

Greater Sage-Grouse

Pre-Listing Mitigation Program Review USFWS Standard Operating Procedure

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Greater Sage-Grouse Mitigation Program Review, USFWS Standard Operating Procedure

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PURPOSE and PROCESS

Purpose

The purpose of this standard operating procedure (SOP) is to establish a uniform process for the U.S. Fish and Wildlife Service (Service) to review local, state and federal mitigation agreements and programs for the Greater sage-grouse (*Centrocercus urophasianus*), including those where the Service may enter into pre-listing mitigation agreements. Mitigation agreements may come in the form of conservation banks or bank-like agreements, habitat or credit exchanges, in lieu fee programs, or other mechanisms.

This document provides Service staff with tools to translate the standards outlined in the 2014 *Greater sage-grouse Range-wide Mitigation Framework* (Framework) to more specific program review criteria. Refer to the Framework for definitions and background on mitigation concepts.



Administration

This SOP identifies a process for Service staff from the field and regional offices to review and approve local mitigation programs. Designated SharePoint sites have been established for working drafts and official documents so they are accurately captured as part of the administrative record.

Working and Final

Documents: <https://fishnet.fws.doi.net/projects/home/NSGC/Mitigation/Forms/AllItems.aspx>

Final Documents:

<https://portal.doi.net/usfws/SG/SitePages/Home.aspx>

Review Process

Service staff may have already been involved in the development of a local mitigation program, or may be seeing a near-complete program for the first time. In either case, an official request for review should include the proponent submitting answers to the Framework Questions Guide. [What should we add, if anything, about regional review, range-wide consistency, etc.?

Comment [LZC1]: I think it depends on what you are hearing from leadership. It seems like the MRT was an avenue to providing that range-wide consistency, but if the current direction is to pass the review/approval to the field or regional offices...

SIDEBOARDS for MITIGATION REVIEW

Narrowing the Sideboards

The Framework provides broad guidance for mitigation program developers to follow. Five mitigation principles and six mitigation standards are provided as guideposts, with the statement:

Approaches to compensatory mitigation that follow these principles and adhere to the standards below are expected to achieve the best outcomes for conservation through effective management of the risks associated with compensatory mitigation.

The Framework also calls attention to the role of the full mitigation hierarchy (including avoidance and minimization), a net conservation gain as the overall mitigation goal, and the importance of program governance.

The tables that follow provide additional internal guidance for Service staff to further narrow the Framework sideboards when reviewing specific programs. The column “Framework Questions” refers to the specific question number in the Framework’s Questions Guide appendix and can be used to cross-reference proponent’s answers.

Goals and Governance

A.	Avoidance, Minimization, and Rectification The documents submitted by a proponent for review may or may not address how projects arrive at compensatory mitigation, and a compensatory program may still meet Service standards independent of application of the mitigation hierarchy (avoid, minimize, rectify, compensate). However, the Service should be careful in providing regulatory predictability through prelisting mitigation agreements if it is uncertain that projects using credits did not first go through an adequate avoidance and minimization filter. At a minimum, the BLM standards for avoidance and minimization may be used as reference.	Framework Question(s)
a.1	To obtain regulatory certainty from the Service and ensure conservation of sage-grouse, avoidance and minimization of impacts should be required prior to transfer of credits from a mitigation program. Any agreement signed by the Service should include language expressing our desire for avoidance and minimization to occur prior to entry into any compensatory mitigation program. There are several ways to accomplish this (in order of strength): <ul style="list-style-type: none">• Mitigation program is integrated into local regulatory mechanism(s) that have avoidance and minimization requirements• Program serves as “third party” compensatory mitigation only but the agreement is signed by relevant regulatory agencies and contains language requiring avoidance and minimization before credit transfer• Language in program operational documents clarifies that only projects providing proof that avoidance and minimization were employed are accepted	I.1 IV.A-B

