

AGENDA

Montana Sage Grouse Oversight Team (MSGOT)

March 24, 2021: 4:00 p.m. – 5:30 p.m.

Zoom Webinar / Video Conference Meeting

4:00 – 4:05: Call to Order and Administrative Matters, MSGOT Chair

- Introductions
- Zoom Webinar logistics
- Review and Approve Minutes:
 - November 30, 2020
 - December 14, 2020
 - February 24, 2021

4:05 – 4:45: Determine Clearwater Energy Resources LLC’s Remaining Contribution to the Stewardship Account to Fulfill its Compensatory Mitigation Obligation

- Introduction
- MSGOT Discussion
- Public Comment
- Any additional MSGOT Discussion and Executive Action

4:45 – 5:20: Overview of Montana Sage Grouse Population Numbers by Montana Fish, Wildlife, and Parks

5:20 – 5:30: Public Comment on Other Matters

5:30: Adjourn

NOTE: Agenda item times are approximate. Actual times may vary by up to one hour. Attendees who may need services or special accommodations should contact Carolyn Sime (406-444-0554 or csime2@mt.gov) at least 5 working days before the meeting.



**MINUTES
MONTANA SAGE GROUSE OVERSIGHT TEAM**

November 30, 2020 Meeting Summary
Virtual Zoom Meeting

Members

Mr. John Tubbs, Chair, Montana Department of Natural Resources & Conservation, Director
Mr. Mike Tooley, Montana Department of Transportation, Director
Mr. Jim Halvorson, Montana Board of Oil and Gas, Administrator
Mr. Shaun McGrath, Montana Department of Environmental Quality, Director
Ms. Martha Williams, Montana Department of Wildlife, Fish and Parks, Director
Senator Mike Lang, Senate District 17
Representative Rhonda Knudsen, House District 34 (Absent, voting proxy via Senator Lang)
Ms. Diane Ahlgren, Rangeland Resources Committee
Mr. Patrick Holmes, Governor's Natural Resource Policy Advisor (Absent, voting proxy via Director Tubbs)

Staff Present

Ms. Carolyn Sime, Sage Grouse Habitat Conservation, Program Manager
Ms. Shawna Swanz, Administrative Attachment Coordinator

Call to Order

00:04:20 Director Tubbs: Called the meeting to order.

00:25:98 Ms. Carolyn Sime: Welcomed the group and announced that the meeting is being recorded. The audio file will be posted to the website a couple of days following the meeting.

00:01:12 Director Tubbs: Initiated introductions with a roll call of MSGOT members.

00:02:23 Approval of June 9, 2020 meeting minutes. Motion to approve by Director Tooley, seconded by Director Williams.

00:02:26 Director Tubbs: Called for changes or discussion. None.

00:02:33 Directors Tubbs: Conducted voice vote. Motion passed.

Program Report and MSGOT Reports

00:03:27 Ms. Carolyn Sime, Sage Grouse Habitat Conservation, Program Manager

I will defer the Program Report until the December meeting to include a brief recap of 2020 and a review of program accomplishments.

00:04:21 Mr. John Tubbs, Chair, Montana Department of Natural Resources & Conservation, Director

We continue to support the Program. We are working through some of the policies, specifically with Administrator Halvorson on oil and gas leasing and dry wells.

00:04:49 Ms. Martha Williams, Montana Department of Wildlife, Fish and Parks, Director

Catherine Wightman is moving on to a new opportunity that will continue to benefit sage grouse and

Fish, Wildlife and Parks. We continue to support the Program the very best that we can.

00:05:30 Mr. Mike Tooley, Montana Department of Transportation, Director

Our various staffs continue to work towards programmatic exceptions. I will have an update later this week that will allow for a further report at the December 14 meeting.

00:05:57 Mr. Shaun McGrath, Montana Department of Environmental Quality, Director

No report.

00:06:07 Mr. Jim Halvorson, Montana Board of Oil and Gas, Administrator

No report.

00:06:20 Ms. Diane Ahlgren, Rangeland Resources Committee

- Rangeland Intern Program is in its third year with three interns in 2020. It has been going very well.
- Range Improvement Loan Program has some applications.
- The Leopold Award in Montana awarded its second recipients.
- Many 2020 Rangeland events were cancelled due to covid.
- Plans for 2021 events are cautiously moving forward.
- Rangeland Resources Program Coordinator, Stacey Barta, implemented monthly 406 Rangeland e-Newsletter. The content is very well done and articles are good.
- Strategic planning is underway.
- Public Hearing December 14 for proposed adoption of new rules for the Rangeland Resources Program.

Follow up Adaptive Management Discussion

00:08:21 Director Tubbs: At the October meeting, Ms. Sime presented several options for new Program Tasks that will be discussed and voted upon at this meeting.

00:09:02 Ms. Sime: This is a continuation of the discussion, with the exact same slides.

[PowerPoint Presentation](#)

00:21:23 Director Tubbs: We have a question on what are “universal limitations”?

00:21:31 Ms. Sime: Universal limitations would be a circumstance that occurs with every single project that we review. The mitigation framework is applied consistently to a wide spectrum of different development projects regardless of the project type, duration, or the required permits. We have not encountered a universal limitation or problem with the HQT or mitigation framework that affects every single project we review in a problematic way or poses the same or frequent glitch. There is enough flexibility in MSGOT’s policy guidance and our ability to work directly with developers to account for anything that may come up that is unique or different about a specific project.

00:23:02 Director Tubbs: There are a couple tasks I think we should focus on, regardless of where the next administration takes this Program.

Update the Basemap: It has been nearly five years since the map was created. Based on some of the current project discussions, we should have the confidence of the next MSGOT group that they have the best data available when considering projects. There is some contract work already in progress.

Feedback Mechanism: The legislative audit will likely identify this as a potential issue that needs to be addressed. The Program does not currently have a formal way of being informed that the developer

has received the necessary permits and or licenses and the project is implemented. The Program needs a feedback mechanism with knowledge of final project approval so that the Program can seek compensation for any mitigation commitments that were made as the project goes to construction. This is not part of MSGOT's workload—requires a conversation with the state agencies that issue the permits and licenses. While I don't think anything is improper, it is an important item to consider.

00:26:03 Director Tubbs: Called for public comment. None.

00:27:13 Director Tubbs: Called for discussion by MSGOT members.

Addressing technical issues.

00:28:22 Senator Lang: I believe the Basemap does need review. Currently, it is difficult to determine some of the boundaries. I think there are some areas that are in question. Are they core? Are they general? We have a lot of topographical and management habitat changes to consider.

I would also like to see the changes being made to the new Basemap in comparison with the current Basemap.

00:29:42 Senator Lang: Some questions for Ms Sime: Do we have any kind of a number that talks about the total number of mitigation dollars? Are there any figures on what state agencies, private taxpayers or private businesses in Montana have paid? Do you have a total since the inception of mitigation?

00:30:19 Ms. Sime: The most current Stewardship Account figures are on the blue paper in your meeting packet. If a developer chooses that option, they work with the Program to determine the dollar amount. Through consistency with the Executive Order, a developer can minimize impacts. This also decreases the contribution dollar amount.

00:31:09 Director Tubbs: \$7.9 million in general appropriation has been allocated over the last five years for grants. Of that, there has been \$1.6 million in each of the last four years (agreed to during the 2017 Legislative Session). There are two contributions shown in the table that have been received with a balance of \$955,267 from two private entities.

00:32:20 Senator Lang: I hear from constituents or from businesses that say, "I couldn't move forward because the Sage Grouse Program wasn't going to let me go, so I had to pay a fee." I would like to know, how much for example, the Montana Department of Transportation has had to pay the state of Montana Sage Grouse Program to proceed with a project? It costs \$7 million to put up a cell tower and when I see a lot of cell towers around the state, I want to know what those fees are that are being assessed. We can say that the Sage Grouse Program isn't directing that, but the developer can't get a permit unless they get the Program's approval. I need to know the gray area.

00:33:16 Director Tubbs: There are several projects that have gone through the Program. Big Flat Electric has negotiated a final determination on project debits. This particular entity has project-sponsored generated credits due to burying some distribution lines. They also have a planned contribution to the MSGOT account that has not been received. There are several obligations that are associated with projects that have been approved but have not been either fully permitted or implemented. It is similar to an accrual.

00:34:16 Ms. Sime: Added, if there is a state agency undertaking its own project, the mitigation framework is applied the same way it is applied to the private sector. Asked Senator Lang if that was the root of his question.

00:34:41 Senator Lang: The blue sheet on available funds for grants does not apply to my question.

00:34:47 Senator Lang: My question is; if a county calls up and says I have a sage grouse deal and it's going to cost me \$1,800 to get the Sage Grouse Committee to open this gravel pit or if Director Tooley wants to do something on a highway, but it is costing him too much money to do what he wants to do because

of sage grouse. Are those numbers available?

- 00:35:19 Director Tubbs: Like the DY Junction cell tower project, we never got a payment, but we did tell them what the cost was. I think we can tell you what the final number of debits is per project and by project sponsor. It doesn't appear on this table report showing available funds to award 2020 Stewardship Account grants until we actually get the money in the bank. We should be able to provide a list of projects that have completed the MSGOT approval process and the amount of money owed to the state should those projects be executed.
- 00:36:08 Ms. Sime: That information has been provided to Mr. Sutcliffe with the Audit Division.
- 00:36:17 Ms. Sime: In addition, the root of the question seems to be about the private sector versus local government versus state agencies. Yes, we do apply the framework consistently across the board. If at any point in time an entity requests to come before MSGOT directly, we could accommodate that request.
- 00:36:41 Director Tubbs: Told Senator Lang that Program staff would work to get that information to him prior to the December meeting so there is opportunity to ask questions.
- 00:46:54 Ms. Sime: Confirmed she would forward the information to Senator Lang and MSGOT.
- 00:37:00 Director Tubbs: Called for any additional comments from MSGOT members on Program assignments.
- 00:37:19 Ms. Ahlgren: I agree with the update on the Basemap. Will it include an update on the shorter stature sagebrush in our area? We have talked about it being good habitat, but perhaps it is not currently being represented as it should be on the Basemap.
- 00:37:46 Ms. Sime: If there are new vegetation layers publicly available, we would use those. I cannot say for sure whether the sagebrush layer has been updated. We are not proposing to conduct fieldwork to inform the update. We would look at each layer, find out if there is more current GIS layer information available from the list of public sources that we have identified, and incorporate those that have been updated.
- 00:38:31 Director Tubbs: Called for further discussion.
- 0038:45 Director McGrath: I am comfortable with what you have laid out, keeping it narrow given where we are at the end of this administration and allowing the new administration to come in and set their priorities.
- 00:39:09 Director McGrath: Moved that the Oversight Team move forward along the lines that the Chairman laid out with supporting moving forward on the mapping and audit information [i.e. Basemap update and development of feedback mechanism proposals].
- 0039:27 Ms. Ahlgren: Second.
- 00:39:30 Director Tubbs: Called for further MSGOT discussion.
- 00:39:33 Senator Lang: Asked the Chairman to repeat the motion.
- 00:39:35 Director Tubbs: The motion is to: (1) update the map to the v1.1 Basemap over the next year; and (2) develop an approach where we would be able to answer the question that you asked more affirmatively -- which is when a project is finally approved for a permit license and proceeds into construction that we have assurances that the Program is notified and that any debits are matched by the credits either invested into the Account by a purchase of our credits or by user-created credits [permittee-responsible actions].
- 00:40:31 Senator Lang: What are the changes on the Basemap compared to what was first developed?

00:40:45 Ms. Sime: The Basemap is like a layer cake with lots of layers. Each layer of the cake has unique information or data. We would determine whether the most current information is incorporated into each data layer, respectively. Then we recalculate the map so each square box or pixel cell would potentially end up with a new number after the most current information is applied. If there are no updates to any of the individual GIS data layers that are used to create the single number assigned to a cell, that individual cell number would not change and the original value would carry forward into the next version of the basemap.

With MSGOT approval, a launch date would be set and V1.1 implemented. Any project in development up until that date would continue to use v1.0. as directed by the Administrative Rules.

00:41:56 Director Tubbs: In addition, we have a contractor working on updating disturbance information right now. Presently, in conversation with the project sponsor, who has a big blue swatch right in the middle of their project that represents a burn from 2012. In the vegetation layer, it is likely that a 2012 burn scar has healed and is now a grassland recovering back into a sage grouse habitat so the color will be different in a revised Basemap. At the same time, if someone plowed a new field in sage grouse territory, that color will turn from bright warm red color to the blue color denoting disturbed land.

I picked just a couple of layers. I think there are a half a dozen or more layers that have statewide data that we will impose on sage grouse habitat quality measures. It is not taking a new approach. It is bringing the current data up to date.

It is also important to recognize that the new data will not be used until it is adopted by the future MSGOT at a future meeting once that data is available.

00:43:36 Senator Lang: Are we changing Core, General and Connectivity aspects of the original Basemap?

00:43:53 Ms. Sime: That is not under consideration at this time.

00:44:03 Director Tubbs: Reminded members that HQT does not consider those variables. HQT looks at habitat quality factors that each one of the cells represents. The Core, General and Connectivity area boundaries are lines that were drawn by Montana Fish, Wildlife & Parks in a prior effort but also used for the MSGOT program.

The original boundaries were not intended to be precise. They used a contour-type line. The original boundary lines provide the most meaning in policy implications, not the Basemap side of it.

00:45:43 Director Tubbs: Call for other discussion. None.

00:45:46 Director Tubbs: There has been a motion and a second.

0045:51 Director Tubbs: Conducted voice vote. Motion passed. Mr. Holmes and Rep. Knudsen voted aye by proxy.

00:46:02 Director Tubbs: Good discussion. Thank you all.

2020 Stewardship Account Grants

00:46:06 Director Tubbs: Invited Ms. Sime to provide an introduction.

00:46:19 Ms. Sime: MSGOT is considering seven applications seeking funding from the Stewardship Account. Thanked the applicants for their preparations and especially the private landowners. We will have presentations from all the grant applicants and we also have in attendance many of the landowners who have been working with the grant applicants. The grant requests exceed the amount currently available from the Stewardship Account. All the applications have unique features that make them worthy of funding. The applications were reviewed independently by seven subject matter experts who know sage grouse, who know these areas, and are familiar with mitigation. You can be confident that

we have reached out to obtain independent opinions.

00:48:16: Director Tubbs: Introduced 54 Ranch Livestock

00:49:08 54 Ranch Livestock - Brian Martin, The Nature Conservancy

[PowerPoint Presentation](#)

Additional Landowner Comments: Mike and Cheryl Goffena

01:00:07 Director Tubbs: Called for questions from MSGOT Members. Public comment will follow after the presentations.

01:03:39 Mr. Goffena: Brian did a wonderful job. We will go with what he had to say.

01:03:48 Director Tubbs: Thank you for considering conservation of your property. Those are big decisions.

01:03:53 Mr. Goffena: Well, we try to do what we can. We are trying to get some young farmers involved and ranchers back onto the property. We thought maybe this would be a vehicle to do that.

01:04:12 Director Tubbs: Called for MSGOT comment.

01:04:16 Director Williams: I want to add my thank you as well.

01:04:29 Mr. Goffena: Thank you much.

01:04:30 Director Tubbs: Thank you. I am glad we got you online.

01:04:51 Director Tubbs: Introduced Alexander Ranch

Alexander Ranch - Jim Berkey, The Nature Conservancy

[PowerPoint Presentation](#)

Additional Landowner Comments: Don Alexander

1:13:55 Don Alexander: Thank you for allowing us to present this. I think Jim has done an excellent job. We are a conservation family interested in trying to contribute what we can to maintain the conservation aspects. We are excited about the possibilities.

01:14:18 Director Tubbs: Thank also you for considering a long-term conservation easement on your property. These are big questions as a landowner—how to see the future and provide some benefit to the state through sage grouse conservation.

01:15:19 Director Tubbs: Introduced the Bequette Property

Bequette Property – Brad Hanson, Montana Land Reliance

[PowerPoint Presentation](#)

Additional Landowner Comments: Dave Bequette, unavailable

01:24:32 Director Tubbs: Called for questions by MSGOT members. None.

01:25:06 Director Tubbs: Introduced the Fauth Ranch

Fauth Ranch – Brad Hanson, Montana Land Reliance

[PowerPoint Presentation](#)

Additional Landowner Comments: KJ Fauth

01:27:57 Mr. Fauth: Thanks everyone for considering us and letting me speak today and for all of Brad's help. I appreciate that a lot. It means a ton to my family, of course, the grouse, our land and other wildlife in the area to be accepted into this program. A lot won't really change on our own property. We are more

grass managers than ranchers. Some people have to worry about hitting a deer on the road, but in our habitat, we have to watch for grouse to pass. You see more of that than school bus stop signs. It is a privilege to see the sage grouse in their habitat. I think this will benefit our family and the ranch as well. We have participated in some NRCS programs in the past. Rotational grazing is a big thing for us on the ranch and I think that is why these grouse thrive so much in our area.

01:29:08 Director Tubbs: Called for questions from MSGOT members. None.

01:20:23 Director Tubbs: Introduced the Jackson Ranch

Jackson Ranch – Jim Berkey, The Nature Conservancy

[PowerPoint Presentation](#)

Additional Landowner Comments: Yvonne Frick

01:38:35 Ms. Frick: I am here with my sister Twila. Thank you for your time. Thank you, Jim, for presenting this; you did a great job. As Jim mentioned, we are fifth generation here, trying to hang on to what our ancestors put together. Our great, great grandfather came to this valley in the late 1800s and we are just really trying to hang on to everything. We don't want to see subdivision. We are conservation minded. We would really like your consideration on this proposal. It would allow us to keep ranching and provide for the sage grouse. Thank you so much for your time.

01:39:28 Director Tubbs: I thank you, as I did the others that are making these decisions on conservation easements. It is very personal, and I thank you for thinking about that for your ranch and certainly for the benefit of the sage grouse and the Sage Grouse Program.

01:39:51 Director Tubbs: Called for questions or comments from MSGOT members. None.

01:39:55 Director Tubbs: Introduced the Mussard-Barrett Property.

