pursuant to 30 U.S.C. § 1251(b), which requires OSM to promulgate regulations “covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of this subchapter [V][.]” 30 U.S.C. § 1251(b).² Among other things, subchapter V

¹ We petition OSM to “issue” rules. However, to the extent that “issuance” of the petitioned rules will require an amendment to existing regulations, WildEarth Guardians also hereby petitions OSM to amend rules as appropriate or necessary.

² We also petition OSM pursuant to 30 U.S.C. § 1262(a), which requires the Agency to promulgate rules regarding coal exploration operations, and 30 U.S.C. § 1211(c)(2), which

requires state and federally issued permits to conduct surface mining operations (including the surface impacts of underground mining) ensure “to the extent possible using the best technology available” that “disturbances and adverse impacts” to wildlife are “minimize[d].” *See* 30 U.S.C. §§ 1265(b)(24) and 1266(b)(11).

OSM has promulgated rules under 30 C.F.R. Chapter VII, Subchapter K (30 C.F.R. § 810, *et seq.*) setting forth “minimum performance standards and design requirements to be adopted and implemented under a regulatory program[.]” 30 C.F.R. § 810.1. Among other things, these rules require protection of wildlife from surface mining and the surface impacts of underground mining, including coal exploration. *See* 30 C.F.R. §§ 815.15, 816.97, and 817.97. However, these rules do not expressly protect sage grouse. This Petition calls on OSM to promulgate explicit and enforceable standards of protection requiring the use of the best technology available to minimize disturbances and adverse impacts wherever coal mining and coal exploration occur within the range of the greater sage grouse.

Attached to this Petition as Exhibit 1 is proposed rule language, which we request OSM promulgate under 30 C.F.R. §§ 815.15, 816.97, and 817.97, or otherwise incorporate as appropriate into OSM’s performance standard regulations under Subchapter K after a public rulemaking process. Herein, we provide the factual, technical, and legal justification for promulgating the proposed rules.

We cannot overemphasize the urgent need for OSM to promulgate the requested rules. According to the U.S. Fish and Wildlife Service (“USFWS”), the greater sage grouse currently warrants listing under the Endangered Species Act due to present and threatened habitat loss and degradation, and inadequate regulatory mechanisms. *See* 75 Fed. Reg. 13910-14014 (March 23, 2010) (warranted but precluded finding for greater sage grouse). Coal mining has been identified as an explicit threat to the species and its habitat. Further, a lack of adequate regulatory mechanisms has been identified as a primary factor supporting the need for listing. This petition simply asks that OSM adopt adequate rules to aid in the conservation of the greater grouse, potentially helping to avoiding the need to list the species.

The need for the proposed rules is underscored by the overlap between coal and grouse in the western United States. Much of the current range of the greater sage grouse overlies large coalfields in Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. *See* Figure 2. Throughout the western United States, coal mining operations have already extensively disturbed or destroyed grouse habitat. In the face of potential listing under the Endangered Species Act, the threat of future destruction and disturbance must be avoided.

provides the Agency with authority to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter.”

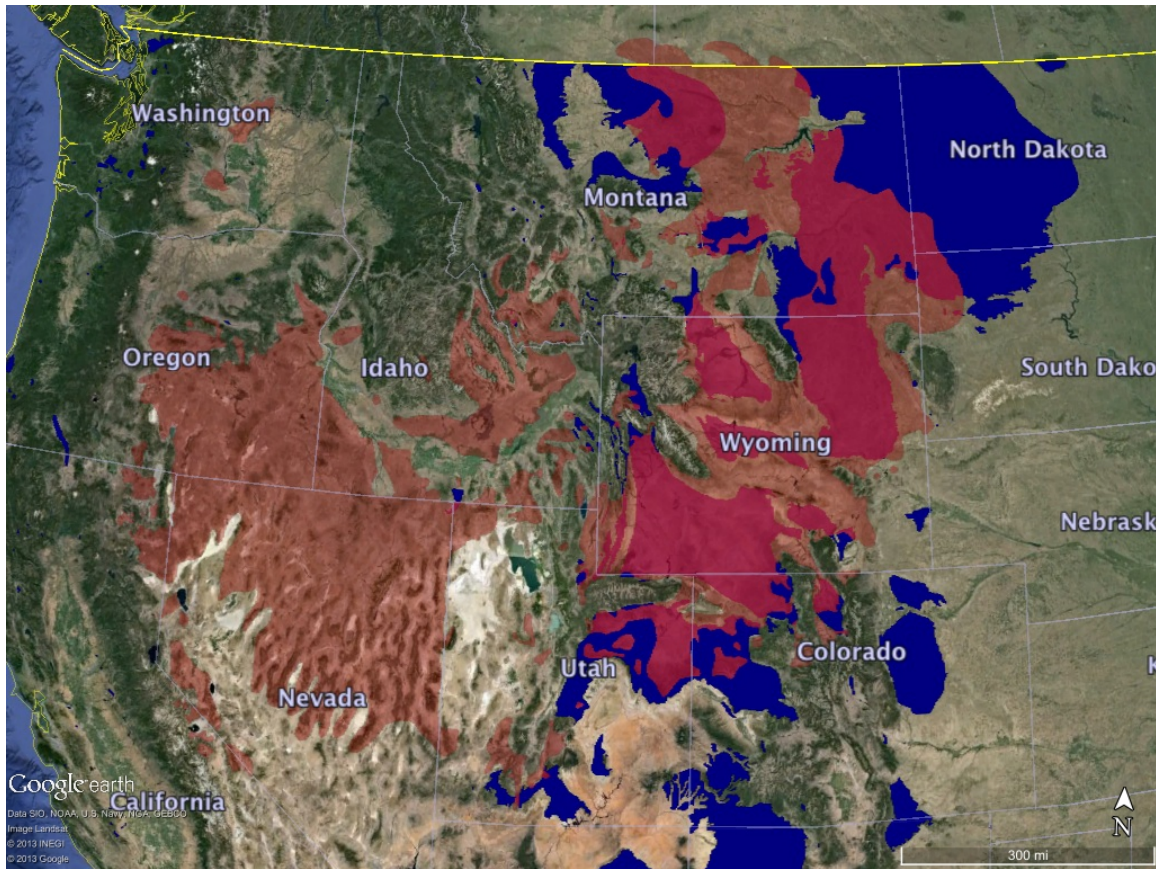


Figure 2. Current range of greater sage grouse (red) and coalfields in western United States (blue). Overlap shows as magenta color.³

This request is all the more appropriate in light of the fact that other federal land and resource management agencies in the western United States, including OSM’s sister agency, the Bureau of Land Management (“BLM”), are similarly adopting enforceable standards to ensure adequate protection of the greater sage grouse. The BLM is currently revising land management plans across 10 western states to ensure that they adequately protect the greater sage grouse. See BLM, “Sage-grouse and sagebrush conservation,” website available at <http://www.blm.gov/wo/st/en/prog/more/sagegrouse.html> (last accessed Feb. 25, 2014). It is critical that OSM also step up to play a meaningful role in the conservation of the greater sage grouse.

PETITIONER

WildEarth Guardians is a nonprofit conservation advocacy organization dedicated to protecting and restoring the wildlife, wild rivers, and wild places of the American West. To this end, Guardians seeks to safeguard the climate by promoting cleaner energy, efficiency and

³ Data from U.S. Geological Survey, SAGEMAP, <http://sagemap.wr.usgs.gov/aboutSagemap.aspx> (last accessed Feb. 25, 2014).

conservation, and alternatives to fossil fuels. Headquartered in Santa Fe, New Mexico, Guardians also has offices in Denver, Utah, Montana, and elsewhere in the western United States. WildEarth Guardians has more than 43,000 members and supporters throughout the United States. WildEarth Guardians is extensively engaged in efforts to conserve the sage grouse and its habitat. WildEarth Guardians has also engaged extensively in coal mining issues for many years, advocating for greater limits on environmental impacts, including to sage grouse.

LEGAL BASIS FOR PETITIONING

WildEarth Guardians petitions OSM pursuant to SMCRA and the APA. The APA generally provides that, “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e).⁴ SMCRA specifically provides that “any person may petition the [OSM] Director to initiate a proceeding for the issuance, amendment, or repeal of a rule under this chapter.” 30 U.S.C. § 1211(g); *see also* 30 C.F.R. § 700.12(a).

