

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R8-ES-2023-0052;
FF09E21000 FXES1111090FEDR 234]

RIN 1018-BH21

Endangered and Threatened Wildlife and Plants; Threatened Status for the Bi-State Distinct Population Segment of Greater Sage-Grouse With Section 4(d) Rule and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of the comment periods.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce that we are reopening the comment periods on our October 28, 2013, proposed rules to list the Bi-State distinct population segment (DPS) of greater sage-grouse (*Centrocercus urophasianus*) (hereafter Bi-State DPS) as threatened under the Endangered Species Act (Act) with a section 4(d) rule and to designate critical habitat for the Bi-State DPS. The District Court for the Northern District of California vacated our March 31, 2020, withdrawal of the October 28, 2013, proposed listing rule, and that action serves to reinstate the proposed listing rule. We will initiate a new status review to determine whether the Bi-State DPS meets the definition of an endangered or threatened species under the Act. We request new information to inform this status review. Comments previously submitted need not be resubmitted, as they will be fully considered in preparing the final determination.

DATES: The comment periods are reopened on the proposed rules that published October 28, 2013 (at 78 FR 64358 and 78 FR 64328). So that we can fully consider your comments in our final determination, submit your comments on or before June 26, 2023.

ADDRESSES:

Document availability: Documents associated with the proposed rule to list the Bi-State DPS and a related proposed rule to designate critical habitat for the DPS are available on the internet at <https://www.regulations.gov> under these dockets: FWS-R8-ES-2013-0072, FWS-R8-ES-2013-0042, FWS-R8-ES-2018-0106, and FWS-R8-ES-2018-0107, as described below in **SUPPLEMENTARY INFORMATION** under *Information Requested*.

Written comments: The docket for this reopened comment period is FWS-R8-ES-2023-0052. You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <https://www.regulations.gov>. In the Search box, enter FWS-R8-ES-2023-0052. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R8-ES-2023-0052, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see *Public Comments*, below, for more information).

FOR FURTHER INFORMATION CONTACT:

Justin Barrett, Deputy Field Supervisor, U.S. Fish and Wildlife Service, Reno Fish and Wildlife Office, 1340 Financial Boulevard, Suite 234, Reno, NV 89502; telephone 775-861-6300; or facsimile 775-861-6301. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

On October 28, 2013, we published a proposed rule to list the Bi-State DPS in California and Nevada as a threatened species under the Endangered Species Act of 1973, as amended ("Act"; 16 U.S.C. 1531 *et seq.*), with a rule under section 4(d) of the Act (78 FR 64358). We concurrently published a proposed rule to designate critical habitat for the Bi-State DPS (78 FR 64328). On April 23, 2015, we published a withdrawal of the proposed rule to list the Bi-State DPS as a threatened species, including withdrawal of the section 4(d) and proposed critical habitat rules (80 FR 22828). That decision was based on our conclusion that the threats to the Bi-State DPS as identified in the proposed

listing rule were no longer as significant as believed at the time of publication of the proposed rule and that conservation plans were ameliorating threats to the species. Thus, we concluded that the Bi-State DPS did not meet the definition of a threatened or endangered species throughout all or a significant portion of its range.

On March 9, 2016, Desert Survivors, the Center for Biological Diversity, WildEarth Guardians, and Western Watershed Project filed suit in the United States District Court for the Northern District of California. The suit challenged the withdrawal of the proposal to list the Bi-State DPS. On May 5, 2018, the court issued a decision. As the result of the court order, the April 23, 2015 (80 FR 22828), withdrawal was vacated and remanded to the Service for further consideration consistent with the order, and on April 12, 2019, we reopened the comment periods on the 2013 proposed listing and critical habitat rules (84 FR 14909).

After review of the public comments received and other information, on March 31, 2020, we published another withdrawal of the proposed rule to list the Bi-State DPS as a threatened species, including withdrawal of the proposed section 4(d) and critical habitat rules (85 FR 18054). That decision was again based on our conclusion that the threats to the Bi-State DPS as identified in the 2013 proposed listing rule were no longer as significant as believed at the time of publication of the 2013 proposed rule and that conservation plans were ameliorating threats to the species. Thus, we concluded that the Bi-State DPS did not meet the definition of a threatened or endangered species throughout all or a significant portion of its range.

