

# Permitting Overview for Electric Transmission Projects

*Bret A. Sumner*

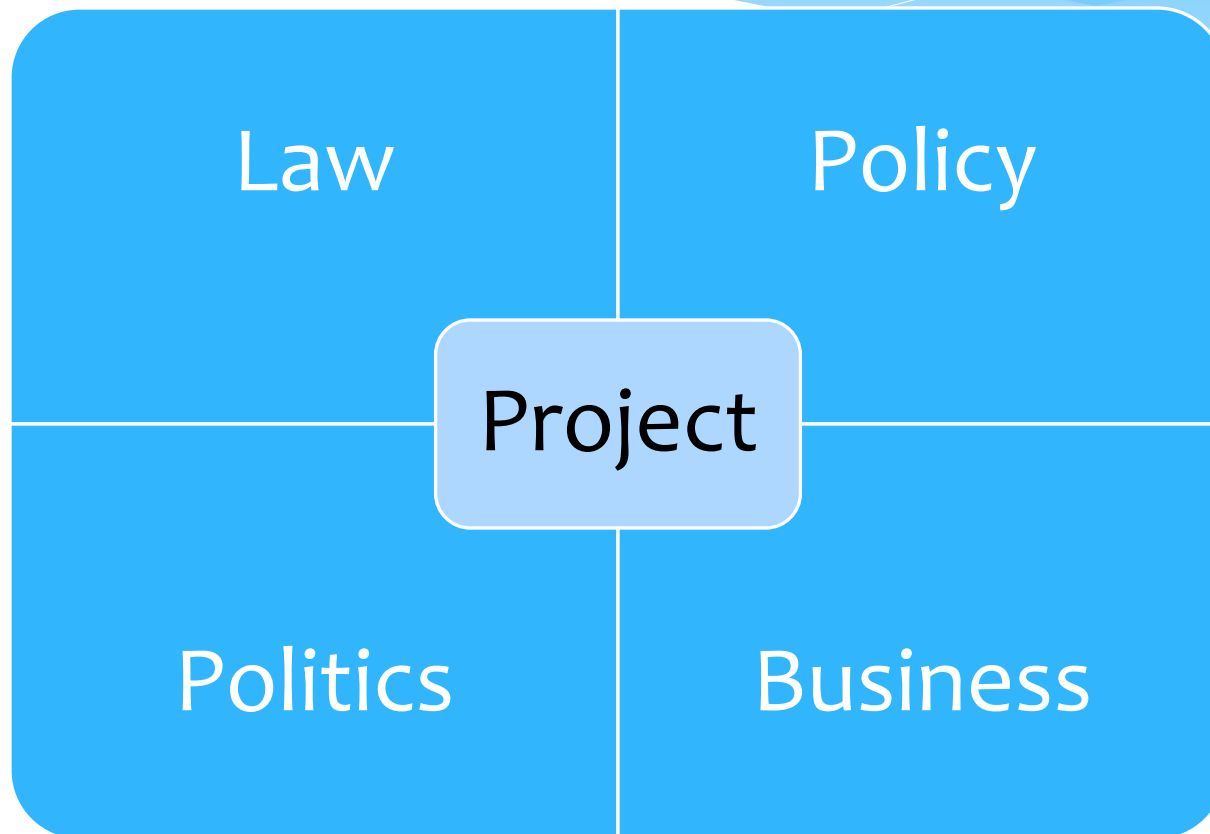
**BEATTY & WOZNIAK, P.C.**  
*ENERGY IN THE LAW*

# Presentation Overview

- \* Macro-Strategic Considerations
- \* State and Local Siting and Permitting
- \* Eminent Domain and Condemnation
- \* Key Federal Statutes and Compliance Issues
- \* Resource and Access Challenges and Strategies
- \* Litigation Risk Management

# Macro-Strategic Perspective

## Federal, State and Local Considerations



# Electric Transmission Permitting Initiatives

- \* Energy Policy Act of 2005
  - \* Section 368 - Western Energy Corridors
  - \* Section 1221 - National Interest Electric Transmission Corridors
  - \* Section 372 – Executive Branch MOU
- \* FAST ACT of 2015 (Fast-41)
- \* 2017 Presidential Executive Order 13807
- \* 2017 BLM Policy for Federal Rights of Way (ROW)
- \* 2019 Federal Agency MOU

# FAST Act of 2015 (FAST 41): Streamlined Permitting

“[A]ny activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for **renewable** or conventional **energy** production, **electricity transmission**, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing or any other sector....”

# Overview of FAST-41

- \* Federal Permitting Improvement Steering Council
- \* Coordination and oversight procedures for infrastructure projects involving federal agencies
- \* Procedural reforms apply to projects involving investment greater than \$200 million
- \* Sets deadlines for permitting decisions; shorter deadlines for litigation challenging permitting decisions

# State and Local Project Siting and Permitting

- \* State agencies and commissions
- \* County and local government authorities
- \* Community outreach
- \* Federal and State Permitting Overlap
  - \* Clean Water Act Sections 404 and 401
  - \* Endangered Species Act and state wildlife agencies

# Land Access: Eminent Domain and Condemnation Procedures

- \* Certificates of Public Convenience and Necessity
- \* States model from the Takings Clause of the Fifth Amendment of the U.S. Constitution
- \* Eminent domain authorities
- \* Condemnation procedures
- \* Landowner compensation

# Surface Use Agreements for Private Land Access

- \* Surface Use Agreements
- \* Easements
- \* Survey Access Agreements
- \* Considerations when negotiating with land owners

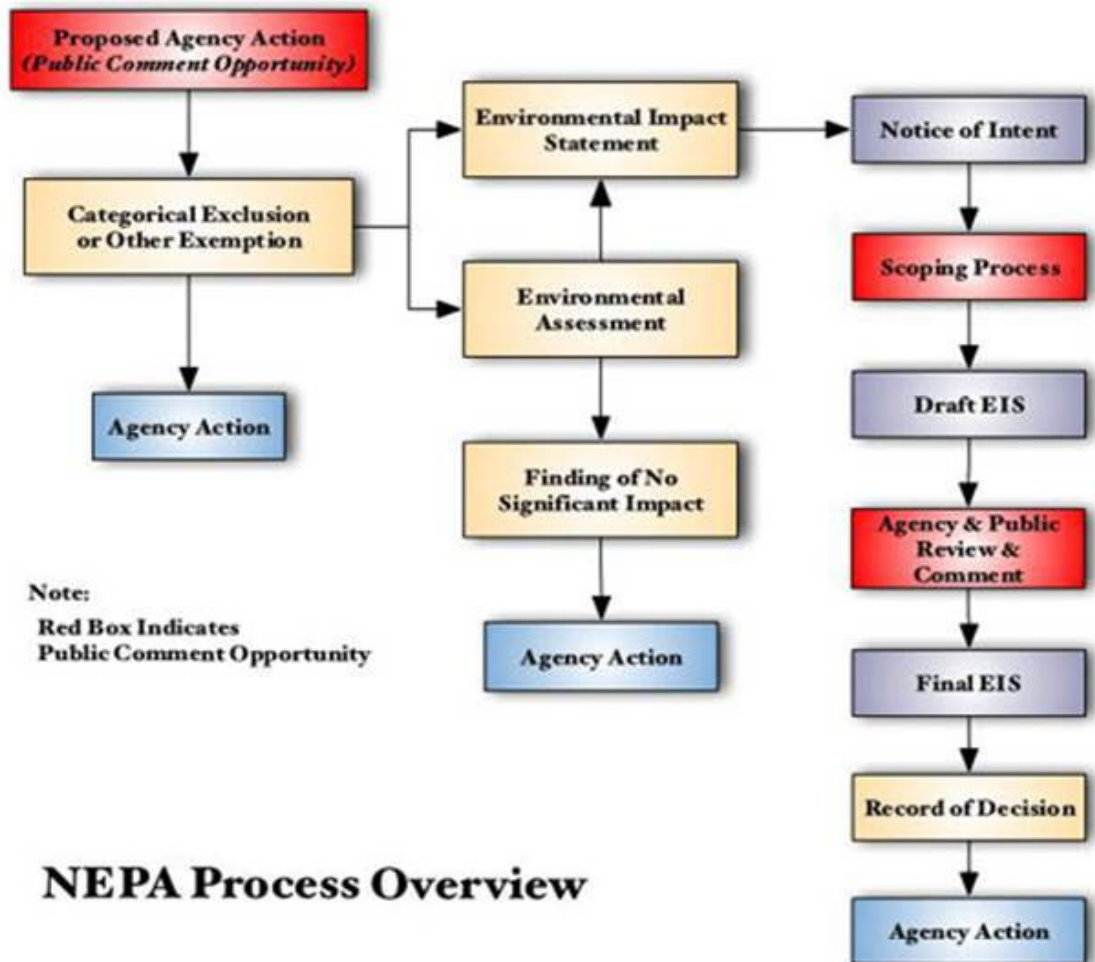
# Key Federal Statutes and Permits Applicable to Private Lands