a.2	If the program will contain term (i.e. not permanently protected) credits, the Service should have confidence that impacts for which those credits will be used can be fully rectified. Preference is for use of permanent credits (perhaps at a discounted rate or amount) to offset term impacts.	IV.C
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B.	Mitigation Goal After avoiding and minimizing project impacts to the maximum extent practicable, compensatory mitigation should provide a net conservation gain or benefit. The overall program design, and specifically the method used to measure debits and credits, should provide the Service reasonable confidence that a net conservation benefit can be provided.	Framework Question(s)
b.1	Net conservation benefit will be measured and can feasibly be demonstrated: <ul style="list-style-type: none"> At the project level (while no net loss is the minimum required at this level net gain is preferable) At a regional or service area level At the mitigation program level 	I.1 IV.D.c.2 IV.D.c.4
b.2	To ensure the mitigation goal is reached, look for the following components: <ul style="list-style-type: none"> Annual reporting requirements (at minimum) Transparent tracking systems Adaptive program management tied to biological and/or other specified triggers (see also c.5) One or more of the following mechanisms: <ul style="list-style-type: none"> A retirement account, separate from any risk management reserve account, that consists of credits that can never be used to offset debits; If credits and debits are measured equally and uncertainties are mitigated through risk management tools, applying a mitigation ratio overall (e.g. need credits equaling 1.5x the number of debits to offset); A high enough reserve account contribution that the Service has confidence that the reserve account will never be completely exhausted; A reserve pool with built-in thresholds to ensure reserve credits never fall below a certain amount (dropping below a certain threshold could be grounds for the Service to suspend any pre-listing agreement) Use of adjustment factors tied to qualitative habitat features that make it relatively easier to generate debits from each functional acre lost and harder to generate credits from each functional acre gained; If credits and debits are measured equally and uncertainties are mitigated through risk management tools, require credits to have a longer duration than the impacts they offset (e.g. 20-year credit project to offset 10-years of disturbance) 	III.11 III.10 III.8

C.	Governance The success of any compensatory mitigation program is dependent on how the program is managed. In most cases, the Service will not be directly involved in governance of a mitigation program so understanding the checks and balances of a governance structure up front is key to providing the Service with certainty that a program will be successful.	Framework Question(s)
c.1	A mechanism (agreement, legislation, etc.) identifies responsible parties for managing the program	III.3
c.2	The agency responsible for managing the species has adequate authority or input in the program, <u>especially in the processes for valuation and prioritization of habitat</u>	III.2
c.3	Roles of the parties are clearly defined, including any role of the Service, and are also linked to landscape-level planning either through existing plans or roles are defined in how landscape-level decisions will be made in context of the mitigation program	III.1 III.2 III.12 III.13
c.4	Administrator has the authority and resources needed to enforce compliance	III.3
c.5	Funding to run the program is addressed and adequate	III.5
c.6	Separate financial administrator and plan for program and for handling of any monies from participants, especially long term stewardship funds	III.5 III.7
c.7	Program <u>adaptive management process</u> identified with program triggers; relationship to biological triggers (related to sage-grouse population and habitat monitoring) either directly through the program or in conjunction with local/state monitoring efforts	III.8
c.8	A dispute resolution process is identified	III.4

Comment [LZC2]: Are there other ways that the responsible agency should have authority/input? (Oversight would also be good.)
I don't want this addition to limit how people consider state F&W agency involvement, but I do think some clarification would be helpful.

Comment [SG3]: Based on discussions with CHE and lack of adaptive mgmt. plan on paper, add more specifics to this component.

Mitigation Standards

The information in the following tables is derived from the standards and program elements sections of the Framework. The column "Requirement" indicates whether the specific component is a requirement or preference of a mitigation program in order for the Service to sign a pre-listing mitigation agreement. The column "Framework Questions" refers to the specific question number in the Framework's Questions Guide appendix and can be used to cross-reference proponent's answers.