Mussard-Barrett – Jim Berkey, The Nature Conservancy

[PowerPoint Presentation](#)

Additional Landowner Comments: Bryan Mussard

01:46:38 Mr. Mussard: I think we have spent the last eight years meeting with Jim, trying to understand easements and if they fit for us. We have been on a place in the Big Hole for 15 years now that has an easement on it. The easement has allowed us to stay and continue to ranch as it has been traditionally ranched for the last 60 years. As we move forward as a family, we are the last stand between Montana, which has become the number one sticker in a real estate magazine in this country, and history. Having partners like the State of Montana, NRCS, and TNC as a trust to preserve these lands and allow us to keep using them, and our kids to keep using them, and their kids to keep using them and nobody gets to subdivide it and lose all that. That is pretty important to us. Thanks for taking your time and letting us be a part of it.

01:47:47 Director Tubbs: Again, thank you for your willingness to consider a long-term conservation easement on your property and help our program as well.

01:48:02 Director Tubbs: Is the "Barrett" the Past Senate President Debbie Barrett? Is she a current owner? I wasn't sure about the two-named ranch.

01:48:13 Mr. Mussard: It is under contract right now. The Barrett's financed it so their name is on all the paperwork until we take full ownership in 2028. The paperwork has to be filed with both names. It is pretty rare, but they have graciously allowed us to pursue an easement to preserve the property and we are very grateful for that.

01:48:42 Director Tubbs: I know that in past conversations with the good senator, she is very proud of this landscape that you are talking about.

01:48:56 Director Tubbs: Introduced the Peters Ranch.

Peters Ranch – Jim Berkey, The Nature Conservancy

[PowerPoint Presentation](#)

Additional Landowner Comments: Roger Peters

1:56:12 Mr. Peters: Talking about all this good rangeland is pretty exciting. I like seeing all these presentations. They are all great. You know, I talked to an old cowboy once. He said, I've seen a lot of changes in my life and I was against all of them. And that's certainly true for me when it comes to rangeland. I hate to see rangeland converted to crop land. Like Charlie Russell said, a rancher is man who turned the grass upside down. I hate to see rangeland converted to subdivisions and homes. I really appreciate the conservation efforts of this committee. We have been involved in some other conservation efforts, simply for that reason, to preserve what we have here. This rangeland, as it now presently is, is the sage grouse habitat. We're looking for a chance to do that here. I think it is also great because once it goes into a conservation easement, a perpetual easement; 50 years down the road there is not a battle among generations about what is going to happen to the land. It has to be highly tempting for those who aren't on the ranch, working the ranch to turn down huge dollars. In fifty years, I can only imagine what this property is going to be worth. We are very interested in preserving the sage grouse, it's great. You can't go across the property without seeing sage grouse every day. It's a lot of fun and it is truly remarkable habitat.

1:57:50 Director Tubbs: Thank you. Again, thank you for the commitment to conservation and seeing the future of your property move forward. I must admit, you must have dodged some tough fires this summer. That was a big fire down on that ridge line.

1:58:09 Mr. Peters: It was the Horse Prairie property that Jim referred to. It did have quite a lot of fire on it. The Bear Creek Fire took quite a lot of that out.

1:58:20 Director Tubbs: That burned down to the valley bottom. I think some of the decadent pine probably needed a little refreshing, but at least it didn't get carried away and move all the way down to the bottom of the valley.

1:58:34 Mr. Peters: We are going to be able to see our cows now.

1:58:39 Director Tubbs: I suppose that is true.

01:58:42 Director Tubbs: That concludes the presentations. Call for public comment concerning any of the seven proposed Stewardship Account grants or any other public comment.

01:59:32 Mr. Glenn Marx, Executive Director of the Montana Association of Land Trusts: I want to compliment all the presenters and landowners on the excellent presentations. MALT has been part of sage grouse discussions from the beginning. I read all the application information, but I still learned some things about these individual projects through these presentations. They each stand on their own merit. They each have very valuable things to add to what the Program is trying to accomplish.

MALT sincerely thanks the landowners for participating in this program. The stewardship commitment, the stewardship ethic, the love of the land, the love of wildlife clearly came through from the landowners. MALT salutes all these landowners for all the work that has brought them and their farms and ranches to this point. The stewardship effort is very remarkable and impressive.

We believe MSGOT should find a way to fund all the projects. They all conserve sage grouse habitat, they all conserve sage grouse populations, they all conserve open land, they all conserve agricultural operations, they all generate credits and they all accomplished what this program was designed to accomplish. The roughly 25,000 acres within these seven projects would produce close to 250,000 mitigation credits.

I am not sure if there is funding for all projects or if some adjustments could be made in the allocations.

Based on the mission of the Program, the quality of applications, the commitment of the landowners, MALT believes that funding all the projects should be one of the goals of MSGOT today.

02:04:32 Director Tubbs: Thanked Mr. Marx for his comments and called for additional public comment.

02:04:35 Mr. Bill Milton, Rancher, Roundup, MT: Thanked the committee for the opportunity to speak in support of the Goffena family and the 54 Ranch Livestock project. I was quite impressed with the quality of all the projects and certainly don't want to favor one over the other, but I do have a fond spot for the 54 Ranch Project. It neighbors our Milton Ranch north of Roundup. What I particularly like about the Goffena family's project, which you have been working on for quite some time, is it not only protects quality habitat for sage grouse, but it creates a real opportunity for some young producers in our neighborhood. To get a lowering on the value of that ranch allows three, maybe four young producers to work together to use that grass to scale up their agricultural operations. The ability to marry some economic opportunity in the ag sector in our county as well as maintain some unfragmented quality sage grouse is exciting. If we are successful here, it is going to be a tool that can be applied to some other ranches in our region. Having some experience making this work will encourage some other producers in our area to take a hard look at this. There has been a lot of good conservation already ongoing in this part of the county and also in Petroleum County. The cooperation that is occurring among a lot of the landowners in the area who work with a variety of partners to get these things done is pretty darn exciting. I want to strongly support, particularly as a neighbor and a rancher in the region, the 54 Ranch project, but I am also quite impressed with all the projects that we have observed and learned about today. Thank you for the opportunity.

Good luck in dealing with hard decisions of how to allocate your dollars, but very grateful for MSGOT and the work of all the people who serve on the committee.

02:07:41 Director Tubbs: Called for any additional public comment. None.

02:07:47 Director Tubbs: Initiated discussion by MSGOT members.

02:07:59 Director Tubbs: If everything was perfect we would have enough money to fund all projects at full cost, and I would be happy to entertain that motion, but as Ms. Sime has pointed out, we have some restricted funds that will support projects within the counties that were impacted.

There are no applications from those counties in this package. As a result, there is \$4,037,904 available.

After review and discussion with Ms. Sime and some follow up discussions, even today, I have resolved that I like all of projects. I do not have a strong feeling about why we would cut out any projects other than we don't have the money.

We have \$4,037,000 available in grant funds. We have \$4.6 million in project requests. That is \$568,000 more than available funds. If we were to reduce all the projects by 12.4%, we could fund them all. I have talked to both Land Trust companies and it is acceptable to them to reduce funding across the board by 87.6%.

A second alternative recommended by Ms. Sime is to fund five of the projects and deny two; Jackson Ranch and Bequette Property. This frees up \$705,000 and would allow us to award full funding for the remaining projects, however, I think both of those projects have very strong merits.

As a representative of the Bullock administration, I would like to end on a positive note with our decision. We have sage grouse conservation funding available and we have good projects before us. We have the Biden administration coming on. You can be assured that the US Fish and Wildlife Service will conduct a full review of the sage grouse conservation across the nine-state region. I think with the adoption of these properties, Montana can stand proudly that we not only said we were going to implement a sage grouse conservation program, but that we have implemented one with significant conservation in place. I also think that full funding would provide the greatest number of credits so that

the next administration can focus on understanding the development pressures and know that they have a bank of credits available if development increases in the next several years. They can count on a strong balance of credits within the MSGOT program for new development opportunities.

The Program goals are to keep control of the bird at the state level. In the commitment we made, we undertook no net loss of habitat as a cornerstone. In today's presentations, we saw that. We have met that target. With the award of these grants, we will meet and exceed that target.

02:13:12 Director Tubbs: Called for MSGOT discussion.

02:13:30 Director Tooley: I don't disagree with your approach, but how does this ultimately affect the projects at hand?

02:14:04 Director Tubbs: That was the primary question in the discussions with the two Land Trusts. This will create a deficit in all seven projects. Initially, both organizations said that they would make the efforts to raise the addition funding.

That is the risk. If we take the more cautious recommendation, we eliminate two conservation investments and preserve a balance of funds. I would lean towards making the conservation investment.

02:14:36 Director Tubbs: Called for additional discussion.

02:14:39 Ms. Ahlgren: We are at a deficit in the Northcentral and Southeastern Service Areas. We should hold on to some funds and attempt to promote some projects and generate credits in those areas. I understand that credits can be shifted among areas, however, I feel it would be better to keep some funds and be prepared for future projects in those areas.

02:15:55 Director Tubbs: The one major investment in the southeast area is the Denbury project. Denbury created permittee-responsible credits by working with Montana Land Reliance, but those are reserved for that specific project. That is another reason the 54 Ranch Livestock project is of interest to me; it is in that area. This is also true of the Bequette Property in Carbon County. That is an area where we need credits. We haven't seen the project development in the Southwestern Service Area, but we have a lot of wonderful conservation there.

02:17:21 Director Tubbs: Director Williams is offline, but texted asking if we are impacting the landowners with a 12.7% reduction across the board? Answered: only to the extent that they are asked to help make up that difference.

Screen shared spreadsheet: The ratio of total funding available, divided by the project requests is 87.6%. I imposed that reduction to each project. The amount of money left to be raised by each project is in the \$50,000-\$60,000 range. The Montana Land Reliance project (Fauth Ranch conservation easement) would be more because the project is more.

Another option, presented by Ms. Sime in the Program's report, was to not fund the Bequette Property and Jackson Ranch. This would zero out their projects. This would more than make up for the \$568,000 deficit, leaving \$150,000 in the Account.

Those are the two approaches that I have looked at, but we wanted to make sure you saw the numbers in discussions.

The proportionate cut option would require the Land Trusts to raise the \$568,000 in order to affect the full development of these projects.

02:20:47 Director Tubbs: There is another policy question that I want to discuss. These projects include \$207,000 in requested funds to cover project costs (or expenses) such as land appraisals, other due diligence costs, investment in long-term monitoring, etc. We should award costs associated with these

easements; they are real. The Land Trust organizations must pay these costs. It is very common for the upfront request to include these costs.

- 02:21:53: Director Tubbs: I would entertain a motion that we would pay only the proportional project costs associated with the conservation easement. For example: If the total cost of the conservation easement is \$1,000,000 and MSGOT was providing \$500,000 of the \$1,000,000; the Program would cover up to 50% of project costs and no more.
- 02:23:07 Director Tubbs: Called for additional MSGOT comments.
- 02:23:24 Senator Lang: Questioned percentage of cost calculations on specific figures using the green sheet (table in the meeting materials summarizing each 2020 project application and the requested amount).
- 02:24:02 Director Tubbs: Explained that he was trying to keep the example general because it is unknown if the Land Trusts have already proportioned the costs for their projects. The Program needs to analyze the dollars for these projects. At this time, we cannot say if the \$207,000 is proportionate or not to the overall costs. Looking for a general statement for a Project Cost Policy.
- 02:25:53 Director Williams: Asked for clarification on the overall project funding and project cost.
- 02:27:00 Director Tubbs: The total project costs do not make a big difference in the overall project funding. Project costs would be about 5%. The deficit to fully fund all the projects is 12-13%. We can't look to that as a source of available money because a Project Cost Policy hasn't been formalized and actual dollar amounts are unknown. That is not going to be a large number, but reflective of our share. I don't want the Program to get to a point where project costs are shifted to the Sage Grouse Program because it is difficult to fund in other places. That is not fair to our Program.
- To calculate the exact project costs, a Project Costs Policy needs to be established.
- 02:28:48 Director Tubbs: That's the project cost side of it—on the project funding side we are short just under \$600,000.
- 02:29:00 Director Tubbs: There are two ways we have addressed this.
- A proportionate reduction of all projects with Land Trusts raising the shortage of funds to complete the project, which could become the responsibility of the project sponsors and/or landowners. I like this option, because I like all seven projects.
- The other option is to take out the two lower scoring projects, Bequette Property and the Jackson Ranch. This would leave a remaining \$150,000.
- 02:30:22 Director Tubbs: After the discussion with the Land Trusts, they would accept the reduction overall across all projects, as a preferred method versus the alternative scenarios presented in the recommendations report. I'm pretty confident they will raise the money.
- 02:30:54 Senator Lang: According to the green sheet table summarizing the 2020 grant applications, the top three projects are 54 Livestock, Mussard-Barrett, and Peters Ranch. They should definitely be approved. Those projects have money in-hand and we could say "shovel ready". Projects that need more work could come back in the next grant cycle.
- I recommend funding the top three leaving a balance in the Account.
- 02:32:16 Senator Lang: In the business world, if you want to buy something or you want to promote something you pay for your costs going in. I would like to remove project costs, but the percentage option could work.
- 02:33:57 Director Tubbs: Prepared a spreadsheet on his own computer with Senator Lang's top three projects

proposal, the total being \$1.56 million dollars, which leaves a balance in the Account.

- 02:34:49 Ms. Ahlgren: Agreed with Senator Lang. In looking at the numbers, those three are the best value and in Core Area. Projects not in a General Habitat area must be pretty special to be considered. I am also more inclined toward traditional ranches and transitioning ranches. MSGOT is charged with getting the most credits out of the dollars paid out. Save some money for projects in other areas.
- 02:36:39 Director Tubbs: Called for additional comments.
- 02:36:36 Director Tubbs: Shared that Patrick Holmes wished to fund all the projects at a percentage reduction. But Mr. Holmes hasn't been able to hear the benefit of this discussion.
- 02:37:14 Director McGrath: Came into the discussion with a preconception of how it would play out but did find the proposals compelling and think the suggestion of trying to accommodate all the projects makes sense. Struggling with the idea that all the projects could raise the additional funds. What if they aren't successful? How long does that take or how much time do we give them? Do they have the opportunity to come back in the next grant cycle?
- It also sounds like there is consensus in support of funding the three top proposals. Does it make sense to fund them wholly and make the remaining funds available to the other four projects, as opposed to making them all go out and raise additional funds?
- Is there concern that supporting all the projects with good intent would have the opposite effect by forcing them to raise additional funds. What if they are unable to raise the funds and unable to advance their project?
- 02:39:48 Director Tubbs: It is a challenge. There is initial confirmation from the Land Trust organizations that they would be willing to meet that challenge. Experience shows us that some projects do not move forward for many reasons and a small percentage of approved projects are withdrawn.
- 02:41:02 Ms. Sime: Explained that a grant agreement has a three-year lifespan. The grant agreement is for three years. This allows more time for Land Trust organizations to work with landowners and any private funding sources to maximize the Account funds and close funding gaps to complete the project. Additional funding dollars from NRCS, for example, could become available. Sometimes final appraised values come in different than expected (higher or lower). Grant agreements can be amended to add more time.
- 02:43:34 Director Tubbs: If we were to fully fund 54 Livestock, Mussard-Barrett, and Peters Ranch it does create a larger percentage deficit reduction for the other projects. I don't know the numbers on that, but it is reasonable to consider that. We have three top projects that are ready to move.
- It does push more of the burden to the other projects, but we have been able to renegotiate funding situations for prior grants in the past if circumstances deemed it necessary. Could do so again in the future.
- 02:45:28 Director Tubbs: There is merit that the top three projects get full funding.
- 02:45:55 Director Tubbs: Possibly bifurcate the motions to the top three projects, then consider whether we fund the other projects and make a motion on that, and then a motion to pay a proportionate share of project costs.
- 02:46:42 Senator Lang: Asked to consider a decision on the Project Cost Policy first as that pertains to all the projects.
- 02:46:47 Director Tubbs: I would take a motion on that first.
- 02:47:00 Senator Lang: Asked for clarification on the language for the motion.

- 02:47:06 Director Tubbs: Motion would be: MSGOT would fund project costs [expenses], as defined by the Program, proportionate to the share of overall conservation easement costs and the grant provided by MSGOT. Up to that amount.
- 02:47:32 Senator Lang: Asked for examples of how project costs [expenses] will be calculated.
- 02:53:57 Senator Lang: Would like hard numbers instead of guessing.
- 02:54:08 Director Tubbs: I don't think it is a guess. The Program has not had clear direction. Currently, applicants can ask for more than their proportionate share of project costs [expenses], asking MSGOT to subsidize costs. The policy should establish: (1) MSGOT will pay project costs [expenses] because they are an eligible expense for the Stewardship Account; and (2) MSGOT will not pay more than the share that the grant represents to the overall project. I think it is fair to ask the State to contribute, but I don't think we should contribute more than our share.
- 02:55:40 Senator Lang: That is what I want to happen, too.
- 02:55:53 Director Tubbs: Asked to establish the Policy and have the Program report back at the next meeting with specific policy costs as they relate to the projects.
- 02:56:08 Senator Lang: What we are saying in the motion is that, if we vote for this, we think the State will have less than \$207,000 invested in project costs (expenses) if we were to fund all seven projects?
- 02:56:28 Director Tubbs: Yes. In my proposal that would become an ending fund balance that could be allocated in a future MSGOT. Rather than applied to the existing projects.
- 2:56:41 Senator Lang: I am willing and okay to go with that. It can be reviewed at a later time, if it has to be changed.
- 02:56:55 Director Tubbs: Okay. Do you want to make a motion?
- 02:57:15 Senator Lang: Please restate the motion.
- 02:57:06 Director Tubbs: The State will pay for project costs but only proportional to the grant received.
- 02:57:15 Senator Lang: I so move.
- 02:57:17 Director Williams: Seconded the motion.
- 02:57:22 Director Tubbs: Called for any further discussion. None.
- 02:57:26 Director Tubbs: Called for voice vote. Motion passed. Mr. Holmes and Rep. Knudsen voted aye by proxy.
- 02:57:37 Director Tubbs: Called for a motion for 54 Ranch, Alexander Ranch, and Peters Ranch.
- 02:57:48 Director Tooley: I will move.
- 02:57:49 Senator Lang: Did you mean the Alexander Ranch?
- 02:57:55 Director Tubbs: The 54 Ranch, the Mussard-Barrett Ranch, and the Peters Ranch. Projects 1, 6, and 7.
- 02:58:11 Ms. Sime: Asked Director Tubbs for clarification on the Project Costs Policy motion regarding the Fauth Ranch. Would like to confirm that because MSGOT is funding 75% of that project, 75% of project costs will be covered.