A rulemaking petition must present a “concise statement of facts, technical justification, and law which require issuance, amendment, or repeal of a regulation” under SMCRA. 30 C.F.R. § 700.12(b). Upon receipt, OSM must determine whether the facts, technical justification, and law set forth in the petition “may provide a reasonable basis for issuance, amendment, or repeal of a regulation.” 30 C.F.R. § 700.12(c). If a petition has a “reasonable basis,” a notice shall be published in the Federal Register seeking public comment on the proposed changes. *Id.* OSM may also hold a public hearing or undertake an investigation to determine whether a petition has a “reasonable basis.” *Id.*

Within 90 days of receipt, OSM must either grant or deny a petition. *See* 30 U.S.C. § 1211(g)(4); *see also* 30 C.F.R. § 700.12(d). If a petition is granted, a rulemaking proceeding must be initiated. *See* 30 C.F.R. § 700.12(d)(1). If a petition is denied, the Director must notify the petitioner in writing and set forth the reasons for denial. *See* 30 C.F.R. § 700.12(d)(2).

LEGAL BACKGROUND

This petition requests that OSM issue rules to ensure compliance with SMCRA. SMCRA requires that coal mining operations meet minimum environmental protection performance standards. OSM is required to promulgate regulations that assure such performance standards are met. Below, we detail these key legal underpinnings.

⁴ A rule is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]” 5 U.S.C. § 551(4).

1. The Surface Mine Reclamation and Control Act

SMCRA was passed in 1977 to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C. § 1202(a). The law implements a “cooperative federalism” approach to regulating coal mining. While minimum standards for surface coal mining are established through federal law and regulation, states are largely delegated authority to implement the law. Where states fail to meet minimum standards, or otherwise choose not to seek delegated authority, the federal government, by and through OSM, retains authority to implement its provisions. Congress intended this “cooperative effort” as “necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.” 30 U.S.C. § 1201(k).

The law primarily regulates the impacts of surface coal mining, including the surface impacts of underground mining, through a permitting program. SMCRA expressly prohibits any person from engaging in or carrying out surface coal mining “unless [that] person has first obtained a permit[.]” 30 U.S.C. § 1256(a). To this end, SMCRA requires that permitting programs be developed. *See id.* While the law contemplates that states will primarily develop permitting programs and serve as delegated permitting authorities, where states lack approved programs, OSM will develop a federal program and serve as the permitting authority. *See* 30 U.S.C. §§ 1253 and 1254. Both state and federal permitting programs must, among other things, “[meet] the requirements of [] subchapter [V of SMCRA] for the [regulation] of surface coal mining and reclamation operations for coal on lands within the State.” 30 U.S.C. § 1253(a)(4).

2. Performance Standards Under SMCRA

SMCRA explicitly requires that surface coal mining operations, including the surface impacts of underground mining, be conducted so as “to protect the environment.” 30 U.S.C. § 1202(d). To this end, SMCRA requires that permits for surface mining and for underground mining, whether issued by states or OSM, meet minimum environmental protection performance standards. *See* 30 U.S.C. §§ 1265(a) and 1266(b).⁵

A number of environmental protection performance standards are set forth under SMCRA. *See e.g.* 30 U.S.C. § 1265(b)(1)-(25). However, the law also charges OSM with promulgating regulations “covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of subchapter [V of SMCRA].” 30 U.S.C. § 1251(b).^{6,7} To this end, OSM has promulgated

⁵ SMCRA also requires that coal exploration operations that “substantially disturb the natural land surface” meet minimum provisions for reclamation in accordance with performance standards set forth under 30 U.S.C. § 1265. 30 U.S.C. § 1262(a).

⁶ OSM also has authority under SMCRA to “publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter.” 30 U.S.C. § 1211(c)(2).

regulations setting forth explicit permanent environmental protection performance standards under 30 C.F.R. Chapter VII, Subchapter K. OSM explains:

Subchapter K sets forth the environmental and other performance standards which apply to coal exploration and to surface coal mining and reclamation operations during the permanent regulatory program. The regulations establish the minimum requirements for operations under State and Federal programs.

30 C.F.R. § 700.1(i). Under Subchapter K, OSM has promulgated environmental protection performance standards for coal exploration (30 C.F.R. § 815), surface mining (30 C.F.R. § 816), and underground mining (30 C.F.R. § 817).

3. Performance Standards for the Protection of Wildlife

Among the environmental protection performance standards established by SMCRA are those related to the protection of wildlife. The law requires both surface and underground coal mining operations “to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.” 30 U.S.C. §§ 1265(b)(24) and 1266(b)(11).

Based on and conforming to the provisions of SMCRA, OSM has taken some steps to promulgate regulations to protect wildlife. In general, OSM’s rules simply echo SMCRA, stating, for example, that coal mining operations must “minimiz[e], to the extent possible using the best technology currently available, disturbances and adverse impacts on fish, wildlife, and other related environmental values, and enhancement of such resources where practicable[.]” 30 C.F.R. § 810.2(e); *see also* 30 C.F.R. §§ 816.97(a) and 817.97(a) (restating 30 U.S.C. §§ 1265(b)(24) and 1266(b)(11)).⁸ However, OSM has promulgated some explicit standards to protect wildlife from surface and underground mining, including, but not limited to:

- Standards for the protection of threatened and endangered species, 30 C.F.R. §§ 816.97(b) and 817.97(b)
- Standards for the protection of bald and golden eagles, 30 C.F.R. §§ 816.97(c) and 817.97(c); and
- Standards for the protection of wetlands and wildlife habitat of “unusually high value,” 30 C.F.R. §§ 816.97(f) and 817.97(f).

⁷ SMCRA also charges OSM with promulgating rules governing coal exploration operations that must, at a minimum, ensure provisions at 30 U.S.C. § 1265 are met. *See* 30 U.S.C. § 1262(a)(2).

⁸ 30 C.F.R. § 815.15(a) also requires coal exploration activities to “not distur[b] habitats of unique or unusually high value for fish, wildlife, and other related environmental values[.]”

The promulgation of these rules by OSM acknowledges the need to ensure that, where necessary, explicit standards of performance are adopted to ensure the “best technology currently available” is used to minimize disturbances and adverse impacts to wildlife.

FACTUAL AND TECHNICAL BACKGROUND

1. The Greater Sage Grouse

The greater sage grouse is a distinctive and iconic North American bird that inhabits the arid sagebrush ecosystem of western North America. It is the largest North American grouse species. *See* 75 Fed. Reg. 13912. The bird once ranged in 13 western states and three western Canadian provinces, including Alberta, Arizona, British Columbia, California, Colorado, Idaho, Montana, Nebraska, Nevada, North Dakota, Oregon, Saskatchewan, South Dakota, Utah, Washington, and Wyoming. *See* 75 Fed. Reg. 13917. The bird has declined, however, and currently only occurs in 11 western states and two Canadian provinces, including Alberta, California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, Saskatchewan, South Dakota, Utah, Washington, and Wyoming. *See id.* Distribution of the greater sage grouse has been reduced from an estimated 1,200,483 square kilometers to an estimated 668,412 square kilometers, a 55% reduction. *See* 75 Fed. Reg. 13917 and 13918. *See* Figure 3.

