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December 22, 2014

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C. Street, N.W.
Washington, D.C. 20240
Email: exsec@ios.doi.gov

VIA U.S. Mail and
Electronic Transmission

Daniel M. Ashe, Director
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Re: Notice of Intent to Sue; Violations of the Endangered Species Act Related to: 1. November 20, 2014 Determination of Threatened Status for the Gunnison Sage-Grouse; 79 FR 69192-69310; 2. November 20, 2014 Designation of Critical Habitat for Gunnison sage-grouse; 79 FR 69312-69363

Dear Secretary Jewell, Director Ashe and Regional Director Walsh:

On behalf of the Board of County Commissioners of the County of Gunnison, Colorado ("Gunnison County"), you are hereby notified that Gunnison County intends to bring a civil action against you, in your official capacities, and the U.S. Fish and Wildlife Service (collectively, the "Service") for violating Section 4 of the Endangered Species Act "ESA"), 16 U.S.C. §1533, for: 1. The improper November 20, 2014 Determination of Threatened Status For The Gunnison sage-grouse; 79 FR 69192-69310 (the "Listing Decision"); and 2. The improper November 20, 2014 Designation of Critical Habitat For Gunnison sage-grouse; 79 FR 69312-69363 (the "Designation of Critical Habitat")

(collectively "Final Decisions"). This notice is provided in fulfillment of the requirements of the citizen suit provision of Section 11 of the ESA, 16 U.S.C. §1540(g).

The State of Colorado's sage-grouse biologists stand in agreement with the State of Utah and county leaders in both states that the science clearly demonstrates that the Gunnison sage-grouse is adequately protected by the states, local governments and private landowners, under existing conservation measures and does not warrant a listing under the ESA. Four elements deserve attention at the onset on this letter:

1. The Service has acknowledged that the Gunnison Basin population of the Gunnison sage-grouse, which is approximately 86% of the species, is stable and growing, healthy and likely to persist in the long term. Indeed, the Gunnison sage-grouse Rangewide Conservation Plan (CDOW 2005) ("RCP") estimates that the likelihood of the species becoming extinct in the next 50 years is less than 0.5%. This data strongly demonstrates the argument that the species is not facing imminent threats. It is important to note that the Service was instrumental in the development of the RCP and was a formal signatory to the RCP.

2. Satellite populations of the Gunnison sage-grouse represent only approximately 14% of the total population. According to the latest Colorado Parks and Wildlife ("CPW") data, the current total Gunnison sage-grouse population estimate is above the RCP rangewide target and has been above that target for the last three years. Importantly, the current rangewide population is 6% above the long term rangewide population average (1996-2013). The population numbers in the Gunnison Basin are significantly higher than the RCP goals (RCP goal = 3,000 grouse, 2014 population estimate 3,978 grouse); and, the Gunnison sage-grouse population in the Gunnison Basin has increased approximately 33% since 2001. These numbers provide strong evidence that existing conservation measures are effective.

3. The U.S. Bureau of Land Management (BLM) has issued an Instructional Memorandum (IM 2014-100) placing a moratorium on new oil and gas development in Gunnison sage-grouse habitat. The forthcoming revised management plans may create additional management restrictions on federally managed habitat, further ensuring long-term protection of Gunnison sage-grouse habitat within the federal regulatory environment.

4. Colorado Parks and Wildlife operates a comprehensive Gunnison sage-grouse augmentation (translocation) program, administers a Candidate Conservation Agreement With Assurances For Gunnison sage-grouse Between The Colorado Division of Wildlife and the U.S. Fish and Wildlife Service; April, 2005 ("CCAA") program with significant private lands acreage enrollment, accomplishes numerous habitat improvement and restoration projects and funds conservation easements. All of these

demonstrate a vibrant and effective conservation program on state and private lands across the range of the Gunnison sage-grouse.

As more fully set forth below:

- The Service determinations were arbitrary and capricious;
- The Service improperly analyzed the required factors to make its determination that the Gunnison sage-grouse is threatened;
- The Service failed to rely on the best scientific and commercial data available;
- The Service introduced significant new information into the rulemaking process without disclosing that information to the public until the Final Decisions were published;
- The Service failed to consider adequately the peer reviews the Service obtained; and
- The Service failed to give adequate weight to the extensive regulatory and conservation efforts undertaken by the States of Colorado and Utah, local governments and private parties.

In addition, the Service incorrectly determined that the Gunnison Basin Population of Gunnison sage-grouse is threatened, and incorrectly applied the "Final Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the Endangered Species Act's Definition of 'Endangered Species' and 'Threatened Species'; Final Rule"; 79 FR 37578-37612.

In designating critical habitat for the Gunnison sage-grouse, the Service:

- Failed to appropriately consider the economic impacts of the designation;
- Failed to appropriately fulfill requirements of NEPA;
- Failed to demonstrate that the habitat that the Service designated is essential to the conservation of the species;
- Designated habitat that is not beneficial to the species; and
- Designated habitat based on flawed and unsubstantiated conjecture regarding historic range.

