

Final

Appendix B

Conservation Agreement

for

Sagebrush Steppe Assemblage

Greater Sage-grouse (*Centrocercus urophasianus*)

Sage Sparrow (*Amphispiza belli*)

Brewer's Sparrow (*Spizella breweri*)

Sage Thrasher (*Oreoscoptes montanus*)

and

Shortgrass Prairie Assemblage

Black-tailed Prairie Dog (*Cynomys ludovicianus*)

Mountain Plover (*Charadrius montanus*)

Burrowing Owl (*Athene cunicularia*)

Ferruginous Hawk (*Buteo regalis*)

Developed in partnership by

U.S. Fish and Wildlife Service

Bureau of Land Management

U.S. Forest Service

Thunder Basin Grasslands Prairie Ecosystem Association

February 8, 2017

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NOTE: All capitalized terms and acronyms used in this CA are defined in Appendix I of this Strategy.

1 INTRODUCTION

1.1 Overview

This CA for Sagebrush Steppe and Shortgrass Prairie Assemblages, along with the CCAA and CCA for these assemblages, are integral parts of the combined conservation Strategy. The Strategy and the three agreements implementing it were developed by the Association, in partnership with the FWS, BLM, and USFS, to address threats to eight at risk species, four in the Sagebrush Steppe Assemblage and four in the Shortgrass Prairie Assemblage. These species assemblages consist of the following: within the Sagebrush steppe ecotype, the greater sage-grouse, sagebrush sparrow, Brewer's sparrow, and the sage thrasher; and, within the Shortgrass Prairie ecotype, the black-tailed prairie dog, mountain plover, burrowing owl, and ferruginous hawk.

The purpose of this CA is to support implementation of the conservation Strategy on federal lands administered by the BLM and USFS in the Coverage Area by allowing eligible Participating Members, as defined below, to voluntarily implement the conservation Strategy for certain land use activities conducted on these federal lands pursuant to a BLM or USFS permit, lease or other authorization. As such, this document focuses on elements of the conservation strategy conducted on these federal lands where a BLM or USFS permit, lease or other authorization is reasonably foreseeable to exist in the future.

This CA is a voluntary agreement, administered by the Association, covering Participating Members who commit to implementing specific Conservation Measures that will reduce or eliminate threats to the Covered Species. It provides a mechanism for implementing and monitoring Conservation Measures that are applicable to the Coverage Area. Proactive conservation efforts are underway. In total, the Association and its members have invested nearly \$2.8 million from 2001 to 2013 to protect or enhance existing habitat.

1.2 Relationship of this CA to BLM and USFS Management Plans and Authorizations Land Use Plans

The Conservation Measures voluntarily undertaken by Participating Members are in addition to those measures required in applicable RMPs, USFS Plans or authorized BLM or USFS permits, leases or other authorizations for the covered land use activities. Neither BLM nor the USFS can provide a CCA/CA Participant with absolute assurance that additional requirements relating to conservation of the eight Covered Species or their habitat will not be applied in the future under the agencies' respective management plans and authorizations. Similarly, in the case of federal lands, the BLM, the USFS and FWS cannot provide absolute assurance that additional requirements will not be applied under the ESA if one or more of the Covered Species is listed under this Act. However, the CCA/CA and the related Conference Opinion potentially used by Participating Members provides the best mechanism for increasing the probability that these authorized land use activities can continue on federal lands without additional measures or restrictions in the event any of the Covered Species are listed under the ESA. BLM and the USFS also agreed in the 2014 Interagency MOU (see Appendix

H to this Strategy) that they are unlikely to impose additional measures, stipulations or restrictions pertaining to the Covered Species upon lands enrolled in the CCA/CA.

1.3 CA Relationship to Section 7 of the ESA

Federal agencies have the option under ESA Section 7 and FWS regulation and policy to confer under the ESA regarding federal actions that may affect non-listed species in order to ensure that the action is not likely to jeopardize the species' continued existence. The FWS also supports a proactive approach to conserving at-risk species, which may reduce or eliminate the need for future protection of the species under the ESA. As a result, although not required by the ESA, the BLM and USFS have requested that FWS provide a "conference opinion" under ESA Section 7 on their implementation of the proposed CCA. If a CA participant is successful in acquiring a lease, license, permit, contract or other instrument with a federal agency, benefits from the conference opinions may apply to them as well. The final Conference Opinions will include an incidental take statement that will anticipate the amount and type of take incidental to the implementation of the Strategy.