On September 29, 2020, Desert Survivors, the Center for Biological Diversity, WildEarth Guardians, and Western Watershed Project filed suit in the United States District Court for the Northern District of California. The suit again challenged the withdrawal of the proposal to list the Bi-State DPS. On May 16, 2022, the court issued a decision. As the result of the court order, the March 31, 2020 (85 FR 18054), withdrawal was vacated and remanded to the Service for further consideration consistent with the order.

Current Situation

The court's action returns the rulemaking process to the proposed rule stage, and the status of the Bi-State DPS has reverted to that of a species proposed for listing for the purposes of consultation under section 7 of the Act. The court's action also reinstates the

proposed section 4(d) rule and the proposed critical habitat rule for the Bi-State DPS (78 FR 64358 and 64328; October 28, 2013). Therefore, this document notifies the public that we are reopening the comment periods on the 2013 proposed rules to list the Bi-State DPS as threatened with a section 4(d) rule and designate critical habitat. We also announce that we will be initiating an entirely new species status assessment (SSA) of the Bi-State DPS. The SSA will inform the decision of whether the Bi-State DPS meets the definition of an endangered or threatened species under the Act, or whether the species is not warranted for listing. We are targeting making a new listing determination through publication in the **Federal Register** by May 2024, which could include withdrawal, re-proposal, or a final listing status and critical habitat determination. We will accept written comments and information during this reopened comment period on our proposed rules to list the Bi-State DPS as threatened with a section 4(d) rule and designate critical habitat that were published in the **Federal Register** on October 28, 2013 (78 FR 64358 and 64328; October 28, 2013). Any listing determination we make must be made based on the best available information. To inform this status review, we request new information regarding the Bi-State DPS that has become available since the publication of the 2013 proposed rules.

Species Information

Please refer to the March 31, 2020, withdrawal of our proposed listing rule (85 FR 18054) and the 2020 Species Report (Service 2020, entire; available on the internet at <https://www.regulations.gov> under Docket No. FWS-R8-ES-2018-0106) for information about the Bi-State DPS taxonomy, habitat (sagebrush ecosystem), seasonal habitat selection, life-history characteristics, home range, life expectancy and survival rates, historical and current range distribution, population estimates and lek (sage-grouse breeding complex) counts, population trends, and land ownership information. Please also refer to our March 23, 2010, 12-month petition finding (75 FR 13910) for the greater sage-grouse for a detailed evaluation of the Bi-State DPS under our DPS policy, which published in the **Federal Register** on February 7, 1996 (61 FR 4722). For a detailed summary of previous open comment periods, please see our 2015 and 2020 withdrawals of the proposed listing rules (80 FR 22828, April 23, 2015; 85 FR 18054, March 31, 2020).

Information Requested

We will accept written comments and information during this reopened comment period on our proposed rules to list the Bi-State DPS as threatened with a section 4(d) rule and designate critical habitat that were published in the **Federal Register** on October 28, 2013 (78 FR 64358 and 78 FR 64328). We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The Bi-State DPS's biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns and the locations of any additional leks or populations of this species;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the Bi-State DPS, its habitat, or both.

(2) Threats and conservation actions affecting the species, including:

(a) Factors that may be affecting the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(b) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species.

(c) Existing regulations or conservation actions that may be addressing threats to this species.

(3) Additional information concerning the historical and current status of the Bi-State DPS.

(4) Information on regulations that may be necessary and advisable to provide for the conservation of the Bi-State DPS and that we can consider in developing a section 4(d) rule for the species. In particular, information concerning the extent to which we should include any of the section 9 prohibitions in the 4(d) rule or whether we should consider any additional exceptions from the prohibitions in the 4(d) rule.

(5) Whether we should add a provision to the proposed 4(d) rule that covers incidental take of the Bi-State DPS in accordance with agricultural or conservation activities consistent with the Act.

(6) Information on effectiveness of ongoing conservation measures and management actions.

(7) Information on current habitat conditions including but not limited to quality of upland and meadow or riparian sites, presence and abundance of annual invasive grasses and weeds or other increasing plants (e.g., conifer trees), and recovery of previously burned sites. This information may include larger landscape-scale assessments or smaller site-specific investigations.

(8) Specific information on:

(a) The amount and distribution of habitat for the Bi-State DPS.

(b) Any additional areas occurring within the range of the species in western Nevada and eastern California that should be included in the critical habitat designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species.

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change.

(d) To evaluate the potential to include areas not occupied at the time of listing, we particularly seek comments regarding whether occupied areas are adequate for the conservation of the species. Additionally, please provide specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species. We also seek comments or information regarding whether areas not occupied at the time of listing qualify as critical habitat for the species.