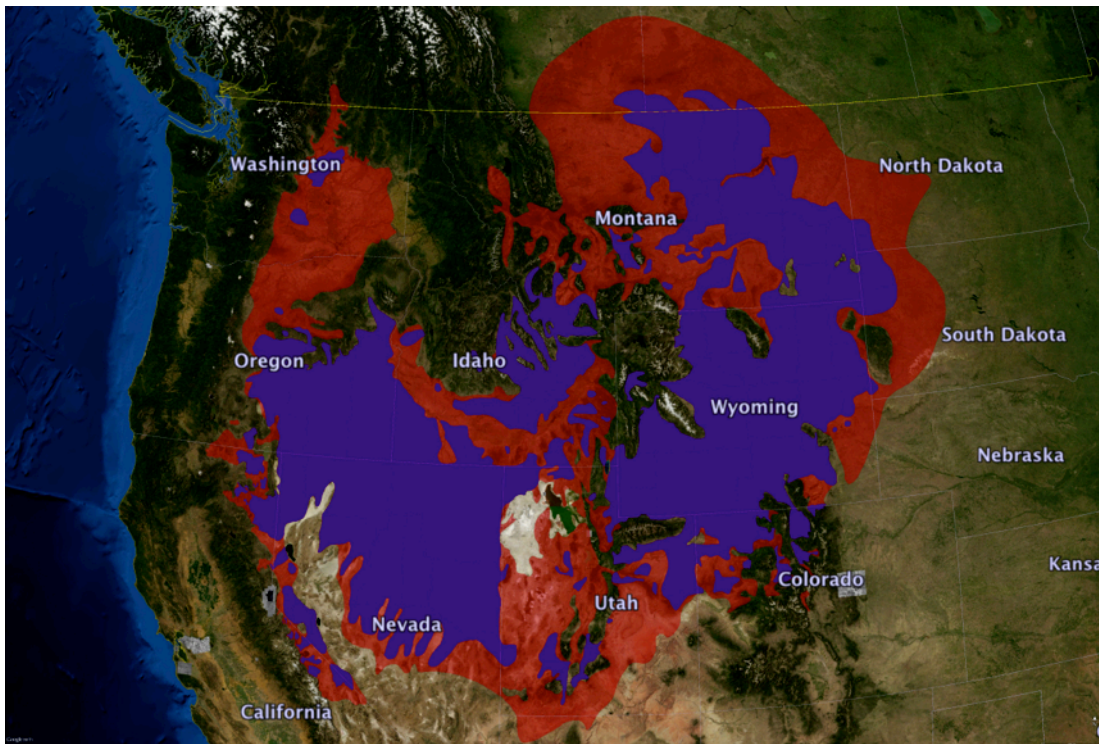


Figure 3. Historical (red) and current (purple) range of greater sage grouse.

The greater sage grouse depends on large areas of contiguous sagebrush. *See* 75 Fed. Reg. 13916. Unfortunately, sagebrush habitat, particularly contiguous sagebrush habitat, has declined precipitously in the west. The USFWS states that, “[a]lmost half of the sagebrush

habitat estimated to have been present historically has been destroyed.” 75 Fed. Reg. 13986. Sagebrush ecosystems are now considered “one of the most imperiled ecosystems in North America.” *Id.* Reductions in sage grouse distribution “are the result of [this] sagebrush alteration and degradation.” 75 Fed. Reg. 13918. The USFWS predicted that declines of sage grouse will continue as sagebrush declines persist in the foreseeable future. *See* 75 Fed. Reg. 13961-13962.

In 2010, the USFWS determined, based on the best available scientific and commercial information, that the greater sage grouse warranted listing as threatened or endangered under the Endangered Species Act. *See* 75 Fed. Reg. 13910-14014. This determination was made on the basis of findings that the grouse was threatened with endangerment, in large part because of habitat loss and degradation and inadequate regulatory mechanisms. *See* 75 Fed. Reg. 13986-13987.

In making its finding, the USFWS explicitly identified coal mining as among the primary threats to the greater sage grouse and its habitat, noting that “individually and in combination [with other threats],” the activity is contributing to the “destruction, modification, or curtailment of the greater sage-grouse’s habitat or range.” 75 Fed. Reg. 13986. The USFWS explained, “[coal] mining directly removes habitat, may interfere with auditory clues important to mate selection, and results in a decrease of males and inhibits yearling recruitment at leks in proximity to mining activity.”⁹ 75 Fed. Reg. 13949. Both surface and underground mining was reported to “result in direct loss of habitat if occurring in sagebrush habitats.” 75 Fed. Reg. 13948. The USFWS elaborated that, “[h]abitat loss from both types of mining can be exacerbated by the storage of overburden (soil removed to reach subsurface resource) in otherwise undisturbed habitat” and that “additional direct loss of habitat could result from structures, staging areas, roads, railroad tracks, and powerlines” associated with mines. *Id.* The USFWS finally found that, “[s]age-grouse habitat reestablishment and recovery of population numbers in an area post-disturbance is uncertain.” *Id.* In other words, reclamation of coal mines was not identified as a factor promoting the expansion of greater sage grouse or otherwise promoting the viability of the species.

The USFWS expressly identified coal mining in Colorado, Montana, and Wyoming as having negatively impacted the sage grouse and its habitat, but its determination indicated that coal mining throughout the range of the species is a threat. In the Powder River Basin region of Montana and Wyoming, which the USFWS discloses is “home to an important regional population” of sage grouse, it was found that “the cumulative impacts of surface coal mine disturbance, concurrent increases in oil and gas development, increased development of renewable energy resources, and transmission infrastructure could have significant impacts on sage-grouse[.]” 75 Fed. Reg. 13949. Compounding the threats from coal mining was the USFWS’s finding “that the inadequacy of existing regulatory mechanisms is a significant threat to the greater sage-grouse now and in the foreseeable future.” 75 Fed. Reg. 13987. The USFWS specifically identified a lack of adequate regulatory mechanisms in relation to “energy development,” including coal mining. *Id.*

⁹ A lek is a traditional sage grouse courtship display area and is indicative of nesting habitat. *See* 75 Fed. Reg. 13915.

Although the USFWS found that listing the greater sage grouse was precluded by higher priority Endangered Species Act listings, under a 2011 legal agreement with WildEarth Guardians, a final listing decision for the sage grouse must be made by September of 2015. *See In re: Endangered Species Act Section 4 Deadline Litigation*, Case No. 1:10-mc-00377-EGS (D.D.C. 2011), Stipulated Settlement Agreement (May 10, 2011) at 6.

2. Technical Team Recommendations for the Conservation of Sage Grouse

Following the USFWS's 2010 finding, key scientific recommendations regarding the conservation of the sage grouse have been released. Among them, a late 2011 report providing "the latest science and best biological judgment to assist in making management decisions" regarding the conservation of the sage grouse, which was authored by the BLM's Sage-grouse National Technical Team. *See* Exhibit 2, Sage-grouse National Technical Team, "A Report on National Greater Sage-Grouse Conservation Measures" (Dec. 21, 2011) (hereafter referred to as the "Technical Team Recommendations"). In response to the Technical Team Recommendations, the BLM directed its programs to revise its resource management plans throughout the western United States to incorporate the recommendations, as appropriate. *See* BLM, Instruction Memorandum No. 2012-044, "BLM National Sage Grouse Land Use Planning Strategy" (Dec. 27, 2011). Starting in late 2011, the BLM has taken steps to formally incorporate the recommendations. *See e.g.* BLM, "Notice of Intent to Prepare Environmental Impact Statements and Supplemental Environmental Impact Statements to Incorporate Greater Sage-Grouse Conservation Measures into Land Use Plans and Land Management Plans," 76 Fed. Reg. 77008-77011 (Dec. 9, 2011).

While directed toward BLM land management actions, the Technical Team Recommendations provide conservation direction based on specific "resource programs," such as coal management. Thus, the recommendations are equally applicable to other resource management agencies sharing similar oversight responsibilities.

The overall objective of the Technical Team Recommendations is "to protect priority sage-grouse habitats from anthropogenic disturbances that will reduce distribution or abundance of sage-grouse." Exhibit 2 at 7. The report explains that "priority" habitats are "areas that have the highest conservation value to maintaining or increasing sage-grouse populations." *Id.* The recommendations also make clear that conservation "sub-objectives [] must be met in general sage-grouse habitat." *Id.* at 9. "General" habitat is described as occupied habitat outside of priority habitat. *Id.*

Within priority habitats, the Technical Team provided specific recommendations for protecting sage grouse from coal mining. With regards to surface mining, the Team recommended that priority habitats on lands managed by the BLM be found "unsuitable" for mining under 43 C.F.R. § 3461.5, in other words that surface mining be disallowed. Exhibit 2 at 24. For underground mining, the Team recommended that all surface disturbances be "placed outside of the priority sage-grouse habitat area." *Id.* Outside of priority habitats, or in general habitat, the Team recommended that surface disturbing activities related to coal mining be

minimized “to reduce the impacts of human activities on important seasonal sage-grouse habitats.” *Id.*

While the Technical Team’s recommendations were, in large part, based on whether or not the coal at issue was leased or otherwise under regulatory control by the BLM, whether or not coal is leased or under BLM control is not a scientific distinction, but rather an administrative distinction. To this end, the Technical Team Recommendations make clear that, wherever possible, surface mining and surface impacts related to underground coal mining should not occur within priority habitats. As the Technical Team states, “[W]e believe the conservation strategy most likely to meet the objective of maintaining or increasing sage-grouse distribution and abundance is to exclude energy development and other large scale disturbances from priority habitats[.]” Exhibit 2 at 21. Thus, although the Technical Team Recommendations may be specifically applicable to the BLM, they are scientifically applicable to other land and resource management agencies with oversight of sage grouse and sagebrush habitat.