- \* National Environmental Policy Act (NEPA)
- \* Endangered Species Act (ESA)
- \* National Historic Preservation Act (NHPA)
- \* Clean Water Act (CWA)

# National Environmental Policy Act

- \* Compliance triggered by a federal nexus (e.g., federal permit)
- \* Twin goals of promoting informed agency decision-making and involving the public
- \* Requires agencies to take a “hard look” at the environmental consequences of the proposed project

# NEPA Procedures



## NEPA Process Overview

# ESA Compliance on Private Lands: Access and Permitting Issues

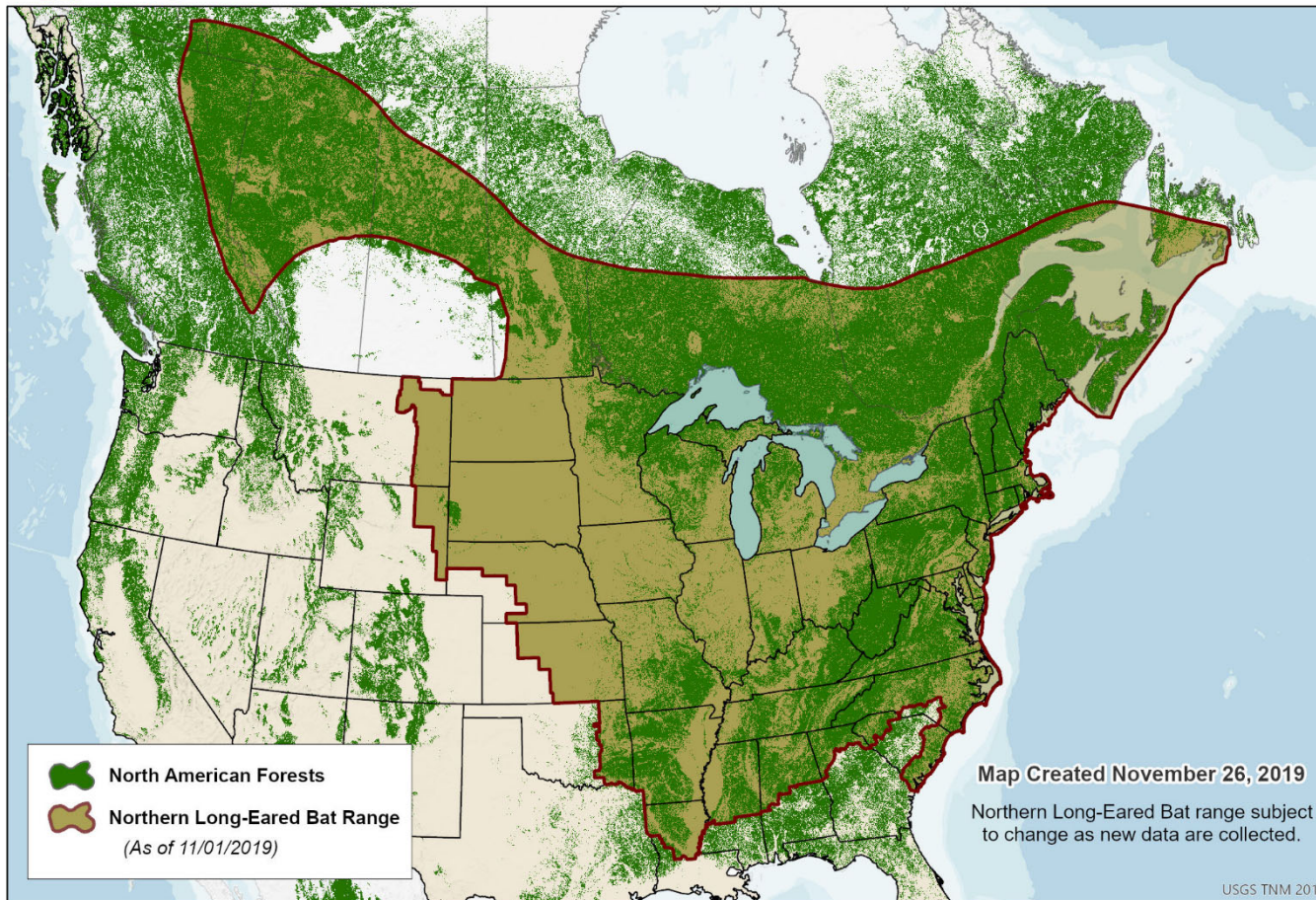
- \* Endangered Species Act
  - \* Listed Endangered or Threatened Species
  - \* Applies on public and private lands
  - \* Designation of Critical Habitat
  - \* Provides restrictions and mitigation requirements
- \* State Sensitive Species and Habitat
- \* BLM, USFWS, State wildlife agencies