(9) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(10) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(11) Information on the extent to which the description of probable economic impacts in the draft economic analysis (available on the internet at <https://www.regulations.gov> under Docket No. FWS-R8-ES-2013-0042) is a reasonable estimate of the likely economic impacts and any additional information regarding probable

economic impacts that we should consider.

(12) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that

area under section 4(b)(2) of the Act. If you think we should exclude any additional areas, please provide information supporting a benefit of exclusion.

(13) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and

understanding, or to better accommodate public concerns and comments.

Prior information regarding this rulemaking action may be found in these dockets on <https://www.regulations.gov>:

Docket No.	Rulemaking actions reflected in the docket	Information available in the docket
FWS-R8-ES-2013-0072	<ul style="list-style-type: none"> Proposed listing rule (78 FR 64358, October 28, 2013). First withdrawal of the 2013 proposed listing and critical habitat rules (80 FR 22828, April 23, 2015). 	<ul style="list-style-type: none"> A Hierarchical Integrated Population Model for Greater Sage-Grouse in the Bi-State Distinct Population Segment, California and Nevada, 2014. Species Status Assessment Maps by Population Management Units, January 2013. Species Status Assessment Bi-State Distinct Population Segment of Greater Sage-Grouse, 2013. Bi-State Action Plan, March 2012. Greater Sage-Grouse Conservation Objectives Team Report, February 2013. Commitment letters from Federal, State, and local partners. Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) Evaluation for the Bi-State Distinct Population Segment of Greater Sage-Grouse 2012 Bi-State Action Plan. Conference Report for the Natural Resources Conservation Service Sage-grouse Initiative, 2010. Draft Economic Analysis for the Bi-State DPS of Greater Sage-Grouse, 2014. References cited for proposed critical habitat designation.
FWS-R8-ES-2013-0042	<ul style="list-style-type: none"> Proposed critical habitat rule (78 FR 64328, October 28, 2013). First withdrawal of the 2013 proposed listing and critical habitat rules (80 FR 22828, April 23, 2015). 	<ul style="list-style-type: none"> References cited for proposed critical habitat designation.
FWS-R8-ES-2018-0106	<ul style="list-style-type: none"> Reopening of the comment period on the 2013 proposed listing rule (84 FR 14909, April 12, 2019). Second withdrawal of the 2013 proposed listing and critical habitat rules (85 FR 18054, March 31, 2020). 	<ul style="list-style-type: none"> Species Report for the Bi-State Distinct Population Segment of Greater Sage-Grouse, January 2020. References cited in proposed rule withdrawal.
FWS-R8-ES-2018-0107	<ul style="list-style-type: none"> Reopening of the comment period on the 2013 proposed critical habitat rule (84 FR 14909, April 12, 2019). Second withdrawal of the 2013 proposed listing and critical habitat rules (85 FR 18054, March 31, 2020). 	<ul style="list-style-type: none"> References cited in proposed rule withdrawal.
FWS-R8-ES-2023-0052 (This is the docket number for this document, and comments should be submitted to this docket.)	<ul style="list-style-type: none"> Reopening of the comment periods on the 2013 proposed listing rule (78 FR 64358, October 28, 2013) and proposed critical habitat rule (78 FR 64328, October 28, 2013). 	

Public Comments

Please do not resubmit comments or information already provided on the proposed rules (78 FR 64358 and 64328; October 28, 2013) during the initial comment periods in 2013 or any of the subsequent comment periods (in 2014, as the result of several extensions and reopenings of the comment periods, and in 2019). Any such comments are incorporated as part of the public record of this rulemaking proceeding, and we will fully consider them in the preparation of our determination. Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

Comments and materials we receive will be available for public inspection on <https://www.regulations.gov> at Docket No. FWS-R8-ES-2023-0052. If you submit information via <https://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this

proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species is endangered instead of threatened, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. For critical habitat, our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species. In addition, we may change the parameters of the prohibitions or the exceptions to those prohibitions in the proposed 4(d) rule if we conclude it is appropriate in light of comments and new information received. For example, we may expand the prohibitions to include prohibiting additional activities if we conclude that those additional activities are not compatible with conservation of the species. Conversely,

we may establish additional exceptions to the prohibitions in the final rule if we conclude that the activities would facilitate or are compatible with the conservation and recovery of the species.

Authors

The primary author of this document is the Reno Fish and Wildlife Office in Reno, Nevada, in coordination with the Pacific Southwest Regional Office in Sacramento, California.

Authority

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) is the authority for this action.

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

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