

AGREEMENT BETWEEN
U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE
U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT
COLORADO DEPARTMENT OF NATURAL RESOURCES
AND
[COLORADO HABITAT EXCHANGE NON-PROFIT ENTITY]

This Agreement (Agreement) is entered into by the U.S. Fish and Wildlife Service (USFWS), the Bureau of Land Management (BLM), the Colorado Department of Natural Resources (CDNR), and [name of non-profit for habitat exchange; using Exchange Administrator as placeholder], collectively referred to as the “Parties.”

RECITALS

WHEREAS, the USFWS, an agency of the U.S. Department of the Interior, has responsibilities related to the conservation, protection, restoration, enhancement and management of wildlife, native fish, plants, and habitat necessary for biologically sustainable populations of those species pursuant to federal statutes including the Endangered Species Act, 16 U.S.C. §§ 1531-1544, (ESA), the U.S. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, and the Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742(f) et seq.

WHEREAS, BLM, an agency of the U.S. Department of the Interior, is responsible for managing and sustaining the health, diversity, and productivity of the public lands for the use and enjoyment of present and future generations. The BLM is responsible for management of approximately 24,086,075 surface acres in Colorado. The BLM manages these lands for multiple uses, including energy and minerals, fish and wildlife habitat, timber, forage, recreation, wilderness areas, and archaeological and historical sites, pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785.

WHEREAS, CDNR’s mission, through Colorado Parks and Wildlife, includes perpetuation of wildlife resources in Colorado, and to inspire current and future generations to serve as active stewards of Colorado’s natural resources; and through the Colorado Oil and Gas Conservation Commission (COGCC) includes fostering the responsible development of Colorado’s oil and gas natural resources;

WHEREAS, the Colorado Habitat Exchange (Exchange) is a non-profit corporation that is in the process of being established to develop, implement, and manage a state-wide voluntary habitat exchange for the benefit of the greater sage-grouse (GrSG) and its habitat;

WHEREAS, the USFWS published a proposed policy on voluntary conservation actions taken for species prior to listing under the ESA, seeking to provide landowners, government agencies, and other stakeholders incentives to carry out voluntary conservation actions, titled “Policy Regarding Voluntary Prelisting Conservation Actions,” 79 Fed. Reg. 42525 (July 22, 2014), and the Parties to this Agreement intend that the Exchange be suitable for consideration if the USFWS publishes a final Policy;

WHEREAS, Governor John Hickenlooper's Executive Order regarding Conserving Greater Sage-Grouse Habitat, D 2015-004, calls for the CDNR to work with stakeholders to launch a voluntary habitat exchange by the end of 2015;

WHEREAS, the Parties agree that the creation and use of a voluntary, non-profit habitat exchange represents an opportunity to conserve and improve valuable GrSG habitat, and can be an effective method to promote conservation actions by private landowners, lessees and permittees, and also a method to mitigate and offset for unavoidable impacts to GrSG associated with development projects in need of such mitigation under the jurisdiction of one or more of the Parties;

WHEREAS, the Parties desire that the Exchange is established and governed in a manner to promote and secure conservation benefits for the GrSG and its habitat;

WHEREAS, the Parties to this Agreement intend that the program of habitat conservation for the benefit of the GrSG established by the Exchange be suitable for consideration by the USFWS pursuant to the USFWS's Policy for Evaluation of Conservation Efforts When Making Listing Decisions, and that said program be considered by the USFWS in evaluating the eligibility and need for listing of the GrSG under Section 4(a)(1) of the ESA;

WHEREAS, the Parties recognize that habitat conservation credits (Credits) developed through the Exchange may be suitable for use in satisfying conservation or mitigation requirements under federal and state regulatory programs, subject to specific review, analysis, and consultation by the federal or state agencies with applicable jurisdiction over such programs;

WHEREAS, this Agreement sets forth the terms by which the Exchange shall be established, implemented, and governed so that Credits may be used in appropriate state and federal regulatory programs;

