

## Enhanced Issue Discussion—Mitigation on Public Lands

Mitigation can occur on either public or private land. However, criteria related to additionality and assurances of implementation present significant challenges to use of public lands.

With respect to additionality, the biological values reasonably expected to be derived from existing, already planned, and anticipated future public programs on these lands will often be the same biological values required for mitigation purposes. As a result, mitigation might not provide benefits beyond those that would be achieved anyway under *other* applicable regulations, policies and/or land-use management plans.

With respect to assurances of implementation, the durability of biological values required for mitigation is very difficult to guarantee on public lands because of rules and policies that preclude use of conservation easements, deed restrictions, and the other legal mechanisms that are used to assure in-perpetuity protection and management of private lands. Absent these legal mechanisms, relatively mutable and unpredictable land management plans will dictate the direction of public land mitigation sites.

Use of public lands for mitigation purposes could also limit attainment of broader policy goals for sage-grouse conservation, specifically those related to providing economic benefits to landowners and increasing financial incentives for private landowners to engage in conservation actions. A framework that significantly directs mitigation to public lands might result in minimal mitigation-derived funds and activities on private lands.

Several recent mitigation proposals for sage-grouse and other priority species have nonetheless been dominated by public lands actions—based on an assumption that impacts incurred on public lands must also be mitigated on public lands, and because of the large number of already planned and “cleared”<sup>4</sup> federal projects that the applicants could fund as a source of quickly implementable mitigation. These issues were given very substantial weight relative to other applicable mitigation standards.

However, existing Federal lands mitigation policies suggest that future mitigation proposals should utilize a different approach. These policies identify off-site mitigation, including on nonfederal lands, as appropriate or even necessary to satisfy important resource objectives for priority species and to achieve consistency with associated state and national policy initiatives. They specifically identify greater sage-grouse as a species subject to such considerations. And, as exemplified in the recent BLM SEZ-RMP, they confirm that “*proximity to impacts will not be a limiting factor in identifying mitigation*” and “*mitigation must build on, rather than replace, business-as-usual land management*” (i.e. additionality and ecological uplift.)

Based on the above, use of public lands for mitigation purposes should be subject to the following considerations:

1. Public lands (specifically conservation-use lands—e.g. state and Federal parks and refuges; multiple-use lands with a conservation component—e.g. BLM and Forest Service lands, Oregon Common School Trust Lands; or other lands in which overall management direction and

**Comment [SG1]:** Consider removing for public use of this document; however, first 4 paragraphs are great and could be used in the principles document.

**Comment [SG2]:** Need to address temporary impacts/offsets issue here as well.

**Comment [SG3]:** Not clear

**Comment [SG4]:** cite

**Comment [SG5]:** This paragraph may need to change based on 2013 BLM IM

**Comment [SG6]:** cite

<sup>4</sup> Have gone through regulatory review and approval but not yet implemented for various reasons.

regulation can be reasonably expected to supply the same biological values required for mitigation purposes) should generally not be prioritized for siting mitigation actions.

2. Some use of public lands for mitigation purposes may be necessary or advisable when:

A. Appropriate mitigation opportunities on private lands are not available;

**Comment [SG7]:** "A" should be when the use of public lands is biologically best for the species (based on conservation strategy)

B. Use of offsite mitigation would result in "unnecessary or undue" onsite degradation of public lands (per FLPMA § 302, etc.); and

C. Funding constraints or procedural obstacles will prevent the public land entity from delivering the conservation benefits expected from the public programs in a timeframe beneficial to the species absent the mitigation action (*e.g.*, some biological conditions associated with proposed mitigation on public lands would otherwise be provided through planned or required public programs, but a lack of implementation monies prevents their execution) and the benefits in question are critical to support the species.

**Comment [SG8]:** "D" as part of mitigation on private land, *e.g.* retiring grazing leases.

3. There should be a significant demonstration that the above situations exist and cannot be resolved before public lands are substantially used as mitigation.

4. If determined necessary or advisable as described above, mitigation actions on public lands should occur consistent with the following:

A. The actions must still yield ecological uplift with respect to current conditions and those anticipated through public programs, including ~~in~~ situations where the mitigation is enabling actions otherwise not implementable by the public program; merely funding or carrying out activities that are planned or required but not yet implemented (by the public land entity) should generally not be considered adequate mitigation.

B. The actions should be limited to those identified as the most critical for sage-grouse conservation in the applicable geography and that will yield the most substantial benefit.

