

Date: October 20, 2006

To: Whom It May Concern

From: Mark Salvo, Director, Sagebrush Sea Campaign

Re: Role of U.S. Department of the Interior Officials (Washington, D.C.) in the Endangered Species Act “Not Warranted” Listing Determination for Gunnison Sage-grouse

Gunnison Sage-grouse

The Gunnison sage-grouse (*Centrocercus minimus*) is a distinct species from greater sage-grouse (*Centrocercus urophasianus*), identified by researchers in the 1970s and recognized as a new species by the American Ornithologists’ Union in 2000. While its historic range included parts of Colorado, Utah, New Mexico, and Arizona, the species now occurs only in small, isolated populations in southwestern Colorado and southeastern Utah. The current range of Gunnison sage-grouse represents about 8.5 percent of its historic range.

Gunnison sage-grouse are smaller than greater sage-grouse, and have distinct genetic, physical and behavioral characteristics. Like the greater sage-grouse, the Gunnison sage-grouse is known for its impressive mating ritual. The Gunnison sage-grouse mating display includes unique visual and acoustical patterns that do not occur in greater sage-grouse. Gunnison sage-grouse males have more noticeable white barring in their sharply pointed tail feathers (retrices), which are also longer than are those of greater sage-grouse. Gunnison sage-grouse males also have longer, thicker filoplumes (hairlike feathers extending back from the nape of the neck) than greater sage-grouse males, which they use more conspicuously by tossing them above their heads during the strut.

Gunnison sage-grouse populations have declined between 42 and 90 percent over the last 50 years. Livestock grazing, drought, motorized recreation, and poor land use planning threaten the species’ continued existence. West Nile virus, a disease that is fatal to greater sage grouse, has also been discovered in Gunnison sage-grouse range. The current population of Gunnison sage-grouse is estimated at 3,000-6,000 individuals.

Gunnison Sage-grouse Endangered Species Act Listing Petition

In January 2000 conservationists submitted a petition to the U.S. Fish and Wildlife Service (FWS) to list the Gunnison sage-grouse as “endangered” under the Endangered Species Act (ESA). FWS designated the grouse as a “Candidate Species” in 2000, but otherwise refused to list the species as “threatened” or “endangered”—even though the agency concurred with petitioners that Gunnison sage-grouse are highly imperiled. Various FWS “Candidate and Listing Priority Assignment” forms, “Notice of Candidate Designation,” and “Candidate Notices of Review” published between 2000-2005 documented that Gunnison sage-grouse are threatened by ongoing habitat loss, fragmentation, and degradation caused by numerous human activities and inadequate regulatory mechanisms to prevent habitat loss, and that the species warrants listing under the ESA. In 2004, FWS elevated the Candidate Species “Listing Priority Number” for

Gunnison sage-grouse from a “5” to a “2.” A listing priority of “2” means that threats to the species are of a “high” magnitude, and that listing is “imminent.”

After five years of litigation by petitioners, FWS finally relented and agreed to consider the Gunnison sage-grouse for listing under the ESA. In a memorandum to the FWS Director dated July 2, 2004, the (acting) FWS Regional Director, Region 6 (Denver) stated that Gunnison sage-grouse is among the “three highest priority candidates in our Region [for listing]” and proposed publishing a draft rule to list the grouse as “threatened” or “endangered” under the ESA on September 2, 2005, and a final listing rule for the species on September 1, 2006. *Document 367.*

The Role of U.S. Department of the Interior Officials (Washington, D.C.) in Delaying the FWS Listing Decision for Gunnison Sage-grouse

Beginning in March 2005, FWS biologists in Colorado, with the assistance of other regional and FWS field staff and FWS sage grouse experts, prepared multiple drafts of a proposed rules to list Gunnison sage-grouse under the ESA. As required by the ESA, FWS also drafted and mapped proposed “critical habitat” for the species encompassing as many as 923,514 acres. By July 2005, and only after significant vetting by FWS biologists and field staff, the agency produced a draft rule to list Gunnison sage-grouse as “endangered” (*Documents 172, 174*); the agency developed media materials to announce the proposed “endangered” listing in September 2005 (*Documents 105, 106*); and a briefing prepared for the FWS Regional Director reminded him that “Gunnison sage-grouse is one of R6’s highest priorities for listing” and that the agency “received funding to list in FY05.” *Document 407.* There was significant momentum within the agency to propose the Gunnison sage-grouse for listing as “endangered” under the ESA in September 2005, and, in the words of an agency sage grouse biologist, FWS was “definitely making the right call” in proposing ESA listing for the species. *Document 171.* A *Gunnison Country Times* article later recalled that an FWS official indicated the agency would recommend listing for the Gunnison sage-grouse under the ESA in autumn 2005. *Document 494.*

As is often the case under the current Administration, in the final weeks leading up to the proposed ESA listing for Gunnison sage-grouse, U.S. Department of Interior (DOI) officials in Washington, D.C., injected themselves into the decisionmaking process and derailed the agency’s plans to protect the species under the act. They include Julie MacDonald, Deputy Assistant Secretary for Fish and Wildlife and Parks (FWP) in the Department of the Interior and Chris Nolin, Chief of the Division of Conservation and Classification for the Fish and Wildlife Service. Records received from FWS indicate that MacDonald ratcheted up her involvement in the listing decision for Gunnison sage-grouse beginning in July 2005 after receiving three telephone calls, including one from a governor’s office (probably former Governor Owens of Colorado [R]), concerning FWS’ preparation of the proposed rule to list the grouse as “endangered.” *Document 336.*

To delay the proposed listing, MacDonald first attacked the science that identified Gunnison sage-grouse as a distinct species. If she could show Gunnison sage-grouse are not a separate species from greater sage-grouse, then FWS would not be obligated to protect it under the ESA (because there are many more greater sage-grouse in the West). MacDonald requested a copy of the original listing petition and inquired about the genetics work done to distinguish Gunnison

sage-grouse as a separate species. *Document 336*. By August 23, 2005, she was apparently questioning morphological data that supported Gunnison sage-grouse as a separate species (i.e., that Gunnison sage-grouse do not appear any different from greater sage-grouse). See *Document 392*. A FWS biologist may have been wary of how MacDonald might affect the agency's plan for listing Gunnison sage-grouse when he wrote the following day that "taxonomy, PECE [FWS Policy for Evaluating Conservation Efforts], threats will all be targeted by Julie M." *Document 44*.