1.4 CA Participation

The CA will use the same set of Conservation Measures required for CCA participation (Appendices C and D of this Strategy) and provide coverage for lessees, permittees, and licensees associated with Covered Activities occurring on federal property. Integration of the CA with the CCA and CCAA will provide for a robust conservation strategy for the Covered Species.

By signing this CA and the associated Interagency MOU, the BLM and USFS have agreed they are unlikely to impose additional measures or restrictions pertaining to the covered species through any lease, license, permit, contract or other instrument upon members participating in this CA. However, this applies only to Participating Members who remain in good standing with the Association and continue to meet the requirements of their CI/CPs (see Appendix E, Section 3 of this Strategy). The Association agrees to notify the BLM and/or USFS no later than 15 days after a CA participant drops their membership.

CI/CPs will be issued by the Association to members who voluntarily meet agreed-upon proactive Conservation Measures for property with CA coverage. These CI/CPs will be administered similarly to the CI/CPs for property with a federal nexus. For more information on how the Association will administer the CI/CPs, see Appendix E of the Strategy.

2 LEGAL AUTHORITY AND PURPOSE

2.1 Legal Authority

Sections 2 and 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, authorize the FWS to enter into this CA. Section 2 of the ESA states that encouraging interested parties, through federal financial assistance and a system of incentives, to develop and maintain conservation programs is a key to safeguarding the Nation's heritage in fish, wildlife, and plants. Section 7 of the ESA requires the FWS to review programs that it administers and to utilize such programs in furtherance of the purposes of the ESA. By entering into this CA, the FWS is utilizing its conservation programs to further the conservation of the Nation's fish and wildlife.

The Federal Land Policy and Management Act (FLPMA, Section 307, 43 USC 1737), which provides overall direction to the BLM for conservation and management of public lands, allows the BLM to participate in conservation agreements. The BLM manual, Section 6840 (“Special Status Species Management”) provides overall policy direction to BLM managers to conserve listed threatened or endangered species on BLM administered lands, and to assure that actions authorized on BLM administered lands do not contribute to the need to list species deemed by the BLM to be “sensitive.” Finally, the BLMs 1998 “Guide to Agreements” notes that “Cooperative Management Agreements” are typically long-term agreements with other parties interested in joint management of wildlife habitats or other areas.

The National Forest Management Act of 1976, as amended, which provides overall direction to the USFS for conservation and management of public lands, allows the USFS to participate in conservation agreements. The Forest Service Manual, Sections 2600-2670, provides overall policy direction to USFS managers to conserve listed threatened or endangered species on USFS administered lands. Section 2670.12 directs the Forest Service to manage “habitats for all existing native and desired nonnative plants, fish, and wildlife species in order to maintain at least viable populations of such species”, to conduct activities and programs "to assist in the identification and recovery of threatened and endangered plant and animal species", and to avoid actions "which may cause a species to become threatened or endangered."

2.2 Purpose

The purpose of this CA is for the FWS, BLM, and USFS to join with the Association to proactively implement Conservation Measures for the Covered Species by preserving and enhancing habitat for these species, while reducing threats that are controllable within the defined Coverage Area.

Primary objectives are to:

- provide a vehicle for proactive voluntary implementation of the Conservation Strategy on BLM and USFS-administered lands in the Coverage Area and allow for consistent management across federal and non-federal lands,
- coordinate and implement conservation actions to reduce or eliminate known threats associated with Covered Species within the Coverage Area,
- identify Conservation Priority Areas within the Coverage Area with input from the Conservation Advisory Committee,
- implement Conservation Measures where they are most likely to achieve lasting conservation benefit,
- support ongoing efforts, especially those of WGFD to establish or re-establish and maintain viable populations of the Covered Species in both ‘occupied’ and ‘suitable, but unoccupied’ habitats,
- encourage development and protection of suitable Covered Species habitat by giving Participating Members incentives to implement specific Conservation Measures,
- provide Participating Members a high degree of certainty that the Conservation Measures agreed to would be considered in the biological opinion, and thus, would reduce the likelihood of additional land use restrictions that might otherwise apply should any of the Covered Species become listed, and

- allow industry to continue their operations through future leasing, licensing and/or permitting while protecting and improving habitat conditions for the Covered Species.

