



November 20, 2014

*Via Electronic Mail & Certified Mail, Return Receipt Requested*

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**Re: Notice of Intent to Sue: Violations of the Endangered Species Act (“ESA”) in Listing the Gunnison Sage-Grouse As Threatened**

Dear Director Ashe, Secretary Jewell, and Regional Director Walsh:

On behalf of the Center for Biological Diversity and Western Watersheds Project, we hereby provide 60-days notice of the organizations’ intent to sue the U.S. Fish and Wildlife Service (Service) and the U.S. Department of the Interior over violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (ESA), for listing Gunnison sage-grouse as a threatened species instead of an endangered species. This notice is provided pursuant to Section 11 of the ESA. 16 U.S.C. § 1540(g).

The Center for Biological Diversity is a national, non-profit conservation organization supported by more than 800,000 members and online activists. Western Watersheds Project is a non-profit conservation organization with the mission of protecting and restoring western watersheds and wildlife through education, public policy initiatives, and litigation. The Center, WWP, and their members have a long-standing interest in the conservation of Gunnison sage-grouse and the species’ little remaining habitat in Colorado and Utah.

With their elaborate mating dance, small size, and distinctive white barred tail feathers, Gunnison sage-grouse were once abundant in prairie habitats in southwestern Colorado, southeastern Utah, northeastern Arizona, and northwestern New Mexico. Due primarily to habitat destruction and fragmentation, today Gunnison sage-grouse populations are limited to southwestern Colorado and a small population in Utah existing in only seven percent of their historic range. 78 Fed. Reg. 2,486,

2,495 (Jan. 11, 2013). The remaining birds are at great risk of extinction from threats including habitat destruction and fragmentation due to livestock grazing, oil and gas drilling, residential development, motorized recreation, and urbanization and the related road and fence construction and incursion of non-native plant species that accompanies these activities, as well as climate change, drought, and small population size (and related demographic, genetic and environmental stochasticity).

Despite the precarious status of Gunnison sage-grouse, the Service decided to list the species as threatened rather than endangered. This decision is based upon political pressure and the Service's willingness to not rely upon the best available science on the species. The ESA does not allow for this trade-off between politics and science and the Service's final rule is thus, unlawful.

The Gunnison sage-grouse listing decision was made in contravention of the requirements of the ESA and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706. Moreover, having only proposed to list Gunnison sage grouse as an endangered species, the Service made its threatened decision in violation of the public notice and opportunity for comment requirements of the ESA and the APA.

## **I. The Endangered Species Act.**

Congress passed the Endangered Species Act ("ESA") to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The Supreme Court's review of the ESA's "language, history, and structure" convinced the Court "beyond a doubt" that "Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). As the Court found, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

The ESA requires the Secretary of Interior to determine whether any species is "endangered" or "threatened," and only those species that have been listed as "endangered" or "threatened" receive protection under the ESA. 16 U.S.C. § 1533(a). A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

No matter how imperiled a species might be, it does not receive any protection under the ESA until it is officially listed under Section 4 of the Act as either threatened or endangered. 16 U.S.C. § 1533. In making all listing determinations, the Secretary must consider five statutory listing criteria: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. *Id.* § 1533(a)(1). If a species meets the definition of threatened or endangered because it is imperiled by any one or more of these five factors, the Secretary must list the species. *Id.* § 1533(1). The Secretary must base all listing determinations "solely on the basis of the best scientific and commercial data available." *Id.* § 1533(b)(1)(A). As a result, Congress aptly described Section 4 of the ESA, 16 U.S.C. §

1533, as “[t]he cornerstone of effective implementation of the Endangered Species Act . . . .” S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10.

When a species is listed or proposed for listing, Section 7 requires all federal agencies to “insure” that their actions neither “jeopardize the continued existence” of any such species nor “result in the destruction or adverse modification” of its “critical habitat.” *Id.* § 1536(a)(2).

Once a species is listed under the ESA, an array of statutory protections applies. The Service must designate “critical habitat” for listed species, 16 U.S.C. § 1533(a)(3), require the Service to “develop and implement” recovery plans for listed species, *id.* §1533(f), authorize the Service to acquire land for the protection of listed species, *id.* § 1534, and make federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species, *Id.* § 1535(d).

Additionally, Section 9 of the statute prohibits various activities including the “take” of all endangered species. 16 U.S.C. § 1538(a). “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). The statute provides the Secretary may extend the take and other prohibitions in Section 9 to threatened species. *Id.* § 1533(d). The Secretary has applied the take prohibition to all threatened species by regulation. 50 C.F.R. § 17.31(a).