# ESA Compliance: Example of geographic scope



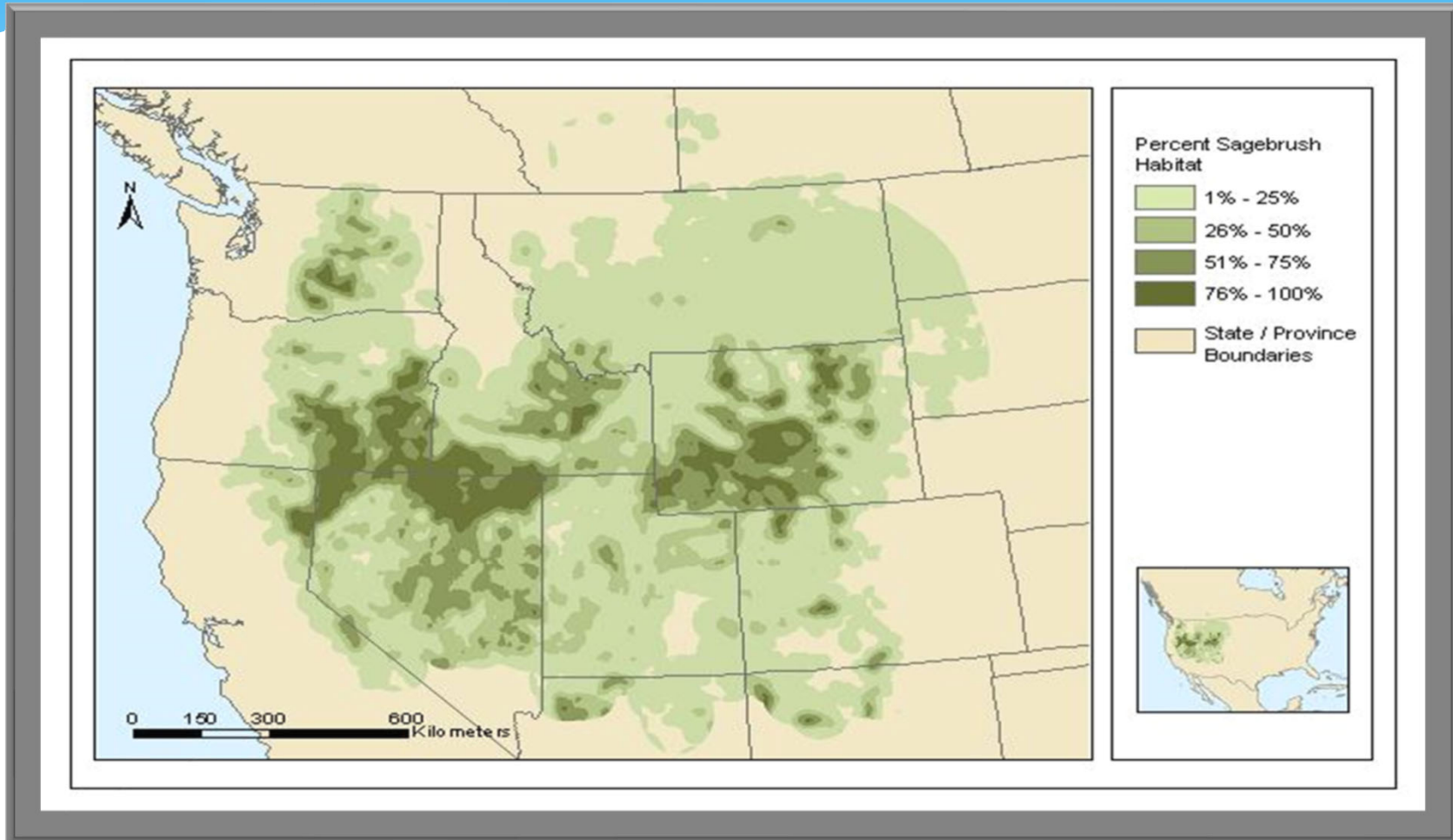
U.S. Fish & Wildlife Service

## Northern Long-Eared Bat Range

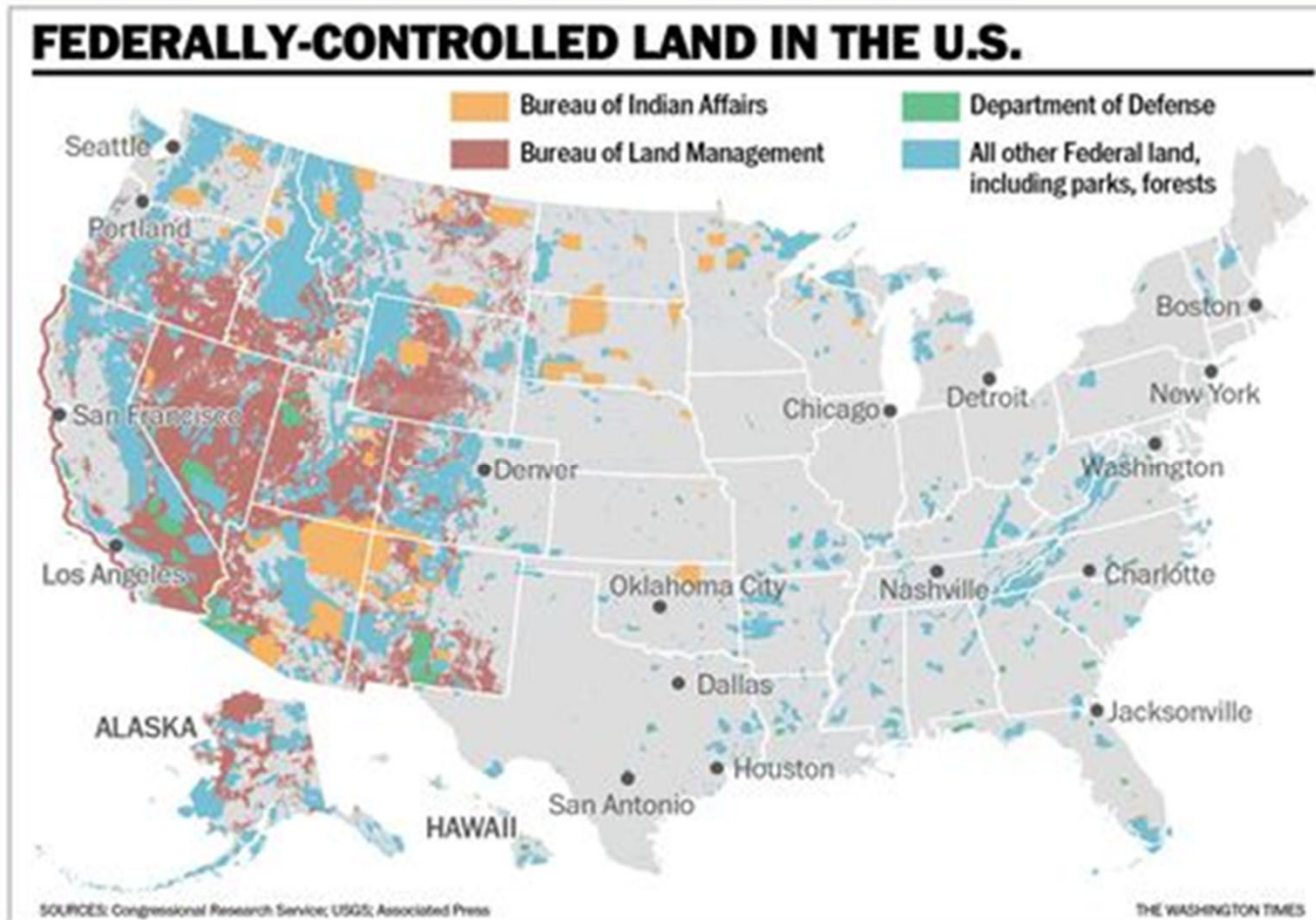


# Permitting in the Sagebrush Sea

186 Million Acres in 11 States



# Federal Land Ownership



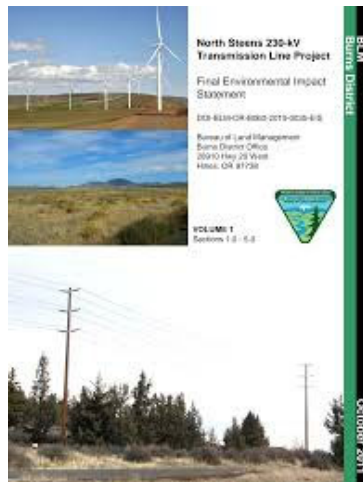
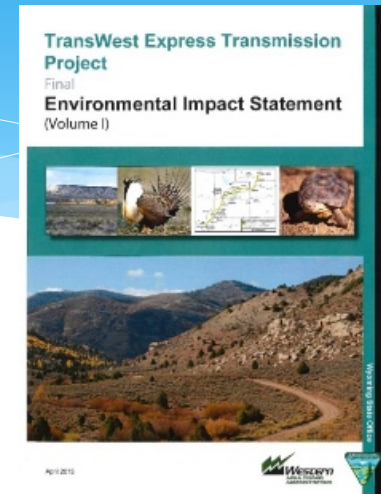
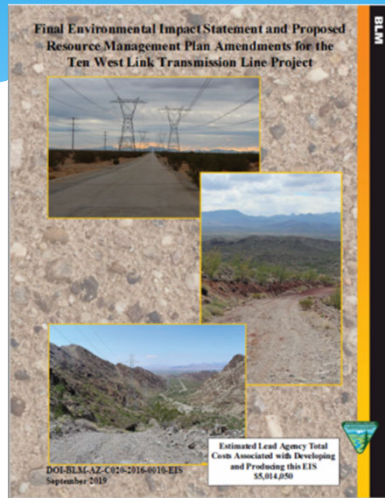
# Federal Land Management Agencies

- \* U.S. Department of the Interior
  - \* Bureau of Land Management
  - \* Fish & Wildlife Service
  - \* Bureau of Indian Affairs
  - \* National Park Service
- \* U.S. Department of Agriculture
  - \* Forest Service

# Federal Land Policy and Management Act (FLPMA)

- \* Directs BLM to develop federal land use plans called “Resource Management Plans” (RMPs)