In addition to providing recommendations specific to coal mining, the Technical Team Recommendations provided general recommendations that are equally applicable to coal mining activities. For example, with regards to mineral exploration, the Technical Team recommended that only “helicopter-portable drilling methods” be used and that such activities be seasonally restricted. Exhibit 2 at 22. As the team noted, while timing restrictions are not effective for construction or production activities, “[s]easonal timing restrictions may be effective during the exploration phase” of mineral development. *Id.* at 21. The Team also noted that to effectively protect sage grouse lek sites, no disturbance buffers of at least four miles would be necessary, although they note that recent scientific studies support buffers up to eight miles or more may be necessary and that in priority habitat, complete avoidance of disturbance should be utilized instead of buffers. *See id.* at 20-21. The Technical Team Recommendations state, “Even a 4-mile NSO [no surface occupancy] buffer would not be large enough to offset all the impacts reviewed above.” *Id.* at 21. In fact, scientific studies relied upon by the Technical Team firmly support the need for greater than four mile buffers to protect lek sites and associated habitats. For example, Holloran (2005), which is relied upon extensively by the Technical Team, reports that to effectively protect an important majority of nesting habitat, buffers of 8.5 kilometers (5.3 miles) are likely necessary. *See* Exhibit 3, Holloran, M., *Greater sage-grouse (Centrocercus urophasianus) population response to natural gas field development in western Wyoming*, PhD Dissertation, University of Wyoming, Department of Zoology and Physiology (Dec. 2005) at A18.

Since the release of the National Technical Team Recommendations, the USFWS has identified specific sage grouse priority habitats throughout the range of the species. Referred to as “Priority Areas for Conservation,” the USFWS used state and BLM data to map these habitats in a 2013 report detailing greater sage grouse conservation objectives. *See* Exhibit 4, USFWS, “Greater sage-grouse (*Centrocercus urophasianus*) conservation objectives: Final report” (Feb. 2013) at 14; *see also* Figure 4. With the identification of Priority Areas for Conservation, it is now clear where the Technical Team Recommendations are to be implemented to ensure consistent and effective protection of the greater sage grouse throughout its range.

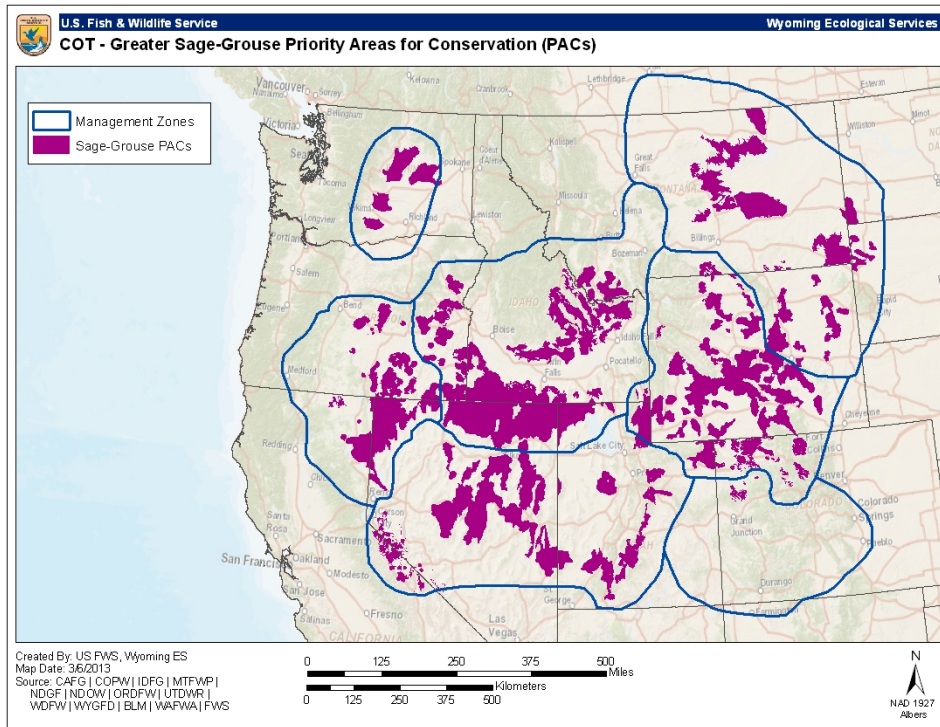


Figure 4. USFWS Greater Sage Grouse Priority Areas for Conservation.

3. Threats to Sage Grouse from Coal Mining

Within the states of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming, greater sage grouse Priority Areas for Conservation overlap considerably with coal resources. The map below illustrates the overlap between priority habitat and coal fields, underscoring the threats mining poses to the species. *See* Figure 5. In many of these areas, existing mining operations have already destroyed extensive areas of sage grouse habitat, contributing to the decline of the species. Many existing mining operations appear to pose significant threats to priority habitat, as well as to general sage grouse habitat.

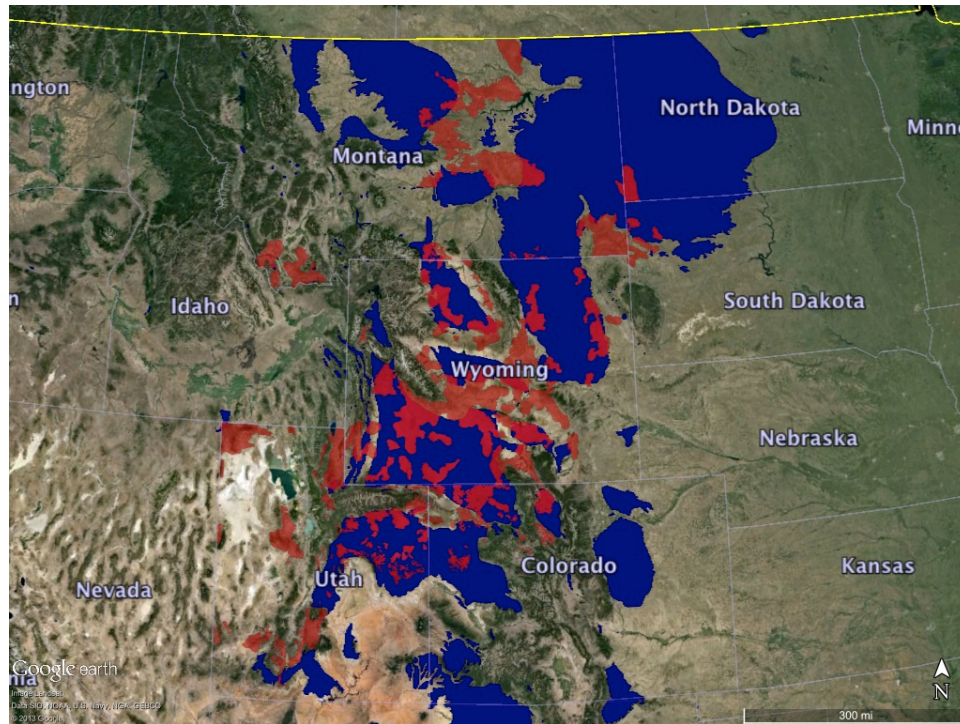


Figure 5. Overlap of coalfields (blue) and sage grouse Priority Areas for Conservation (red). Areas of overlap appear pink. Sage grouse data obtained from state GIS data sites, as disclosed on the BLM’s website, http://www.blm.gov/wo/st/en/prog/more/sagegrouse/documents_and_resources.html (last accessed Feb. 25, 2014).

A closer look at coal mining areas within or near Priority Areas for Conservation emphasizes the impacts and the threats that exist. In one coal mining area of southeastern Montana and northeastern Wyoming (in the northern portion of the Powder River Basin), these impacts are clearly illustrated. *See* Figure 6. Here, the Spring Creek, West Decker, and East Decker surface coal mines have already stripped away an extensive amount of sagebrush habitat within the range of the greater sage grouse. A newly permitted surface mine, the Youngs Creek mine, located in Wyoming on the border with Montana, threatens to strip away even more sagebrush habitat. More disconcerting, however, is that mapping of the permitted mining areas and Priority Areas for Conservation clearly demonstrates these mines are not only currently stripping away priority habitat, but that they are likely to strip away much more. The Spring Creek and West Decker mines in particular are already directly impacting priority habitat. In fact, priority habitat is located within the permitted boundaries of these mines. Further, both the East Decker and Youngs Creek mines appear to be in such close proximity to priority habitat (less than two miles) that adverse impacts appear inevitable.