On August 24, 2005 (the same day that the biologist expressed his concerns about MacDonald's influence on the listing process), a department e-mail stated that "since some questions have been raised about justification for Gunnison sage grouse being a valid species, Chris Nolin suggested we have an expert within the Service look at the scientific data to see if we think it supports the conclusions." *Document 341*. While it is unclear what caused FWS to miss its September 2005 deadline for the draft listing rule, MacDonald's involvement in the decisionmaking process and her questioning of the taxonomy of Gunnison sage-grouse were probably partially responsible. Now, with the agency delaying publication of a listing determination to March 2006, MacDonald, Nolin and others had time to change the agency's listing decision entirely.

The Role of U.S. Department of the Interior Officials (Washington, D.C.) in Reversing the FWS Listing Decision for Gunnison Sage-grouse

FWS biologists and field staff continued to work on a draft listing rule for Gunnison sage-grouse ("endangered," but some drafts also recommended "threatened") and the FWS expert that MacDonald and Nolin requested to review the taxonomy of Gunnison sage-grouse (*Document 341*) confirmed that Gunnison sage-grouse *are* a distinct species ("I believe that the Gunnison sage-grouse is a listable entity in the sense that it meets the definition of 'species' under the Endangered Species Act"). *Document 349*. However, MacDonald was still not satisfied. FWS documents indicate that Dr. Rob R. Ramey II¹ told her in October 2005 that Gunnison sage-grouse are not a distinct species (*Document 350*) and she continued to question the species validity throughout the decisionmaking process (see below; also *Document 352*).

The field and regional office in Colorado finally submitted an abridged draft listing rule to the FWS Washington (D.C.) Office for review in November 2005. The Washington Office responded that the field office needed to substantially revise their submission by further reducing it to a mere outline of information presented in the listing rule—which could only be accomplished by removing much of the text that supported listing the Gunnison sage-grouse under the ESA. *Document 397*. Within a week the field staff had joined regional and Washington Office staff on a conference call to discuss the "prudence of listing" Gunnison sage-grouse based not on the comprehensive document that agency biologists and field staff had drafted over the past eight months, but "on [the] new outline" that lacked much of the information that supported listing. *Document 67*. A Region 6 official again reminded field staff that it must shorten the outline because the Washington, D.C., staff does not want to "wade through [an] exhaustive list again." *Document 399*. The outline presented to the Washington Office by Region 6 was significantly reduced from the more detailed drafts of the listing rule. *Document 400*.

¹ R. Ramey has a history of "disproving" species classifications.

Based on the shortened outline—and contrary to the recommendations of FWS biologists, sage grouse experts, and field staff—DOIA and the FWS Washington Office decided not to list the Gunnison sage-grouse as “threatened” or “endangered” under the ESA. *Documents 68, 69*. The Washington Office essentially set up the “not warranted” determination over the course of two weeks in November 2005 by refusing to consider the details that supported listing Gunnison sage-grouse under the ESA. “[Washington Office] doesn’t see where threats add up; litigation risk on equal side.” *Document 69*. “WO will re-craft outline to support removal.” *Document 69*. By deciding to withdraw the Gunnison sage-grouse from consideration as a threatened or endangered species, FWS would also remove the grouse from the Candidate Species list, which was also contrary to the agency’s position on Gunnison sage-grouse since 2000.

Julie MacDonald immersed herself in the process of rewriting the not warranted determination. She requested Dr. Rob Ramey to *again* review the taxonomy of Gunnison sage-grouse (*Document 490*), and he reported that the species designation is questionable (*Documents 491*). The Washington Office reviewed and edited multiple drafts of the not warranted determination (“WO review taking more time than expected”) (*Document 76*) and field biologists wondered how to “explain why prof[essional] judgment gets to where to we got to” [sic] not listing the Gunnison sage-grouse and removing the species from the Candidate Species list. *Document 75*.

In the final days before FWS published the not warranted listing determination on April 18, 2006, FWS biologists made a last attempt to honor science in the decision document by responding and refuting significant comments and edits by Julie MacDonald and Tom Graf (DOI attorney, Denver) to the draft “not warranted” determination. FWS biologists and field staff opposed MacDonald’s questioning of Gunnison sage-grouse taxonomy (“The species designation issue is one that should NOT be questioned” (*Document 255*)); MacDonald’s removal of the species description from the draft determination (*Document 258*); MacDonald’s editing and removal of text describing the historic range of Gunnison sage-grouse (*Document 258*); MacDonald’s challenges to the veracity and accuracy of certain literature cited (*Document 261*); and MacDonald’s removal of text describing habitat loss and threats to Gunnison sage-grouse (*Document 261*).

MacDonald continued to edit the determination until it was published in the *Federal Register*. (*Document 274*) and the final version out of her office, in the words on one FWS official, included “a disturbing sentence on P7 regarding the validity of the [Gunnison sage-grouse] taxon.” *Document 275*.

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