I. Board of County Commissioners of the County of Gunnison, Colorado.

The Board of County Commissioners of the County of Gunnison, Colorado is the governing board of a Colorado county, a political subdivision of the State of Colorado, with certain constitutional and statutory authority under Colorado law. The Board of County Commissioners is the local government of general jurisdiction for Gunnison County, Colorado.

Gunnison County has the authority to protect and promote the health, welfare and safety of the people of Gunnison County, and the authority to regulate land use planning and environmental quality and protection (including wildlife) in Gunnison County.

Colorado Statutes that grant authorities to Gunnison County include but are not limited to:

a. Title 29, Article 20, Colorado Revised Statutes; Local Government Land Use Control Enabling Act of 1974. In particular, Title 29, Article 20, Section 104(1)(b) grants authority to Gunnison County to protect "lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species." Title 29, Article 20, Section 104(1)(h) grants authority to Gunnison County for "planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights."

b. Title 30, Article 28, Colorado Revised Statutes; Planning and building codes, subdivision exemption plats, cluster development, the establishment of a county planning commission, improvement agreements, master plans, zoning plans, and other land use planning and regulatory mechanisms, including subdivision regulations.

Pursuant to these authorities, Gunnison County has duly adopted policies and regulations including the review, approval, conditioning or denial of proposed activities and uses of land and natural resources that reasonably might impact the Gunnison sage-grouse.

Gunnison County, since 1995, consistently has provided personnel, facilities, financial support in excess of one million dollars, and conspicuously public efforts – political, diplomatic, collegial, organized and scientifically based – to protect and foster the Gunnison sage-grouse and its habitat.

The Listing Decision and the designation of Critical Habitat will impact the citizens, and the social, economic and environmental fabric and future of the Gunnison County community, in qualities and impacts different than any single community in the United States. There have been few, if any, actions in the history of Gunnison County that will be as consequential for the Gunnison County community as the listing decision and the designation of critical habitat.

Gunnison County has made formal comment to the Service during the comment periods regarding the listing decision and the designation of critical habitat. These comments are:

1. "Comments by the Board of County Commissioners of the County of Gunnison, Colorado; Endangered Status for Gunnison sage-grouse; Proposed Rule; Docket No: FWS-R6-ES-2012-0108; 4500030113,78 Fed. Reg. 8, 2486 (January 11, 2013); and Designation of Critical Habitat for Gunnison sage-grouse; Proposed Rule; Docket No: FWS-R6-ES-2011-0111; 4500030114, 78 Fed. Reg. 8, 2540 (January 11, 2013)", April 2, 2013.

2. "Second Set of Comments by the Board of County Commissioners of the County of Gunnison, Colorado; Endangered Status for Gunnison sage-grouse; Proposed Rule; Docket No: FWS-R6-ES-2012-0108; 4500030113, 78 Fed. Reg. 8, 2486, (January 11, 2013); and Designation of Critical Habitat for Gunnison sage-grouse; Proposed Rule; Docket No: FWS-R6-ES-2011-0111; 4500030114, 78 Fed. Reg. 8, 2540, (January 11, 2013)", October 18, 2013.

3. "Third Set of Comments by the Board of County Commissioners of the County of Gunnison, Colorado; Endangered Status for Gunnison sage-grouse; Proposed Rule; Docket No: FWS-R6-ES-2012-0108; 4500030113, 78 Fed. Reg. 8, 2486, (January 11, 2013); and Designation of Critical Habitat for Gunnison sage-grouse; Proposed Rule; Docket No: FWS-R6-ES-2011-0111; 4500030114, 78 Fed. Reg. 8, 2540, (January 11, 2013)", November 26, 2013.

4. Comments of Gunnison County were resubmitted to the Service by the State of Colorado in the letter dated July 2, 2014 and signed by Governor John Hickenlooper. Governor Hickenlooper requested from the Service "…feedback on the entirety of this submission…"

II. Gunnison sage-grouse.

Gunnison sage-grouse are ground dwelling birds known for their unusual mating ritual, in which males congregate in leks, or breeding grounds, and engage in an elaborate display to attract a mate.

Gunnison sage-grouse were first identified as a discrete species in 2000. Currently, two distinct species of sage-grouse are recognized by the American Ornithologists' Union: the Greater sage-grouse (*Centrocercus urophasianus*) and the Gunnison sage-grouse (*Centrocercus minimus*).

Most research exploring the life history and habitat requirements of sage-grouse has been conducted on the Greater sage-grouse. Comparably little research has been done specifically on Gunnison sage-grouse. ("CCAA 2005").

Gunnison sage-grouse are found only in southwestern Colorado and southeastern Utah. By contrast, the Greater sage-grouse inhabit parts of north-central and northwestern Colorado as well as parts of ten other western states.