NOW, THEREFORE, the Parties agree as follows:

I. PURPOSE

The purpose of this Agreement is to set forth the terms agreed to by the Parties for the establishment, implementation, and governance of a viable Exchange to facilitate cooperative conservation and mitigation efforts among the Parties and with others for the conservation and management of the GrSG in Colorado. Based on the existing governing documents to the Exchange, as provided in Section VI.A. of this Agreement, this Agreement also provides the terms for how USFWS, BLM and/or CDNR will provide for the use of the Exchange and recognition of Credits generated by the Exchange. This Agreement provides regulatory certainty related to the GrSG prior to a threatened or endangered listing decision under the ESA or following a not warranted determination, and sets the stage for pursuing regulatory assurances through Section 10 of the ESA should the GrSG be determined as a threatened or endangered species.

II. DEFINITIONS

Defined terms, as denoted in parenthesis () in this Agreement, are consistent with and further

defined in the Colorado Habitat Exchange Manual (Exchange Manual) glossary, located at Appendix A to the Exchange Manual.

III. BACKGROUND

The GrSG is a ground-dwelling bird native to the West, and its habitat is comprised of approximately 165 million acres across 11 states and two Canadian provinces. More than half of the GrSG habitat is under federal ownership and managed by the BLM, U.S. Forest Service (Forest Service), or other federal agency, and the remainder is located on private or state lands. In Colorado, GrSG habitat is comprised of approximately 3,990,031 acres, including habitat on private and state lands located within a variety of oil and gas producing basins in Colorado.

The GrSG is a candidate for listing under the ESA for its entire range, including Colorado. Under a court-ordered settlement, USFWS is required to make a 12-month finding whether listing of the GrSG is warranted by September 30, 2015, though cannot publish any determination other than “not warranted” until after September 30, 2015 based on a provision in the 2015 Omnibus Appropriations Bill restricting USFWS from writing or issuing a proposed rule to list the GrSG. USFWS is working with states and other federal agencies to coordinate development of voluntary conservation programs to preclude the need to list the species under the ESA.

The Exchange Administrator will operate a voluntary, state-wide Exchange to provide conservation benefits to the GrSG.

This Agreement represents the Parties’ commitment to recognize the Exchange as a tool to provide offset mitigation for impacts in GrSG habitat.

IV. GUIDING PRINCIPLES

The Parties agree to the following guiding principles for the establishment, development, implementation, and governance of the Exchange:

- A. The goal of the Exchange is to improve the long-term viability of the GrSG in Colorado by incentivizing participation by landowners, lessees, permittees and project developers to sell and purchase habitat conservation credits to benefit GrSG.
- B. The operation of the Exchange must be science-based, employing the best available science to determine the most appropriate conservation actions and quantification methods for GrSG;
- C. Designed to be applicable across broad geographies and natural resource types;
- D. Achieves measureable net conservation benefits for GrSG;
- E. Improves certainty and efficiency for private landowners, lessees, permittees and project developers by providing regulatory certainty in a pre-listing or not warranted environment, and sets the stage for pursuing regulatory assurances through Section 10 of the ESA and/or other regulatory and statutory enabled covenants in a post-listing

environment;

- F. Focuses on meeting priority habitat and species conservation goals for GrSG in Colorado;
- G. Meets the standards and approval of entities with regulatory authority for the GrSG, if and when regulatory approval is necessary (e.g., in the event USFWS lists the GrSG under the ESA);
- H. Flexible and adaptable to specific local community and environmental conditions;
- I. Appeals to a broad spectrum of credit developers, such as private landowners, state land leases, and federal land permittees, because it is straightforward, easy to understand, and provides a powerful financial incentive;
- J. A market-based mechanism for mitigation (Debits) from impacting projects. Debits are offset through the funding of conservation (Credits), resulting in preservation, enhancement, and/or restoration of habitat for the species;
- K. Use of Exchange Credits to offset unavoidable adverse impacts shall be based on ecological principles for the GrSG.
- L. Fosters transparency, accountability, credibility, and continuous improvement.
- M. Facilitates connections between credit buyers and credit developers that put the greatest amount of resources towards measureable conservation outcomes for the GrSG while minimizing transaction costs to further incentivize participation.