3 RESPONSIBILITIES OF THE PARTIES

3.1 Participating Members

To participate in the CA, interested property owners must be a member of the Association, have private property enrolled in the CCAA, and must participate in either or both of the CA Potential Mineral Development Areas (see Figure 2 in the CCAA of this Strategy) by working with the Association to complete and submit a CI/CP (see application process in Appendix E, of this Strategy; see example CI/CP in Appendix F), which will include the specific Conservation Measures that the member commits to implementing.

With respect to both federal and non-federal properties, the Participating Member agrees to implement Conservation Measures either on or off these properties as provided in the CI/CP, consistent with the conservation Strategy.

The Participating Member will:

- 1) Comply with the applicable terms and conditions of the CA
- 2) Implement all Conservation Measures identified within the CI/CP
- 3) Monitor as agreed to within the Conservation Measures and as described in their CI/CP
- 4) Report results of monitoring annually to the Association as described in their CI/CP
- 5) Notify the Association and FWS of any incidental take of Covered Species following listing as described in Section 8.5 of the parent CCAA.

3.2 Association

Implement and administer this CA by:

- 1) Encouraging Association Members to participate in the CA Potential Mineral Development Areas applicable to their activities.
- 2) Working with appropriate land management / wildlife professionals and researchers to ensure that Conservation Measures remain current and incorporate appropriate best management practices.
- 3) Working with Participating Members to ensure CI/CPs include appropriate Conservation Measures, including best management practices to avoid impacts to migratory birds. All applicable CI/CPs will include conservation strategies to ensure that rangeland health is maintained, especially during drought.
- 4) Approving and signing CI/CPs utilizing the Conservation Measures detailed in Appendix C of this Strategy for sagebrush obligates and Appendix D of this Strategy for shortgrass prairie species. All CI/CPs will be available to the FWS, BLM, and USFS and summarized in the annual monitoring report.
- 5) Being the primary party responsible for conducting monitoring activities as specified in the Agreement (See Section 12, 13, and 14 in the CCAA and monitoring provisions in Appendices C and D).

- 6) Working with landowner members to ensure appropriate implementation of the provisions of their individual CI/CPs.
- 7) Submitting an annual report to the FWS, BLM, and USFS by March 15 of the following year, that documents activities implemented under this CA, their effects on the Covered Species, and effects of activities undertaken in prior years that require multi-year monitoring on Covered Species.

3.3 FWS

The FWS agrees to provide the following administrative and technical assistance to aid the Association in implementing the Conservation Measures, subject to authorized and availability of appropriated funds:

- 1) Review monitoring and other reports submitted by the Association to the FWS for compliance with the terms of the Strategy and associated CI/CPs and notify the Association if more information is necessary.
- 2) Serve on the Conservation Advisory Committee, provide expertise on the management and conservation of the Covered Species, help to determine Conservation Priority Areas, provide assistance in developing and implementing CIs and CI/CPs, evaluate and process modifications or amendments, and provide assistance in coordinating implementation of this Agreement.
- 3) Help seek funding, if available, to achieve the Conservation Measures and implement monitoring and Adaptive Management activities outlined in the Conservation Measures given in Appendices C and D of this Strategy.
- 4) Provide technical assistance to the Association and Participating Members regarding migratory birds. This includes identifying potential impacts of the implementation of Conservation Measures during migratory bird nesting season and recommendations of best management practices to avoid impacts to migratory birds.

3.4 BLM and USFS

The BLM and USFS agree to provide the following technical assistance to aid the Association in implementing the Conservation Measures, subject to authorized and availability of appropriated funds:

- 1) Serve on the Conservation Advisory Committee, provide expertise on the management and conservation of the Covered Species habitat, help to determine Conservation Priority Areas, provide assistance in developing and implementing CI/CPs, evaluate and process modifications or amendments and provide assistance in coordinating implementation of this CA.
- 2) Help seek funding, if available, to achieve the Conservation Measures and implement monitoring and Adaptive Management activities outlined in the Conservation Measures given in Appendices C and D.
- 3) Agree that BLM/USFS is unlikely to impose additional measures, stipulations or restrictions pertaining to the Covered Species upon Participating Members Covered Activities that are addressed in this CA and that are described in the CI/CP.

4 COVERAGE AREA AND COVERED ACTIVITIES

4.1 Coverage Area

The CA covers all lands in the Potential Coal Development Area and the Potential Oil and Gas Development Area. The Association will notify the FWS if new members desire coverage for other lands. New property would require FWS to make a determination whether it was adequately covered under the Strategy and under NEPA. The applicable Association Member shall fund any additional NEPA analysis that may be required.