Within its range, there are seven Gunnison sage-grouse populations in 9 southwest Colorado counties (i.e. Gunnison, Saguache, Chaffee, Dolores, Delta, Montrose, Mesa, San Miguel and Ouray) and one southeast Utah county (San Juan, Utah); each population may contain several subpopulations. The largest population, the "Gunnison Basin Population", found in the Gunnison Basin, comprises approximately 86% of the population and covers almost two thirds (63%) of the occupied habitat of the species. The remaining 14% is divided among six discrete populations (the "satellite populations").

III. Conservation Effects.

A. State of Colorado Conservation Efforts.

As noted in the State of Colorado's Notice of Intent, dated December 12, 2014 ("Colorado NOI"), with the exception of federally listed species and migratory birds, Colorado has exclusive jurisdiction over wildlife within its boundaries. To date, the State has invested close to $40 million in voluntary conservation programs, land acquisition, conservation easements, research, monitoring activities, habitat treatments, translocation, and predator control programs aimed at conservation of Gunnison sage-grouse and its habitat. State and county-led voluntary conservation programs have resulted in protection of over 140,000 acres of privately owned habitat. In combination with areas of habitat that are federally-owned and managed, approximately 75% of occupied habitat has some level of protection (CPW 2014).

As further noted in the Colorado NOI, Colorado Parks and Wildlife ("CPW") is the principal Colorado agency with responsibility for management and conservation of species of concern, including the Gunnison sage-grouse. CPW directs numerous ongoing programs, including administering the CCAA program, and provides financial assistance for new conservation easements on private lands, funds – directly and through grants – numerous habitat growth and improvement programs, and conducts Gunnison sage-grouse research. CPW staff biologists provide population counts and other raw data concerning the status of the species in Colorado, and conduct many ongoing research projects critical to a better understanding of the needs of and threats to the Gunnison sage-grouse. Through CPW, Colorado has been a leader in Gunnison sage-grouse research and conservation efforts throughout the species' range. Working closely with local communities and other stakeholders, CPW's efforts continue to generate invaluable data and analysis to enhance the effectiveness of Gunnison sage-grouse conservation programs.

B. State of Utah Conservation Efforts.

The State of Utah is an active participant in conservation actions regarding Gunnison sage-grouse including:

- Participation in drafting, and through the Utah Division of Wildlife, a signatory to, the Gunnison Sage-grouse Rangewide Conservation Plan

- Implementation of the "Community Based Conservation Program" that enhances coordination and communication between community based adaptive resource management working groups, and private and public partners.

- Working directly in San Juan County, Utah to bring together landowners, local government officials, state and federal agencies and universities to work on cooperative research and habitat projects

- Signatory to the "Conservation Agreement" with the State of Colorado and nine Colorado and Utah counties

- Participant in the San Juan County Gunnison Sage-grouse Working Group

- Listed the Gunnison sage-grouse on Utah's Sensitive Species List Under Administrative Rule R657-48

- In 2005, established a Utah State "Conservation Agreement" regarding conservation measures for the Gunnison sage-grouse.

C. Gunnison County Conservation Efforts.

1. Conservation of occupied habitat located in the Gunnison Basin (which includes portions of Gunnison County and Saguache County) includes:

(a.) Percent of occupied habitat on public land covered by Candidate Conservation Agreement ("CCA") (federal lands) in occupied habitat: 100%.

(b.) Percent of occupied habitat on private land covered by CEs and CCAA enrolled properties is: 46% of all private lands in occupied habitat.

(c). Percent of occupied habitat on all lands (public and private) protected by some mechanism (CE, CCAA) without overlap: 83%

2. Efforts to conserve the Gunnison sage-grouse were first organized under the Gunnison Basin Local Working Group, founded in 1995, and later incorporated into the Gunnison Basin Sage-grouse Strategic Committee, created in 2005 by the Gunnison County Board of County Commissioners, to implement programs and steps to and in the conservation of the Gunnison sage-grouse.

3. In 2005, Gunnison County retained a wildlife biologist who has evaluated over 500 land use related applications (including building permits, individual septic system permits, driveway permits, reclamation permits) and prepared a Gunnison sage-grouse Site Specific Analysis for each. The intent of the evaluations is to reach any application that may have the potential to effect Gunnison sage-grouse. Gunnison County works with applicants to achieve a net benefit in habitat quality on the subject land beyond the direct impacts of the proposed activity. The Analysis identifies specific criteria as permit conditions to avoid, minimize and/or mitigate impacts to Gunnison sage-grouse and their habitats.

5. With the assistance of the State of Colorado and the Gunnison Basin Sage-grouse Strategic Committee, Gunnison County created a Gunnison sage-grouse Habitat Prioritization Tool ("HPT"). The HPT was finalized in January, 2012. The HPT has been in continuous use by the Gunnison County Wildlife Conservation Coordinator for Gunnison sage-grouse related land use reviews since its release in January, 2012. Ninety seven (97) reviews have been accomplished using the HPT to date.