V. BENEFITS OF THE PROPOSED COLORADO HABITAT EXCHANGE

A. Benefits to the Greater Sage-Grouse

The Exchange is intended to provide significant conservation to the GrSG by addressing the needs of the GrSG and associated habitat on a pro-active, regional basis, rather than on a localized, project-by-project basis.

Conservation activities will be coordinated and aggregated on a broad geographic scale consistent with GrSG communities and focused on achieving broad conservation goals, providing certainty and continuity in how cooperative conservation measures are applied across the landscape. This approach is designed to address cumulative impacts to the GrSG associated with multiple projects over time, to lead to more meaningful and effective conservation efforts, and to inform a species-specific recovery plan, should the GrSG be or become listed.

B. Benefits to the USFWS, BLM and CDNR

The USFWS, BLM and CDNR will benefit from a viable Exchange through the promotion of voluntary conservation actions to conserve and benefit the GrSG. This conservation mechanism will allow the agencies to use their staff and other resources more efficiently and productively to

conserve the GrSG. The Exchange will generate conservation Credits that may be utilized to satisfy GrSG conservation and mitigation requirements for a specific debit project (Debit Project) or activity, subject to specific review, consultation, and approval by the appropriate agency. This conservation option may significantly reduce the agencies' administrative burden by streamlining the project-level consultation process and development of additional conservation or mitigation measures.

C. Benefits to the Exchange and Exchange Participants

From a GrSG habitat conservation perspective, the state-wide Exchange will provide greater certainty by effectively promoting conservation activities while also allowing continued development and operations, as well as protecting private property rights.

By offering private landowners such as farmers and ranchers the opportunity to monetize conservation projects, the Exchange will incentivize private property owners to participate by allowing them to custom tailor conservation projects to their lands (subject to applicable requirements), and then seek financial compensation through purchase of the associated conservation Credits generated from those conservation projects from buyers on the Exchange.

The Exchange will also provide participants with a mechanism to purchase and utilize Exchange Credits to satisfy GrSG conservation and mitigation requirements for Debit Projects permitted by federal and state agencies (e.g., oil and gas drilling permits), subject to project-specific review, consultation, and approval by the appropriate permitting agencies.

VI. OPERATION OF THE COLORADO HABITAT EXCHANGE

A. Governing Documents

The Exchange shall be governed by the bylaws or other yet-to-be-identified controlling document (Bylaws) of the Colorado Habitat Exchange non-profit corporation. The Exchange's Board of Directors will serve the role of oversight committee (Oversight Committee). The Bylaws shall include a durable framework for the Exchange which can only be modified upon written agreement by two-thirds of the voting members of the Oversight Committee.

The Bylaws shall be accompanied by an Exchange Manual which will serve as a handbook to explain the guidance and mechanisms of the Exchange. To the extent not inconsistent with the Bylaws, the Exchange Manual may be modified and updated based upon suggestion from the Exchange Administrator, science advisory committee (Science Advisory Committee), and following approval of the Oversight Committee.

Additionally, the Bylaws shall be accompanied by a habitat quantification tool (HQT) which will serve as the mechanism to quantify Credits generated from landowner projects and Debits incurred from Debit Projects.

Each of these governing documents (Bylaws, Exchange Manual, and HQT) will be revised prior to implementation of the Exchange, and they are expected to be further revised pursuant to adaptive management procedures built into the Exchange and briefly discussed in Section IV.D. of this Agreement.