- 02:58:56 Director Tubbs: Yes, the proportionate share of the grant.
- 2:59:20 Director Tubbs: Ms. Ahlgren and Senator Lang identified the 54 Ranch Livestock, Mussard-Barrett and the Peters Ranch as deserving of full funding. Called for a motion to that effect.
- 2:59:39 Ms. Ahlgren: I would make that motion.
- 02:59:45 Director Tooley: Seconded motion.
- 02:59:56 Director Tubbs: Called for discussion.
- 02:59:47 Director Tubbs: This means the deficit is larger for the remaining projects, but we have heard good discussion about why these projects are “shovel ready”. I think it is in our interest to get all the projects implemented.
- 02:59:59 Director Tubbs: Called for further discussion. None.
- 03:00:14 Director Tubbs: Called for roll call vote. Motion passed unanimously. Mr. Holmes and Rep. Knudsen voted aye by proxy.
- 03:00:40 Director Tubbs: Alexander Ranch, Bequette Property, Fauth Ranch, and Jackson Ranch remain unfunded. MSGOT has two options: (1) drop the Bequette Property and Jackson Ranch and fund the remaining; or (2) fund all the remaining at a proportion that exhausts the remaining available balance.
- 03:01:16 Director Williams: Having read the reviews of the projects prior to the meeting today, I did think some were better than others. The presentations and comments from the landowners on the merit of each project was compelling. I don't know that we would be ready for a motion, but it leads me to prefer to fund all of the remaining projects proportionately to what we could, understanding it would not be fully funding all of the projects.
- I would prefer to allocate the funding to each project proportionately rather than fully funding one and cutting out the others.
- 03:02:26 Director McGrath: If that is a motion, I second it.
- 03:02:30 Director Williams: So moved.
- 03:02:30 Director Tubbs: Funding each of the remaining projects proportionately has been moved and seconded.
- 03:02:34 Director Tubbs: If the Land Trust organizations have concerns or questions, I remind them that we do have one more MSGT meeting. If you need to come back, please do so.
- We will instruct the Program to start the granting process for the first three fully funded projects. The next MSGOT meeting is in two weeks, so if there are issues, we will consider that.
- 03:03:28 Director Tubbs: Called for any additional discussion. None
- 03:40:17 Director Tubbs: Roll call vote. Motion passes 5-4.
Director Tooley Aye
Director Williams Aye
Director McGrath Aye
Director Tubbs Aye
Mr. Holmes Aye, via proxy, Director Tubbs
Senator Lang No
Rep Knudson No, via proxy, Senator Lang

Ms. Ahlgren No
Mr. Halvorson No

- 03:05:17 Mr. Halvorson: Expressed concern that there was a lot of discussion and changes going on during the meeting. Having more time to consider the options would have been beneficial. Also, the group agreed under that vote to give money to projects that don't have matching funds and I think we overlooked one.
- 03:06:20 Director Tubbs: I appreciate that, Jim. You are a very steady member of the committee, and I appreciate your perspective.
- I will ask the Land Trust organizations if we have created a big problem for them, and whether we need to revisit the issue.
- And for a little bit hope and for the future, Ms. Ahlgren, I think we have some big projects on the horizon that are likely to contribute to the Stewardship Account should they move forward.
- While I do not know what the legislature will provide for future grant funds, they have provided a fair amount already. There are some large projects that are moving forward that are likely to contribute some significant funds which gives me hope that there are future grant cycles available for the next administration.
- 03:07:30 Ms. Sime: Seeks clarification about the motion that just passed -- MSGOT intends to fund the remaining projects proportional to the available remaining funding balance? I understand that MSGOT intends to fully expend the balance of \$4,037,904, which was the balance available as of November 16.
- 03:07:56 Director Tubbs: Correct.
- 03:08:09: Director Tubbs: Called for public comment.
- 03:08:13 Mr. Brad Hansen, Montana Land Reliance: The proportional funding scenario changes things for both the Montana Land Reliance projects. I can't fully commit without discussion with the landowners that they would go forward. I couldn't recommend to the landowner to take less money than they might possibly get from a NRCS funded grassland project.
- Would MSGOT be open to allowing the Land Trust to size down the easements to meet available funding in order that the landowners are getting a fair value in terms of funding for the credits?
- 03:09:33 Director Tubbs: I don't like across the board cuts either. However, without more finite information that is what we typically get every legislative session. If both The Nature Conservancy and the Montana Land Reliance can agree upon a different proposal, we can reconsider that at the December meeting, while keeping in mind we are constrained by the revenue that we have available.
- We can provide that opportunity to reconsider in the public notice of the agenda, so it is clearly before the public.
- 03:10:47 Senator Lang: Commented, as a legislator that's what you're trying to do. You're trying to get the most equitable option for the taxpayer. We have \$7.9 million of the taxpayer's money into these projects. If we can get more sage grouse habitat with less money, that's the way I'm going to go.
- 03:11:37: Director Tubbs: Called for public comment.
- 03:12:00 Mr. Marx: I will work with the Land Trust community. We will have comments at the next MSGOT meeting. Thank you very much for trying to make this work.
- 03:13:46 Director Tubbs: Called for any additional public comment for anything not on the agenda.

These abbreviated summary minutes and the audio recording will become the official adopted minutes at the next Montana Sage Grouse Oversight Team Meeting when they will be approved. Until then, they are considered a draft.

- 03:14:08 Director Tubbs: Second call for any public comment on agenda or not. None.
- 03:14:36 Director Tubbs: Called for motion to adjourn.
- 03:14:45 Director Williams: I moved to adjourn. The motion was seconded. Approved unanimously.
- 03:14:59 Meeting adjourned.

Chair for this meeting:

/s/ _____ x

Director John Tubbs

DRAFT

**MINUTES
MONTANA SAGE GROUSE OVERSIGHT TEAM**

December 14, 2020 Meeting Summary
Virtual Zoom Meeting

Members

Mr. John Tubbs, Chair, Montana Department of Natural Resources & Conservation, Director
Mr. Mike Tooley, Montana Department of Transportation, Director
Mr. Jim Halvorson, Montana Board of Oil and Gas, Administrator
Mr. Shaun McGrath, Montana Department of Environmental Quality, Director
Ms. Martha Williams, Montana Department of Wildlife, Fish and Parks, Director
Senator Mike Lang, Senate District 17
Representative Rhonda Knudsen, House District 34
Ms. Diane Ahlgren, Rangeland Resources Committee
Mr. Patrick Holmes, Governor's Natural Resource Policy Advisor

Staff Present

Ms. Carolyn Sime, Sage Grouse Habitat Conservation, Program Manager
Ms. Shawna Swanz, Administrative Attachment Coordinator

Call to Order

00:00:06 Director Tubbs: Called the meeting to order and initiated introductions with roll call of MSGOT members.

Approval of Minutes

00:03:15 Director Tubbs: Approval of October 27, 2020 and November 30, 2020 meeting minutes. Motion to approve by Director McGrath, seconded.

00:04:44 Ms. Ahlgren: Noted an error on page 9 of November 30 minutes. Should read "to 87.6%" instead of "by 87.6%".

00:05:58 Ms. Sime: The correction will be made.

00:06:07 Director Tubbs: Called for other changes or discussion. None.

00:06:59 Directors Tubbs: Conducted voice vote. Motion passed. Minutes adopted.

MSGOT Reports, Program Report, Partner Report

00:07:36 Mr. Mike Tooley, Montana Department of Transportation, Director
Unable to bring forward anticipated programmatic exceptions at this time. MDT staff and Program staff discussions continue concerning "moderate" versus "light" mitigation activity. "Light" activity, in MDTs view, includes chip seals, paving, thin lift overlays, paint. Maintenance on the existing blacktop within existing right-of-way. They were not able to agree to that [a final list of activities considered "light" vs. activities that would be considered "moderate"] and I frankly never would have agreed to something that might have caused those activities to be subject to mitigation costs when they are already pretty expensive as it is.

00:09:18 Director Tubbs: The Program will continue to implement Senator Lang's Bill [299, 2019 session]. Need more time to discuss with MDT to work out the details.

- 00:10:16 Ms. Ahlgren, Rangeland Resources Committee
- Rangeland Improvement Loan Program public hearing held December 11, 2020 on proposed administrative rules. No public comment during virtual hearing. Public comment ends December 18.
 - Rangelands Resources Committee 2021-22 Strategic Plan is in final draft.
 - Now taking host and mentor applications for Working Lands Internship Program.
 - Nominations for Leopold Conservation Award continue. March 15, 2021 due date.
 - Continue to plan for 2021 events. Grazing Academy with MSU and the Dan Scott Ranch Management Program is planned.
 - Rangelands Resources Committee positions are up for re-appointment. Candidate nominations to the Rangeland Resource Committee are made by the Montana Association of Conservation Districts and Montana State Association of Grazing Districts and brought forward to the Governor for appointment.
- 00:11:17 Ms. Sime, Sage Grouse Habitat Conservation, Program Manager
Thanked MSGOT for time and related agency service. Thanked the Montana Legislature. Also thanked sister agencies and host agency DNRC. It takes effort and contributions by everyone to pull the Program together, including landowners and external partners.

2020 Accomplishments

Executive Order Implementation

Ongoing regular work with developers as they implement projects with the least amount of impact on sage grouse habitat.

Received about 280 requests for project reviews from developers from January 1 to December 14. Number is down a bit, compared to the same period in 2019. Percentage of completed project reviews is the same as 2019. Suggesting that there may be fewer development projects moving into implementation in 2020 that required Program review. Some of the streamline processes that MSGOT approved may also be a contributing factor. To date, the Program has completed 89 percent of requested project reviews. Continue to work on about 24 projects, several of which will be completed by the end of December 2020. The completion rate is likely to go up.

Stewardship Account Grants

Closed or will have closed two additional easements by the end of 2020. The Mark Lewis Project was initially funded in 2019. It will close before the end of this month. The Watson Conservation Easement from 2016 closed in March 2020. All 2016 grants that did move forward have now closed and stewardship for those rests with their private landowner, as well as the land trust organization (whoever holds that easement).

Three of the four 2019 grants that moved forward have closed or will have closed by the end of 2020. One remaining 2019 grant, the Sauerbier Conservation Easement, will move into 2021 for closing. A draft easement is in a second round of Program review. NRCS has completed its review. The negotiation process has become more efficient and streamlined.

Implementing SB299

After the 2019 Legislative Session the Code Commissioner inserted the amendments from the bill, but they do appear in various places within the Stewardship Act. There are several provisions that codified language from the Executive Order. In those instances, because we had been implementing the Executive Order, we are now more formally implementing the guidance under the Statutory language rather than the Executive Order language. This is nothing new, just a focused attention to what the statute directs.

Operations and maintenance is another portion of SB299 that codified guidance already in the Executive Order. Continue to implement accordingly.

These abbreviated summary minutes and the audio recording will become the official adopted minutes at the next Montana Sage Grouse Oversight Team Meeting when they will be approved. Until then, they are considered a draft.

There is also a portion that addresses reduction or waiver of compensatory mitigation. This language is drawing from the Mitigation Framework Policy Document. Developers can request either a waiver or mitigation and come to MSGOT for review and a final decision. We did not receive any requests in 2020.

Agencies, the Program and MSGOT continue to work on clarifying operations and maintenance activities and what may be exempt from HQT calculations. Some activities remain subject to stipulations of Montana strategy, either through Executive Orders, Policy, Administrative Rules or direction or regulation adopted by MSGOT.

At the June 2020 MSGOT meeting Mr. Halvorson discussed some work that he was doing with the Board and his staff. MSGOT had previously reviewed implementation guidance provided within DEQ. Work with MTD is still ongoing.

The Program worked with stakeholders in visioning how to streamline the compensatory mitigation review process [another directive from SB299], including calculation of reduced costs for low impact projects such as trenchless excavation.

In June of 2020, MSGOT approved a modified mitigation approach for projects using trenchless excavation methods. Another successful iteration at improving implementation of the Program.

In October, MSGOT reviewed and approved a modified mitigation policy approach for unsuccessful oil and gas wells (i.e. dry holes). If an operator drills a well with no commercial quantities to develop further, they continue to work with the Board and permanently plug and abandon the well. The Program and Mr. Halvorson continue to work out the implementation details and should have them finalized by the end of the year or early 2021.

2021 Preview

At the November 30 meeting, MSGOT approved an update to the BaseMap, through the adaptive management framework.

Also approved through adaptive management is the ability to address the knowledge gap with developers and permitting agencies after the Program has completed its reviews. The Program will develop a timeline and reach out to stakeholders and begin that work early in 2021.

The Program continues to work with two contractors. One contractor is implementing updates to the Program's web application. This application is the interface that developers and credit providers use to initiate contact with the Program. The work is underway, with delivery expected by the end of calendar year 2021. The same contractor is implementing items on the website that are required under the mitigation framework. Mitigation is not formally included on the website right now, but it will be at conclusion of this contract. This contract also includes incorporating a registry available to everyone, which is another statutory requirement. The second contractor is working to help verify the accuracy of spatial data for disturbances on the landscape. These data are provided to the Program by developers. The data must be independently verified before it is included in the new, updated BaseMap. This project is expected to be completed by Fall 2021.

2020 Stewardship Grant contracts and projects will be implemented.

Conservation Assessment

The information regarding the Conservation Assessment briefed at the December 2018 MSGOT meeting is largely still accurate. The work is behind schedule for a variety of reasons including technical delays, website upgrades by the US Fish and Wildlife Service, and COVID-19 has slowed some work.

The Conservation Assessment will entail a review of: (1) the commitments made by all the states and the federal agencies leading up to and upon determination by the US Fish and Wildlife Service that sage grouse did not warrant protections of the Endangered Species Act. All states worked together with the federal agencies and came up with their respective strategies. Those were relied upon by the Service to make their conclusion that listing was not warranted; and (2) population trends of sage grouse. That population trend work is being led by the USGS in conjunction with the state fish and wildlife agencies. It largely has to do with monitoring efforts that the state agencies and their partners do.

The Conservation Assessment Report effort is being led by the Western Association of Fish and Wildlife Agencies. Montana's representatives on the drafting group include myself and Catherine Wightman's replacement or someone else at Fish Wildlife and Parks. There are four objectives of the assessment report:

1. Evaluate the progress of implementation of federal and state commitments since 2015 made to the continued conservation of sage grouse and habitat;
2. Cumulatively assess sage grouse population trends, sagebrush availability and lessons learned in order to inform range-wide adaptive management discussions;
3. Assess new scientific information for sage grouse and habitats that may inform conservation delivery; and
4. Recognize the importance of ongoing continued conservation work, and as part of adaptive management, recommend changes to conservation delivery in order to ensure continued success.

Montana also shares a goal with many of the states, if not all of them, as well as our federal agency partners that our conservation work be both effective and successful so that the ESA protections are not needed in the future. This drafting team will have an opportunity to consider the work to date, how partners are doing on their commitments, consider trends and populations, and to make adaptive management recommendations for the future.

The USGS report is expected sometime in early 2021. USGS has extensive quality control and quality assurance processes. The report is currently under final review. An updated timeline for the overall Conservation Assessment report is still being developed, but there is clearly the expectation that the work product will be done in 2021.

Conclusion

Acknowledged MSGOT's work and the work of all our partners. Montana's goal has always been to implement a conservation strategy that addresses the conservation concerns for this bird going forward in an effective, transparent way and that is also based on science. It is also largely based on the voluntary work of private landowners and not taking a hard, regulatory approach. That work has largely been guided by MSGOT and engagement from the Program, but also great work by everyone.

Thanked Program staff. Look forward to working with the incoming administration.

00:28:12 Director Tubbs: Thanked Ms. Sime and commended her on the report. Called for questions from MSGOT. None.

2020 Stewardship Grant Awards Wrap Up

00:28:26 Director Tubbs: Agenda item to make sure all necessary motions and approvals to award the 2020 Stewardship Grants are complete and accurate.

A spreadsheet with final grant awardee information was emailed to MSGOT for review. [See Meeting Notes on the MSGOT meeting archive webpage.]

Appreciate both the Montana Land Reliance and The Nature Conservancy in coordination with Glenn Marx of the Montana Association of Land Trust for their work with the landowners. All recommended changes to the amounts awarded and approved at the last meeting have been accepted.

Our work today is to celebrate more conservation on the land.

Thanked the landowners: 54 Livestock Ranch, Mussard-Barrett Ranch, Peters Ranch, Alexander Ranch, Bequette Ranch, Fauth Ranch, and Jackson Ranch. Especially the four that had to deal with reduced funds. The landowners worked with their associated Land Trust and have agreed to accept the reduced amounts necessary to meet amount of available funding. Ready to move forward with seven additional conservation easements. Three of them fully funded and four of them, partially funded at approximately 83% level of the amount originally requested in the application.

A Project Expense Policy percentage match was also adopted by MSGOT.

00:31:12 Director Tubbs: Called for questions from MSGOT.

00:31:42 Director Williams: Thanked the generosity of the landowners and their long-term commitment to stewardship. Thanked everybody involved to make the grant funding work. Thanked Director Tubbs. Appreciates all that he has done.

00:32:28 Director Tubbs: Other projects that closed so far since the first set of grants: include the 44 Ranch, the Hanson Livestock, Rath's Livestock, Watson, Willow Basin Ranch, Burgess Ranch, and just about to close Marc Lewis at the end of the year and Sauerbier Ranch in 2021. A tremendous amount of conservation.

MSGOT was the decision-making body on all those properties. Remind yourself, there is good conservation on sage grouse lands. MSGOT provided the ability for working ranches to continue and facilitated the passing of ownership from one generation to the next.