- \* RMPs provide a framework for project permitting and related requirements for environmental compliance
- \* Once an RMP is approved, all future management actions, such as authorization of a transmission construction project, must conform with the RMP.

# Federal Land Use Plans: The “Big Picture”



EA or  
DNA

Project EA

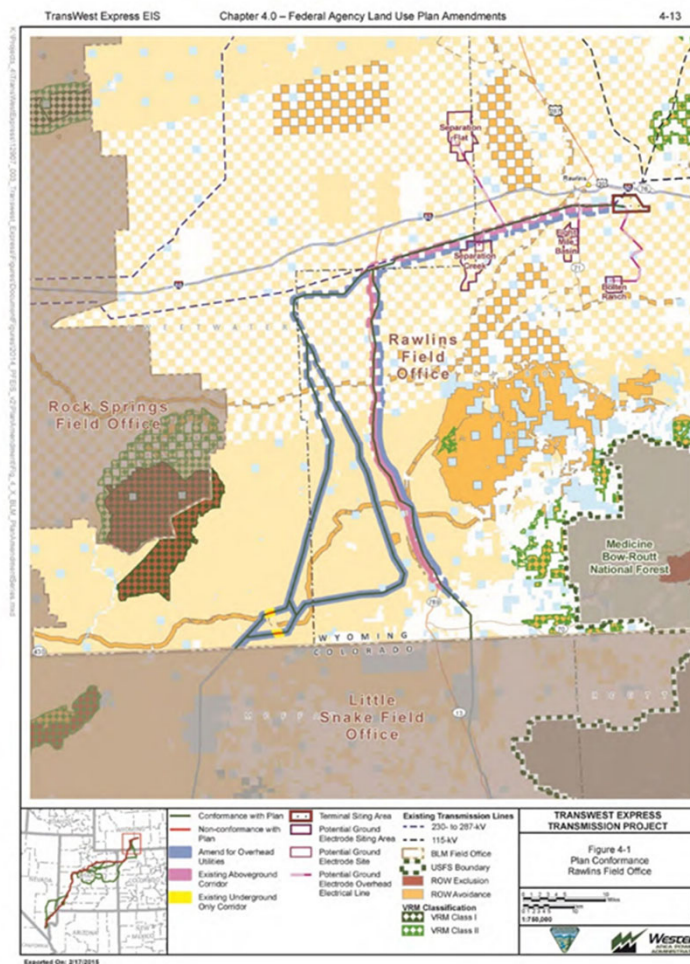
Programmatic  
or Project Level EIS

Resource Management Plan

# Federal Right of Way Permit

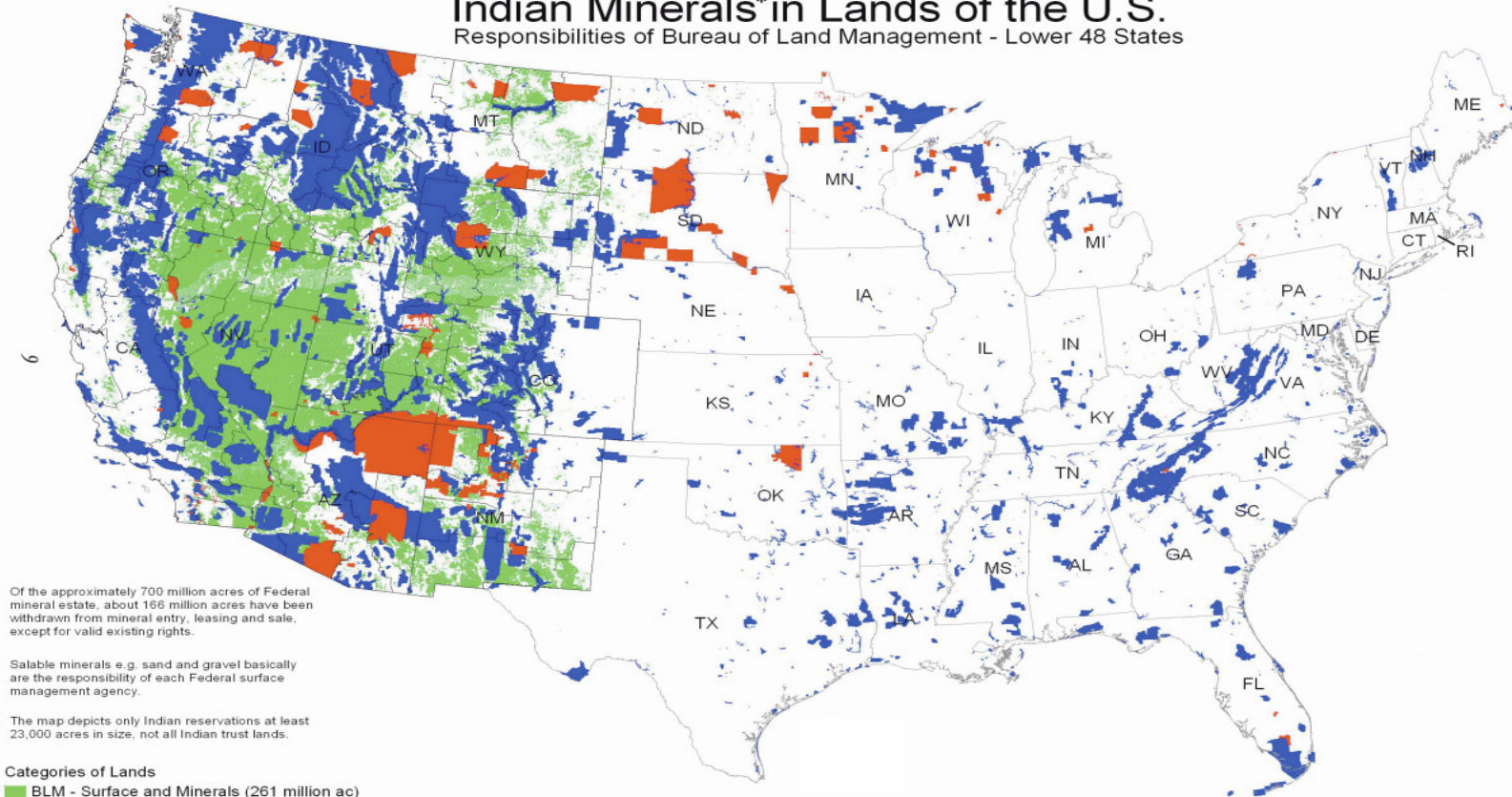
- \* Section 504(g) of FLPMA
- \* “The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the [BLM]”
- \* 2018 Congressional Amendment to FLPMA for Electric Transmission
- \* 2019 MOU between federal agencies and the Edison Electric Institute