## **II. Gunnison Sage Grouse and the Long Road to ESA Protection.**

Gunnison sage-grouse (*Centrocercus minimus*) are beautiful birds with the males displaying long, white barred tail feathers and dark colored, lengthy filoplume feathers and white chests. Known for their ritual mating dance designed to court females at breeding grounds known as leks, Gunnison sage-grouse are a slightly smaller grouse species when compared to greater sage-grouse.

Formerly, Gunnison sage-grouse were found in areas of Colorado, Utah, Arizona, and New Mexico. Today, the species exists in only seven percent of its historic range. Within its current range, Gunnison sage-grouse are limited to seven or six isolated populations that exist only in Colorado and Utah.

The birds require large spans of un-fragmented habitat. Their numerous predators (from carnivores such as foxes to other birds such as corvids) make Gunnison sage-grouse vulnerable to habitat fragmentation. Roads provide carnivore access and fences and powerlines provide easy perches for predatory bird species. However, direct mortality also results from collisions on roads or with fences, as well as nest trampling by humans, off-road vehicles, and cattle. Due to the threat of predation “[s]age-grouse need significant grass and shrub cover for protection from predators, particularly during nesting season . . . .” 78 Fed. Reg. at 2,501. Cover of a height of “18 cm (7 in.) [is] needed for predator avoidance.” *Id.*

Since 2000 efforts have been made to protect Gunnison sage-grouse under the ESA. After petitioning the Service and several lawsuits, the species was considered to be a candidate for protection under the ESA in 2010. Only after further litigation and landmark settlements

requiring the Service to work through the backlog of imperiled but unprotected species, was the Gunnison sage-grouse finally proposed for listing under the ESA on January 11, 2013.

That proposal was for an endangered listing with a critical habitat designation. On March 7, 2013, the Service extended the comment period on the endangered listing and critical habitat designation citing requests for an extension “from the public.”

On July 18, 2013, the Service extended the endangered rulemaking and critical habitat designation by six months citing “substantial disagreement regarding the sufficiency and accuracy of the available data relevant to our determinations.” 78 Fed. Reg. 43,123 (July 18, 2013). While the Service cited some scientific concerns, it also cited to “commenters” disagreeing with the Service’s characterization of Gunnison County’s “regulatory mechanisms” and growth projections in the county. *Id.* at 43,124.

On September 19, 2013, the Service again requested comments on its endangered rulemaking and critical habitat designation. 78 Fed. Reg. 57,604 (Sept. 19, 2013). The Service asked for additional information relevant to the rulemakings, provided notice of information sessions, and provided supplementary documents related to critical habitat.

On November 4, 2013, the Service again reopened the comment period on its endangered rulemaking and critical habitat designation and announced the rescheduling of information sessions. 78 Fed. Reg. 65,936 (Nov. 4, 2013).

The Service then sought and obtained an extension for the rulemakings citing the appropriations lapse and need to review comments. The six-week extension was announced via press release on February 12, 2014. The Service did not reopen the comment period on the rules and did not indicate any intent to alter the endangered listing.

On May 6, 2014, the Service announced another six-week extension of the rulemaking by press release. In that announcement, *for the first time*, the Service indicated a possible intent to downgrade the listing from endangered to threatened. The Service stated the extension was necessary to take:

additional time for the Service to review information received during the public review process on whether final listing as a “threatened species” may be necessary. The Service originally proposed an “endangered species” listing. The Service will propose a 4(d) special rule to tailor the take prohibitions of the ESA to those necessary and advisable for conservation of the species. This time extension will allow for public engagement and comment on that special rule before a final listing determination.

The Service never opened a comment period on the threatened listing or on any proposed 4(d) rule. Instead, on November 12, 2014, the Service held a press conference announcing its intent to list Gunnison sage-grouse as threatened instead of endangered, to issue a 4(d) rule for the species at some point in 2015, and to designate critical habitat. That final rule was noticed in the Federal Register on November 20, 2014.

### **III. Legal Violations.**

We hereby provide notice of the legal violations, including procedural and substantive violations, associated with the Service's promulgation of a rule listing Gunnison sage-grouse as threatened, instead of endangered.