Association Members engaged in livestock grazing and members developing energy resources provide a unique synergy for implementing cooperative Conservation Measures to achieve enhanced habitat conditions for the Covered Species. The system of Conservation Measures included in the Agreement has been structured to provide incentives and mechanisms to facilitate these cooperative efforts and ensure these Conservation Measures are successful. This process encourages voluntary, cooperative Conservation Measures occurring on enrolled acres across the landscape for the benefit of the Covered Species. When cooperative Conservation Measures occur, points credited to Participating Members will be proportional to the resources provided by each partner. These particular areas and associated acres will be defined in signed agreements between the individual Participating Member(s) and the Association and included as an attachment to the relevant CI/CP(s).

4.2 Covered Activities

Covered activities will be specified in each CI/CP, as applicable. Covered Activities include the items set forth below and operations reasonably associated with the Covered Activities:

1. *General farm operations:* Cultivation of fields; planting, cultivation and harvesting small grain, seed and/or hay crops; irrigation by flooding or sprinklers; construction and placement of watering sources; installation, maintenance, and reconstruction of access roads, fences, and power lines; leasing of fee minerals; agricultural equipment operation; weed control; and construction and maintenance of farm houses (no subdivisions), outbuildings, fences and corrals.
2. *General ranching operations:* Grazing of forage; feeding hay and dietary supplements in feedlots and in pastures; calving and branding operations, including temporary penning of animals; disposal of dead animals; construction and placement of watering sources; installation of access roads, fences, and power lines; gathering and shipping livestock; general stewardship and animal husbandry practices; leasing of fee minerals; and construction and maintenance of ranch houses (no subdivisions), outbuildings, fences and corrals.
3. *Oil and gas production activities:* Exploration, construction, operation and maintenance of oil and gas wells, including production facilities, gathering systems, waste water reservoirs, access roads, fences, power lines, and other ancillary activities necessary to produce oil and gas from federal, state and fee mineral leases.
4. *Surface/in-situ mining activities:* Exploration, leasing, construction, operation and maintenance of a surface or in-situ mine. This would include activities such as establishment and utilization of mine facilities; overstripping operations (including drilling and blasting); stockpiling overburden and topsoil; mineral removal (including drilling and blasting); backfilling; grading; establishment

and utilization of drainage diversions, sedimentation ponds, waste water reservoirs, haul roads, fences, power lines, and railroads; environmental monitoring activities, reclamation of mined lands including animal husbandry, and other ancillary activities necessary to mine minerals from federal, state and fee leases and reclaim associated mined lands. For example, surface coal mining involves progressive sequencing of topsoil salvage, overburden removal, coal removal, backfilling and recontouring, topsoil reapplication, seedbed preparation and reseeding, and animal husbandry. The active mining process moves progressively through this sequence. Active mining includes lands being contemporaneously reclaimed utilizing direct haul of topsoil and fill material along with material from stockpiles. Reclamation efforts correspond with fluctuations in mine production.

5 SPECIES SPECIFIC INFORMATION

For a complete description of the natural history, status and distribution, and threats for the Covered Species, see the parent CCA for Sagebrush Steppe Assemblage and Shortgrass Prairie Assemblage.

6 CI/CPs

A CI/CP is the mechanism for any Association Member that holds a lease, license, permit, contract or other authorization from BLM or USFS to conduct Covered Activities on BLM/USFS property in the Coverage Area to participate in the CA. See Appendix F of this Strategy for an example CI/CP and Appendix E for more details on implementation. Participation in the CA is limited, however, to individuals or entities that have enrolled non-federal lands they own or control in the CCA. Each Participating Member signs a CI/CP that includes the non-federal property it wishes to enroll in the CCA and identifies their desire to participate in one or more of the Potential Mineral Development Areas, and agrees to implement Conservation Measures where they are most likely to achieve conservation benefit to the Covered Species. If a Participating Member is successful in acquiring a lease, license, permit, contract or other instrument with a federal agency, the applicable area will be included in their CCA acreage calculations for determining the total conservation points necessary (see Appendix E for additional detail).

The Association will be responsible for enrolling Participating Members. As members of the Conservation Advisory Committee, the FWS, BLM, and USFS will work cooperatively with the Association to determine the Conservation Priority Areas where Conservation Measures are expected to achieve the greatest benefit.

7 PROVISIONS FOR ADAPTIVE MANAGEMENT

The Association, in conjunction with Participating Members and qualified consultants, will be responsible for monitoring as specified in each Conservation Measure. For a complete description of the Adaptive Management process, see the CCA.