As we hear the highlights of projects MSGOT has funded, remember there is always a working ranch, Program staff, Montana Land Reliance staff, The Nature Conservancy staff; behind the scenes to develop the conservation trust instruments and execute the grant agreements.

Thanked Mark Aagenes and Kendall VanDyke for their work creating agreements that protect the sage grouse and its habitat.

Montana can stand proud behind its sage grouse investment over the past 3-4 years.

Conservation Spotlights: Highlights from throughout Montana

Central and North Central Montana Collaborative Conservation Efforts

00:35:35 Brian Martin, The Nature Conservancy | [PowerPoint Presentation](#)

00:50:04 Marisa Sather, USFWS Partners Program | [PowerPoint Presentation](#)

01:01:47 Director Tubbs: Called for questions from MSGOT members.

01:01:50 Director Williams: Great demonstration for agencies on how to get good durable work done. Thanked the presenters for showing the path forward.

01:02:24 Director Tubbs: Called for additional comments.

01:02:43 Director Tubbs: Shared in Director William's thanks. There are several partners working towards the same goals. One of the challenges MSGOT has not been able to address is other prairie grassland bird species. These birds often require a slightly different habitat than sage grouse. MSGOT is concerned and recognizes that there are other bird species that may be listed in the future.

We must manage holistically in that landscape. One of the things MSGOT Stewardship Grant conservation easements have done to date is prioritize sage grouse conservation. That working landscape model allows for conservation of many species due to the focus on quality habitat.

Appreciate your work and so many others up in that area. Thanks for the great photo of the board. When you have people with dirt under their fingernails working on land conservation in Montana you have durability.

Montana Greater Sage-grouse Candidate Conservation Agreements with Assurances

01:04:40 Kelsey Molloy, The Nature Conservancy | [PowerPoint Presentation](#)

01:16:35 Director Tubbs: Thanked Ms. Molloy. Good photo of the staff.

01:16:40 Director Tubbs: Called for questions from MSGOT.

01:16:46 Ms. Ahlgren: Thanked the presenters. Thanked the Program and MSGOT for acknowledging working lands, ranches and grazing as being beneficial to conservation and wildlife.

01:17:16 Director Tubbs: That is a work in progress. Need to continue the voices in presentations like this, but groups like the Rangeland Resources Committee need to continue to remind the public that grazing is part of the ecology of prairie grasslands. Lack of grazing is as much a threat as almost any of the other threats in the area.

The use of high-quality management systems by your family and other landowners is effective in attaining soil health and rangeland quality that benefit both cattle operations and the natural resources that you steward.

01:18:15 Ms. Ahlgren: Correct, very well put.

01:18:18 Director Tubbs: Called for additional comments.

Southwest Montana Collaborative Conservation Efforts through the Southwest Montana Sagebrush Partnership

01:19:15 Jim Berkey, The Nature Conservancy | [PowerPoint Presentation](#)

01:28:12 Sean Claffey, The Nature Conservancy | [PowerPoint Presentation](#)

01:44:00 Director Tubbs: Need efforts in that area. Involving the outfitters negatively impacted by the COVID-19 pandemic and the youth corps expands the capacity of any organization's ability to treat the landscape.

Sagebrush habitat in southwestern Montana has some unique characteristics in terms of fire resiliency and high elevation. Because of the large impact that cheat grass and other invasive species have in southwestern regions of sage grouse habitat, is fire prohibited in the federal agencies' lexicon of treatments in sage grouse country?

Asked Ms. Sime; Do we need to champion, a little harder to get it to resonate at the national level?

01:45:28 Ms. Sime: Montana is heterogeneous when it comes to sage grouse and sage grouse habitats. It would be good to recognize the regional variation for these natural systems. The presenters for the Big Hole and the Centennial will help us better understand how birds operate in the southwest part of the state and how that might be different from eastern parts of the state.

An effort that is showcased by Sean and Jim is the cross boundary and multi-agency work in the southwest part of the state. They have zeroed in on important work but also zeroed in on how to deliver habitat restoration and conservation at scale, which is very effective. This is a message we can definitely amplify.

- 1:46:46 Mr. Claffey: Our Federal partners can actively use prescribed fire in high elevation sagebrush habitats. There is a desire to expand using that tool across other ownerships, if there is opportunity.
- 1:47:04 Director Tubbs: If you can introduce fire into the conifer encroachment issue, it can greatly reduce your per acre cost of treatment and expand the number of acres that can be treated.
- 01:47:18 Mr. Claffey: Absolutely.
- 01:47:22 Director Tubbs: Thanked presenters and called for next presentations.

Montana Research and Field Studies

- 01:47:38 Ms. Sime: This series of presenters will share lessons learned from research and field studies. Presentations will provide foundation in science and local knowledge about the landscapes where they are working. Presenters will share what they have learned, and we can consider how the knowledge could inform MSGOT decisions and Program decisions in our shared goals.
- 01:48:47 Roundup Area: Jenny Helm, PhD Candidate, University of Montana | [PowerPoint Presentation](#)
- 02:04:06 Director Tubbs: Thanked Ms. Helm. Called for comments from MSGOT.
- 02:04:15 Director Tubbs: Not had many research presentations over the course of management tenure. There are several questions that could benefit from research. Asked Ms. Helm who funds research efforts?
- 02:04:40 Ms. Helm: Our research funds come from Pittman Robertson dollars via US Fish and Wildlife Service via MT Fish, Wildlife and Parks.
- 02:04:30 Director Tubbs: Is that stable funding for you through the end of your PhD?
- 02:04:41 Ms. Helm: We are good through 2022.
- 02:04:50 Director Tubbs: Called for additional comments. None.
- 02:05:40 Big Hole Valley: Vanna Boccadori, Montana Fish, Wildlife & Parks | [PowerPoint Presentation](#)
- 02:36:40 Director Tubbs: Thanked Ms. Boccadori. Called for comments from MSGOT members.
- 02:36:50 Director Tubbs: The Big Hole area has had multiple conservation efforts in place for many years. This study adds value to those efforts. If we are successful, we will have expanded the population so that General Habitat today may look like Core Habitat of yesterday. Measuring these sites now, as we implement the Sage Grouse Program and its policies, will be beneficial in the long run. With the hope this will expand the territory and affirm that Montana conservation is working for the sage grouse population.
- 02:37:46 Director Williams: Struck by the research presentations and reminded of how we need all the different efforts. Research feeds into good work-on-the-ground partnerships. It takes a Herculean effort. Thanked University of Montana and Ms. Boccadori for showing MSGOT what you are learning and how it can be applied.
- 02:38:32 Director Tubbs: Agreed. Appreciates time spent in the field. It is often underappreciated.
- 02:39:20 Director Tubbs: Called for additional comments. None.
- 02:41:00 Centennial Valley: Kyle Cutting USFWS Red Rocks National Wildlife Refuge | [PowerPoint Presentation](#)

- 02:54:11 Director Tubbs: There is also a conservation effort bridging the divide in the Centennials that can bring this message to both Idaho and Montana with your research. Because BLM manages the landscape under the same resource management plans, we have some ability to effectively communicate across the state's boundary.
- 02:54:35 Director Tubbs: Called for questions or comments from MSGOT.
- 02:54:45 Director Tubbs: Certainly, a difference in snow cover in the Roundup area versus the Centennials. Sage grouse have adapted to more snow in the Centennials by moving to the South aspect wind-blown ridges.
- 02:55:14 Director Tubbs: Called for additional comments.
- 02:55:49 Ms. Sime: Presentations are concluded. Thanked everyone for work and willingness to present to MSGOT. The MSGOT Meeting Archive Notes at sagegrouse.mt.gov will be updated with today's presentations and additional meeting materials that were emailed to MSGOT directly. Presentations will be available to the public in the near future, hopefully within a couple of days.
- 02:56:23 Director Tubbs: Called for any other public comment.
- 02:56:46 Mr. Glenn Marx, Montana Association of Land Trusts: Thanked Ms. Sime and Program staff, the Governor, Patrick Holmes and all MSGOT members. Montana is now a national leader in sage grouse conservation. What has been created is very impressive. Work succeeded to help the people of Montana, the economy of Montana and the future of Montana.
- For those leaving, we very much thank you. We wish you well and hope, wherever you go, whatever you do; you feel very proud and very good about your role within MSGOT and Montana sage grouse conservation. Those of you who are going to stay, we in the Land Trust world look forward to working with you in the future.
- 02:58:30 Director Tubbs: Thanked Mr. Marx for his comments. Called for any additional public comment.
- 02:58:43 Director Tubbs: Final call for additional public comment. None.
- 02:58:48 Director Tubbs: Called for motion to adjourn the last meeting of the Montana Sage Grouse Oversight Team, for this team, and welcome in the new year.
- 02:59:03 Senator Lang: So moved.
- 02:59:07 Director Tubbs: Moved and seconded. Called for voice vote. Approved unanimously.
- 02:59:18 Meeting adjourned.

Chair for this meeting:

/s/ x

Director John Tubbs

**MINUTES
MONTANA SAGE GROUSE OVERSIGHT TEAM**

February 24, 2021 - Meeting Summary
Virtual Zoom Meeting

Members

Mr. Michael Freeman, Chair, Governor's Natural Resource Policy Advisor
Ms. Amanda Kaster, Montana Department of Natural Resources and Conservation, Director
Mr. Malcolm Long, Montana Department of Transportation, Director
Mr. Jim Halvorson, Montana Board of Oil and Gas, Administrator
Mr. Christopher Dorrington, Montana Department of Environmental Quality, Director
Mr. Hank Worsech, Montana Department of Wildlife, Fish and Parks, Director [Absent, Dustin Temple proxy]
Senator Mike Lang, Senate District 17
Representative Rhonda Knudsen, House District 34

Staff Present

Ms. Carolyn Sime, Sage Grouse Habitat Conservation, Program Manager
Ms. Shawna Swanz, Administrative Attachment Coordinator

Call to Order and Administrative Matters

- 00:00:09 Chair Freeman: Called the meeting to order, welcomed MSGOT members, representatives of Clearwater Energy Resources LLC, and the public.
- 00:00:18 Chair Freeman: In the interest of time will defer MSGOT orientation until a future meeting.
- 00:35:43 Chair Freeman: Read Section 1.1 of the Policy Framework to review duties for the meeting today:
- The implementation of full mitigation hierarchy or mitigation sequence, which is avoidance, minimization, reclamation, and compensation using a systematic approach. Directly and effectively address the threat of habitat loss, degradation, and fragmentation, while at the same time allowing development and economic activity. The specific goals in our mitigation decision making are to maintain viable sage grouse populations and habitat, support rangeland health and provide an approach that is flexible, predictable, transparent, equitable and science based, so the state of Montana, federal agencies, and all parties engaged in the mitigation system can make informed, proactive decisions.

Introductions

- 00:01:30 Chair Freeman: Initiated introductions of the new MSGOT members and DNRC staff: Director Amanda Kaster, DNRC; Director Malcolm (Mack) Long, MDT; Director Chris Dorrington, DEQ; on behalf of FWP Director Hank Worsech—Dustin Temple, Deputy Director, FWP; Senator Mike Lang SD17, Representative Rhonda Knudsen HD34; Administrator Jim Halvorson, DNRC Oil & Gas Division; Sage Grouse Conservation Habitat Program Manager Carolyn Sime, DNRC; Shawna Swanz, DNRC.
- 00:04:03 Chair Freeman: Would like to observe Parliamentary Procedure and Roberts Rules of Order for the meeting. Majority of MSGOT members are present. There is a quorum. Prepared to take executive action today. There will be opportunity for public comment. Provided Zoom virtual meeting instructions.
- 00:05:15 Chair Freeman: Called for questions from MSGOT members. None.

Clearwater Wind Project Proposed Mitigation

00:05:22 Chair Freeman: Called for introductory remarks from Director Kaster and outlined format for today's meeting.

00:05:59 Director Kaster: Today's agenda item is to consider a mitigation plan from Clearwater Energy Resources LLC that provides a combination of cash and a corporate guarantee for the proposed Clearwater wind project.

Clearwater has proposed a wind facility to produce approximately 750 megawatts of energy at full build-out along with an approximately 100-mile-long transmission line that would interconnect to the electrical grid through an existing substation near Colstrip, Montana.

Additional infrastructure associated with the project includes roads, underground electrical collection and communication systems, substations, an operations and maintenance building, three meteorological towers, temporary workspaces for construction and lay down areas, and a concrete batch plant.

In February 2021, the Program issued an analysis, and Clearwater submitted a mitigation plan, which includes an initial cash contribution and a corporate guaranty component, accounting for Program and Clearwater differences in interpretation on how policy multiplier should be applied. Clearwater seeks to initiate construction in summer of 2021 and is requesting approval of the mitigation plan from the Montana Sage Grouse Oversight Team to secure necessary state permits, while the parties determine Clearwater's final mitigation obligation.

Clearwater will offset impacts of the project through a contribution to the Stewardship Account in lieu of undertaking permittee-responsible mitigation. Clearwater has voluntarily offered and requests that MSGOT approve and accept an initial cash contribution with corporate guarantee now to enable the permitting process to move forward.

Clearwater would make an initial account contribution of \$2,634,843.13 prior to initiating construction activities—that is the equivalent of the cost of the credits that would be required to offset the number of functional acres lost over the life of the project (i.e. the HQT Raw Score). A corporate guarantee in favor of the State for \$3,802,595.50 would then be provided by Clearwater. The maximum amount represents the outer limit of any remaining mitigation attributable to policy multipliers that could reasonably be anticipated under the Program's analysis. This ensures that sufficient funds would be available for a future contribution once the final mitigation outcomes are determined in the coming weeks.

The question before MSGOT today is: Should MSGOT, through its executive action authority, approve and accept Clearwater's mitigation plan, including an initial cash contribution with corporate guarantee for differences over policy multipliers associated with the project? It is the recommendation of the Program Director to approve and accept this plan.

00:08:48 Chair Freeman: Recognized Clearwater Energy Resources LLC representatives and asked them to introduce themselves.

00:09:02 Clearwater Energy Resources representative introductions:

- Jess Melin, Director of Renewable Development, NextEra Energy Resources
- Greg Dorrington, Attorney, Crowley Fleck
- Dave Galt, Private Consultant, NextEra Energy Resources
- Dustin Jones, NextEra Energy Resources
- Dexter Liu, Project Director, NextEra Energy Resources | Day-to-day Project Manager, Clearwater Wind Project

- 00:10:26 Jess Melin: NextEra Energy is the parent company of the Clearwater Project Company. We are the largest electric utility in the nation. NextEra Energy is incorporated under two main companies: Florida Power and Light (FPL) and NextEra Energy Resources. Most of the energy is generated from natural gas, second largest generation source is nuclear fuel. What brings us to Montana is wind.
- [Presentation of the proposed Clearwater Wind Facility](#) [Jess Melin and Dexter Liu]
Click on agenda item in the PDF link to go directly to the presentation slides.
- 00:25:20 Dexter Liu: Formal request to the Montana Sage Grouse Oversight Team to approve the current mitigation plan that was submitted this month for the cash payment of \$2.6 million and a parent guaranty of \$3.8 million and a formal consultation letter from the Program in a timely manner in order to proceed with permits from the state agencies.
- 00:26:01 Chair Freeman: Called for questions from MSGOT members.
- 00:26:28 Rep. Knudsen: Requested copies of the presentation and the Clearwater Wind Project Sage-Grouse Mitigation Plan Project 3288, February 22, 2021. And also, a copy of the objection letter, if possible
- 00:26:45 Chair Freeman: Confirmed copies would be made available and will work with Clearwater to provide the letter.
- 00:27:09 Chair Freeman: Called for additional questions from MSGOT members.
- 00:27:37 Sen. Lang: We're getting \$2+ million to the Account right away, and then we will have the \$3 million. Is that as high as we could go or is that the lowest that we think it will be at this time? The balance that we are not receiving is going to be discussed later, can you explain that, please.
- 00:28:10 Chair Freeman: Invited Clearwater to respond to Sen. Lang's question.
- 00:28:13 Mr. Melin: We think the final answer is \$4.1 million, the Program's view is currently at \$6.4 million. Those are the bookends. We think the answer will end up at one of those ends or somewhere in between. Right now, the \$2.6 million cash is the undisputed Raw HQT Score. Our number is \$4.1 million. We aren't saying that the policy multipliers don't apply; we are wondering how they should apply. The final answer will be somewhere between \$4.1 million and \$6.4 million in total payments by the Clearwater to the Program.
- 00:29:00 Chair Freeman: Asked Mr. Melin if Clearwater will commit to working with the Program and MSGOT to resolve the issues.
- 00:29:11 Mr. Melin: Absolutely.
- 00:29:17 Director Dorrington: The summary materials say, "in the coming weeks the policy side will be determined". Can we set a date, something that is more definitive?
- 00:29:58 Chair Freeman: Entertain a motion to set a date for the next MSGOT meeting or work with the program to set a date. Asked for other opinions for MSGOT members.
- 00:30:06 Director Kaster: Would like to poll the availability of MSGOT members prior to setting a date.
- 00:30:18 Chair Freeman: That would be preferable. With the legislature going on we want to make sure everyone is available.
- 00:30:24 Chair Freeman: We hope to resolve this quickly. I think we are close. This has been a long process. We have made progress and will continue to make progress and resolve this pretty quickly.
- 00:30:49 Director Long: Clearwater indicated they need the Program letter, but are there other permits ready to be issued?