#### **A. Public Notice and Comment Violations.**

By failing to provide any public notice or opportunity for comment upon the Service's change in position that the Gunnison sage-grouse should be listed as a threatened species, instead of an endangered species the Service violated the ESA and the APA. As discussed above, this rulemaking has been in the works since January 11, 2013. During this time period, the Service sought and obtained several extensions for its final determination, but never once proposed a threatened listing or issued a draft 4(d) rule. As a result, the public was cut out of the agency's decision-making process in contravention of applicable laws.

The ESA requires the Service "not less than 90 days before the effective date of the regulation" to "publish a general notice and *the complete text of the proposed regulation* in the Federal Register . . . ." 16 U.S.C. § 1533(b)(5)(A)(i) (emphasis added). "The APA requires federal agencies to publish a general notice of proposed rulemaking in the Federal Register to 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation,' and '[a]fter consideration of the relevant matter presented, . . . [to] incorporate in the rules adopted a concise general statement of their basis and purpose.'" *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1075 (9th Cir. 2006) (citing 5 U.S.C. § 553(b)-(c); *see also* 16 U.S.C. § 1533(b)(4) (ESA listing decisions must comply with the APA, 5 U.S.C. § 553)). The APA also requires that a final rule be a logical outgrowth of the proposed rule.

Here, the public never even saw the proposed threatened listing or the Service's justifications for it, let alone was provided with an opportunity to comment thereon. Since proposing to list Gunnison sage-grouse as endangered, the Service had numerous opportunities to seek comment on whether the species should be threatened instead of endangered and to offer up justifications for so doing. However, the agency failed to provide the requisite notice or opportunity for comment.

Moreover, the Service is relying upon new information and studies to justify the threatened listing. Neither the studies nor the Service's justifications were ever shared with the public or offered up for public comment. As a result, the Service has run afoul of the procedural requirements of the ESA and APA by failing to provide the opportunity for comment on significant scientific studies upon which the agency based its decision. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995).

As a result, the rule violates the procedural requirements of the ESA and APA. For this reason alone, the Gunnison sage-grouse listing rule should be remanded to the Service.

## **B. Failure to List the Gunnison Sage-Grouse as Endangered.**

In deciding to list the Gunnison sage-grouse as threatened instead of endangered, the Service violated the substantive requirements of the ESA and APA. These violations include, *inter alia*, the following:

The Service failed to adequately evaluate the ESA's statutory listing factors. 16 U.S.C. § 1533(a)(1). The loss and degradation of habitat for the species; small population size (approximately 4,705 birds); continuing decline in population numbers, loss of one of the original seven populations, and loss of genetic diversity; loss of all but seven percent of its historic range and contraction of the existing range; mortality of birds and habitat fragmentation related to oil and gas activities, development, and grazing; inadequate regulatory mechanisms to ensure its survival; cumulative threats from our changing climate, predation, drought, disease, and off-road recreation; and other threats all support an endangered listing.<sup>1</sup>

In making its threatened determination, the Service failed to utilize the best available science. 16 U.S.C. § 1533(b)(1)(A). The best available scientific information regarding the status of the species and threats to its continued existence are well documented in the Service's proposed endangered listing. In changing its mind and proposing to list the species as threatened the Service has failed to rely on this best available science. For example, the Service relies on various voluntary conservation plans for the species and the goals of those plans, instead of the best available scientific literature on the species, to set new benchmarks for the species and justify a threatened determination. This includes, but is not limited to, side-stepping population data and requirements, downgrading the threat from residential development in Gunnison County.

The Service acted arbitrarily in deciding that Gunnison sage-grouse do not meet the definition of endangered species "throughout all of its range." 16 U.S.C. § 1533. The Service has delineated seven (now six) populations of "widely scattered and isolated" birds. 78 Fed. Reg. at 2,488.<sup>2</sup> The agency is relying upon one of these populations (the Gunnison population) to make its threatened finding because that one population "currently appears stable." Service Press Release (Nov. 12, 2014).<sup>3</sup> However, this conclusion is directly contrary to the Service's previous conclusion that the six (now five) smaller populations' "genetic diversity is important to future rangewide survival of the species." 78 Fed. Reg. at 2,530. Even if the Gunnison population is "stable," it is not a sufficient size to be considered viable. *Id.* (explaining best available science indicates the need for more than 5,000 birds per population). The species needs more than one isolated population to protect against extinction as the Service acknowledges. *See, e.g.*, Service Press Release (Nov. 12, 2014) ("If anything happened to the core population, healthy satellite

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<sup>1</sup> The Service arbitrarily decided in its original proposal that climate change and fossil fuel development are not real threats to the species.