8 MONITORING PROVISIONS

The parent CCAA for Sagebrush Steppe Assemblage and Shortgrass Prairie Assemblage contains all monitoring provisions and these provisions are incorporated into this CA by reference.

If species become listed under the ESA, the Association agrees to provide the FWS with an opportunity to rescue individuals, with the cooperation of BLM/USFS, of the Covered Species on lands with CA coverage prior to actions that would cause losses to occur, provided the Association is aware of these actions. Notification that Covered Species are available for rescue will be provided to the FWS at least 30 days in advance of the action that might cause take or otherwise impact the Covered Species. In no case will failure of the FWS to rescue identified Covered Species populations within the allotted time frame require Participating Members to delay any action(s) which could cause population losses to occur.

9 DURATION OF CA

The anticipated term of this CA, including any commitments related to funding under FWS programs, is 30 years, the same as the parent CCAA. However this CA will remain in effect until termination of the parent CCAA or until one or more of the participating parties terminates it. Any signatory may withdraw from this CA at any time by providing 30 days written notice to all other signatories. A decision to withdraw from the Agreement will result in, among other things, individual section 7 requirements to consult on all federal actions that may affect listed species.

10 MODIFICATION OF THE CA

Any signatory may propose modifications or amendments to this CA, by providing written notice to, and obtaining the written concurrence of, all other signatories. Such notice shall include a statement of the proposed modification, the reason for it, and its expected results. The signatories will use their best efforts to respond to proposed modifications to the CA within 60 days of receipt of such notice. Proposed modifications will become effective upon the receipt of all other signatories' written concurrence.

11 REMEDIES

No Party shall be liable in damages for any relief under this Agreement (including, but not limited to, damages, injunctive relief, personal injury, and attorney fees) for any performance or failure to perform under this Agreement. Furthermore, no Party has any right of action under this Agreement.

12 DISPUTE RESOLUTION

The informal dispute resolution process among the signatory parties of the conservation Strategy may utilize the following steps to attempt resolve disputes, unless the parties agree upon another dispute resolution process, or unless an aggrieved party has initiated administrative proceedings or suit in federal court. This process will apply to resolution of any dispute between FWS and the Board as described in Appendix E, Section 6, of this conservation Strategy.

- 1) The aggrieved party will notify the other parties of the potential violation, the basis for contending a violation has occurred, and the remedies it proposes to correct the alleged violation.
- 2) The party alleged to be in violation will have 30 days, or such other time as may be agreed, to respond.
- 3) Within 30 days after such response was provided or was due, representatives of the parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all involved parties, or will establish a specific process and timetable to seek such a solution.
- 4) If any issues cannot be resolved through such negotiations, the parties involved will consider non-binding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good faith efforts to resolve all remaining issues through that process.

13 NO THIRD-PARTY BENEFICIARIES

The CA does not create any new right or interest in any member of the public as a third-party beneficiary, nor shall it authorize anyone not a party to the Strategy to maintain a suit for personal injuries or damages pursuant to the provisions of this Strategy. The duties, obligations, and responsibilities of the parties to this Strategy with respect to third parties shall remain as imposed under existing law.

14 FUNDING AND IMPLEMENTATION OF CONSERVATION MEASURES

This CA is subject to available funding and staffing. This does not impose financial obligations beyond appropriations. The parties to this agreement are committed to seeking funding to implement this conservation agreement each year.

15 NOTICES AND REPORTS

Any notice or reports, including monitoring and annual reports, required by this CA shall be delivered to the person listed below as appropriate:

Thunder Basin Grasslands Prairie Ecosystem Association
671 Steinle Rd
Douglas, WY 82633

Field Supervisor, Wyoming Field Office
U.S. Fish and Wildlife Service
5353 Yellowstone Road, Suite 308A
Cheyenne, WY 82009

State Director
Bureau of Land Management
Box 1828
Cheyenne, WY 82003-1828

Forest Supervisor
US Forest Service
2468 Jackson St
Laramie, WY 82070-6535

IN WITNESS WHEREOF, THE PARTIES HERETO have, as of the last signature date below, executed this CA to be in effect as of the date that the last signatory signs this agreement.



Chairman
Thunder Basin Grasslands Prairie Ecosystem Association

3/18/17

Date



Field Supervisor
US Fish and Wildlife Service

3-13-17


Date



State Director
Bureau of Land Management

3/13/17

Date



Forest Supervisor
US Forest Service

3/14/17

Date