B. Administrative Structure and Oversight

The Exchange will be a non-profit entity that is responsible for carrying out the operations and management of the Exchange as outlined in the Exchange's governing documents. The Exchange will utilize a governance structure defined in the Bylaws that includes the Exchange Administrator, Oversight Committee, and Science Advisory Committee to ensure the Exchange is managed consistently without causing uncertainty for state or federal regulators or participants.

The Exchange Administrator will execute daily management decisions based on authority granted in the Exchange governing documents.

The Oversight Committee will serve as the formal, representative stakeholder group responsible for overseeing the operations of the Exchange, and making high-level Exchange management decisions. The Oversight Committee shall include voting members from the environmental conservation community, industry (e.g. energy, development), private landowners (e.g. ranching or agriculture), and CDNR. Representatives from USFWS, BLM, and the Science Advisory Committee shall also hold non-voting seats on the Oversight Committee. Members of the Oversight Committee shall be appointed as specified in the Bylaws.

The Science Advisory Committee will consist of expert scientists whose purpose is to inform the development and revision of the HQT and to inform monitoring and adaptive management efforts across the Exchange service areas. Members of the Science Advisory Committee shall be appointed as specified in the Bylaws.

C. Credits as a Means for Offsetting Impacts

Exchange Credits can be purchased by project developers in order to mitigate or offset unavoidable impacts to the GrGS or its habitat associated with Debit Projects.

Buyers who purchase Credits to fulfill regulatory mitigation requirements shall meet all other requirements of the relevant permitting process through the relevant state or federal permitting agency.

D. Adaptive Management

The Exchange Administrator shall use an annual process to engage stakeholders and execute monitoring and research to identify, recommend and implement improvements to the Manual and HQT. The adaptive management process will take a programmatic look at the Exchange, including social, economic and biological outcomes.

The Exchange governing documents will initially be modified prior to implementation based on continued review of the documents, after the first year of implementation, if necessary, to correct any procedural concerns and/or respond to results of any peer review, and as required through the adaptive management plan.

E. Managing Risk and Uncertainty

The Exchange will utilize several risk management measures that ensure performance before and after Credits are released to secure habitat for the benefit of the GrSG. Credit release and verification will ensure that credit projects achieve their stated performance standards and generate benefit for the species before they may be sold to offset debits. In the event of Credit reversals, the Exchange will utilize a combination of a reserve account and project-specific financial assurances to cover credit losses to ensure continued programmatic net conservation gain.

F. Financial Assurance

The Exchange will require that credit developers and debit creators establish appropriate and reasonable financial assurances for each credit and debit project site in order to initiate transactions through the Exchange and not act as a disincentive to participation.

G. Information Sharing

The Exchange Administrator shall provide sufficient information to the Parties to enable the Parties to monitor compliance with the Bylaws, without releasing participant names or other identifying information. Additionally, the Parties shall have access to view Exchange Administrator-held data during normal business hours, with prior notice to the Exchange Administrator.

The Oversight Committee shall annually file a report with the designated representatives of the Parties identified pursuant to Section IX of this Agreement, as prepared by the Exchange Administrator. The annual report may include items such as information related to registry outputs such as Credits transferred, biological monitoring results, reserve account balance, proposed adaptive management changes, and volume of participating properties.

VII. STATE AND FEDERAL AGENCY RECOGNITION OF THE COLORADO HABITAT EXCHANGE

USFWS, BLM, and CDNR have each independently reviewed the current governance documents for the Exchange and have determined that Credits generated and sold through the Exchange are a viable option to satisfy future GrSG conservation or mitigation requirements for GrSG associated with appropriate state or federal programs, or project-level authorizations or permits.

Where the GrSG is not listed as threatened or endangered under section 4 of the ESA, the use of Credits to offset impacts will be approved through the appropriate CDNR state consultation process for projects without a federal nexus or through the appropriate BLM or other federal consultation process on federal lands or for projects with a federal nexus. In the event that the GrSG is listed as threatened or endangered under the ESA, review and analysis will be conducted through the ESA section 7 consultation process for federal projects, conducted through the ESA section 10 incidental take permit program for non-federal projects, as well as by the appropriate jurisdictional agency according to the associated permit or project authorization procedures.

