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Draft briefing paper for the Sagebrush Ecosystem Council Technical Team to the Council on Regulatory Assurances for Sage Grouse and Sagebrush Ecosystem Conservation

The best assurance against imposition of regulations conserving sage grouse and sagebrush ecosystems is to ensure they are adequately conserved to begin with. If there is no problem to solve, there is little risk of regulations developing to meet a perceived need. Focus on conservation, and assurances will likely follow in some way.

For sage grouse and sagebrush ecosystems, some of the biggest threats are not readily subject to regulation, such as wildfire and invasive species dominance (e.g., cheatgrass). For the purposes of this paper, regulatory assurances would be focused on development activities affecting grouse habitat, such as mining, energy development, infrastructure, grazing, etc., that represent human activities more readily subjected to regulation.

Here are some options for pursuing regulatory certainty, with a preliminary “pros” and “cons” list for each:

- (1) **Preclude the need to list** sage grouse under the federal Endangered Species Act (ESA)
 - a. Pros: no federal ESA regulation; if adequately conserved, little need for other regulation from state or federal entities; lead species management authority remains with NDOW.
 - b. Cons: little time to ensure adequate conservation; a “not warranted” finding by the U.S. Fish and Wildlife Service (FWS) would likely be challenged in court, perpetuating uncertainty.
- (2) Obtain an **ESA section 10 take permit**
 - a. Pros: regardless of an ESA listing of sage grouse, a permit holder would have regulatory assurance for covered activities and species for a given geographic area provided they implement an approved Habitat Conservation Plan.
 - b. Cons: expensive and time consuming to complete (though some funding could be available), with lots of public process and influence on the plan and permit.
- (3) Obtain “approval” from the FWS for a **state “plan,”** and make that plan the preferred alternative of the Bureau of Land Management (BLM) in their Resource Management Plan revision process.

- a. Pros: this could align the state's interests with the BLM's decision-making process for permitted activities; it's simpler and cheaper than a section 10 permit.
 - b. Cons: it may not cover private land well; it may lack some certainty of implementation; there is no clear process for FWS "approval".
- (4) Set up a formal **Mitigation Bank** to ensure development activities avoid, minimize or mitigate harm to sage grouse.
- a. Pros: this could allow a variety of landowners to get involved in sage grouse conservation; it would theoretically facilitate a "no net loss" of grouse habitat from development.
 - b. Cons: complex and difficult to set up and run; tricky to ensure adequate emphasis on "avoid" and "minimize".
- (5) Similar to #4, above, set up a **mitigation program** (not a formal "Bank") to ensure development activities avoid, minimize or mitigate harm to sage grouse, in cooperation with BLM and others.
- a. Pros: similar to #4, above, except less clear on how a variety of landowners could participate.
 - b. Cons: easier to set up and run than a true bank; coordination with BLM and others is critical; tricky to ensure adequate emphasis on "avoid" and "minimize".
- (6) Focus solely on quickly implementing sagebrush ecosystem **conservation** with no formally approved plan.
- a. Pros: most direct path for achieving conservation on the ground; demonstration of quick progress would be the most persuasive case for minimizing need for regulation; would facilitate adaptive management and testing of conservation ideas that could build the case that we can succeed in "stopping the decline".
 - b. Cons: risk lack of cohesion or focus of efforts; risk difficulty matching efforts with neighboring states; lack of symbolic act (e.g., "plan approval") indicating commitment and unified direction.