# Checkerboard Land Ownership: Issues and Challenges



# Federal Mineral Ownership

## Public Lands, On-Shore Federal and Indian Minerals\* in Lands of the U.S. Responsibilities of Bureau of Land Management - Lower 48 States



- \* Of the approximately 700 million acres of Federal mineral estate, about 166 million acres have been withdrawn from mineral entry, leasing and sale, except for valid existing rights.
- \* Salable minerals e.g. sand and gravel basically are the responsibility of each Federal surface management agency.
- \* The map depicts only Indian reservations at least 23,000 acres in size, not all Indian trust lands.

### Categories of Lands

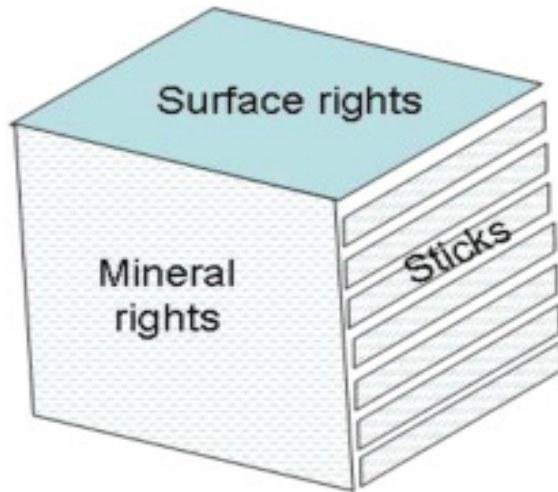
- BLM - Surface and Minerals (261 million ac)
- Other Federal Lands - Minerals (380 million ac)
- Non-Federal Surface (includes 58 million ac of Split - Estate Federal Minerals)
- Indian Trust Lands (56 million ac) except Mineral Operations for Osage Minerals
- ▬ BLM Administration Boundaries

No warranty is made as to the accuracy, reliability, or completeness of these data for individual use or aggregate use with other data. Spatial information may not meet National Map Accuracy Standards. This information may be updated without notification.

Produced By :  
WVO-210, Leonard Gore, Jr. (Graphics)  
WVO-300, Sie Ling Chiang (Data)  
Documentation available in file  
September 2003

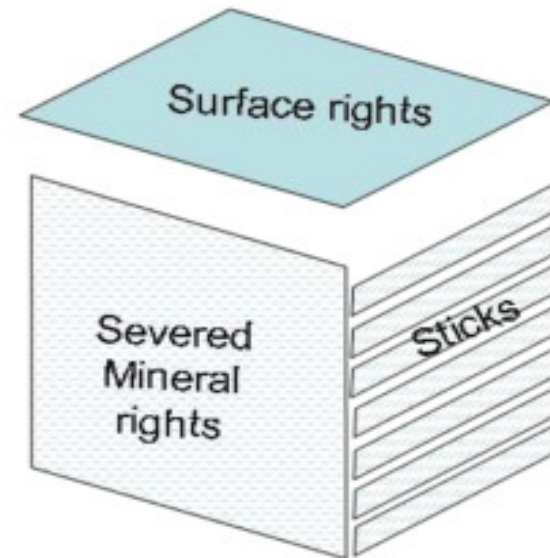
# Split Estates: A Key Access Issue - Severed Surface and Subsurface Ownership

a) Unified Estate



Landlord can lease all or fractional part of mineral interest

b) Split Estate

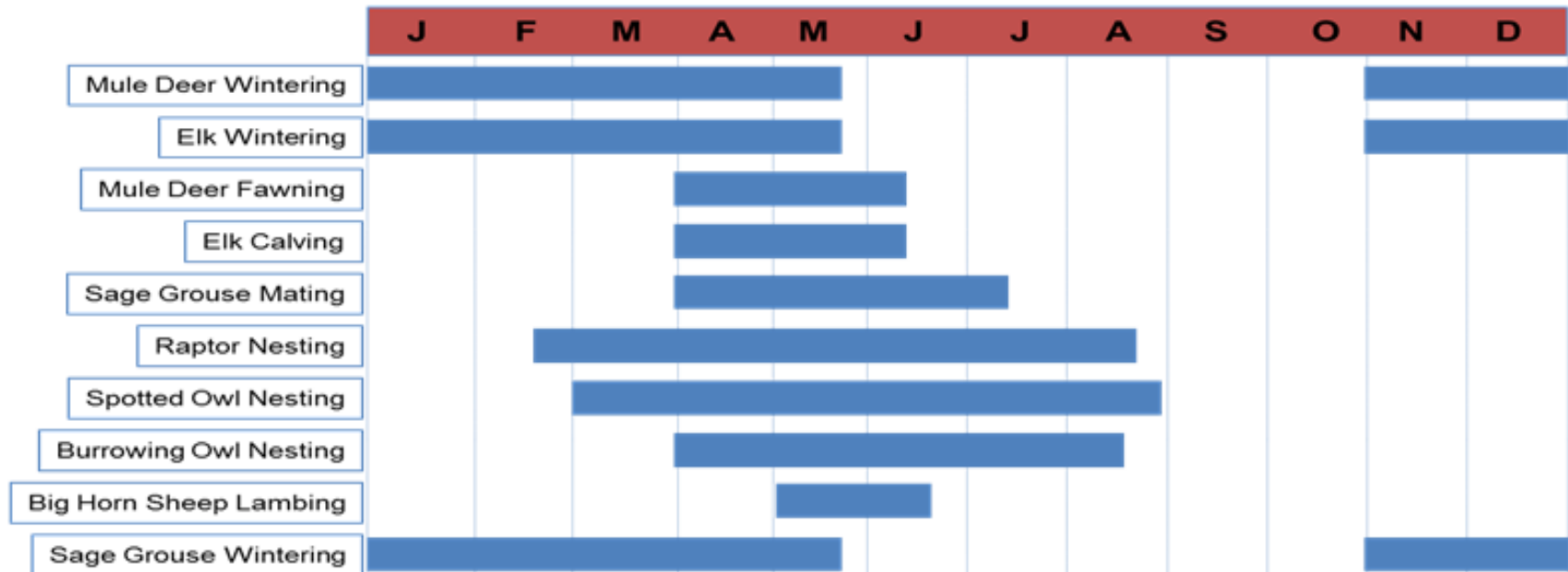


Landlord has sold mineral rights after splitting the estate.