**Comment [SG9]:** Switch A and B

C. The actions must include measures that assure, as much as possible, the attainment and durability of the required biological conditions to an equivalent extent as would occur on private lands which, as described earlier, will typically need to be in-perpetuity. These assurances should be provided via one or more of the following land-use management instruments (LMI), in order of suitability—

**Comment [SG10]:** Does permanent retirement of grazing leases fit in here?

- 1) Conservation easement;
- 2) Deed restriction;
- 3) Legislative or statutory land-use designations or withdrawals;
- 4) Administrative land-use designations (*e.g.* ACEC, RNA, and other designations via administrative rule or RMP/LRMP or state-equivalent);
- 5) Administrative land-use allocations (via RMP/LRMP); or
- 6) Policy land-use direction (Instruction Memoranda, *etc.*)

The first three of these are considered primary LMIs adequate to provide “protection” as described above in “*Assurances of Implementation*.” The others are secondary LMIs which might not fully assure long-term protection.

- D. The agency responsible for oversight of the public lands on which the mitigation occurs should be responsible for providing alternative adequate mitigation if subsequent changes in management direction result in incompatible uses on those lands. This contingency responsibility should be identified in the administrative and regulatory documents (*e.g.* Records of Decision, etc.) that enable the original mitigation and associated impacts.

Comment [SG11]: Good point

Collectively, these considerations point to a mitigation regime in which actions on public lands should generally represent secondary or “fallback” sources of mitigation. Where public lands cannot be subject to a primary LMI but specific Federal lands or local policy issues still indicate use of public lands, actions on those lands shouldn’t constitute the primary or dominant source of mitigation. However, there may be situations in which the public lands in question are subject to a primary LMI and, assuming other applicable criteria are satisfied, could appropriately be more dominant in a mitigation proposal.

## Enhanced Issue Discussion—Role of Restoration, Enhancement and Protection Actions

**Comment [SG12]:** As written, may not be ready for external audiences.

Merely maintaining existing conditions on proposed mitigation sites, even if such conditions support targeted resources, does not result in additionality or in true offsets to impacts because there is an overall net loss to the resource. Accordingly, mitigation regimes for many resources (e.g. wetlands, carbon, etc.) emphasize restoration and enhancement of habitat as the primary conservation action. Site protection/acquisition by itself as a mitigation measure is ~~either allowed:~~

**Comment [SG13]:** It could if you build it in to the metric or in the ratios

- ~~not allowed;~~

**Comment [SG14]:** The Service is clear that for some species preservation is vital. Policy leaves this open.

- ~~is allowed~~ only in situations in which on-site conditions are critical to the long-term conservation of the species and are subject to imminent destruction, or in which methods to create, restore, or enhance conditions don't exist, are unproven, or will only be successful many years after the impacts have occurred; and/or

**Comment [SG15]:** There are always exceptions so I recommend deleting this

- ~~is allowed~~ only in amounts substantially in excess of the amount of impact in order to ameliorate some of the inherent net loss.

**Comment [SG16]:** Or?

For sage-grouse, however, it might not be appropriate to strictly adhere to such a standard approach to the relative roles of restoration, enhancement and protection for mitigation. For instance, while the COT identifies that “*restoration activities should be implemented immediately*”, it also makes clear that, because successful restoration of sage-grouse habitat is particularly difficult and uncertain, effectiveness “*must be demonstrated prior to receiving any credit for mitigating losses.*” The COT also strongly emphasizes the importance of protecting existing habitat. For sage-grouse then, protection/acquisition of habitat should be accommodated to a greater extent than in mitigation regimes for many other resources.

**Comment [SG17]:** cite

Strict adherence to additionality criteria may be problematic also, especially with respect to sage-grouse conservation policy goals for providing economic benefits to landowners. A universal requirement for an ecological uplift for mitigation credit could penalize some landowners (by precluding their involvement in mitigation transactions) who have previously undertaken desired management activities and are already supporting species conservation.

**Comment [SG18]:** this seems to conflict with some of the either points in the principles document

These factors—additionality criteria, economic incentives, and the uncertainty associated with restoring this species' habitat—in conjunction with criteria related to NNL-NB and assurances, suggest the following utilization of restoration, enhancement and protection actions for sage-grouse mitigation<sup>5</sup>:

1. All mitigation actions must entail protection/acquisition<sup>6</sup> of existing suitable habitat;
2. In some cases, the protection/acquisition of existing habitat will, by itself, constitute adequate mitigation; these will be situations in which—
  - A. The existing habitat occurs on private land, is of the highest quality and its conservation value is such that it currently provides critical support to the species, and securing its protection will substantially enhance the conservation of the species, or

**Comment [SG19]:** but what about in lieu and temporary impacts/offsets?

<sup>5</sup> Please note that this relative valuation is applicable only in the context of mitigation. It does not imply that overall sage-grouse conservation actions—either regulatory or voluntary—should be prioritized identically.

<sup>6</sup> As described in “Assurances of Implementation” and “Mitigation on Public Lands.”