1.	Siting The mitigation sequencing hierarchy should be applied in the context of conservation objectives derived by a landscape-scale approach. Compensatory mitigation actions should be sited in locations that have been identified in conservation plans to most likely successfully and fully compensate losses to sage-grouse	Requirement	Framework Question(s)
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1.1	Program integrates landscape level plan(s) such as a county or state conservation plan or BLM regional mitigation strategy. or Includes planning or decision support tools to facilitate smart siting of development and conservation actions.	Yes	IV.D.d.1
1.3	Overall program incentivizes conservation and discourages development in areas designated by a conservation strategy as important for sage-grouse. This will include provisions for when, if ever, on-site mitigation is appropriate.	Yes	IV.D.d.1 IV.D.d.6 IV.D.d.16
1.4	Defined service area(s) based primarily on biological factors. Jurisdictional factors are justified if they are used.	Yes	IV.D.c.8
1.5	Addresses trading of credit outside service area or jurisdictional boundaries (e.g. county, state). or Provides for adjustment of service areas later through an adaptive management process.	Yes	IV.D.c.9 IV.D.c.10
1.2	Landscape factors, habitat proximity, limited/rare habitat and/or habitat importance factors in including siting decisions. This can be accomplished through the metrics or through other program components.	Yes	IV.D.a.2

Comment [SG4]: Flagged. CHE issue discussions on this point with HQT. May need to add more here

2.	Duration Compensatory mitigation actions should achieve targeted biological conditions in a timeframe commensurate and proportional with the biological impacts to be offset	Requirement	Framework Question(s)
2.1	Credit project duration must meet or exceed duration of the impact, accounting for any time lags, uncertainty, and remediation.	Yes	IV.D.a.3 IV.D.b.4 IV.D.c.3
2.2	Limits to length and use of term credits to no less than 10 years.* <i>For example:</i> a "5 year" impact is offset using a 10 year or more term credit.	Yes	IV.D.d.7
2.3	Limits to length and use of dynamic credits (credits purchased in sequence over time to offset a longer-term impact) to no less than 30 years and in 30 year increments.* <i>For example:</i> a "50 year" impact could be offset using ≥50 year offset or two 30 year dynamic (sequential) credits. *If the program limits use of dynamic credits (see 2.4) then the 30 year increment requirement could be reconsidered.	Yes	IV.D.d.7

2.4	Limits to use of dynamic credits programmatically (e.g. <25% of program funds or credits in a given year may be used for dynamic credits)	Preference	IV.D.d.7
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Note: The limits to term and dynamic credits are based on the slow nature of the sagebrush ecosystem to respond to restoration and management efforts. Use of these credit types is relatively untested and until proven successful, these limits will reduce uncertainty that impacts are adequately offset in a sustainable manner in the long term.

3.	Additionality Actions proposed as compensatory mitigation should provide benefits beyond those that would be achieved if the mitigation actions had not taken place and should exceed what is otherwise required by federal, state, and local regulations.	Requirement	Framework Question(s)
3.1	Eligibility - program outlines minimum eligibility criteria for credit sites which include the potential for sage-grouse use, the landowner's ability/authorization to implement conservation actions, and minimum habitat functionality that should exist before accruing credit.	Yes	IV.D.d.2 IV.D.d.3
3.2	Baseline – program uses the same baseline for calculating credits and debits both pre- and post-project and baselines provide certainty of ecological benefit. If different baselines are used, a biologically-based justification is given.	Yes	IV.D.a.4 IV.D.b.2
3.3	Credit Types – justifies use and role of preservation or enhancement/restoration as part of conservation plan.	Yes	IV.D.d.12
3.4	Regulatory Requirements – the program ensures that eligible sites must exceed existing regulatory or policy obligations, including designation as conservation lands, to qualify as additional.	Yes	IV.D.d.10
3.5	Public Funds – program describes how ecological outcomes achieved using public funds in active contracts will be separate and excluded from credit calculations.	Yes	IV.D.d.17
3.6	CCAAs – program explains when it is appropriate to have mitigation agreements on lands covered under a CCAA and how conservation measures in CCAAs and mitigation agreements will be separately accounted.	Yes, if... program may overlap with CCAAs	IV.D.d.5
3.7	Credit Stacking – program addresses any possible credit stacking of other resources and clarifies how to account for sage-grouse credit to ensure additionality.	Yes, if... credit stacking could apply	II.4 IV.D.d.18