Mineral rights are sold onward as leasehold estate.

# Construction Planning and Permitting: Wildlife Seasonal Restrictions

## Typical Wildlife Seasonal Restrictions



# Cultural and Tribal Resources: Access and Permitting Issues

- \* Some tribal reservations are large; locating resources there or traversing them requires agreements with the tribe that then must be ratified by BIA
- \* Many tribes in the West also assert treaty rights to protect resources or limit development in “ceded lands.”
- \* Early and often consultation with tribes is essential to avoid potentially serious delays

# Litigation Risk Management

- \* Recent legal challenges against transmission projects
- \* Federal permits and environmental documents are “Exhibit A” to lawsuits
- \* Strategies to manage and minimize litigation risk
- \* Building your administrative record for project permits

# Conclusion

- \* Study the surface and legal landscapes
- \* Planning and Siting Due Diligence
- \* Macro-Strategic Considerations
  - \* Ascertain federal agencies and permits involved
  - \* Integrate decision-points into overall timeline
- \* Litigation Risk Assessments

# Questions?

Thank you for your time!

Bret Sumner Contact Information:

[bsumner@bwenergylaw.com](mailto:bsumner@bwenergylaw.com)

(303) 407-4436

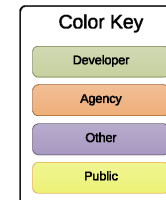
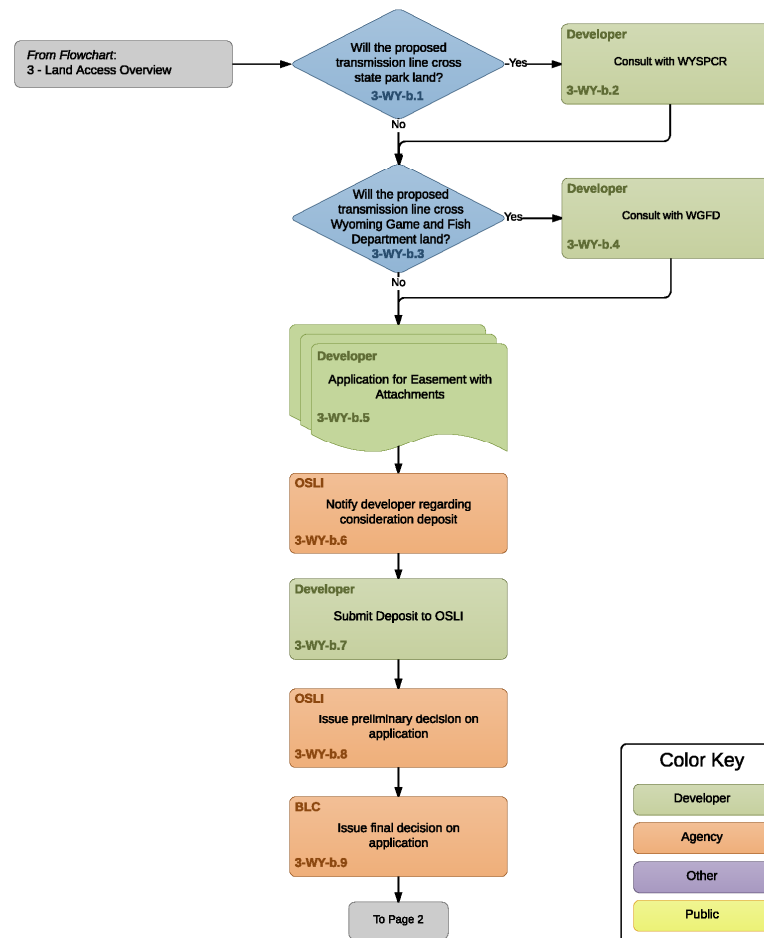
# Additional Demonstrative Slides: Land Access and Resource Issues

- ▶ The following slides will only be presented in the event helpful to answering specific questions
- ▶ Slides can be provided with presentation materials to provide additional context to land access and resource issues common for transmission projects