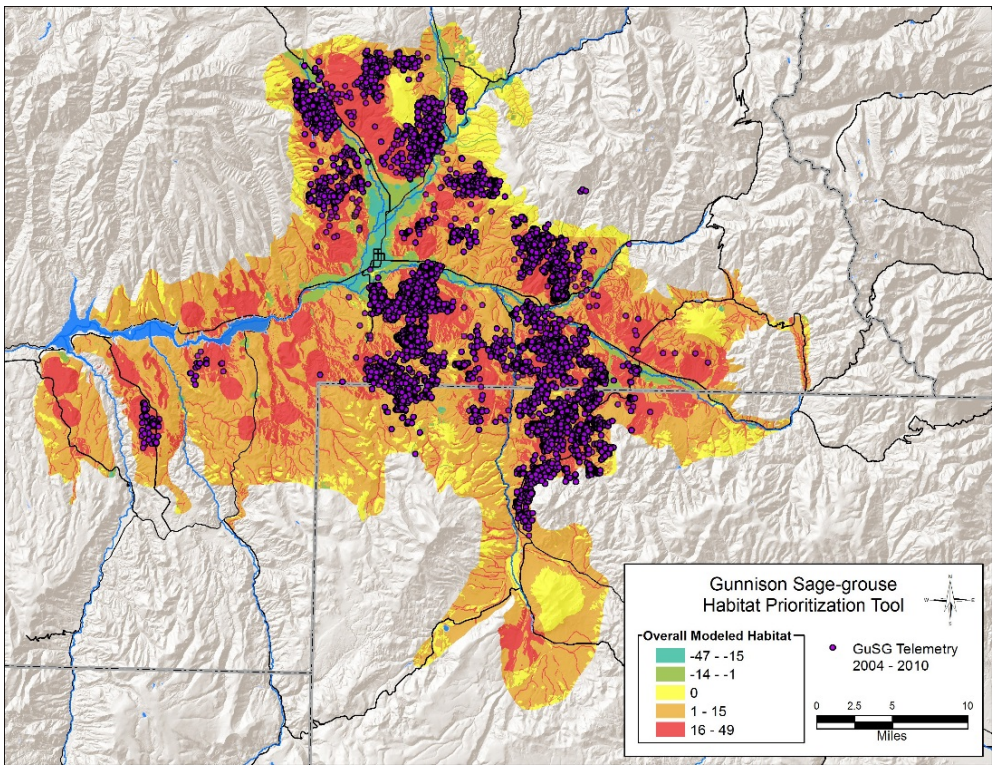
   The HPT is also the foundation for the Candidate Conservation Agreement ("CCA") on federal lands in the Gunnison Basin.

   The HPT is a dynamic model. The Gunnison Basin sage-grouse Strategic Committee is developing a formal process of updating the HPT and incorporating new information as it becomes available. That process will be incorporated into the formal documentation of the HPT.

   In March, 2013, Colorado Parks and Wildlife performed an analysis of their extensive Gunnison sage-grouse location data collected from 2004 – 2010 against the Gunnison Basin Habitat Prioritization Tool. The results of that analysis are detailed in the table below. (Eichoff, email to M.Pelletier March 29, 2013).

HPT Combined Habitat Tier/Score	# of Location Points	% of Location Points in Habitat Tier/Score
-30 to -1	308	3.04%
0	170	1.68%
Tier 2 (1 – 14)	1587	15.65%
Tier 1 (15 +)	8074	79.63%
TOTAL	10,139	100.00%

This analysis is graphically depicted in the figure below.



The soils-based HPT was validated by over 10,000 Gunnison sage-grouse locations indicating a high level grouse use predictive capability for the Tool.

5. Participant in Conservation Agreement for Gunnison sage-grouse with State of Colorado and State of Utah and 9 Counties with a commitment to amend the Rangewide Conservation Plan.

6. Implemented Local Institutional Controls to include:

   (a.) Regulatory controls applicable to +35 acres:

Board of County Commissioners of Gunnison County Resolution No: 95-34, “Resolution Stating Policy Regarding Regulation of Parcels of Land”.

(b.) Adopted Land Use Regulations/Subdivision Regulations Concerning Wildlife:

Gunnison County Colorado Regulations for Oil and Gas Operations, Adopted by the Gunnison County Board of County Commissioners May 9, 2003 by Resolution No: 2003-50; Amended May 18, 2004 by Resolution No: 2004-27; Amended October 5, 2010 by Resolution No: 2010-43; and Amended August 28, 2012 by Resolution No: 2012-25.

Gunnison County Regulations for Special Development Projects, Adopted December 19, 1990; and amended 1994.

Gunnison County, Colorado Regulations for the Use of Geothermal Resources for the Commercial Generation of Electricity; Adopted November 4, 2012 by Resolution No: 14-30. Gunnison County, Colorado North Fork Valley Coal Resource Special Area Regulations; Adopted November 18, 2003 by Resolution No: 2003-62.