<sup>2</sup> Since the Service proposed Gunnison sage-grouse for listing, the Poncha Pass population appears to have gone extinct and birds exist in this area only through translocation. Thus, it appears that in reality only six populations of Gunnison sage-grouse remain.

<sup>3</sup> Available at: [http://www.fws.gov/mountain-prairie/pressrel/2014/11122014\\_ServiceProtectsGunnisonSageGrouseAsThreatenedUnderESA.php#.VGOtM4fyjow](http://www.fws.gov/mountain-prairie/pressrel/2014/11122014_ServiceProtectsGunnisonSageGrouseAsThreatenedUnderESA.php#.VGOtM4fyjow) (last visited Nov. 12, 2014).

populations would be essential to enable the species to rebound.”). Moreover, the Gunnison population has to be a sufficient size to support the other populations, at least one of which exists only due to translocation of birds from Gunnison. Additionally, the Service did not factor in the substantial contraction of the historic range of the species and the fact that few birds remain in the remaining range. Instability of remaining populations and threatened habitat destruction and further fragmentation (from oil and gas, grazing, human population expansion and development, and the like) are clear existing threats that warrant an endangered listing. When these threats are coupled with drought, predation, climate change, disease, and off-road recreation, the species is in danger of extinction throughout its small remaining range. Simply put, Gunnison sage-grouse are in danger of extinction now throughout all of their range.

In making its threatened determination, the Service arbitrarily defined the “foreseeable future” for the species and failed to apply its definition in the listing decision. The Service also failed to explain why the species qualifies as “endangered” in light of the loss of more than 90 percent of its historic range, or to analyze the portions of the species’ current range to determine whether a portion of its current range is significant, and whether it may be in danger of extinction there due to the concentration of threats in an important geographic area.

It also appears that while the Service finds current voluntary conservation efforts to be insufficient to protect the species, the agency is relying upon these efforts and pressure from the states to down grade the listing from endangered to threatened. While we appreciate the Service taking a firm position that minimal, voluntary efforts will not protect Gunnison sage-grouse from extinction, we find this position difficult to reconcile with the agency’s threatened determination and promise of a 4(d) rule for the species. Saying one thing and doing another is the height of arbitrary decisionmaking and that is what the Service has done here. *See Public Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (“For an agency to say one thing . . . and do another . . . is the essence of arbitrary action.” (citing *New England Coalition on Nuclear Pollution v. NRC*, 234 U.S. App. D.C. 28, 727 F.2d 1127 (D.C.Cir.1984)).<sup>4</sup>

The Service otherwise acted arbitrarily, capriciously, and contrary to law in deciding to list Gunnison sage-grouse as threatened instead of endangered. 5 U.S.C. § 706(2).

### **C. The Service’s Critical Habitat Designation Is Unlawful.**

In designating critical habitat for Gunnison sage-grouse, the Service has violated several requirements of the ESA and the APA. These violations include, *inter alia*, the following:

The Service excludes from its critical habitat designation several areas known to contain Gunnison sage-grouse and that are important for the species’ conservation and survival. These areas allegedly will be covered by the 4(d) rule the Service is planning for the species, but are excluded from the critical habitat designation. The record documents areas that are repeatedly

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<sup>4</sup> We reiterate that just as the Service may not rely upon voluntary measures as a basis for not listing a species as endangered or threatened, *Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (“NMFS must base its decision on current, enforceable measures”); *Fed’n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1169 (N.D. Cal. 2000); *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 744 (W.D. Tex. 1997), the agency also may not rely upon such voluntary measures to serve as the basis for a threatened listing.

used by the species but that are not designated as critical habitat. The Service further failed to include important areas that are not currently occupied by Gunnison sage-grouse in the critical habitat designation. Thus, the critical habitat designation is insufficient.

### **Conclusion**

This letter provides notice that we intend to file suit against the Service and DOI for failing to abide by the ESA and APA in listing Gunnison sage-grouse as threatened and designating critical habitat for the species. If the Service does not act to remedy these violations within 60 days, we will initiate litigation in federal district court against the Service concerning these violations and will seek declaratory and injunctive relief and reasonable attorneys' fees and costs. If you would like to discuss these issues or believe that anything stated above is in error, please contact the undersigned. We appreciate your consideration of this letter and the issues it raises.

Sincerely,



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