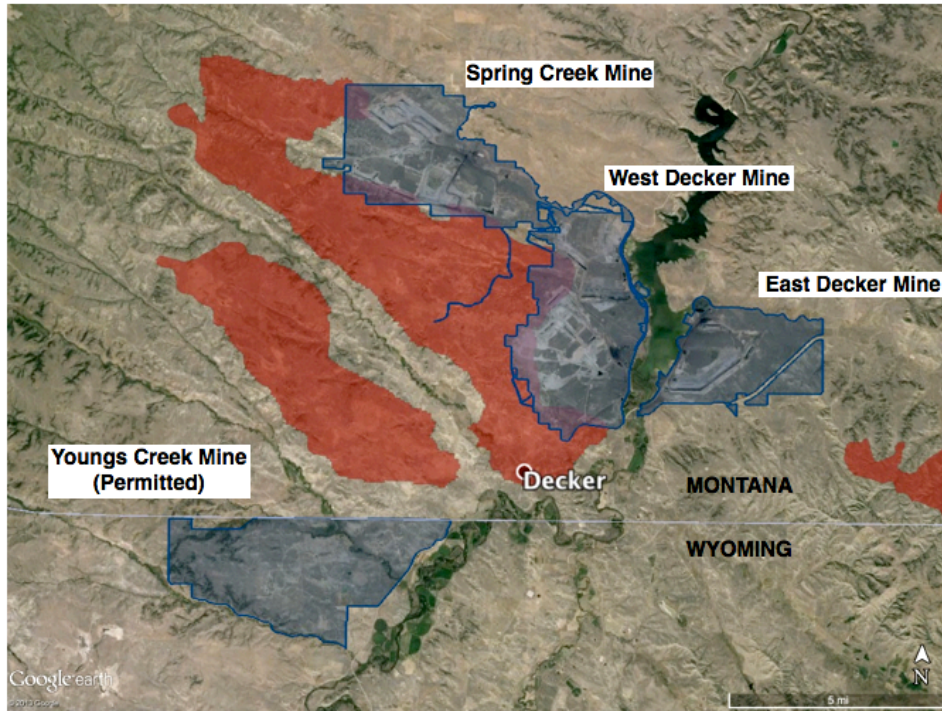


Figure 6. Proximity of Spring Creek, West Decker, East Decker, and Youngs Creek Mining areas (blue) to greater sage grouse Priority Areas for Conservation (red). Mine permit boundary data from Montana Department of Environmental Quality and Wyoming Department of Environmental Quality.

With regards to the Spring Creek mine, it is notable that the BLM has projected an extensive amount of additional coal mining in the area, which will occur directly in priority habitat. According to the agency’s recent Reasonably Foreseeable Development analysis prepared for the draft Miles City Field Office Resource Management Plan Revision, an extensive amount of land to the west and south of the mine is slated to be mined in the next 20 years. *See* BLM, “Miles City Field Office Draft Resource Management Plan and Environmental Impact Statement,” Volume IV at Map 75; *see also* Figure 7.

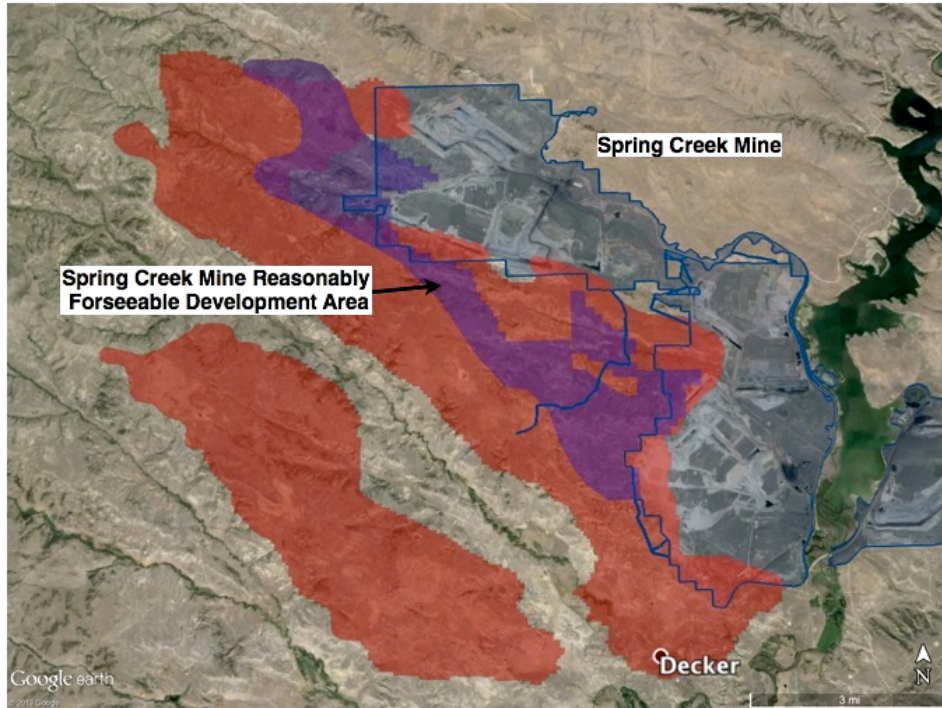


Figure 7. Reasonably foreseeable coal mining projected by the BLM at the Spring Creek Coal Mine (in purple) and overlap with priority habitat. Reasonably foreseeable development data from BLM.

Elsewhere in Wyoming, coal mines are similarly currently impacting priority sage grouse habitat. In southeastern Wyoming, the Carbon Basin Mines near the towns of Medicine Bow and Elk Mountain in Carbon County are largely permitted within priority sage grouse habitat. According to a 2005 permit issued by the Wyoming Department of Environmental Quality, the Carbon Basin Mines consist of the Elk Mountain mine, a surface mine, and the Saddleback Hills mine, an underground mine, and are permitted to produce 2.1 million tons of coal annually. *See* Exhibit 5, Wyoming Department of Environmental Quality, Air Pollution Permit AP-2989, Carbon Basin Mines (Nov. 9, 2005). This mining is clearly permitted within priority habitat. *See* Figure 8. Similarly, the Jim Bridger Mine in southern Wyoming east of Rock Springs in Sweetwater County, is also permitted to impact priority habitat. *See* Figure 9. This mine fuels the adjacent Jim Bridger power plant and according to the U.S. Energy Information Administration (“EIA”), produces more than four million tons annually. *See* U.S. EIA, “Major U.S. Coal Mines, 2012,” website available at <http://www.eia.gov/coal/annual/pdf/table9.pdf> (last accessed Feb. 25, 2014).

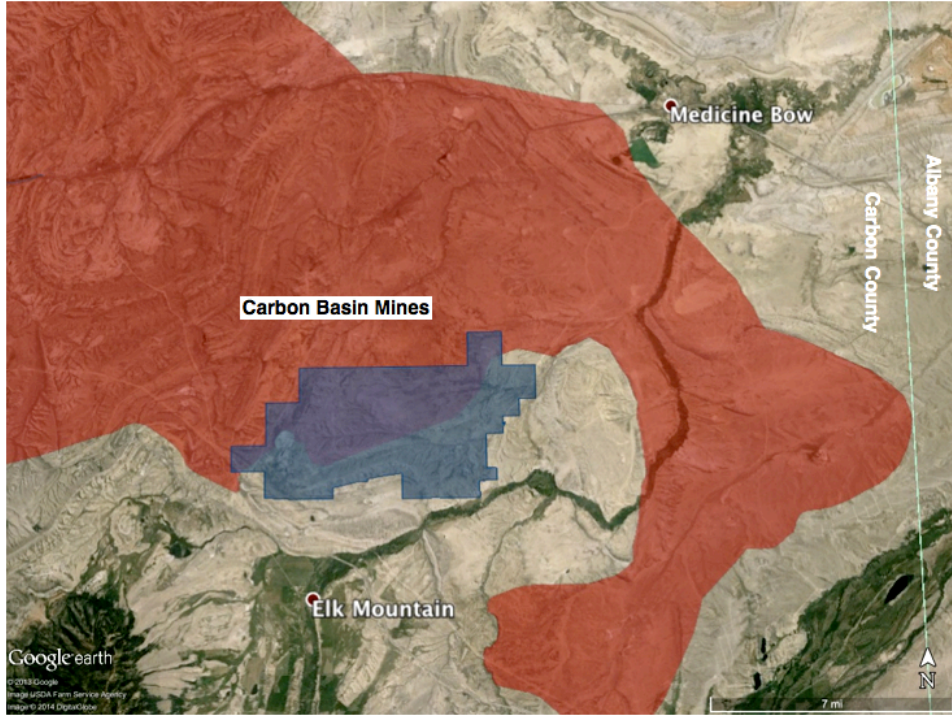


Figure 8. Location of Carbon Basin Mines (blue), Carbon County Wyoming, in Relation to Priority Sage Grouse Habitat (red).