Board of County Commissioners of the County of Gunnison, Colorado Resolution No: 2014-24; A Resolution Amending the Gunnison County Land Use Resolution Including Amendments to Section 13-115: Reclamation and Noxious Weed Control.

(c.) Adopted Land Use/ Performance Regulations/Subdivision Regulations Specific to Gunnison sage-grouse:

Board of County Commissioners of the County of Gunnison, Colorado Resolution No: 07-17, “Section 11-106: Protection of Wildlife Habitat Areas, and Related Sections of the Gunnison County Land Use Resolution, and Replacing the Temporary Regulations for Gunnison County Land Use Change, Access, Reclamation, Individual Sewage Disposal System or Building Permits on Lands Located Wholly or Partially Within a 0.60 Mile Radius of a Gunnison sage-grouse Lek, or Located Wholly or Partially within Gunnison sage-grouse Occupied Habitat”.

Board of County Commissioners of the County of Gunnison, Colorado Resolution 2013-23 “A Resolution Amending the

Gunnison County Land Use Resolution Including Amendments to Section 11-106: Protection of Wildlife Habitat Areas and Adoption of the Habitat Prioritization Tool" recorded in the records of the Office of the Clerk and Recorder of Gunnison County, Colorado on November 5, 2013, bearing Reception No: 623683.

(d.) Designated Road Closures Specific to the Conservation of Gunnison sage-grouse:

Board of County Commissioners of the County of Gunnison, Colorado Resolution No: 2007-09, "A Resolution Authorizing Temporary Closure of Certain Roads within the County of Gunnison, Colorado for Protection of Gunnison Sage Grouse".

(e.) Adopted Animal Control Ordinances and Resolutions:

Ordinance No. 5, 1988, An Ordinance Concerning Vicious Dogs.

Ordinance No. 13, 2000, An Ordinance Establishing Regulations for Control of Domestic Animals within the Unincorporated Areas of Gunnison County, Colorado.

Resolution No: 92-49, A Resolution Designating the Antelope Hills Division of the Gunnison County Water and Sewer District as a Designated Dog Control Area.

Resolution No: 02-23, A Resolution Concerning Control and Licensing of Dogs; Resolution No: 02-30, A Resolution Amending Resolution No: 02-23.

(f.) Assisting other counties in implementing in developing the Gunnison sage-grouse Habitat Prioritization Tool.

7. Has Engaged in Additional Local Efforts:

(a.) Works with federal and state land managers in a coordinated manner.

(b.) Coordinates with the Gunnison County Trails Commission.

(c.) Coordinates with local recreational users within Gunnison sage-grouse occupied habitat.

(e.) In 2009, the Committee produced the Gunnison Basin Sage-grouse Strategic Plan and the Gunnison County Sage-Grouse Conservation Action Plan which in 2009 was adopted by the Board of County Commissioners of the County of Gunnison, Colorado.

(d.) Provides oversight of the Gunnison Basin Sage-Grouse Strategic Committee.

(f.) Gunnison County has also either funded, participated and/or implemented the following Habitat Restoration Projects:

(1.) Doyleville Gunnison sage-grouse Habitat Improvement Project;

(2.) Gunnison sage-grouse Hay Meadow Interface Inter-seeding Project;

(3.) Habitat Improvement Project to conserve land along Tomichi Creek;

(4.) Gunnison sage-grouse/Grazing Research – Gunnison Basin sage-grouse Strategic Committee;

(5.) Raven Population Study;

(6.) Gunnison sage-grouse Summer Use Study at Proposed W-Mountain Trail Site;

(7.) Flat Top Mountain Gunnison sage-grouse and Big Game Habitat Monitoring Study; and

(8.) Gunnison Conservation District Projects

8. Gunnison County has participated in the following program:

Wildlife Conservation Society Climate Adaptation Fund – Enhancing Ecosystem Resilience of Wetland/Riparian Habitats to Increase the Adaptive Capacity of Gunnison sage-grouse in the Gunnison Basin – Final Report by The Nature Conservancy and the Gunnison Climate Working Group (Bureau of Land Management-Gunnison Field Office, Colorado Natural Heritage Program; Colorado Parks & Wildlife, Gunnison County, Gunnison County Stockgrowers Association, Lake Fork Valley Conservancy, National Center for Atmospheric Research, National Park Service, Natural Resources Conservation Service, Rocky Mountain Biological Lab, The Nature

Conservancy, Trout Unlimited, Upper Gunnison River Water Conservancy District, U.S. Fish & Wildlife Service, U.S. Forest Service, Western State Colorado University and Western Water Assessment), September 27, 2013.

D. Local Government Efforts.

The chart on the following pages illustrates – county by county – adoption of regulatory and non-regulatory conservation efforts for the Gunnison sage-grouse. The chart also provides reference to the specific document(s) which are the written description of those conservation efforts.