# Example: Wyoming State Land Right-of-Way Process

**Flowchart 3-WY-b:**  
**State Land Right-of-Way**  
 Version: 26 September 2017

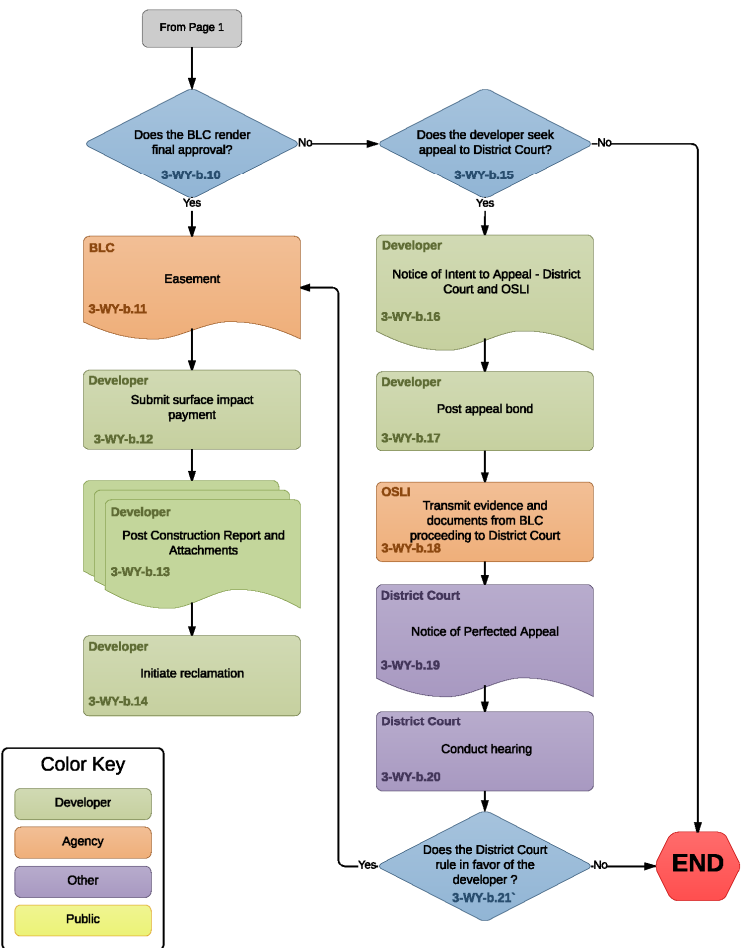
Page 1 of 2



Developed by the National Renewable Energy Laboratory for the DOE

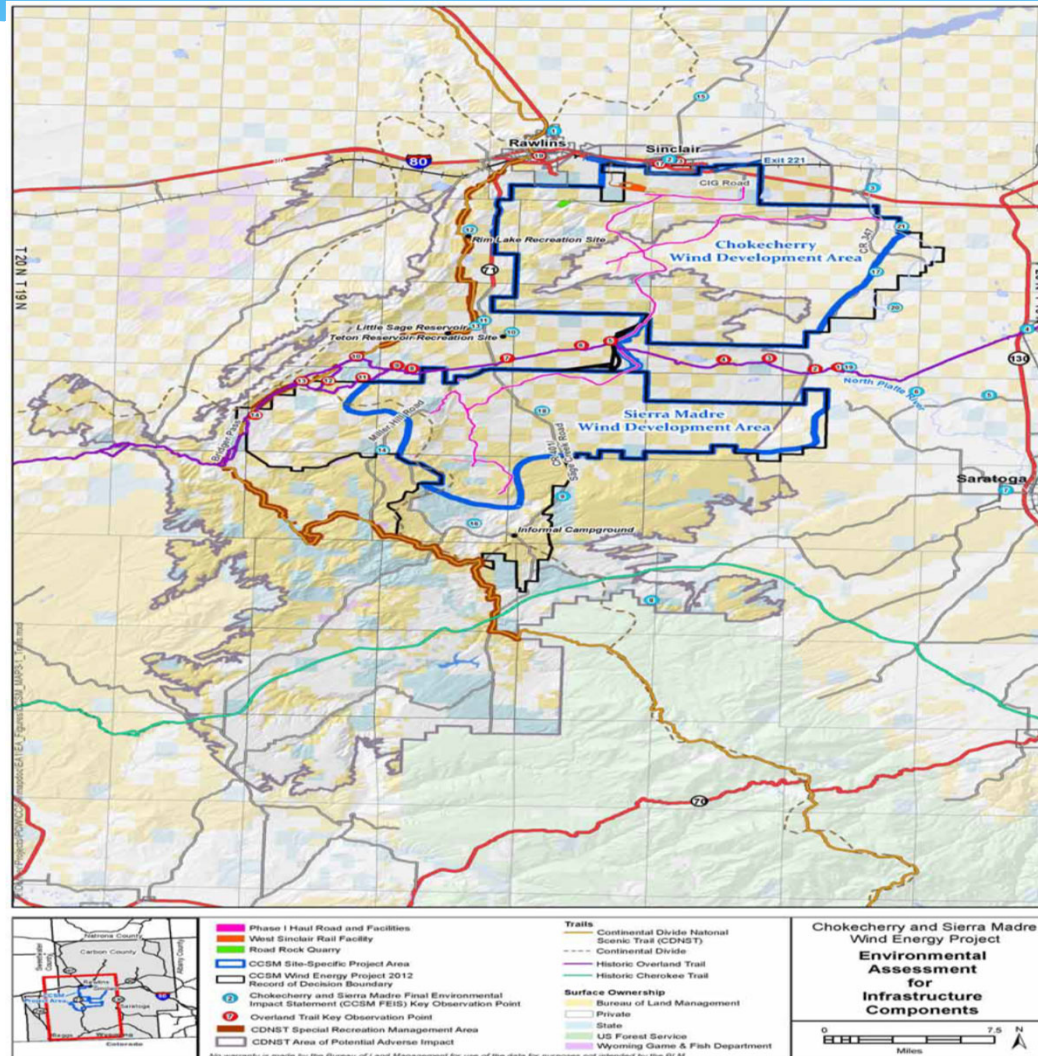
# Part 2- WY Right-of-Way Process

Flowchart 3-WY-b: (continued)  
State Land Right-of-Way



Developed by the National Renewable Energy Laboratory for the DOE

# National Scenic Trails and Cultural Resources

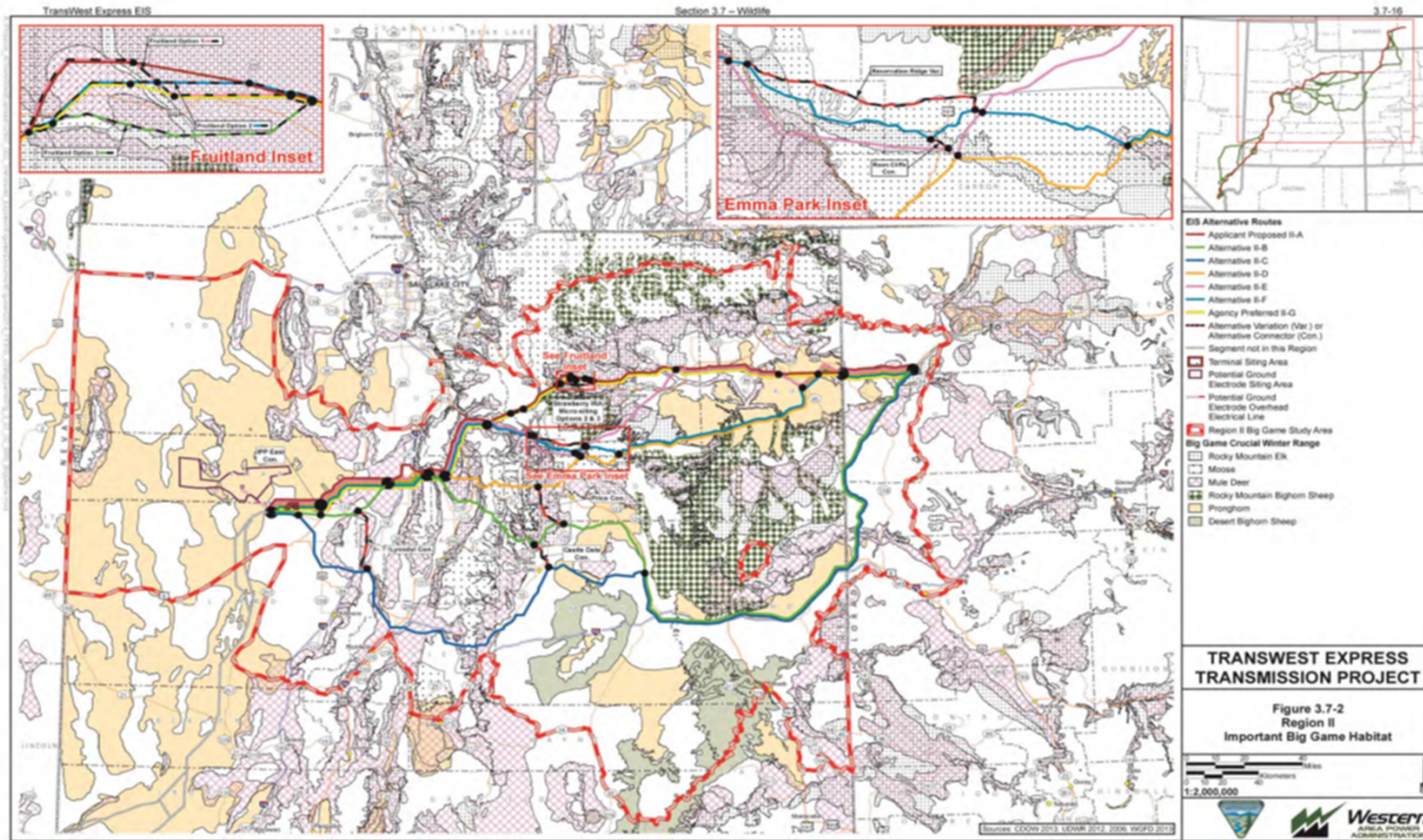


# Example: Converse County, Wyoming

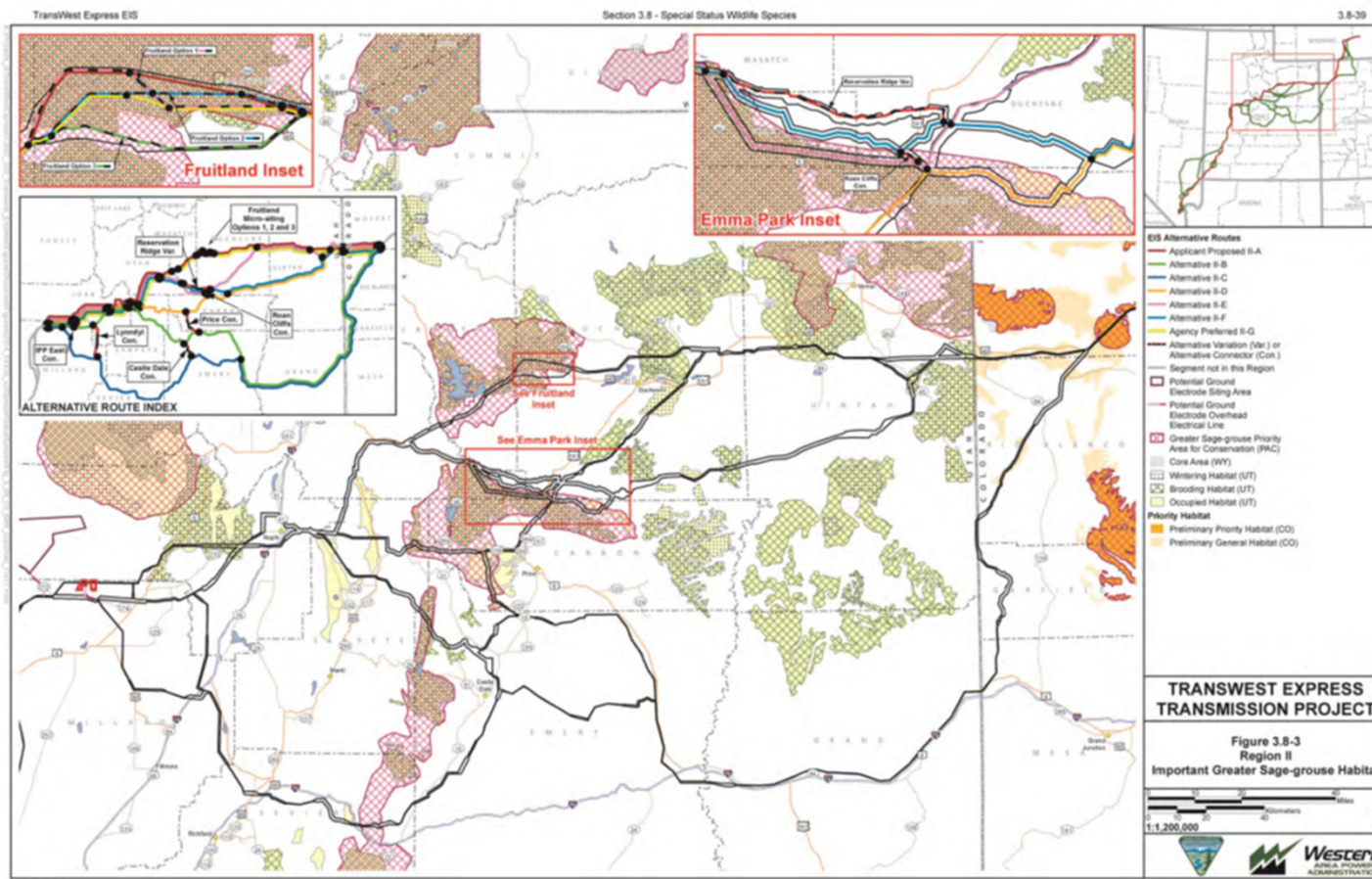
## Wildlife Seasonal Restrictions – BLM Casper Field Office

Species	Spatial Designation	Seasonal Construction Restriction
Big game	Big-game crucial winter range	Nov. 1 – April 30
Sharp-tailed grouse	2 miles from lek	March 1 – June 15
Greater sage-grouse	Winter concentration areas	Dec. 1 – March 14
Greater sage-grouse	Priority habitat	March 15 – June 30
Greater sage-grouse	Priority connectivity habitat, 4 miles from occupied lek	March 15 – June 30
Greater sage-grouse	General habitat, 2 miles from occupied lek	March 15 – June 30
Golden eagle	½ mile from active nest	Feb. 1 – July 31
Ferruginous Hawk	1 mile from active nest	Feb. 1 – July 31
Other raptors	¼ to ½ mile from active nest	Feb. 1 – July 31

# Mule Deer Crucial Winter Range and Migration Corridors



# Greater Sage Grouse and its Habitat



# Migratory Birds Seasonal Time Frames

TransWest Express EIS Section 3.22 – Migratory Birds 3.22-51

Families	January	February	March	April	May	June	July	August	September	October	November	December
Waterfowl ECCP/FAMS (8 species)	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Grain, Pheasant, Quail, Turnip ECCP/FAMS (8 species)												