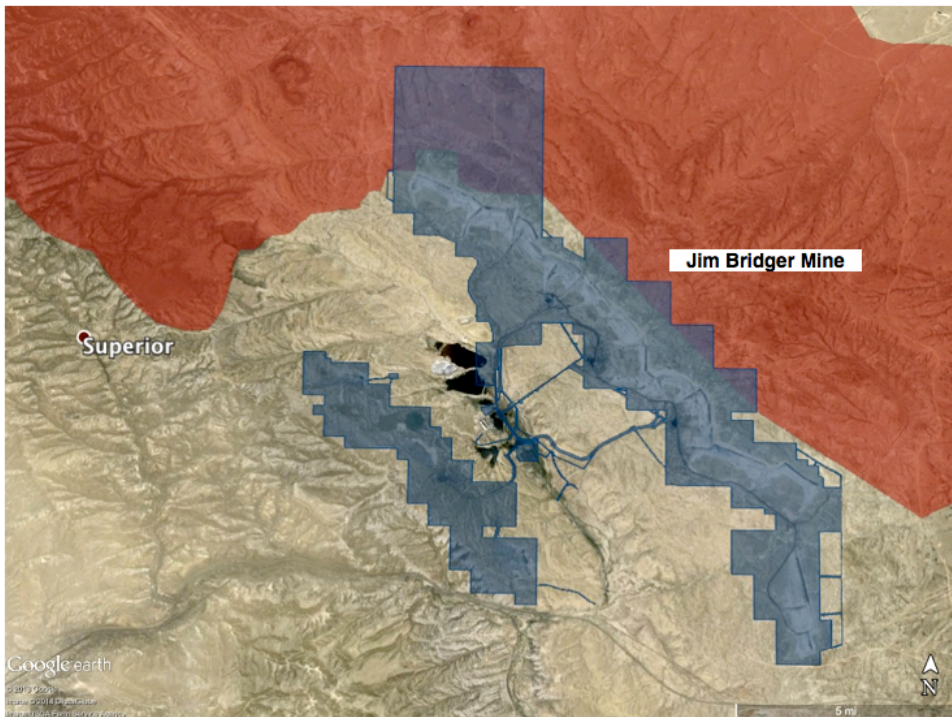


Figure 9. Location of Jim Bridger Mine (blue), Sweetwater County Wyoming, in Relation to Priority Sage Grouse Habitat (red).

In Colorado, the impacts and threats to greater sage grouse from coal mining are also apparent. In northwestern Colorado, five coal mines, including the underground Deserado mine, the surface Trapper mine, the surface Colowyo mine, the underground Sage Creek mine, and the underground Twentymile mine are adjacent to or very near Priority Areas for Conservation. *See* Figure 10. Surface impacts of mining at these mines, including impacts from road and transmission line construction, rail construction, soil and coal stockpiling, surface stripping, ventilation shaft construction, and other developments would appear to pose significant threats to the greater sage grouse and its habitat. It is notable that Colorado has mapped general sage grouse habitat extending beyond the Priority Areas for Conservation, indicating that adverse impacts to the sage grouse from coal mining may be even more extensive.

The impacts of mining at the Colowyo mine are especially of concern. Already, mining activities have encroached into priority habitat and it appears that the permit boundary for the mine encompasses an extensive amount of priority habitat to the west and north of current operations. Mapping clearly indicates that operations at the northern end of the mine have adversely impacted and are continuing to occur within priority habitat. Further, OSM is currently considering whether to approve an expansion of the mine to the northwest. *See* Exhibit 6, OSM, Dear Reader Letter in re: Collom Permit Expansion Area (Sept. 26, 2013) and Map of Proposed Permit Expansion Area (Nov. 1, 2013). Called the Collom Permit Expansion Area, the new mining would occur directly in priority habitat. *See* Figure 11.

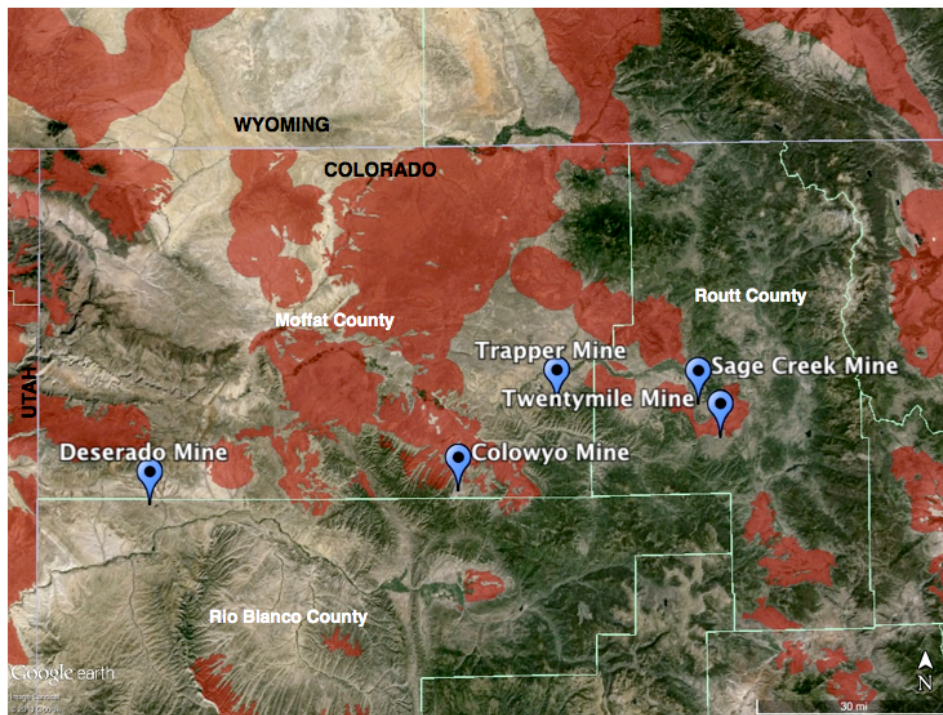


Figure 10. Proximity of Northwestern Colorado Coal Mines to Greater Sage Grouse Priority Areas for Conservation.

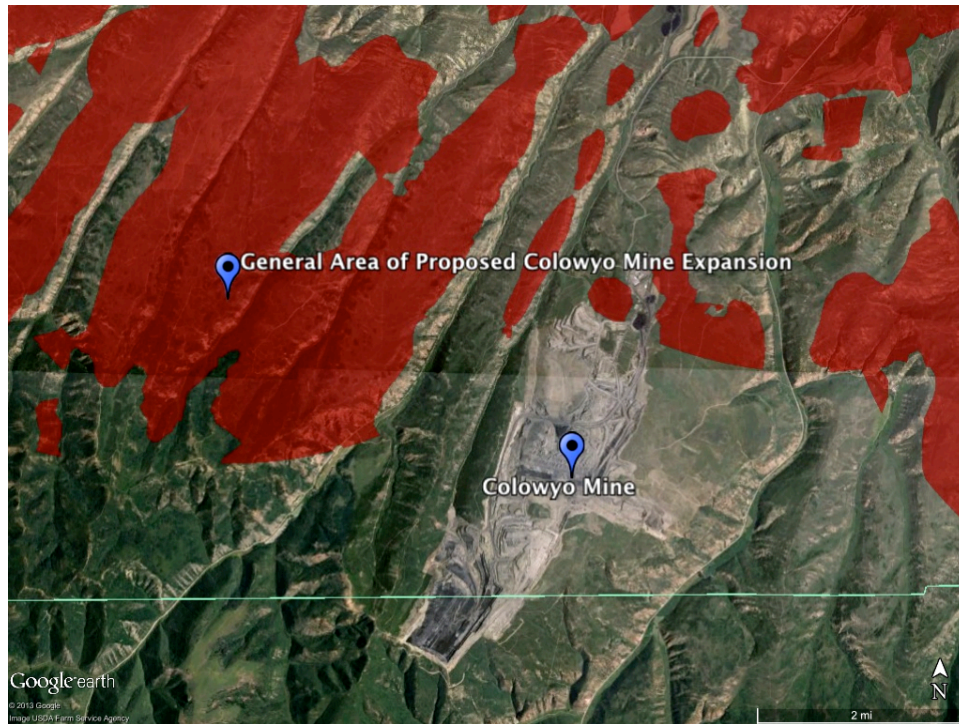


Figure 11. Proximity of Colowyo Coal Mine and Proposed Colowyo Expansion Area to Priority Habitat (red) in Northwestern Colorado.