LOCAL EFFORTS

Current through October 23, 2014

A. Rangewide Local Efforts

	Delta	Dolores	Gunnison	Mesa	Montrose	Ouray	Saguache	San Juan	San Miguel
1. Participant in Memorandum of Understanding	X (1)*	X (1)	X (1)	X (1)	X (1)	X (1)	X (1)	X (1)	X (1)
2. Formal Signatory to the "Conservation Agreement for GuSG" **	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)
3. Formally Committed to Update GuSG Rangewide Conservation Plan	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)
4. Formally Committed to Adopting Amended GuSG Rangewide Conservation Plan	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)
5. Formally Committed to Adopt the Habitat Prioritization Tool	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)	X (2)

*The numbers in parentheses are a reference to source documents provided in Gunnison County comment letters.
** State of Colorado, State of Utah and 9 counties are formal signatories.

B. Local Institutional Controls

	Delta	Dolores	Gunnison	Mesa	Montrose	Ouray	Saguache	San Juan	San Miguel
1. Regulatory Controls Applicable to +35 acre Projects	X (3)	X (9)	X (23)	X (48)(49)	X (55)(56) (57)(58)	X (64)	X (70)	X (88)	X (106)
2. Land Use Regulations/Subdivision Regulations Concerning Wildlife	X (4)(5)	X (10)	X (24)(25)	X (50)	X (59)	X (65) (66) (67) (68 In adoption process)	X (71) (72) (73 in process)		X (107)
3. Land Use Regulations/Subdivision Regulations Specific to GuSG			X (24)(25)		X (59)	X (67) (68 In adoption process)			
4. Zoning -"Euclidean", "Performance" or Combination – with wildlife and/or GuSG** specific conditions, Land Development Agreements	X (5)	X (11)	X (24**(25**) (27)(28)	X (51)	X (57)	(68 In adoption process)	X (71)		X (108**)
5. Policy/Mechanisms Specific to Wildlife and/or specific to GuSG***	X (3)(4)(5)	X (10)(12*****)**	X (24***) (25***)	X (50)	X (59***)(60)	X (64***) (68*** In adoption process) (69)	X (71)(72) (73***in process)	X (89)	X (109)
6. Has Authority and/or has Designated Road Closures Specific to GuSG		X (13)	X (26)	X (52)	X (61)	X (64)	X (74)	X (90)	X (109)(110)
7. Animal Control (Ordinances/Regulations)			X (29)(30) (31)(32) (33)	X (53)	X (62)			X (91)	X (112)
8. GuSG Habitat Prioritization Tool	X Developing	X (14) Developing	X (25)	X Developing	X Developing				X Developing

C. Additional Local Efforts

	Delta	Dolores	Gunnison	Mesa	Montrose	Ouray	Saguache	San Juan	San Miguel
1. County Representative on Local GUSG Work Group or Strategic Committee Supportive of Local Conservation Plan (also acts as County GuSG liaison w/agencies)	X (6)	X (15)	X (34)(35) (36)	X (54)	X (6)(111)		X (75)	X (92)	X (113)
2. Local Conservation Plan Specific to GuSG	X (6)	Developing	X (36)	X (54)	X (6) (111)		X (76)	X (93)	X (114)
3. Conservation Easements or Open Space in County Support of GuSG	X (8)	X (8 &16)	X (8)	X (8)	X (8)	X (8)	X (8)	X (8)(93)(94)	X (8)(114) (115) (116) (117) (118)
4. Supports GuSG Candidate Conservation Agreement with Assurances Initiative	X	X	X	X	X	X	X	X	X
5. Supports Initiative and/or Participant in Local Candidate Conservation Agreement for the GuSG	X	X	X (37)	X	X	X	X (37)	X	X
6. Supports & Participates in GuSG Conservation Efforts w/Federal, State Agencies or Other Local Entities	X (6)(7)	X (10)(15) (16)(17) (18)(20)	X (26)(36) (37)(38) (39)(40) (41)(42) (43)(44) (45)(46)(47)	X (50) (54)	X (6)(61) (63)(111)	X (64)	X (37)(74)(75) (76)(78)(79) (80)(81)(82) (83)(84)((85) (86)(87)	X (92)(93) (94)(95)(96)(97) (98)(99)(100) (101)(102) (103)(104) (105)	X (113)
7. Participant in GuSG Habitat Enhancement Projects	X (6)(7)	X (18)(19)	X (36)(38) (39)(40) (41)	(54)	X (6)(63) (111)		X (75)(78) (79)(80)	X (92)(95)(96)(97) (98)(99)(100) (101)(102)	X (113)
8. Involved in Research Projects Specific to the GuSG	X (6)(7)	X (11)(21) (22)	X (36)(42) (43)(44) (45)(46)(47)	(54)	(6)(63) (111)		X (75)(81)(82) (83)(84)((85) (86)(87)	X (92)(103) (104)(105)	X (113)

E. County Coalition Efforts.

In a unique effort to provide a large-landscape, coordinated effort to conserve the species and its habitat, the eleven Colorado and Utah counties in which the Gunnison sage-grouse is found or in which the Service proposed critical habitat, along with the State of Colorado and the State of Utah, with the support of bi-partisan congressional delegations, created a "County Coalition" and executed a "Conservation Agreement For The Gunnison sage-grouse" ("Conservation Agreement") with the intent to establish a culture of cooperation, collaboration and partnerships that foster Gunnison sage-grouse so that the species is stable and growing, healthy and likely to persist in the long term. The County Coalition and the two states offered to the Service an executed Conservation Agreement – whose first step is to update the RCP and formally adopt together the updated RCP. The Service did not respond to the offer.