Jacks, Goshawk, Cormorant ECCP/FAMS (1 species)												
Intons, Bta ECCP/FAMS (1 species)												
California Condor ECCP/FAMS (2 species)												
Eagles ECCP/FAMS (2 species)												
Hawks, Vultures ECCP/FAMS (4 species)												
Rab, Shorebirds ECCP/FAMS (2 species)												
Owls, Terns ECCP/FAMS (8 species)	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Doves, Cuckoo ECCP/FAMS (2 species)												
Falcons ECCP/FAMS (2 species)												
Owls, Nightjar ECCP/FAMS (4 species)												
Buffs to Woodpeckers ECCP/FAMS (13 species)												
Flycatchers to Vireos ECCP/FAMS (8 species)												
Jays, Larks, Swallows ECCP/FAMS (5 species)												
Tits to Creepers ECCP/FAMS (2 species)												
Wrens to Grackles ECCP/FAMS (2 species)												
Thrushes, Minors, Pipits ECCP/FAMS (2 species)												
Warblers, Wrenblers, Tanspers ECCP/FAMS (7 species)												
Cherries, Towhees, Grosbeaks ECCP/FAMS (11 species)												
Blackbirds, Finches ECCP/FAMS (7 species)												

Months are divided into quarters:  
 Approximate Nesting Seasons for Avian Species, Which Could Occur in the Regions II and III Wildlife Analysis Areas.  
 Approximate Nesting Seasons for ECCP/FAMS Species, Which Could Occur in the Regions II and III Wildlife Analysis Areas.

<sup>1</sup> Nesting season for the California Condor begins in mid-February and successful nesting takes 2 years.  
<sup>2</sup> Excludes crossbills which may breed in any month.  
 Source: Balch and Harrison 1997; Nelson and Leukering 2007.

Figure 3.22-8 Approximate Breeding Seasons for Avian Species in Regions II and III

# Checkerboard Landownership