- 00:31:07 Mr. Melin: We would like to start construction in the next few months, specifically on the transmission line. We have tried to avoid certain areas and times of the year. We are as far as we can go on the permits. The next step is getting that consultation letter. We are moving forward in good faith and putting up the parent guaranty to make sure that you know we won't be a bad actor. To allay any fears that we are a bad actor, you have the money in hand. You just draw on that guaranty. We do need that consultation letter quickly so that we can finish permitting so that we can start construction.
- 00:32:09 Chair Freeman: Called for any additional questions from MSGOT members.
- 00:32:23 Director Long: Asked for clarification on Director Dorrington's earlier question.
- 00:33:09 Director Dorrington: Restated his question about "coming weeks".
- 00:33:29 Chair Freeman: Called for further questions from MSGOT members.
- 00:33:42 Sen. Lang: I will make the motion that the money, as it was presented, is okay and that the process should move forward with a time limit. I defer to Chair Freeman on the time.
- 00:34:13 Chair Freeman: We will inquire on MSGOT member availability and set a time in the next three to four weeks.
- 00:34:30 Chair Freeman: Before we continue with the motion, is there any public comment?
Please introduce yourself and if you are representing someone other than yourself.
- 00:35:39 Ms. Carmen Borchelt, Montana Audubon.
- 00:38:55 Chair Freeman: Called for additional public questions or comments. None.
- 00:39:04 Chair Freeman: Called to approve motion on the table.
- 00:39:15 Sen. Lang: So moved to approve the motion on the table.
- 00:39:23 Director Long: I will second that motion.
- 00:39:28 Chair Freeman: The Question has been called. All those in favor say, Aye.
- 00:39:34 MSGOT responses: Aye
- 00:39:36 Chair Freeman: All those opposed, say No. No responses.
- 00:39:42 Chair Freeman: The motion passes.
- 00:39:50 Chair Freeman: Invited Director Kaster to summarize the next steps for this project.
- 00:39:58 Director Kaster: We look forward to an upcoming MSGOT meeting where we will further discuss the project. Our focus will be on going through the application of the policy multipliers. We look forward to convening in short order.
- 00:40:14 Chair Freeman: That concludes our formal agenda at this time, we will take general comment on anything not related to today's agenda.
Please introduce yourself and tell us if you are representing someone other than yourself.
- 00:40:41 Dustin Temple, FWP: Director Kaster is in receipt of Director Worsech's proxy form. He would like his vote on the previous motion noted, as Aye, for the record.

These abbreviated summary minutes and the audio recording will become the official adopted minutes at the next Montana Sage Grouse Oversight Team Meeting when they will be approved. Until then, they are considered a draft.

00:40:59 Chair Freeman: Seeing no more questions, called for motion to adjourn.

00:41:04 Sen. Lang: So moved. Seconded by Director Kaster.

00:41:17 Chair Freeman: Called for voice vote. Approved unanimously.

00:41:23 Meeting adjourned.

Chair for this meeting:

/s/ _____ x .

Michael Freeman, Governor's Natural Resource Policy Advisor

DRAFT

MONTANA SAGE GROUSE OVERSIGHT TEAM AGENDA ITEM BRIEF SHEET

MARCH 24, 2021

AGENDA ITEM: CLEARWATER ENERGY RESOURCES LLC'S REMAINING CONTRIBUTION TO THE STEWARDSHIP ACCOUNT TO FULFILL COMPENSATORY OBLIGATION

ACTION NEEDED: EXECUTIVE ACTION TO FINALIZE CLEARWATER ENERGY RESOURCES LLC'S COMPENSATORY MITIGATION OBLIGATION FOR THE CLEARWATER WIND PROJECT

SUMMARY:

On February 24, 2021, the Montana Sage Grouse Oversight Team (MSGOT) approved a mitigation plan (Plan) proposed by Clearwater Energy Resources LLC (Clearwater) for the Clearwater Wind Project (Project). The final compensatory mitigation outcome must be considered and approved by MSGOT.

The February 22, 2021, Plan approved by MSGOT outlined an approach to compensatory mitigation that Clearwater believes is consistent with the Greater Sage Grouse Stewardship Act, administrative rules, Executive Order 12-2015, and Montana's mitigation framework documents (Policy Guidance Document October 2018 v 1.0, Habitat Quantification Tool Technical Manual October 2018 v1.0). See Section 4.4 and Appendix C. The Plan also contained draft mitigation results dated November 2, 2020, which are no longer timely (Appendix B).

Since February 2020, Montana and Clearwater have worked towards finalizing an approach that both squarely addresses Clearwater's concerns stated in a letter dated December 2020, while also squarely addressing the requirement to mitigate impacts to sage grouse habitat and populations in the Rosebud Core Area reasonably attributed to the newly-proposed 345 kilovolt transmission line. Since the Program's November 2020 draft mitigation results, several efforts were undertaken to both refine results and address Clearwater's concerns.

MSGOT and the Sage Grouse Program have carefully considered all the facts surrounding the public benefits of the Project as a whole, Clearwater's articulated concerns about how mitigation policy is applied to development projects, Project impacts calculated using the Habitat Quantification Tool (HQT), and what, if any, policy-based adjustments through site-specific multipliers would be appropriate under the circumstances.

Public benefits to Montana accrue through increased economic activity and employment in rural Montana counties, as well as the addition of 750 megawatts of renewable energy and a major outgoing transmission line (which has historically been a limitation to renewable energy development in Montana). Additionally, the Project highlighted areas where the mitigation policy is less than clear, and Clearwater's concerns are well taken. Lastly, there is no dispute that impacts to sage grouse habitats and populations are reasonably reflected by the HQT Raw Score.

Clearwater's estimated compensatory mitigation debit obligation of 602,551.84 is a reasonable balancing of the facts and circumstances, while also mitigating impacts on sage grouse. Clearwater's proposed total debit amount includes the HQT Raw Score, the Reserve Account and Advanced Payment policy multipliers applicable to all development projects, along with four site-specific multipliers for deviating from the Core Area Seasonal Use stipulation of Executive Order 12-2015. Clearwater proposed a final contribution to the Stewardship Account of \$4,059,431.00. See Tables 3 and 4 of the MSGOT-approved Clearwater Wind Project Sage-Grouse Mitigation Plan, February 22, 2021 (page 9).

Clearwater's contribution to the Stewardship Account could occur as a single payment or through a phased approach using a corporate guaranty (which MSGOT has previously approved). The parties will work to finalize those arrangements in the near future.

PROGRAM RECOMMENDATION:

The Program Manager recommends MSGOT finalize and approve a compensatory mitigation obligation of 602,551.84 debits and a contribution to the Stewardship Account of \$4,059,431.00 by Clearwater Energy Resources LLC.



Sage-Grouse

Population Report

Montana

Ken McDonald
Wildlife Division Administrator



87-1-201(1)(11) - The department shall report current sage grouse population numbers, including the number of leks, to the Montana sage grouse oversight team, established in [2-15-243](#), and the environmental quality council, established in [5-16-101](#), on an annual basis. The report must include seasonal and historic population data available from the department or any other source.



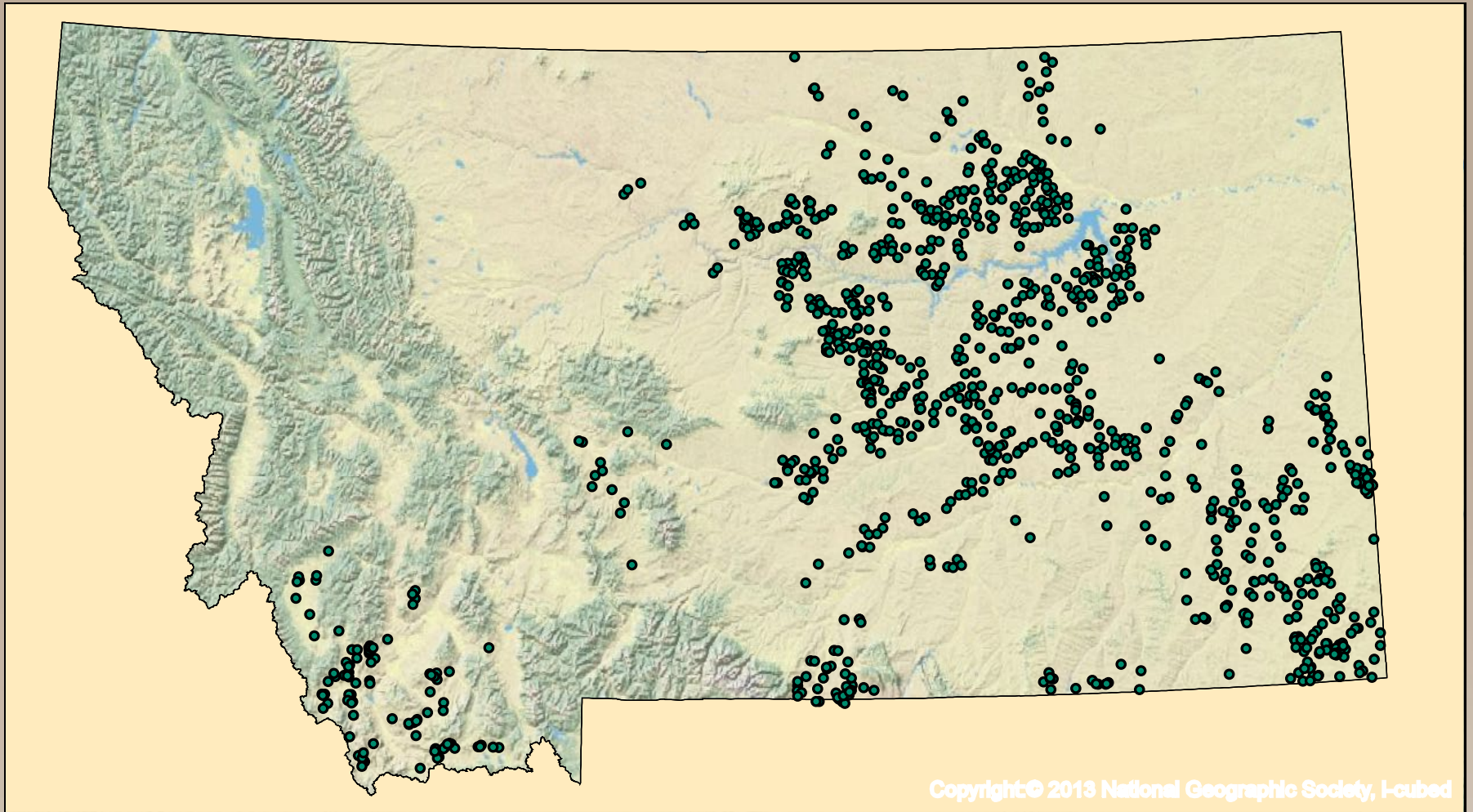
Spring - Summer

The season of Breeding/Brooding



Sage-grouse Strutting Grounds (a type of lek)





997 confirmed active sage-grouse leks in Montana



Number of known Greater Sage-grouse leks in Montana by classification status, 2002 – 2020.*

	Confirmed Active	Confirmed Inactive	Confirmed Extirpated	Provisionally Active	Never Confirmed	Unconfirm	Total
2002	548	79	17	.	29	512	1185
2003	613	84	17	.	47	519	1280
2004	650	88	19	.	56	530	1343
2005	675	94	19	.	64	544	1396
2006	718	96	19	.	67	604	1504
2007	753	98	20	.	72	630	1573
2008	809	100	22	.	75	591	1597
2009	851	104	25	.	92	551	1623
2010	948	110	40	.	119	444	1661
2011	971	125	50	.	150	382	1678
2012	979	133	50	.	180	352	1694
2013	978	144	59	.	200	331	1712
2014	985	154	65	.	227	292	1723
2015	988	172	65	.	242	269	1736
2016	993	185	66	.	255	270	1769
2017	1009	199	66	.	251	280	1805
2018	1012	220	66	(3)	260	255	1813
2019	1019	232	66	(3)	266	249	1832
2020	998	264	66	3	273	237	1841



Montana Sage-grouse Lek Counts (Leks with 10 or more years of data, 1980-2020)

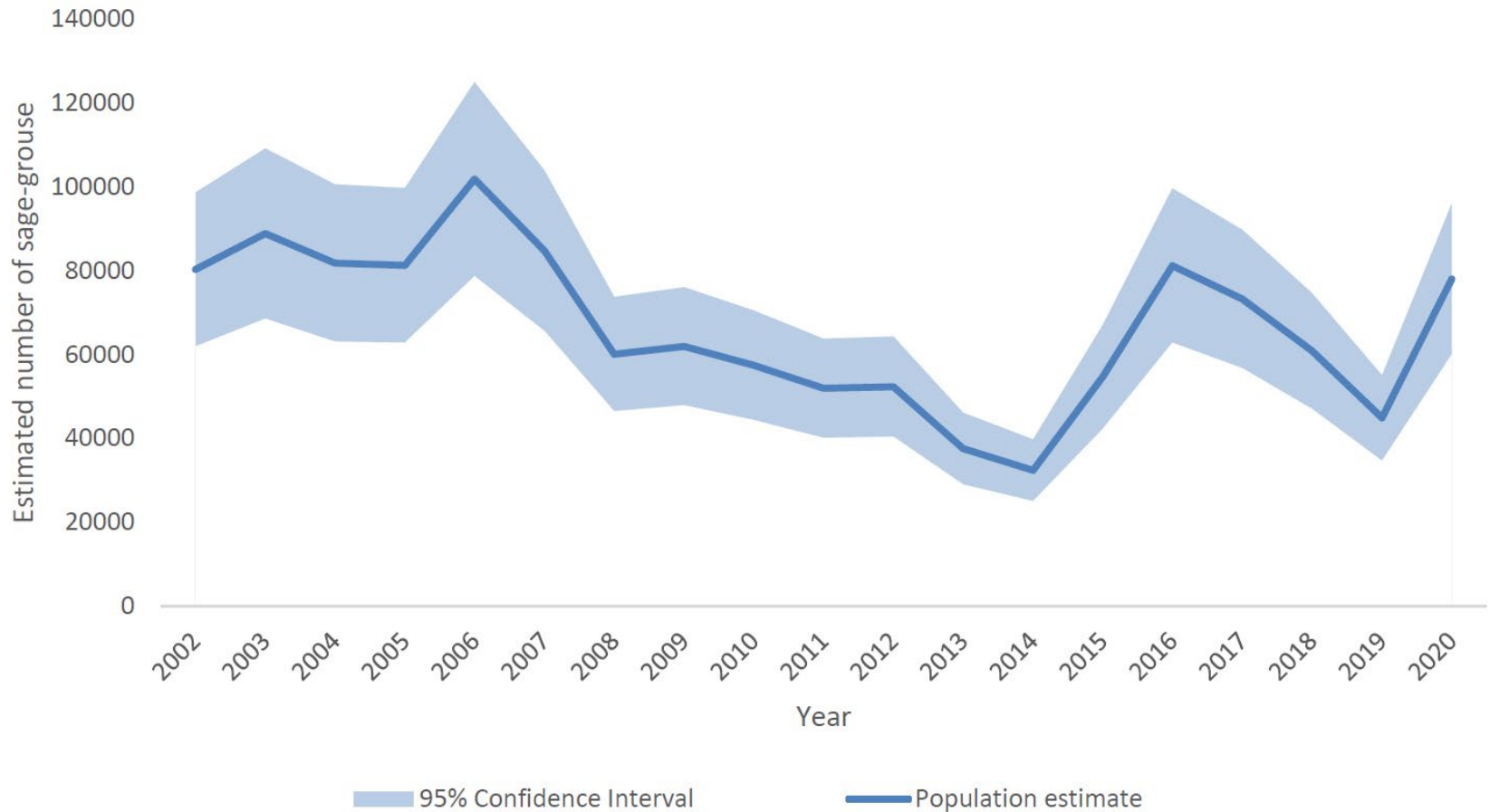


Using lek count data to derive population estimate

- Dave Messmer, MFWP Biometrician.....



Montana Sage-grouse Population Estimates, 2002 - 2020



Spring 2020 estimate ~ 78,000 sage-grouse

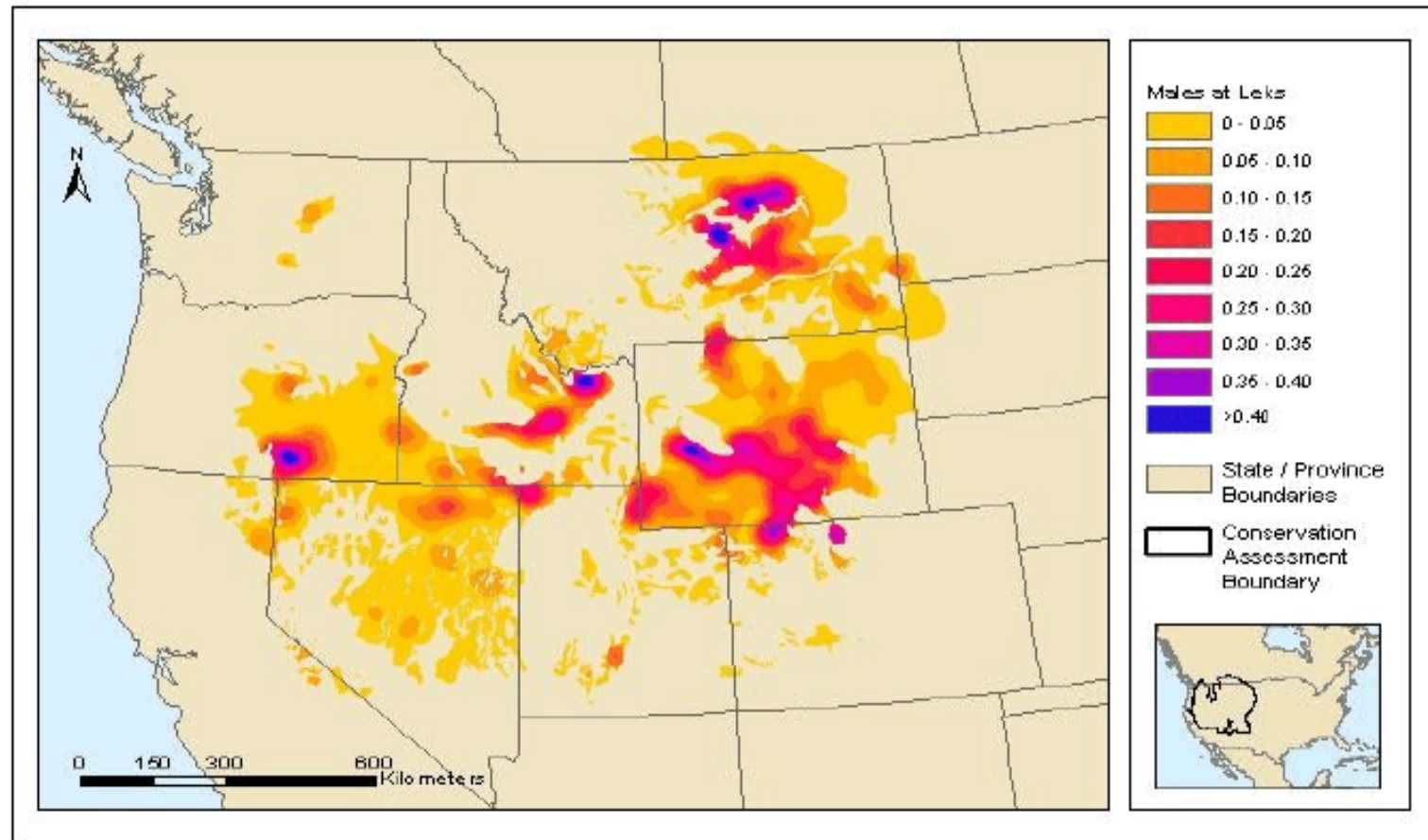


Table 1. Numerical estimates of Greater Sage-grouse population numbers and associated uncertainty from *N*-mixture models in Montana, 2002-2020.