4.	Effectiveness (and Managing Risk) Compensatory mitigation actions should be proven to be reasonably likely to deliver expected conservation benefits, target those actions that will provide the greatest benefit to sage-grouse, be measurable, and be commensurate with the degree of risk and uncertainty associated with predicted effects.	Requirement	Framework Question(s)
4.1	The program provides certainty towards net gain by requiring verified credits are available before impacts occur. or If short-term net loss is possible, the program is structured to provide net gain in the future through metrics that account for time lags, transfer of additional credits, reserve accounts, or other risk management tools. <i>For example:</i> An in lieu fee mitigation program typically does not have credits available before an impact but should be structured to account for time lags in credit availability.	Yes	IV.D.c.2 IV.D.c.3 IV.D.c.4
4.2	Conservation measures/actions are supported by science and time lags in restoration actions are appropriately considered.	Yes	IV.D.b.3 IV.D.d.4 IV.D.d.20
4.3	Credit for preservation is proportionately assigned according to the magnitude and likelihood of existing and future threats to the habitat and/or the value of the site to conservation of the species as recommended in a plan (see also 3.3).	Yes	IV.D.d.9
4.4	The program identifies site-specific specific performance standards to ensure continued compliance of credit sites. or Performance standards are required but to be determined at each site.	Yes	IV.D.d.13 IV.D.d.20 IV.D.d.21
4.5	The program contains or outlines a monitoring plan for credit sites based on performance standards and proportional to the type of credit projects (e.g. preservation projects may require less monitoring than restoration projects). Monitoring should tie into program adaptive management triggers (see also 6.5, 6.6).	Yes	IV.D.d.21 IV.D.d.23

4.7	<p>A credit release schedule is identified that will limit release of credits to only when specific administrative and ecological performance criteria are achieved.</p> <p>Minimum administrative criteria for the first credit release should include: site agreement and management plan approved, real estate instrument secured, and establishment of financial assurances. Base ecological criteria would be outlined in verification criteria (see 6.3).</p> <p>Additional release could occur from meeting ecological milestones determined through monitoring of performance standards (see 4.4) and for meeting financial milestones (see 5.3).</p>	Yes	IV.D.d.13 IV.D.d.15
4.8	Research and education are not used as compensatory mitigation. Research is encouraged on mitigation sites and additional fees may be collected for these purposes, but only after full compensation for impacts on the ground is ensured.	Yes	---

5.	Durability Actions or plans proposed as compensatory mitigation must be accompanied by management, legal, and financial assurances that ensure the action or plan will be in place and effective for the intended duration. Assurances should address unintentional and intentional losses of compensatory mitigation actions.	Requirement	Framework Question(s)
5.1	Site Agreement – binding agreement between administrator and participants that ties in assurances, management, reporting.	Yes	IV.D.d.11
5.2	Real Estate – the program will require site protection instruments for participating lands, including federal lands and lands with split estates.	Yes	IV.D.d.11
5.3	Financial – the mitigation program requires sufficient financial assurances connected to each project that ensures a high level of confidence that compensatory mitigation will be successfully completed in accordance with performance standards for the full duration of the project's life.	Yes	IV.D.d.19 IV.D.d.20
5.4	Management Plan – the program requires each site to have a customized management plan.	Yes	IV.D.d.11
5.6	<p>A plan or structure is in place to replace any potential reversals in credit projects from unintended natural or anthropogenic disturbances.</p> <p><i>For example:</i> One risk management tool is to develop a credit or financial reserve pool system. A site's contribution can be based on the amount of risk (e.g. from fire or split estate issues) to potential reversals.</p>	Yes	IV.D.d.22