A. CDNR Recognition of the Colorado Habitat Exchange

The State of Colorado, through the COGCC and the Division of Reclamation Mining and Safety (DRMS), recognizes that Credits purchased through the Exchange can be used as one method to fulfill permit conditions to offset unavoidable adverse impacts to GrSG as determined on a case-by-case basis through consultation with Colorado Parks and Wildlife (CPW).

The value of Credits purchased in the Exchange, as calculated by the HQT, will not be diminished by changes to COGCC/DRMS/CPW rules or other policies, for the duration of the credit project. Likewise, once a buyer of Credits purchases Credits to offset an impact project, the amount of debits incurred by that project, as calculated by the HQT, will not be increased by changes to COGCC/DRMS/CPW rules or other policies.

B. USFWS Recognition of the Colorado Habitat Exchange

The USFWS recognizes that the Exchange is structured in a manner such that use of the Exchange, when implemented, provides a net conservation gain to the GrSG. The USFWS further recognizes that the Exchange contains necessary elements that serve as an appropriate option to provide offset or mitigation for impacts to GrSG and/or its habitat.

The USFWS agrees that Credits purchased through the Exchange, as calculated by the HQT, will retain their conservation value in relation to Debits if the GrSG is listed as a threatened or endangered species under the ESA.

The USFWS agrees that a buyer, who purchases Credits in a pre-listing environment to offset an impact project, as calculated by the HQT, will not be required to purchase additional Credits to offset that same impact project should the GrSG be listed as a threatened or endangered species under the ESA.

The USFWS also agrees that Credits may be used as a component of future conservation efforts, such as Candidate Conservation Agreements with Assurances (CCAA), Habitat Conservation Plans (HCP), Recovery Plans, Safe Harbor Agreements, BLM, U.S. Forest Service or other federal agency requirements, state or county level integrated permitting strategies, and advance mitigation planning efforts with infrastructure agencies.

C. BLM Recognition of the Colorado Habitat Exchange

Pursuant to the Northwest Colorado Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement (NW Colo. LUPA/FEIS), BLM must collaborate with the State of Colorado to ensure that GrSG-related mitigation requirements contained in the LUPA are met through a mitigation program that provides a net conservation gain to the GrSG.

The BLM agrees that the Exchange is structured in a manner such that use of the Exchange, when implemented, provides a net conservation gain to the GrSG. The BLM further agrees that the Exchange contains necessary elements that serve as an appropriate option to provide required GrSG mitigation under the NW Colo. LUPA/FEIS and/or Section 7 consultation with USFWS, and that the Exchange can be used to reduce BLM's disturbance cap calculations as discussed in Appendix E to the NW Colo. LUPA/FEIS.

BLM agrees that Credits purchased through the Exchange can be used as one method to fulfill BLM permit conditions for GrSG offset mitigation based on the NW Colo. LUPA/FEIS and/or Section 7 consultation with USFWS.

BLM also agrees that the value of Credits purchased in the Exchange, as calculated by the HQT, will not be diminished by changes to relevant BLM land use plans, policies, or guidance, for the duration of the credit project. Likewise, once a buyer of Credits purchases Credits to offset an impact project, the amount of debits incurred by that project, as calculated by the HQT, will not be increased by changes to relevant BLM land use plans, policies or guidance.

To the extent that proposed impact projects include activities on federal lands, the Parties contemplate and agree that BLM will ensure compliance with the National Environmental Policy Act, the Federal Land Policy and Management Act, the ESA, and other laws applicable to the authorization of land management actions proposed. Project proponents will obtain all appropriate permits and other authorizations needed from appropriate state and federal agencies to implement the proposed federal impact projects. Participation in the Exchange does not constitute or substitute any such approval.