Year	Pop Estimate	Confidence Interval	
		<i>Lower</i>	<i>Upper</i>
2002	80272	61919	98625
2003	88874	68596	109152
2004	81813	63070	100556
2005	81244	62802	99686
2006	101831	78691	124971
2007	84692	65547	103837
2008	60122	46473	73771
2009	61969	47926	76012
2010	57433	44411	70455
2011	51970	40112	63828
2012	52362	40426	64298
2013	37613	29067	46159
2014	32407	25033	39781
2015	54673	42282	67064
2016	81201	62787	99615
2017	73222	56699	89745
2018	60858	47040	74676
2019	44867	34699	55035
2020	77977	59998	95956



Figure 13.1. Strongholds for breeding populations of sage-grouse in western North America.

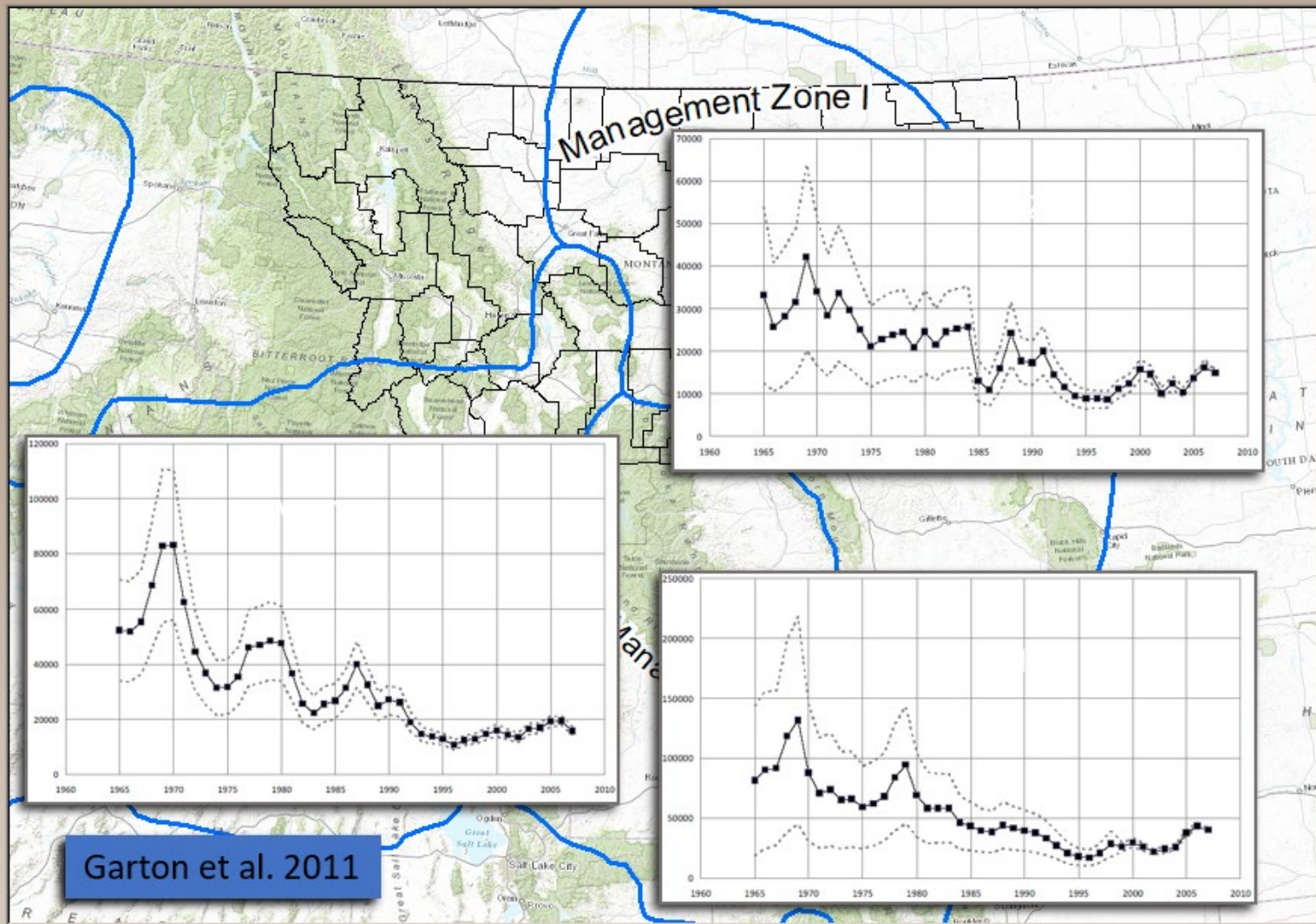


Darker shades represent highest densities of males/km²

(Conservation Assessment of Greater Sage-Grouse and Sagebrush Habitats, Connelly et al. 2004)







New Pop'n Analysis – Scheduled release around the end of February. Conducted by USGS.







MONTANA FISH, WILDLIFE & PARKS

Montana Greater Sage-grouse Population Report

August 18, 2020

Montana Greater Sage-grouse population estimates and associated uncertainty, and the number of known breeding sites (called leks) are presented here in compliance with MCA 87-1-201(1)(11), as amended in 2017.

Montana Fish, Wildlife and Parks (FWP) biologists work with federal agency and non-governmental organization partners and volunteers to count the number of displaying males at lek sites across the state in spring of each year. These data are used to assess population trends for use in sage-grouse management decisions. They are also provided to the Montana Sage-grouse Habitat Conservation Program and the Bureau of Land Management for use in land use decisions and permitting. Counts are conducted at leks 1 – 3 times within a season; however, all leks are not monitored in every year. Each lek is also categorized based on activity status, such as confirmed active or confirmed inactive, according to established definitions (see below). FWP manages the sage-grouse lek count and activity status database for the State of Montana.

Population Estimates - Methods

Montana FWP is working with Dr. Paul Lukacs, University of Montana, to estimate sage-grouse population numbers based on counts of displaying males at leks using *N*-mixture models. This modeling approach is a robust analytical method for estimating population size and trend over time for species like sage-grouse that congregate at discrete breeding sites (McCaffrey et al. 2016). Although FWP maintains a database of male counts at leks that date back to 1952, only data from 2002 onward could be used in this approach.

It is important to recognize these models use algorithms that will estimate similar, but not precisely the same, population numbers each time the models are run. This means that population estimates may vary slightly from previous reports but are well within reported confidence limit bounds.

Population Estimates – Results and Discussion

Montana FWP and partners surveyed 805 leks at least once in spring 2020. The models estimate that there were approximately 77,977 ($\pm 17,979$) sage-grouse in Montana in spring 2020 (Figure 1, Table 1). The increase in population estimates is likely a result of favorable weather conditions in 2019. The lack of widespread drought or extreme weather events (e.g., hail, flooding) during this period may have positively influenced late summer food resources and led to higher survival and recruitment. Data from FWP's sage-grouse research project in central Montana suggests nest success and hen survival were comparatively high in spring and

summer 2019 (Berkeley et al. 2019). If these data are representative of statewide patterns, they could explain the increase in the number of sage-grouse attending leks in spring 2020.

Sage-grouse population numbers oscillate over a period of 8 – 10 years across large scales (Fedy and Doherty 2011). The variation in estimates among years in Montana’s dataset may be due to natural fluctuations. It is important to consider long-term patterns over time and not make management decisions based on one or a few years of lek counts, especially at broad scales.

There are certain assumptions that were used in the development of these estimates, such as an assumed male to female ratio of 1:2.45. The 2018 and 2019 population reports list the main assumptions. There are also other analytical models that have utility for estimating population size and trends, such as Integrated Population Models. However, these models require additional demographic information, such as recruitment data, that are currently unavailable statewide. FWP may explore additional and/or improved modeling techniques in the future as new data become available.

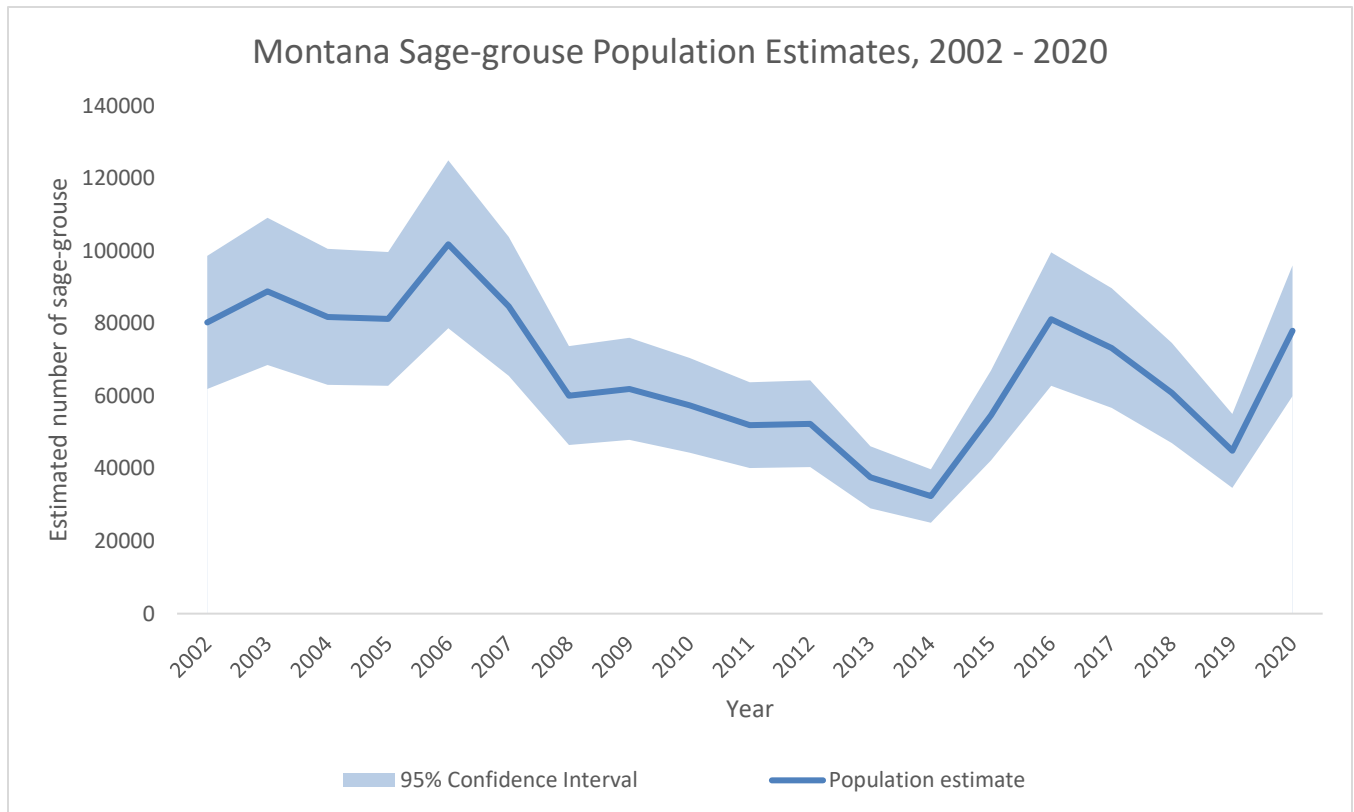


Figure 1. Graphical representation of Greater Sage-grouse population estimates and associated uncertainty from *N*-mixture models in Montana, 2002 – 2020. In general terms, confidence intervals are the range of values that describe the uncertainty around the population estimate.

Table 1. Numerical estimates of Greater Sage-grouse population numbers and associated uncertainty from *N*-mixture models in Montana, 2002-2020.

Year	Population Estimate	Standard Error	Confidence Interval	
			Lower Bound	Upper Bound
2002	80272	9364	61919	98625
2003	88874	10346	68596	109152
2004	81813	9563	63070	100556
2005	81244	9409	62802	99686
2006	101831	11806	78691	124971
2007	84692	9768	65547	103837
2008	60122	6964	46473	73771
2009	61969	7165	47926	76012
2010	57433	6644	44411	70455
2011	51970	6050	40112	63828
2012	52362	6090	40426	64298
2013	37613	4360	29067	46159
2014	32407	3762	25033	39781
2015	54673	6322	42282	67064
2016	81201	9395	62787	99615
2017	73222	8430	56699	89745
2018	60858	7050	47040	74676
2019	44867	5188	34699	55035
2020	77977	9173	59998	95956

Number of Leaks

FWP maintains a spatial database of Greater Sage-grouse leks, summarized by activity status in Table 2. FWP staff are continually working to confirm and record new lek locations and update lek status. In 2018, FWP added a new status category, *Provisionally Active*, to alert the Montana Sage Grouse Habitat Conservation Program, the Bureau of Land Management, and industry proponents of newly discovered leks immediately. Two survey years are required to meet the definition of a Confirmed Active lek; thus, without a Provisionally Active status option, there was a delay of over one year before resource agencies and industry were notified of newly discovered leks. Provisionally Active status is meant to be temporary. If data are not sufficient to meet the definition of Confirmed Active after a second year of surveys, a Provisionally Active lek will revert to Unconfirmed and would not be evaluated under state or federal assessments for new development. If data is sufficient in the second year of surveys, the lek will immediately be classified as Confirmed Active.

Table 2. Number of known Greater Sage-grouse leks in Montana by classification status, 2002 – 2020.*

	Confirmed Active	Confirmed Inactive	Confirmed Extirpated	Provisionally Active	Never Confirmed Active	Unconfirmed	Total
2002	548	79	17	.	29	512	1185
2003	613	84	17	.	47	519	1280
2004	650	88	19	.	56	530	1343
2005	675	94	19	.	64	544	1396
2006	718	96	19	.	67	604	1504
2007	753	98	20	.	72	630	1573
2008	809	100	22	.	75	591	1597
2009	851	104	25	.	92	551	1623
2010	948	110	40	.	119	444	1661
2011	971	125	50	.	150	382	1678
2012	979	133	50	.	180	352	1694
2013	978	144	59	.	200	331	1712
2014	985	154	65	.	227	292	1723
2015	988	172	65	.	242	269	1736
2016	993	185	66	.	255	270	1769
2017	1009	199	66	.	251	280	1805
2018	1012	220	66	(3)	260	255	1813
2019	1019	232	66	(3)	266	249	1832
2020	998	264	66	3	273	237	1841

*FWP’s database is dynamic and the status of a lek can change retroactively based on new information entered at any time. Reviewers may notice small changes in classification numbers from what was reported in previous reports. These are not errors; rather they are the most up-to-date numbers as of this report.

^New status created in 2018. See definition below. Provisionally Active status is only relevant for the current year; leks categorized as Provisionally Active in previous years have been moved to Confirmed Active or Unconfirmed status, as appropriate. The number of leks that meet the Provisionally Active criteria in 2018 and 2019 is noted in parenthesis.

Lek Status Definitions

Confirmed Active - Data supports existence of lek. Supporting data defined as 1 year with 2 or more males lekking on site followed by evidence of lekking (Birds - male, female or unclassified; -OR- Sign - vegetation trampling, feathers, or droppings) within 10 years of that observation.

Confirmed Inactive - A Confirmed Active lek with no evidence of lekking (Birds - male, female or unclassified; -OR- Sign - vegetation trampling, feathers, or droppings) for the last 10 years. Requires a minimum of 3 survey years with no evidence of lekking during a 10 year period. Reinstating Confirmed Active status requires meeting the supporting data requirements.

Confirmed Extirpated - Habitat changes have caused birds to permanently abandon a lek (e.g., plowing, urban development, overhead power line) as determined by the biologists monitoring the lek.

Never confirmed active – An Unconfirmed lek that was never confirmed active. Requires 3 or more survey years with no evidence of lekking (Birds - male, female or unclassified; -OR- Sign - vegetation trampling, feathers, or droppings) over any period of time.

Provisionally Active – Preliminary data supports existence of an active lek. This status can only apply during the first year of detection. Supporting data defined as 1 observation with 2 or more males lekking on site AND sign of lekking (vegetation trampling, feather, or droppings) or followed by a 2nd observation of 2 or more males lekking within the same survey year.

Unconfirmed - Possible lek. Grouse activity documented. Data insufficient to classify as Confirmed Active status.