Although the BLM, as well other land management agencies, have taken steps to ensure the recommendations of the Technical Team are implemented, and that greater sage grouse habitats are protected, OSM has been conspicuously absent. In 2011 the BLM, USFWS, and United States Department of Agriculture’s Natural Resources Conservation Service and U.S. Forest Service entered into an Interagency Agreement committing to the conservation of the sage grouse. *See* Exhibit 7, “Interagency Agreement Between the United States Department of Agriculture Natural Resources Conservation Service, and the USDA Forest Service, and the United States Department of the Interior Bureau of Land Management and the Fish and Wildlife Service,” FS Agreement Number: 11-IA-11132400-104, available online at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/fish_wildlife_and_sage-grouse.Par.6386.File.dat/MOU%20on%20Greater%20Sage-Grouse.pdf (last accessed Feb. 25, 2014). To date, OSM does not appear to have provided similar substantive commitments to protect greater sage grouse or to be involved in efforts to conserve the sage grouse, despite its obligations under SMCRA to protect wildlife.

This lack of oversight is disconcerting given that OSM has distinct and important authorities related to coal mining that other agencies do not have. The BLM, for example, only manages coal leasing and mining on federal lands. Even then, this authority is limited. For example, BLM cannot designate areas unsuitable for surface coal mining where federal coal has been leased. *See* 43 C.F.R. § 3461.3-2.

The lack of OSM oversight is all the more disturbing given that states responsible for permitting coal mining operations within the range of the greater sage grouse also appear to not be effectively protecting the species from mining. Indeed, although OSM has approved SMCRA

regulatory programs for Colorado (30 C.F.R. § 906), Montana (30 C.F.R. § 926), North Dakota (30 C.F.R. § 934), South Dakota (30 C.F.R. § 941), Utah (30 C.F.R. § 944), and Wyoming (30 C.F.R. § 950), it does not appear that any of these states' programs have incorporated explicit rules to protect the greater sage grouse and its habitat consistent with the Technical Team Recommendations or other best available scientific information.

THE PETITIONED RULES

In light of the aforementioned legal, factual, and technical background, WildEarth Guardians hereby petitions OSM to issue rules providing explicit and enforceable protection for the greater sage grouse and its habitat from the impacts of coal exploration, surface coal mining, and the surface impacts of underground mining. We request these rules be promulgated by OSM as environmental protection performance standards under Subchapter K. This rulemaking request is based on the following:

- A. The greater sage grouse warrants listing under the Endangered Species Act and may be listed as threatened or endangered by September 2015 if effective conservation commitments are not undertaken and implemented by land and resource managers that protect and recover the species. There is a need for OSM to make effective conservation commitments in order to play a meaningful role in conserving the greater sage grouse and potentially avoiding the need to list the species under the Endangered Species Act;
- B. Coal mining has been explicitly identified as an activity that, as an individual activity and cumulatively with other impacts, has contributed to the degradation of sagebrush and declines of greater sage grouse, and continues to threaten the species and its habitat in an important part of the species' range. Mapping indicates several coal mines are either impacting or threatening to impact greater sage grouse Priority Areas for Conservation, as well as other occupied habitat. There is a need to minimize or eliminate these impacts and threats;
- C. OSM's oversight of coal mining (including coal exploration), whether occurring on federal, private, or state lands, and duties under SMCRA, uniquely positions the agency to play a more effective and comprehensive role in protecting the sage grouse from coal mining. Whereas, for example, the BLM can only influence leasing decisions involving federally owned coal, OSM can influence coal mining decisions regardless of coal ownership and location of the coal;
- D. The BLM's Sage-grouse National Technical Team has prepared scientifically based recommendations for the protection of sage grouse from coal mining and related impacts. The USFWS has further identified and mapped Priority Areas for Conservation that clearly indicate where the Technical Team Recommendations should be implemented in order to protect the sage grouse and its habitat. There is a sound scientific basis for OSM to adopt rules to protect the greater sage grouse and its habitat;

- E. OSM's sister agency within the Interior Department, the BLM, as well as other federal land and resource management agencies, are undertaking significant efforts to ensure their actions are adequately protecting the sage grouse consistent with the Technical Team Recommendations and other relevant best available scientific information. There is a need for OSM to join with other federal agencies in utilizing its authorities and duties under SMCRA to ensure adequate protection of the sage grouse. It is especially critical for OSM to step up its conservation efforts given that other federal agencies lack authority under SMCRA to ensure coal mining effectively protects sage grouse and sagebrush habitat;
- F. States with approved SMCRA regulatory programs thus far do not have rules providing explicit and enforceable protection of the greater sage grouse and its habitat from the impacts of coal mining and coal exploration. It is necessary for OSM to exercise its oversight role under SMCRA and direct the states, by rule, to ensure their permitting and other related decisions under SMCRA consistently and effectively protect the sage grouse and its habitat;
- G. Current coal mining and exploration within the range of the greater sage grouse is not using the best technology currently available to minimize disturbances and adverse impacts to the species and its habitat. Notably, it appears that coal mining is directly disturbing and adversely impacting Priority Areas for Conservation. Furthermore, the best available scientific information strongly indicates that future coal mining will continue to disturb and adversely impact priority habitat. There is a need for OSM to adopt specific rules to protect the sage grouse to ensure effective conservation and recovery of the species, particularly to ensure full protection of Priority Areas for Conservation; and
- H. SMCRA not only provides authority for the promulgation of rules to protect wildlife from coal mining and exploration, but also expressly requires OSM to promulgate performance standards to ensure that, to the extent possible, the best technology currently available is used to minimize disturbances and adverse impacts to wildlife. Pursuant to this duty, OSM has already promulgated rules to protect certain species of wildlife, including bald and golden eagles, from coal mining and exploration through the promulgation of performance standards. There is a need for OSM to similarly promulgate performance standards that protect the greater sage grouse and its habitat consistent with the best available scientific information.

To this end, we petition OSM to incorporate the language detailed below into 30 C.F.R. §§ 815, 816, and 817, which set forth performance standards for coal exploration, surface mining, and underground mining. We believe the proposed rule language would best be promulgated as additions to performance standards set forth at 30 C.F.R. §§ 815.15, 816.97, and 817.97.¹⁰ However, we urge OSM to determine the best placement for the proposed rule

¹⁰ We propose rules related to coal exploration, surface mining, and underground mining given that these coal mining activities are predominant in the western United States and appear most

language through a public rulemaking process. The specific language and additional background and justification is as follows:

1. Revision to 30 C.F.R. § 815.15

We propose that OSM issue a rule that adds the following language to 30 C.F.R. § 815.15 (proposed language is in underline while existing language is in plain text):

30 C.F.R. § 815.15

(a) Habitats of unique or unusually high value for fish, wildlife, and other related environmental values and critical habitats of threatened or endangered species identified pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) shall not be disturbed during coal exploration. Coal exploration activities shall also meet the following standards for the protection of greater sage grouse:

(1) In priority sage grouse areas, coal exploration activities shall be conducted only by helicopter-portable drilling methods and shall be prohibited in nesting, brood-rearing, and wintering habitat during their season of use by sage grouse. Priority sage grouse areas are those areas that have been identified as Priority Areas for Conservation by the U.S. Fish and Wildlife Service Conservation Objectives Team, or areas having the highest conservation value to maintaining sustainable sage grouse populations.

(2) Outside of priority sage grouse areas, surface disturbing activities shall be prohibited within 5.3 miles of an existing lek site during the nesting, brood-rearing, and winter seasons of use.