6.	Metrics Determinations of the expected impacts of actions and the measures necessary to avoid, minimize, or compensate for those impacts should be based on biological conditions and upon reliable, repeatable, and quantitative science-based methods.	Requirement	Framework Question(s)
6.1	The metrics (credit and debit methods) are developed from a science-based and transparent process and result in reliable, consistent, and repeatable methods.	Yes	IV.D.a IV.D.b IV.D.c.1
6.2	The metrics take into consideration both direct and indirect effects for all of the potential covered impact activities.	Yes	IV.D.a.5 IV.D.b IV.D.c.1
6.3	The metrics consider habitat quality, quantity, and scale including accounting for and/or tracking the three major sage-grouse habitat categories (breeding, summer/foraging, and wintering habitat).	Yes	IV.D.a IV.D.b IV.D.c.1 IV.D.d.16
6.4	A verification process is identified that will confirm program rules are followed and that credits are ecologically available to be released for use.	Yes	IV.D.a.6 IV.D.b.5 IV.D.d.14 IV.D.d.15
6.5	Actions generating and managing credits are included in a monitoring plan to ensure credits are implemented and maintained for their duration (see also 4.5).	Yes	IV.D.d.21
6.6	The program establishes clear thresholds to trigger any future adjustments to metrics. Criteria and processes for making adjustments in a way that will not undermine existing credits or mitigation agreements should be identified.	Yes	IV.D.c.6 IV.D.c.7
6.7	A robust accounting system to track credits (and debits, if applicable) is established. The accounting system should foster transparency, accountability, and creditability and be accessible to parties to the agreement and, at minimum a ledger is included with monitoring reports.*	Yes	IV.D.d.14 IV.D.d.15

Comment [SG5]: Based on CHE discussions, do we need to add more to this?

*Note: The Service is exploring the use of the Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS), used to track conservation banks and ILF programs for listed species, to track these types of non-listed species mitigation programs. If proven feasible, tracking prelisting mitigation programs in RIBITS should become a requirement for Service participation in prelisting mitigation agreements.

PRELISTING MITIGATION AGREEMENTS

Background on Prelisting Mitigation

Prelisting mitigation refers to explicit recognition from the Service that actions or credits developed or acquired both in advance of impacts, and in advance of a listing decision, will be considered as a conservation action in a status review and may be used as compensatory mitigation through ESA consultations should the species be listed. Additionally, suppliers of compensatory mitigation may be able to attain regulatory predictability that, should the species become federally listed, the management to which they agreed will not change and/or incidental take coverage will be provided for these management actions. In order to obtain this regulatory predictability, a prelisting mitigation agreement with the Service is required.

The Service does not currently provide guidance on the specific language or structure of these agreements. However, it is generally recognized that they may fall into three broad categories: conservation bank or bank-like agreements, Endangered Species Act (ESA) section 7(a)(4) consultations, and CCAAs.

1. Conservation Bank or “Bank-Like” Agreements

Traditionally, conservation bank agreements are the regulatory instrument used to provide both bank sponsors and entities buying credits from conservation banks that credits are fungible, valid, and meet regulatory requirements under sections 7 or 10 of the ESA. While it is plausible to have a conservation bank for non-listed species, banks do not cover lands that are not permanently protected and also do not cover the debiting side of the equation. However, their familiar structure can be used to develop “bank-like” agreements for prelisting programs which may cover debiting and which may offer term credits. These bank-like agreements are most appropriate where the Service lacks clear understanding of the future adverse impacts to be offset by prelisting mitigation actions. Through these types of agreements the Service is best positioned to offer at least the following: 1) that prelisting actions will be credited if those actions meet the conditions specified in the agreement, and 2) that valid credits can be used in the manner described in the agreement. To solidify this level, or offer higher levels of regulatory predictability, a Section 7 consultation would be needed.

2. Section 7(a)(4) Consultation

Where there is clearer understanding of impacts, the Service can complete a section 7(a)(4) conference that covers both beneficial and adverse actions for a prelisting mitigation program. For federal agencies, the Service can issue a draft section 7 incidental take statement through a conference opinion. For nonfederal entities, the Service can provide at least a conference report and possibly a conference opinion through an intra-Service consultation [right? Ask SOL]. If the species is listed and if there are no significant changes, the conference opinion may be converted to a biological opinion.