References

- Berkeley, L., M. Szczypinski, J. Helm, and V. Dreitz. 2019. The impacts of grazing on greater sage-grouse habitat and population dynamics in central Montana, FY2019 Annual Progress Report. Montana Fish, Wildlife and Parks, Helena.
- Fedy, B.C. and K.E. Doherty. 2010. Population cycles are highly correlated over long time series and large spatial scales in two unrelated species: greater sage-grouse and cottontail rabbits. *Oecologia*; DOI 10.1007/s00442-010-1768-0.
- McCaffrey, R., J.J. Nowak, and P.M. Lukacs. 2016. Improved analysis of lek count data using N-Mixture models. *Journal of Wildlife Management*; DOI: 10.1002/jwmg.21094.
- Taylor, R.L., B.L. Walker, D.E. Naugle, and L.S. Mills. 2011. Managing multiple vital rates to maximize Greater Sage-grouse population growth. *Journal of Wildlife Management*; DOI: 10.1002/jwmg.267

GREGORY F. DORRINGTON
900 N. Last Chance Gulch, Suite 200
P.O. Box 797
Helena, MT 59624-0797
Direct 406.457.2049
Facsimile 406.449.5149
gdorrington@crowleyfleck.com

December 15, 2020

Via Email: CSime2@mt.gov

Ms. Carolyn Sime
Program Manager
Montana Sage Grouse Habitat Conservation Program
Department of Natural Resources and Conservation
1539 11th Ave
Helena, MT 59602

**RE: Clearwater Wind Project (No. 3288)
Objections to HQT Results Dated November 2, 2020**

Dear Ms. Sime:

I represent Clearwater Energy Resources LLC (“Clearwater”) in connection with its development of a 750-megawatt wind energy project and associated transmission line (collectively, the “Clearwater Project” or “Project”). Clearwater has been in consultation with the Sage Grouse Habitat Conservation Program (“Program”) since at least February 2020 and has been working diligently with you and your team to proceed through the mitigation sequence.

In early November, the Program issued revised Habitat Quantification Tool (“HQT”) results for the Clearwater Project, which propose an estimated total sage grouse habitat mitigation burden of 1,667,703 debits. This equates to over \$11 million, an unprecedented and imponderable cost for sage grouse mitigation. It also more than doubles the Project’s debits compared to the results Clearwater received from the Program in March of this year. Such extreme and disproportionate costs threaten the economic viability of the Clearwater Project, and energy projects in the state in general. The unpredictability of the HQT process and the liberal application of policy multipliers threaten this Project and sensible renewable energy development in Montana. The proposed mitigation costs, in numerous respects, bear little to no relation to the minimization of impacts to

sage grouse or to sage grouse habitat protection. Such exactions, sought absent any clear nexus or proportionality to potential Project effects, threaten to violate constitutional protections.

Renewable energy development and sage grouse habitat protection can be achieved simultaneously. The law provides a framework for this to occur. But it can only happen where project developers and policy makers are reasonable, adhere to the law, and recognize the benefits both of renewable energy development and of sage grouse habitat protection. The Program, however, is deviating from a reasonable, legally defensible approach to sage grouse habitat protection. It is doing so by:

- (1) Treating an unconfirmed sage grouse lek as a confirmed active lek for purposes of sage grouse Core Area stipulations and related modifiers;
- (2) Adopting a 4-mile buffer around active (and unconfirmed) leks;
- (3) Applying Core Area stipulations to regulate activity in General Habitat;
- (4) Construing a single road as multiple segments; and
- (5) Failing to consider how the Program's actions disincentivize co-location of Project infrastructure, thereby increasing the impacts to sage grouse habitat.

None of these actions are countenanced by law. All are unreasonably calculated to exponentially increase sage grouse habitat mitigation costs in a manner wholly disproportionate to the potential effects of the Clearwater Project.

Clearwater understands the importance of environmentally sensitive development, including the minimization of impacts to sage grouse and the protection of sage grouse habitat. Clearwater's actions, as reflected below, have been, and will continue to be, consistent with this understanding. But the law contemplates a reciprocal recognition by the Program that renewable energy development can occur with appropriate, legally cognizable mitigation and without unconstitutional exaction.

We look forward to continuing to work with your Program, as well as the Montana Sage Grouse Oversight Team, to ensure impacts to sage grouse and sage grouse habitat are minimized to the extent feasible and to propose a reasonable mitigation plan that will allow Clearwater to move forward with Project development so it can invest in Montana's future, create jobs, and produce clean, affordable, renewable energy.

THE CLEARWATER PROJECT

The Clearwater Project is a proposed 750-megawatt wind farm and associated 102-mile transmission line. The wind farm will encompass approximately 147,000 acres in Custer, Garfield, and Rosebud Counties, and will consist of approximately 269 turbines, access roads, underground electrical collection and communication systems, three collection substations, an operations and maintenance building, four permanent meteorological towers, and temporary work spaces for a construction laydown area and a batch plant. The generated power will interconnect to the

electrical grid through a transmission line to an existing substation within the city limits of Colstrip.

Once constructed, the Project will produce clean, affordable, renewable energy. It will also provide considerable economic stimulus to the region and to Montana, including jobs and tax revenue, among other things. Over its first 30 years, the Clearwater Project will bring many benefits to the region, such as:

- Millions in annual property tax revenue for local schools and services;
- Millions in annual payments to private landowners to help farmers and ranchers balance high input costs, low commodity prices, and drought conditions;
- State trust land lease payments that will support Montana schools;
- Up to 350 construction and 20 full-time jobs;
- Contributions totaling over \$150,000 (per year of Project operation) to the Southeastern Montana Development Corporation for youth activities, student scholarships, matching grants, medical retention, and water infrastructure studies; and
- Clean, home-grown electricity with no air or water pollution.

The economics of the Project are matched with Clearwater's environmental consciousness. Clearwater has already taken considerable steps to ensure the Project is developed in a responsible and environmentally conscious manner, including: Minimizing impacts to sage grouse by siting the wind farm outside of Core Area; co-locating infrastructure – such as transmission lines, Met towers, and substations – with existing disturbances (*e.g.*, existing roads or power lines) or in low quality habitat to the extent feasible; locating infrastructure as far as economically feasible from active leks; utilizing existing roads for turbine access where possible; burying collection lines; limiting surface disturbance and vegetation removal; scheduling construction outside of seasonal timing restrictions; and utilizing monopole, non-nest facilitating construction techniques.

Despite its best efforts, Clearwater cannot completely avoid impacts to sage grouse or sage grouse habitat. Many factors impact siting of wind facility infrastructure, such as energy market conditions, available wind resource relative to electrical interconnections, landowner participation and requests, federal lands, existing infrastructure and accessibility, and consideration of impacts to aquatic, biological, and cultural resources. With the assistance of wildlife biologists, consultants, and other environmental experts, Clearwater has endeavored to design its Project in an environmentally responsible way that accounts for and balances each of these factors, including sage grouse conservation. Clearwater was understandably shocked at the recent HQT results which bear little if any resemblance to the efforts Clearwater has taken to avoid and minimize impacts to sage grouse and sage grouse habitat. The following sections outline Clearwater's legal objections.

OBJECTIONS TO NOVEMBER HQT RESULTS

Objection No. 1

In Contravention of EO 12-2015, the Program Applies Core Area Stipulations and Related Multipliers to a Lek that Has Not Been Confirmed Active.

A critical difference between Clearwater's prior HQT results and the HQT results issued in November is the Program's decision to include in its analysis a new, unconfirmed lek known as RO-181-New.¹ An unconfirmed lek cannot be used to apply Core Area stipulations and related multipliers. The Program's use of an unconfirmed lek in its calculations is arbitrary, capricious, and contrary to law, and exceeds the Program's delegated authority. *See Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality (MEIC V)*, 2020 MT 288, ¶¶ 16, 26 (articulating the applicable legal standard of review for agency decisions and stating that Montana courts do not defer to agency action that is incorrect, unlawful, or entered into without reasoned decisionmaking).

In terms of lek status and consistency with EO 12-2015, the law is clear: seasonal use stipulations can only apply to a lek that has been confirmed active. *See, e.g.*, Policy Manual at 55 (providing that "seasonal restrictions within two miles of active leks" are critical to the State's conservation goals); EO 12-2015, Attachment D, Core Area Stipulation No. 3 (seasonal use stipulation prohibits activities "outside of the NSO perimeter of an active lek in Core Areas"); Core Area Stipulation Nos. 2-4, 6-8 (lek-centric stipulations apply to "active leks"); General Habitat Stipulation 14 (new wind development is "not recommended within 4.0 miles of the perimeter of active sage grouse leks") (emphasis added).

It takes a minimum of two survey years to meet the definition of a confirmed active lek. Under EO 12-2015, for a lek to be confirmed "active," the following must be true: "Data supports existence of lek. Supporting data defined as 1 year with 2 or more males lekking on site followed by evidence of lekking within 10 years of that observation." EO 12-2015, Attachment H, Definitions; *see also* Technical Manual at 85. If there is insufficient data to meet this definition, the lek is classified as "unconfirmed," which means: "Possible lek. Sage grouse activity documented. Data insufficient to classify as active status." *Id.*

Based on these definitions, RO-181-New is an "unconfirmed lek" for purposes of the HQT analysis and related multipliers. It is not an active lek and Montana Fish, Wildlife, and Parks (FWP) has

¹ It is our understanding that RO-181-New (which the Program now refers to as RO-New183) was not discovered as part of a formal lek survey. The information that led to its identification was an incidental observation made in May 2020 by Clearwater's own environmental consultant (WEST, Inc.) while performing a wetland survey for the Project. After reporting this observation, Clearwater voluntarily rerouted its transmission line in order to avoid and/or minimize impacts to the unconfirmed lek. Because other Project features were located in General Habitat, not Core Area, more than two miles from this possible lek, no other modifications were made.

never classified it as such. There is no evidence of lekking within 10 years of the initial observation and, thus, the data are insufficient to classify the lek as “active.”²

Despite this lek not being an active lek, the Program has taken the extreme position to treat it as such, applying a 4-mile buffer around it, and imposing 31 additional seasonal use deviations (14 turbines + 17 road segments). The Program’s decision, by our calculation, action adds 720,243 debits to the HQT results, which equals approximately \$4,893,231 in mitigation burden.³ To put this in perspective, the Program’s inclusion of this single, unconfirmed lek creates an additional mitigation burden for the Project that alone exceeds two and a half times the sum total of *all* Stewardship Account deposits or payments due for the entire life of the Sage Grouse Program through 2019.⁴

There is no legal or factual basis for the Program’s inclusion of RO-181-New in its calculation, and its insistence on doing so is arbitrary, capricious, and contrary to law. *See MEIC V*, ¶¶ 26-28 (invalidating Department of Environmental Quality’s (DEQ) action as arbitrary, capricious, and unlawful when DEQ incorrectly interpreted a prior agency order to sidestep state water quality requirements).

Additionally, the Program’s decision to treat an unconfirmed lek as an active lek establishes a new legal standard regarding a project’s consistency with EO 12-2015 and constitutes a de facto rule within the meaning of the Montana Administrative Procedures Act (MAPA), Mont. Code Ann. §§

² RO-181-New could be characterized under a relatively new FWP classification known as “provisionally active leks.” FWP maintains the database of Sage Grouse leks in Montana and makes determinations regarding their activity status. In 2018, FWP added a new status category known as provisionally active leks, which was done to alert stakeholders of newly discovered, possible leks. Provisionally active status is meant to be temporary. A minimum of two survey years are required to meet the definition of a confirmed active lek. If data are not sufficient to meet the definition of a confirmed active lek after a second year of surveys, a provisionally active lek will revert to unconfirmed status. If data are sufficient in the second year of surveys, the lek will immediately be classified as confirmed active. As relevant here, provisionally active leks are not addressed or otherwise acknowledged under the Stewardship Act, MSGOT’s existing rules, Program manuals, or EO 12-2015. To our knowledge, the Program did not include provisionally active or unconfirmed leks in its March HQT analysis. The only possible reason for doing so here is based on the Program’s expectation that FWP will, theoretically, at some unknown date in the future, classify RO-181-New as a confirmed active lek. Notwithstanding the Program’s beliefs or expectations on this point, to our knowledge, the subject lek still has not been officially confirmed active and couldn’t be until a second survey is conducted during the 2021 lek season.

³ Under each objection, we provide an estimated financial impact to Clearwater, which is calculated using the non-nest facilitating HQT score, 10% of the Core Area Operations Phase debits (23,233.66), and a cost of \$6.79 per debit. As you will see, the sum of the financial impact for all objections will exceed the Program’s total estimated mitigation burden for the Project. This is because more than one objection may apply to each deviation, yet the financial impact under each objection is evaluated on an individual basis without regard to the other objections.

⁴ Montana Sage Grouse Habitat Conservation Program, 2019 Annual Report at p. 58 (providing that “[a] total of \$506,806.18 was received into the Stewardship Account since 2018” and “[a] total of \$1,449,688.10 is categorized as Due” for a total of \$1,956,494.28).

2-4-101, *et seq.* Before this new standard can be implemented, the Program, or rather MSGOT, is obligated to comply with MAPA's rulemaking procedures, including notice and comment, which has not occurred here. Because neither MSGOT nor the Program has adopted this new rule in substantial compliance with MAPA and has, in any event, failed to give any interested party a fair opportunity to comment on the change, the standard being applied is not valid and is without effect. *See, e.g., S. Mont. Telephone Co. v. Mont. Pub. Serv. Comm'n*, 2017 MT 123, ¶ 20 (invalidating the Commission's adoption of an analytical rubric for evaluating motions for protective orders because it failed to comply with MAPA requirements).

Unless EO 12-2015 is amended and MSGOT adopts new rules or amends the existing rules in accordance with MAPA's requirements, the Program has no authority to treat an unconfirmed lek as a confirmed active lek for purposes of HQT analysis and the use of site-specific policy multipliers. *Id.*

Clearwater respectfully requests that the Program remove RO-181-New from the HQT analysis and prepare revised results to share with Clearwater.

Objection No. 2

The Program Improperly Applies a Four-Mile Buffer Around Active Sage Grouse Leks for Purposes of Evaluating Consistency with the Seasonal Use Stipulation.

The Program applies a 4-mile buffer around active leks (and one unconfirmed lek, as discussed above) and imposes a seasonal use multiplier based on the presence of any new project feature within the buffer during the restricted seasonal period. The Program's adoption of a 4-mile lek buffer instead of a 2-mile buffer results in 41 EO deviations, which adds 952,579.98 debits to the HQT results, equal to approximately \$6,471,692 in mitigation burden.

There is no legal basis for imposing a 4-mile buffer around active leks. To the contrary, applicable law requires at most a 2-mile buffer. For example, the Montana Legislature adopted a 2-mile buffer as being sufficiently protective of sage grouse when evaluating requests for reduction or waiver of compensatory mitigation. *See* Mont. Code Ann. § 76-22-116(a) (authorizing MSGOT to reduce or waive mitigation upon assessment of whether, among other things, the project is located "more than 2 miles from the center of an active lek"). EO 12-2015 similarly establishes a 2-mile buffer for active leks in General Habitat, but it is silent as to the buffer for leks in Core Areas.⁵ EO 12-2015, Attachment D. MSGOT, however, appears to have adopted a 2-mile buffer for *all* leks when it adopted the Policy Guidance by rule and declined to differentiate between leks in Core Area and those in General Habitat:

⁵ We note that General Habitat Stipulation No. 14 provides that new "wind energy developments" are not recommended within 4 miles of the perimeter of "active sage grouse leks." However, this restriction applies to the wind turbines and related infrastructure, not an overhead transmission line, which is addressed separately in the stipulations.

Among all the stipulations, limitations on the total surface disturbance within four miles of active leks, the no-surface-occupancy buffer requirement near active leks, seasonal restrictions within two miles of active leks during the breeding, nesting, and early-brood rearing season are particularly critical to meeting the State's conservation goals according to the scientific literature.

Policy Guidance at 55 (emphasis added). *See also* HQT Manual at 35 (“Generally, distances less than 3.2-km [1.9 mi] of a lek were recognized as important nesting habitat across the state with decreased nest numbers with increased distance from a lek.”); Montana Sage Grouse Habitat Conservation Program 2019 Annual Report at 38 (referring to “seasonal restrictions within two miles of active leks”).

Clearwater's technical team sought clarification of the legal basis for the 4-mile lek buffer during a meeting with Program staff and two MSGOT members on November 6, 2020 and was informed that the 4-mile buffer applies in Core Area whereas a 2-mile buffer applies in General Habitat, and that the 4-mile buffer is based on various unspecified Montana-specific studies.

This explanation, however, contradicts statute, Executive Order, and Policy Guidance, which has been adopted by reference in administrative rules. If the Program intends to apply a seasonal use buffer standard different than what has already been adopted in rule, MSGOT would first be required to comply with MAPA's rulemaking procedures. *See S. Mont. Telephone Co.*, 2017 MT 123, ¶ 20. Clearly, if the Program believes scientific literature warrants application of a 4-mile lek buffer it has every opportunity to go to MSGOT to initiate rulemaking consistent with MAPA so that stakeholders and other interested parties can assess the proposed change, evaluate its consistency with state statute, and provide input and comment. Imposing a 4-mile lek buffer by administrative fiat, as the Program has done here, is improper and inconsistent with the Stewardship Act, MAPA, and customary notions of due process and public participation. *See* Mont. Code Ann. § 76-22-104 (authorizing MSGOT, not the Program, to adopt rules implementing the Stewardship Act and HQT tool); Mont. Code Ann. § 2-4-102(14)(a) (agency rules that purport to have the force of law are invalid unless adopted via rulemaking pursuant to MAPA). The Program's adoption of a 4-mile lek buffer is, therefore, invalid and should not apply.

Therefore, Clearwater respectfully requests that the Program apply a 2-mile lek buffer, as provided by MSGOT, and then reevaluate the Project's consistency with EO 12-2015 consistent with that standard.

Objection No. 3

The Program Incorrectly Applies a Core Area Stipulation to Activity in General Habitat.

As depicted in Addendum 1, taken from the November HQT results, the Program applies a 4-mile buffer (which is contrary to law, see above) around leks in Core Areas (blue) and a 2-mile buffer around leks in General Habitat (green). For several Core Area leks, the 4-mile buffer extends beyond Core Area and into General Habitat where it encompasses Project features (small purple dots represent turbines and gray lines represent access roads). Despite these features being sited

within General Habitat and/or in areas unsuitable for Sage Grouse (HQT Habitat Function values <10),⁶ the Program nevertheless imposes upon each feature a 10% multiplier, an amount reserved solely for Core Area deviations. That is improper. It adds 36 EO deviations to the Project, which equates to 836,412 debits, or approximately \$5,682,461 in mitigation burden.