The County Coalition is a unique circumstance where a regional collaboration has been adopted by all Colorado and Utah counties with affected habitat and a jointly executed conservation agreement for the Gunnison sage-grouse. Specific evidence of the benefits of these efforts related to the population and habitat of Gunnison sage-grouse rangewide include:

- Increasing population trends in 4 of the 7 Gunnison sage-grouse populations.
- Rangewide population goal of 4,500 Gunnison sage-grouse exceeded.
- Local programs that work with private property owners utilizing local land use and other regulatory and non-regulatory approaches.
- 126,217 acres of Gunnison sage-grouse habitat protected by conservation easements on private lands within occupied and proposed critical habitat (CPW 2014).
- 84,011 acres of private lands enrolled in the CCAA program rangewide (CPW 2014).

F. Stakeholder Efforts.

Owners of private properties have worked to implement strong and binding voluntary conservation measures throughout the Gunnison sage-grouse's habitat. Private landowners have used a variety of tools including conservation easements on private land, enrollment in the CCAA program, and participation in habitat restoration and improvement projects.

G. The Service's Efforts.

From September 2006 through December 2012, a representative of the Service attended 69 meetings of the Gunnison Basin Sage-grouse Strategic Committee. But, during that time, that representative did not inform the Committee that the efforts the Committee, states, local governments and others were inappropriate, insufficient or otherwise unacceptable to the Service as measures to appropriately conserve the species. Nor did the Service propose or initiate conservation measures of its own.

The Service reviewed Gunnison County's draft land use regulations in 2006 and 2007 and provided no substantive comments nor any indication that the regulations were inadequate or ineffective in any way.

H. The Service's Acknowledgement of Conservation Efforts.

After Gunnison County made its April 2, 2013, "Comments by the Board of County Commissioners of the County of Gunnison, Colorado", and while the Service was making requests for further information regarding local and collegial efforts, the Service also began to modify its position regarding Gunnison County, local government, intergovernmental, and community efforts:

> On July 16, 2013, the Service Director Dan Ashe visited Gunnison County to observe local Gunnison sage-grouse conservation efforts and to meet with federal, state and local government, local conservation groups, landowners and private citizen partners in conservation efforts.
>
> Director Ashe commented at a public meeting at Western State Colorado University that the conservation efforts are "inspirational". He noted that regulatory measures are "highly certain… and highly likely to be implemented…", and that "incentive based measures are important…" He noted also that the "amount of land covered by …conservation agreement… (is) highly relevant".
>
> On September 9, 2013, the Service stated: "Gunnison County has set a standard for implementing local regulations designed to avoid or minimize impacts on Gunnison sage-grouse caused by land development and improvements." (The Service's Written Response to Gunnison Basin Sage-grouse Strategic Committee Questions, received by Gunnison County on September 9, 2013.)
>
> On September 16, 2013, the Service stated:
>
> > "Thanks to collaborative conservation efforts, the largest Gunnison sage-grouse population has remained relatively stable over the past 12 years,' said the Service's Mountain-Prairie Regional Director Noreen Walsh… 'Gunnison County, Colorado, is committed to conservation of Gunnison sage-grouse and its habitat. Likewise, federal agencies have completed a Candidate Conservation Agreement in the Gunnison Basin; a number of

private landowners are currently enrolled in voluntary conservation agreements; and a portion of private lands are in conservation easements that help conserve Gunnison sage-grouse. Combined, these conservation tools protect, at some level, the majority of occupied habitat in the Gunnison Basin. Perhaps the greatest need and challenge is to expand the suite of conservation efforts completed and underway in the Gunnison Basin to other areas across the species range."
(U.S. Fish and Wildlife Service Mountain-Prairie Region, Press Release, dated September 16, 2013.)

IV. Legal Framework.

A. The Endangered Species Act.

Congress enacted the Endangered Species Act ("ESA" or "Act") to "provide a program for the conservation of ... endangered species and threatened species" and to "provide a means by which the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C.A. §1531(b). To receive the full protections of the Act, a species must first be listed by the Secretary of the Interior as "endangered" or "threatened" pursuant to Section 4 of the ESA. *Id.* at §1533. The ESA defines an endangered species as "any species which is in danger of extinction throughout all of a part of its range." *Id.* At §1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at §1532(20).