...

We propose this language based on the Technical Team Recommendations and scientific information relied upon for the Recommendations. Although not speaking directly to coal exploration, the Recommendations made clear that mineral exploration activities within priority habitat would be detrimental to the sage grouse and should be limited. Specifically, the Technical Team Recommendations directed that fluid mineral exploration in priority habitat,

likely to impact the greater sage grouse. However, we urge OSM to determine whether standards for the protection of sage grouse should be adopted for other coal mining activities, including auger mining and in-situ processing.

including geophysical exploration and drilling activities, be restricted only to “helicopter-portable drilling methods,” and that “seasonal timing restrictions” apply. Exhibit 2 at 22.¹¹ The Recommendations state that protecting seasonal habitats, including “breeding, nesting, brood rearing, and wintering areas” (Exhibit 2 at 51), is important. Outside of priority areas, we recommend that exploration activities be prohibited within 5.3 miles of existing lek sites during important seasons of use. A 5.3-mile buffer is consistent with the findings of Holloran (2005) (who found that 8.5 kilometer buffers encompass an important majority of nesting habitat) and the acknowledgement of the Technical Team that four miles buffers are insufficient to fully protect sage grouse.

2. Revision to 30 C.F.R. § 816.97

We propose that OSM issue a rule that adds a paragraph (j) to 30 C.F.R. § 816.97 as follows:

30 C.F.R. § 816.97

....

(j) *Greater sage grouse.* Surface mining shall be conducted using the best technology currently available to minimize disturbances and adverse impacts to greater sage grouse. Surface mining shall also be conducted as follows:

(1) No surface coal mining operations shall be conducted in priority sage grouse areas. Priority sage grouse areas are those areas that have been identified as Priority Areas for Conservation by the U.S. Fish and Wildlife Service Conservation Objectives Team, or areas having the highest conservation value to maintaining sustainable sage grouse populations.

(2) All surface coal mining operations outside of primary sage grouse areas, shall occur at least 5.3 miles away from existing lek sites.

We propose this language based on the Technical Team Recommendations and scientific information relied upon for the Recommendations. The Technical Recommendations make clear that surface coal mining operations must be prohibited from greater sage grouse Priority Areas

¹¹ The Technical Team Recommendations also explicitly state that the surface impacts of “exploratory drilling” should be prohibited during the nesting and early brood-rearing season in all priority habitat. Exhibit 1 at 23. Given that coal exploration requires drilling, the Technical Team Recommendations regarding fluid mineral exploration appear more than relevant and applicable.

for Conservation.¹² See Exhibit 2 at 24. Although the Technical Team Recommendations refer to designating lands as “unsuitable” for surface coal mining by the BLM in accordance with 43 C.F.R. § 3461, the effect and intent is to ensure that surface mining does not occur in priority areas. We do not request OSM designate coal within priority areas as “unsuitable” for coal mining pursuant to 30 U.S.C. § 1272 given that Priority Areas for Conservation may shift over time due to shifts in habitat and grouse populations. We believe it is more appropriate for OSM to impose reasonable performance standards consistent with the scientific underpinnings and explicit advice of the Technical Team Recommendations to ensure that surface coal mining operations are outright prohibited within priority habitat. Outside of priority areas, we recommend that surface coal mining be prohibited within 5.3 miles of existing lek sites. As explained, a 5.3-mile buffer is consistent with the findings of Holloran (2005) (who found that 8.5 kilometer buffers encompass an important majority of nesting habitat) and the acknowledgement of the Technical Team that four miles buffers are insufficient to fully protect sage grouse. This language is appropriate in light of the Technical Team’s recommendation that “surface-disturbing activities” be minimized where needed to reduce impacts to important seasonal sage-grouse habitat, as well as the Team’s recognition that timing restrictions do not effectively protect sage grouse habitat from infrastructure impacts. See Exhibit 2 at 21 and 24. A 5.3-mile buffer around existing lek sites effectively minimizes the impacts of surface disturbing activities in order to reduce impacts to important seasonal sage grouse habitat.

3. Revision to 30 C.F.R. § 817.97

We propose that OSM issue a rule that adds a paragraph (j) to 30 C.F.R. § 817.97 as follows:

30 C.F.R. § 817.97

....

(j) Greater sage grouse. Underground mining shall be conducted using the best technology currently available to minimize disturbances and adverse impacts to sage grouse. Underground mining shall further meet the following standards:

(1) No surface coal mining operations associated with underground mining shall occur within priority sage grouse areas. Priority sage grouse areas are those areas that have been identified as Priority Areas for Conservation by the U.S. Fish and Wildlife Service Conservation Objectives Team, or areas having the highest conservation value to maintaining sustainable sage grouse populations.

¹² This proposed rule is intended to apply to all activities that fall under the definition of “surface mining operations” as set forth under 30 U.S.C. § 1291(28) and 30 C.F.R. § 700.5 in relation to surface mining operations.

(2) Roads, overburden piles, and related surface operations and impacts associated with underground mining outside of priority sage grouse areas, whether temporary or permanent, shall be routed or placed at least 5.3 miles away from existing lek sites.

We propose this language based on the Technical Team Recommendations and scientific information relied upon for the Recommendations. The Technical Recommendations make clear that surface impacts related to underground coal mining operations must be prohibited from greater sage grouse Priority Areas for Conservation.¹³ See Exhibit 2 at 24. Although the Technical Team Recommendations refer to the granting of new coal leases for underground mining, the effect and intent is to ensure that the surface impacts of underground mining do not occur in priority areas. Outside of priority areas, we recommend that surface impacts of underground mining be prohibited within 5.3 miles of existing lek sites. As explained, a 5.3-mile buffer is consistent with the findings of Holloran (2005) (who found that 8.5 kilometer buffers encompass an important majority of nesting habitat) and the acknowledgement of the Technical Team that four miles buffers are insufficient to fully protect sage grouse. This language is appropriate in light of the Technical Team’s recommendation that “surface-disturbing activities” be minimized where needed to reduce impacts to important seasonal sage-grouse habitat, as well as the Team’s recognition that timing restrictions do not effectively protect sage grouse habitat from infrastructure impacts. See Exhibit 2 at 21 and 24. A 5.3-mile buffer around existing lek sites effectively minimizes the impacts of surface disturbing activities in order to reduce impacts to important seasonal sage grouse habitat.

CONCLUSION

For the foregoing reasons, WildEarth Guardians requests that OSM issue rules pursuant to 30 U.S.C. § 1211(g) to ensure protection of the greater sage grouse and its habitat from the impacts of coal exploration, surface mining, and underground mining. We request these rules be adopted as environmental protection performance standards and promulgated under 30 C.F.R. §§ 815, 816, and 817 as appropriate. Not only is OSM authorized to promulgate the requested rules, but SMCRA also compels them. The best available scientific information demonstrates that the sage grouse warrants listing under the Endangered Species Act, is threatened by coal mining, and that that current mining practices are not using the best technology available to minimize disturbances and adverse impacts to the grouse to the extent possible. What’s more, OSM has at its disposal scientifically based recommendations to adopt and implement in order to ensure mining is carried out in compliance with SMCRA.

¹³ This proposed rule is intended to apply to all activities that fall under the definition of “surface mining operations” as set forth under 30 U.S.C. § 1291(28) and 30 C.F.R. § 700.5 in relation to underground mining operations.

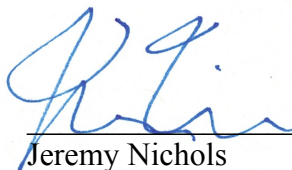
The petitioned rules are all the more appropriate given that they are based on scientific recommendations from its own sister agency, the BLM. Not only that, but the BLM and other land and resource management agencies, are taking steps to adopt and implement these scientific recommendations. OSM can and must also step up to ensure its distinct authorities and oversight roles are used to conserve the sage grouse and its sagebrush habitat in the face of coal mining in the western United States.

Pursuant to 30 U.S.C. § 1211(g), we look forward to OSM granting this Petition within 90 days and initiating a public rulemaking immediately thereafter. Should OSM not respond to this Petition within 90 days, Guardians will consider OSM to have failed to perform a nondiscretionary duty.

Please direct all correspondence regarding this Petition to:

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Respectfully submitted this 26th day of February 2014,



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Cc: Assistant Secretary for Lands and Minerals Management
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