Under the Executive Order, Core Area stipulations are intended to apply only to activities that are physically located within Core Areas. Each Core Area stipulation is duly qualified by the following language:

Sage grouse Core Areas were delineated as areas of highest conservation priority. These stipulations are designed to maintain existing levels of suitable sage grouse habitat by regulating uses and activities (herein activities) in Core Areas to ensure the maintenance of sage grouse abundance and distribution in Montana. The following stipulations apply to all new activities in Core Areas:

EO 12-2015, Attachment D (emphasis added). Likewise, General Habitat stipulations apply “[i]n all General Habitat areas.” EO 12-2015, Attachment D. Thus, under the plain language of the Executive Order, a Core Area stipulation cannot be used to regulate activity located in General Habitat, and that would logically extend to the Program’s use of multipliers in order to incentivize consistency with EO 12-2015.

Here, the project features at issue are located entirely within General Habitat and so the General Habitat stipulations apply. The applicable seasonal use stipulation prohibits activities in General Habitat “from March 15 – July 15 within 2.0 miles of an active lek.” EO 12-2015, Attachment D, General Habitat Stipulation No. 3 (emphasis added). These relevant project features in General Habitat are not located within 2.0 miles of any active lek, meaning they are consistent with the Executive Order and no multiplier should apply.

Additionally, the Executive Order provides that the seasonal use stipulation can be “modified or waived for areas of unsuitable habitat.” *Id.* Thus, even if the features were located within a lek buffer, the Program should evaluate the habitat in which the features are sited to determine whether to waive the stipulation. Here, the wind turbines and access roads at issue are generally located in cultivated agricultural land or co-located with existing ranch roads, or adjacent to such features, where habitat value is low and, therefore, warrant a waiver of the seasonal use stipulation, should it apply.

In all, the Program applies the wrong EO 12-2015 stipulation, imposes an enhanced multiplier reserved only for activities in Core Areas, not General Habitat, and then fails to consider co-location and the habitat quality in which the features are located. All of this serves to inflate the debit calculation and increase Clearwater’s mitigation burden, and does so in contravention of law.

⁶ Clearwater acknowledges that in a couple areas the access road occurs within in a narrow strip of Core Area sandwiched between General Habitat, within the 4-mile lek buffer the Program applied. These access roads, however, will be co-located on-top-of existing ranch roads in areas with negligible sage grouse habitat value (HQT values <10).

See *MEIC V*, ¶¶ 26-28 (incorrect interpretation leads to invalid, arbitrary, capricious, and unlawful agency action); *Koontz v. St. Johns River Water Mgt. Dist.*, 570 U.S. 595, 613-14 (2013) (monetary exactions in permitting process subject to *Nollan/Dolan* scrutiny requiring essential nexus and rough proportionality to the effects of the proposed action).

Clearwater respectfully requests that the Program, consistent with EO 12-2015, apply Core Area stipulations only to Project features that are physically located within designated Core Area habitat.

Objection No. 4

The Program's Segmentation of Access Roads into Multiple Deviating Features is Arbitrary and Capricious.

The Program's Policy Guidance document provides that developers will be required to obtain mitigation credits "for each deviating project feature" during the construction and operations phases of a development project. Policy Guidance at 55. There is no definition of what constitutes a "deviating project feature" under the controlling documents. In the absence of any such language, the Program has determined that when it comes to a wind turbine access road within a 4-mile lek buffer, it will consider not only the road a deviating project feature, but also each individual segment of the road that provides access to a wind turbine.

Applying this standard here, the Program determined that approximately 7.57 miles of low- traffic, 16-foot wide, dirt or gravel access road located almost entirely in General Habitat in areas with low functional habitat value should be divided into 20 separate road segments, each of which constitutes a "deviating project feature" and is assessed a 10% Core Area site-specific multiplier. By our calculation, the result of the Program's segmentation of access roads creates 20 EO deviations, which adds approximately 464,673 debits to the HQT results, equal to approximately \$3,156,923 in mitigation burden.

The Program's road segmentation methodology is improper. There is no rational connection between the fact that the subject road provides access to multiple wind turbines and the Program's decision to partition the road into numerous segments and assess a separate multiplier for each portion of the road that goes to a wind turbine. *Mont. Info. Ctr. v. Dep't of Env'tl. Quality (MEIC IV)*, 2019 MT 213, ¶ 26 ("An agency has an obligation to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.") (quotations and citation omitted). We are aware of no evidence – and the Program points to none – suggesting that a road segment accessing a turbine should be treated as an independent deviating feature for purposes of assessing consistency with EO 12-2015. In fact, the Program provides no reasoned explanation at all for its segmentation of the Project's roads. There is no discussion or analysis of factors that would typically define the level of impact a road may have on sage grouse or sage grouse habitat, such as the size of the roads, traffic frequency, density of road networks, or associated noise levels. Rather, the Program's decision to apply a multiplier appears based entirely on whether the road accesses a wind turbine or not.

There is no rational explanation for the Program's method of road segmentation, nor has it attempted to provide any in its written analysis. The Program's methods on this point are so at odds with the science of road impacts, as recognized by MSGOT, and so divorced from reasoned decision-making that it constitutes arbitrary agency action that would not withstand scrutiny from a reviewing court. *MEIC IV*, ¶ 26 ("An agency's decision so at odds with the information gathered in the record is arbitrary and the product of caprice.") (quotations and citation omitted).

As such, Clearwater respectfully requests that the Program reevaluate what constitutes a "deviating project feature" for purposes of EO 12-2015 and decline to unnecessarily segment roads without a reasonable basis grounded in science for doing so.

Objection No. 5

The Program's Application of Site-Specific Multipliers Disincentivizes Co-Location in Contravention of the Mitigation Hierarchy and Constitutes an Abuse of Discretion.

One of the fundamental steps in the mitigation hierarchy is to minimize impacts by implementing development activities in a way that limits or reduces impacts to the extent possible. One example of minimizing impacts is locating a new development project in an area where habitat is already considered low quality or is already impacted by existing development. Policy Manual at 9. This is co-location and MSGOT has adopted measures to ensure that a project developer's minimization efforts, including co-location, are not unintentionally disincentivized by the Program's rote application of site-specific multipliers. Here, the Program has failed to consider co-location of impacts with respect to 46 purported EO deviations, adding approximately 1,069,347 debits, or \$7,264,988 in mitigation burden.

MSGOT's Policy Guidance makes clear that, in order to incentivize developers to design projects consistent with the EO stipulations, they will be required to obtain additional credits for each deviation from the stipulations found in EO 12-2015. Policy Manual at 55. However, MSGOT recognized that there can be a tension between blind adherence to the EO stipulations, on the one hand, and interference with a developer's ability to engage in efforts to minimize project impacts, on the other.

Specifically, MSGOT adopted policy stating that "[t]he Program will review individual projects to ensure that use of [the site-specific EO deviation] multiplier does not unintentionally disincentivize co-location of impacts." *Id.* at 55 n.59 (emphasis on mandatory language added). MSGOT's guidance goes on to state:

For example, an exemption from the Core Area stipulation multiplier may be provided if an impact occurs in an area where disturbance has already exceeded 5%, or where co-location with existing impacts is used to minimize impacts to sage grouse. The Program may waive the stipulations adjustment where needed to accommodate this kind of situation.

Id. The Program, therefore, has discretion *not* to apply site specific multipliers where doing so would interfere with or disincentivize the project developer's ability to minimize impacts to sage grouse or sage grouse habitat, such as by co-locating project features with existing disturbances.

While the Program may have discretion to grant such a waiver, it cannot ignore the issue altogether, as it has done here. *See id.* at 55 n.59 (using mandatory language stating that the Program "will" review projects for waiver of stipulations); *see also Clark Fork Coalition v. Mont. Dep't of Env'tl. Quality*, 2008 MT 407 ¶ 43 (explaining that an agency's failure to exercise discretion is itself an abuse of discretion). There is no indication that the Program ever evaluated whether application of EO multipliers would disincentivize Clearwater from minimizing the impacts of its Project. Had it done so, the Program would have found that several multipliers were being applied in a way that discourages co-location and encourages Clearwater to site its Project features in undisturbed areas that would increase habitat fragmentation and impacts to sage grouse.

For example, in Addendum 2, the Program applies a multiplier for the transmission line's proximity to an active sage grouse lek (RO-152). But, as you can see, the transmission line is co-located with Little Porcupine Creek Road (Rd 202) in low function habitat (green) – exactly what developers should be incentivized to do in order to reduce impacts to sage grouse. Here, however, Clearwater derives no benefit from its mitigation efforts and, in fact, is being penalized by the Program. The application of a policy multiplier in this instance disincentivizes Clearwater from engaging in mitigation behavior, such as co-location. Instead, it encourages Clearwater to avoid the policy multiplier by rerouting of the transmission line through adjacent, higher quality sage grouse habitat (blue) where there are not already existing disturbances. While the Program's intention may have been to encourage consistency with EO 12-2015, the result of its actions is to incentivize the project developer to take actions that will increase, not decrease, impacts to sage grouse and sage grouse habitat. This is precisely the reason why the Policy Guidance requires an analysis of whether use of a multiplier will unintentionally disincentivize co-location of impacts. Policy Manual at 55 n.59.

The Program's failure to even consider the possibility of a waiver of the EO stipulations in this and other instances is an abuse of discretion. *See also Clark Fork Coalition*, ¶ 43. Clearwater, therefore, requests that the Program reevaluate its use of site-specific multipliers and consider whether waiver of the stipulations is warranted in order to achieve the broader goals and objectives of EO 12-2015, which is to conserve sage grouse and sage grouse habitat.

We appreciate the opportunity to provide our perspective on these issues and look forward to working through these matters with the Program or MSGOT.

Sincerely Yours,

CROWLEY FLECK PLLP



Gregory F. Dorrington

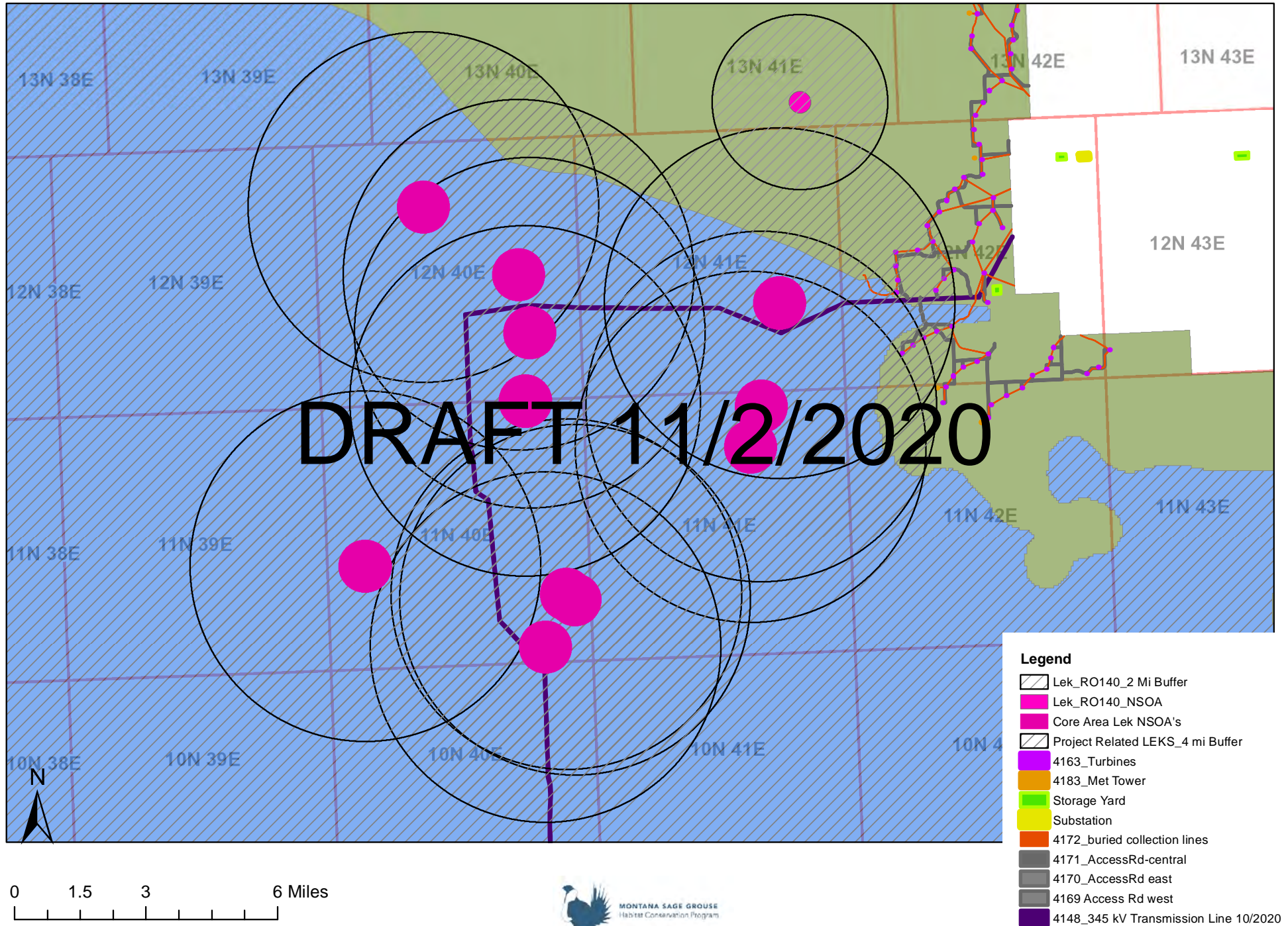
Cc: Mr. John Tubbs, Director DNRC, via email only: JTubbs@mt.gov
Mr. Patrick Holmes, Natural Resources Policy Advisor to Gov. Bullock, via email only:
Patrick.Holmes@mt.gov

Addendum 1:

Objection No. 3 –
Applying Core Area
Stipulations to Activity in
General Habitat

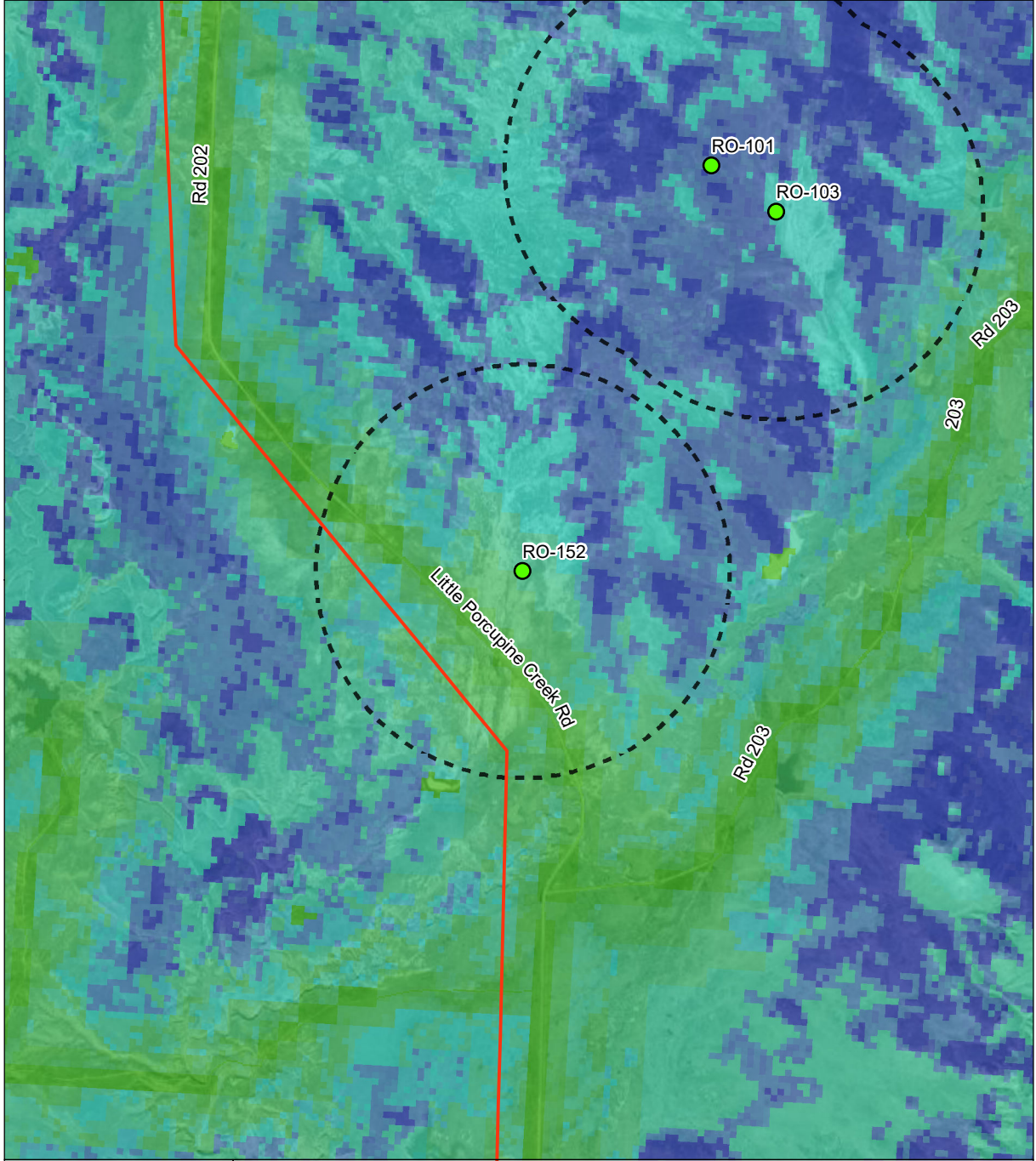
Figure 6

Clearwater Wind Project Transmission Line and West Side Facility Lek Buffers 10/26/2020



Addendum 2:

Objection No. 5 –
Program's Use of Multipliers
Disincentivizes Co-location



Clearwater Wind Project

MT
ND
Dickinson
SD
Sheridan, WY

- Transmission Line
- Confirmed Active Lek 2020
- 0.6-mi distance from Active Lek

0 1,000 2,000 3,000 Feet
0 300 600 900 Meters

Habitat Function (Basemap)

High : 100 Low : 0

Data Source: World Imagery 2020
Coordinate System: NAD 1983 UTM Zone 13N
Date: 12/15/2020