VIII. AUTHORITIES

This Agreement is entered into under various legal authorities, including the following authorities:

The Endangered Species Act of 1973, as amended (16 U.S.C. §§ 1531-1544);
Federal Land Policy and Management Act of 1976 (43 U.S.C. §§ 1701 et seq.);
Fish and Wildlife Act of 1956 (16 U.S.C. §§ 742 et seq.);
Fish and Wildlife Coordination Act (16 U.S.C. §§ 661-667);
Fish and Wildlife Improvement Act, 1978 (16 U.S.C. §§ 7421 et seq.); and,
[insert State authorities].

IX. DESIGNATED REPRESENTATIVES

- A. The Parties shall appoint and maintain designated representatives as the primary contact for actions relating to the oversight of the Exchange.
- B. Representatives, at the time of the Agreement signature, are:

USFWS

BLM

CDNR

Colorado Habitat Exchange

- C. Joint meetings between the Parties may be held to review the Exchange governing documents, review verification, monitoring and implementation reports, the overall progress in implementing conservation measures from the Credits sold, and other matters relevant to the implementation of this Agreement.

X. ADMINISTRATIVE AND LEGAL PROVISIONS

A. Effective Date

This Agreement is effective upon the date of the final signatory.

B. Modification and Amendment

This Agreement may be modified or amended in writing by the mutual agreement of the Parties.

C. Termination

Any Party to this Agreement may terminate the Agreement after 30 days prior written notice to the other Parties. During the intervening 30 days, the Parties agree to actively attempt to resolve any outstanding disputes or disagreements. Any termination shall not affect the agreed-upon value of any transaction that has previously occurred within the Exchange.

D. Non-Exclusive; Participation in Similar Activities

This instrument in no way restricts any of the Parties from participating in similar activities with other public or private agencies, organizations, or individuals.

E. Establishment of Responsibility

This Agreement is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.

F. Non-Fund Obligor Agreement

This Agreement is neither a fiscal nor a funds obligation document. Nothing in this Agreement shall obligate the CDNR, BLM or USFWS to obligate or transfer any funds.

Specific work projects or activities that involve the transfer of funds, services, or property by USFWS or BLM will require execution of separate agreements and must be contingent upon the availability of appropriated funds. Such activities must be independently authorized by appropriate statutory authority.

This Agreement does not provide any such authority to transfer funds, services, or property. Negotiation, execution, and administration of each such transfer must comply with all applicable statutes and regulations.

G. Exchange of Information

Data provided pursuant to this Agreement may contain proprietary and/or pre-decisional information from one of the Parties. If records or information provided by any Party is requested for release by or to a third party, the Party that provided the records or information will be given timely notice and a reasonable opportunity for review prior to its release to a third party.

To the extent permissible under law, any recipient of proprietary and/or pre-decisional information agrees not to disclose this information to the public or other parties. To the extent permissible by law, any recipient of this information agrees not to transmit or otherwise divulge this information without prior approval from the Parties.

H. Limitations

In executing this Agreement, the Parties agree that the Exchange is intended to be a voluntary, non-profit program in which the BLM and USFWS will not hold a voting seat. The Exchange Administrator recognizes that nothing in this Agreement commits the USFWS, BLM, or CDNR to take action favorable to the Exchange beyond what is contemplated in Section V of this Agreement.

I. Sovereign Immunity

The State of Colorado and the United States do not waive their sovereign immunity by entering into this Agreement, and each fully retains all immunities and defenses provided by law with respect to any action based on or occurring as a result of this Agreement.

J. Severability

Should any portion of this Agreement be determined to be illegal or unenforceable, the remainder of the Agreement will continue in full force and effect, and any Party to the Agreement may renegotiate the terms affected by the severance.

K. Third-Party Beneficiary Rights

This Agreement does not create in any other individual or entity the status of third-party beneficiary.

The rights, duties, and obligations contained in this Agreement operate only between the Parties to the Agreement and inure solely to their benefit.

[Signatures]