**Comment [SG20]:** ?

- B. The existing habitat occurs on private land, is not necessarily the highest quality habitat but is highly subject to near-term loss or destruction, and such loss would substantially impair the conservation of the species.
3. In most cases, additional conservation measures must also occur on the protected habitat; these measures will take the form of—
- A. Rehabilitating currently degraded (but still otherwise suitable) habitat from the effects of previous fire, invasive species or juniper encroachment;
- B. Enhancing the resiliency of existing suitable habitat from the potential effects of future fires, invasive species or juniper encroachment where such effects are likely in the near future; or
- C. Restoring historic habitat that is currently unsuitable from the effects of fires, invasive species or juniper encroachment.
4. Enhancement/rehabilitation of existing habitat, by itself in the absence of protection/acquisition, should not be considered adequate mitigation, except in the following situations—
- A. Absent the proposed enhancement/rehabilitation the subject habitat would be subject to near-term degradation that would substantially impair the conservation of the species and absent mitigation, the proposed enhancement or rehabilitation would not occur; and
- B. The enhancement or rehabilitation actions that occur in the absence of protection/acquisition represent a relatively minor component of the overall mitigation plan.
5. Restoration in the form of reestablishing sagebrush where it no longer occurs, or restoration/enhancement/rehabilitation efforts that result in significant manipulation of remnant sagebrush or that will require long periods of time to reach conservation maturity, even when these actions occur in conjunction with protection/acquisition of the site, should not be considered adequate mitigation;
- and
6. Restoration/enhancement/rehabilitation actions with effects that are not readily measurable in terms of acres of habitat should not be considered adequate mitigation.

**Comment [SG21]:** What about reducing fragmentation, the biggest threat?

**Comment [SG22]:** Careful here. We would have to set rules to determine this (see Willamette Partnership counting on the environment)

**Comment [SG23]:** There may be exceptions. This could contribute to a larger mitigation plan, especially for corridors.

## Enhanced Issue Discussion—Role of On-site and Off-site Actions

Comment [SG24]: For compensatory mitigation

Traditionally, mitigation frameworks have included a requirement or preference for on-site (and in-kind) compensatory mitigation. In many cases, however, mitigation at the point of impact may not yield the greatest benefit to a specific resource or its ecosystem, and offsite mitigation generally presents more opportunity to:

- Consolidate compensatory mitigation from multiple projects into larger, more functional tracts of habitat;
- Target mitigation towards priority actions and locations;
- Provide legal and biological assurances of attaining and maintaining targeted habitat conditions;
- Efficiently monitor implementation and effectiveness of mitigation; and
- Develop sources of advance “ready-to-go” mitigation for predictability and streamlining.

Comment [SG25]: But we do have to think about “service areas”. It may not be appropriate, for ex, to concentrate all mitigation in Oregon in one area.

As a result of these opportunities, the general preference has shifted towards offsite mitigation, or at least away from an automatic preference for onsite mitigation. However, there is still considerable inertia to mitigate onsite, largely resulting from: tradition; delays in updating formal mitigation policies to reflect the shift; and, confusion when the term “mitigation” is used not just in reference to compensatory offsets, but also to impact avoidance and minimization actions which should almost universally be focused onsite.

Some current land management and mitigation policies which will be relevant to sage-grouse conservation are interpreted to require onsite mitigation because of this broad use of the term “mitigation.” For instance, BLM mitigation policies express a preference to “*mitigate impacts onsite whenever possible*” and that offsite mitigation is “*supplemental to onsite mitigation.*” However, mitigation in that part of the BLM policy is specifically defined as “*avoidance, minimization, remediation, or reduction of impacts.*” Components of the policy that refer directly to compensatory offsets allow for offsite mitigation. Recent BLM solar energy zone regional mitigation planning (SEZ-RMP) further elaborates mitigation frameworks should “*prioritize areas where a local or regional conservation priority will benefit rather than completing mitigation projects in lower priority areas or at a smaller scale*” and “*encourage strategic placement of mitigation efforts.*”

Comment [SG26]: Still relevant with 2013 IM?

Comment [SG27]: cite

Because sage-grouse conservation and associated policy goals will almost certainly benefit more from a consolidated offsite mitigation regime than from traditional onsite mitigation<sup>7</sup>, it will be important to avoid policy and terminology misinterpretations that favor the latter. The overall mitigation program for sage-grouse in Oregon should rely primarily on the identification, development and utilization of consolidated offsite mitigation areas, with project-specific on-site mitigation used only as a secondary or contingency approach.

Comment [SG28]: ??

<sup>7</sup> “Meaningful conservation for greater sage-grouse requires landscape, watershed, or eco-regional scale efforts rather than individual, unconnected efforts.” USFWS 2010 status review.