3. CCAAs

For nonfederal entities and assuming details about potential impacts are known, the Service can conference on both beneficial prelisting mitigation actions (credits) and proposed adverse impacts (debits) and issue a 10(a)(1)(A) enhancement of survival permit, essentially a CCAA. There is general debate about using this tool for mitigation and it is also unclear what level of impacts can be authorized through CCAAs. This mechanism would only be appropriate if enough detailed information about future impacts were available in order to adequately evaluate the effects on the species to meet the CCAA standard.

Agreement Recommendations

The Service recommends, for maximum regulatory and legal predictability, that prelisting mitigation agreements of any variety are vetted through an inter- or intra-Service section 7 conference process which assesses, to the extent possible, beneficial and adverse actions of the program. For any agreement the Service should require a net conservation benefit standard. The standards outlined in this SOP should be met in order to deliver the fullest amount of regulatory predictability; however, the Service may offer conditional or partial predictability if some standards are not fully addressed.

To provide specific certainty that credits may be recognized in a post-listing environment, modification of the following language from the 2015 Barrick Gold Bank Enabling Agreement may be useful:

If the sage-grouse is listed or proposed for listing as threatened or endangered under the ESA, FWS agrees that Barrick may incorporate Credits that have been or will be Released to Barrick pursuant to an approved Project Plan under this BEA prior to the conclusion of Section 7 consultation or conference into a proposed action to approve a future proposed Plan of Operations or amendment in the Service Area. If Barrick elects to incorporate Credits to offset the Debits associated with such proposed action, FWS agrees, when conducting Section 7 consultation or conference with BLM, to assess the impacts to the sage-grouse of such proposed action based on the calculation of Credits and Debits generated by the TNC Methodology set forth in Appendix 1, Exhibit C, or other methodology mutually agreed upon pursuant to Section IV.A.1. In accordance with Sections I and IV of this BEA, if FWS determines that these Credits are sufficient to achieve a Net Conservation Gain to offset the adverse effects of habitat loss or modification (i.e., Debits) of such Plan of Operations or amendment upon the sage-grouse, no additional requirements related to sources of adverse effects that are addressed in the TNC Methodology will be included in the reasonable and prudent measures to the extent that use of the TNC Methodology is consistent with applicable law and regulations.

If the lands within the Service Area are not in federal ownership at the time that Barrick proposes activities on those lands, and Barrick chooses to apply for an incidental take permit under ESA Section 10 for those activities, and minimizes the impacts of those activities on the sage-grouse to the maximum extent practicable, and includes sufficient Credits that have been Released to Barrick under this BEA in its habitat conservation plan to show a Net Conservation Gain, FWS agrees to accept those Credits as satisfaction of Barrick's obligation to mitigate impacts to the sage-grouse to the maximum extent practicable and in accordance with Section I of this BEA.

CCAs/CCAAs and Prelisting Mitigation Agreements

Informed by national policy discussion and consistent with the Framework, landowners enrolled in CCAs/CCAAs can provide compensatory mitigation if the actions related to mitigation are additional to the minimum conservation measures required by the CCA/CCAA. In order to track conservation actions and ensure additionality, conservation measures and mitigation-related conservation actions should be independently accounted for and reported to each respective program.

Ideally, participants will retire a CCAA when entering into a mitigation program that provides regulatory predictability. However, when regulatory certainty through a mitigation program is not available and where CCAs and mitigation agreements may cover the same lands, the following measures should be considered to ensure both CCAA and mitigation program standards are retained:

1. Baselines are measured using the same metric and at the same time (within 2 years) – OR - baseline measures are reconciled in a transparent, scientific way approved by the Service.
 - a. If land has been under a CCAA for > 5 years or is within 2 years of its termination date, this provision need not apply.
 - b. If the CCAA is surrendered and the original CCAA baseline metrics meet this provision, the original CCAA baseline may be used as the mitigation baseline.
2. At least 15% additional uplift from measureable activities is available for mitigation – OR – for preservation situations, the financial and real estate provisions under the mitigation agreement provide protection for at least the duration of the CCAA and such protections demonstrate avoided loss.
3. A process is identified for communication and reporting of conservation measures for each program.