In particular:

1. Section 4 of the ESA requires the Secretary of the Interior to assess the following factors to determine whether a species is endangered or threatened so as to qualify for the protections of the Act: (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. 16 U.S.C. §1533(a)(1).

2. The Service is required to make its determination solely on the basis of the best scientific and commercial data available. The United States Supreme Court, in a unanimous decision, has stated: "… the obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." Bennet v. Spear, 520 U.S. 154, 176 (1997).

3. The Service must make decisions consistent with its own formally adopted policies, including "The Policy on Interpretation of the Phrase 'Significant Portion of its Range' in the Endangered Species Act's Definitions of 'Endangered Species' and 'Threatened Species';" 79 FR 37578; effective July 31, 2014 ("Policy Regarding Significant Portion Of Its Range").

4. ESA, Section 4, requires the Secretary to "designate critical habitat … on the basis of the best scientific data available and after taking into consideration the economic impact [of such designation]." 16 U.S.C. §1533(b)(2). The Secretary may exclude areas from critical habitat if she determines that the benefits of exclusion outweigh the benefits of including the area as part of the critical habitat.

5. When determining whether to list a species under Section 4 of the ESA, the Service is required to take into account efforts made by the states and their political subdivisions to protect the species. 16 U.S.C. §1533(b)(1)(A).

Bob Broscheid, Director, Colorado Parks and Wildlife, formally stated in his correspondence dated October 15, 2014, to Noreen Walsh, Regional Director, U.S. Fish and Wildlife Service: "… if the Service does decide to list the species, the state will expect a written justification in compliance with 16 U.S.C. §1553(i) and 50 C.F.R. §424.18(c), regarding all of the comments and supporting documentation that the State has submitted regarding the proposed listing. In addition, we respectfully request that you respond to comments filed by Gunnison County, our close partner in this conservation effort and a political subdivision of the State, as well."

6. In making determinations regarding designation of critical habitat, the Service must exclude areas that are not suitable for the subject species, and must demonstrate that inclusion of currently unsuitable habitat is essential to the conservation of the species. 16 U.S.C. §§1533(a)(3) and 1533(b)(2).

7. Determinations by the Service must be informed by public notice and comment, particularly comment by individual states. "…it is clear from the fact that Congress established a separate procedure to respond to State agency comments, as opposed to comments from other affected parties, that Congress envisioned a separate duty on the part of the Service to specifically respond to those State comments not adopted in a final rule." See: Alaska Oil and Gas Ass'n v. Salazar, 916 F. Supp. 2d 974 1003 (D. Alaska, 2013); Alaska Oil and Gas Association, Case No: 4:13-cv-00018-RRB (D. Ct. Alaska, 2014).

8. The Service is required to incorporate peer review in ESA listing and designation of habitat decisions. Peer review supplies a fundamental check on the validity of assertions and conclusions in these decisions and is considered to be a fundamental element in the practice of environmental science.

B. Federal Administrative Procedure Act ("APA").

1. 5 U.S.C. §706(2)(A) states that a reviewing court shall set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. While an agency's final rule need only be a "logical outgrowth" of its notice, Covad Communications Co. v. FCC, 450 F.3d 528, 548 (D.C. Cir. 2006), the final rule fails the "logical outgrowth" test and violates the APA's notice requirement where "interested parties would have had to divine (the agency's) unspoken thoughts' because the final rule was surprisingly distant from the proposed rule." CSX Transportation Board, 584 F.3d 1076, 1079-1080 (U.S. App. D.C. 244, 2009).

3. APA notice and comment requirements. APA requires an agency to publish "notice" of "either the terms or substance of the proposed rule or a description of the subjects and issues involved" in order to "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments…" 5 U.S.C. §553 (b)-(c).

Under APA notice and comment requirements, "(a)mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies (in its rulemaking." Chamber of Commerce v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006).

Public notice and comment regarding relied-upon technical analysis, then, are "(t)he safety values in the use of … sophisticated methodology." Sierra Club v. Costle, 657 F.2s 298, 334, 397-98.

By requiring the "most critical factual material" used by the agency to be subjected to informed comment, the APA provides a procedural device to ensure that agency rules are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review. Chamber of Commerce v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006).

Where an agency's determination "is based upon 'a complex mix of controversial and uncommented upon data and calculations; there is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely in part." American Radio Relay League, Incorporated v. Federal Communications Commission, 524 F.3d 227, 237 (2008). The rationale for APA public notice and comment requirement is to ensure that: "…a genuine interchange occurs rather than allowing an agency to play hunt the peanut with technical information, hiding or disguising the information its employs." American Radio Relay, *Id* at 237.

Public notice and comment regarding relied-upon technical analysis, then, are "(t)he safety values in the use of … sophisticated methodology." Sierra Club v. Costle, 657 F.2d 298, 334, 397-98.

C. National Environmental Policy Act ("NEPA").

An Environmental Assessment ("EA") under NEPA is a public document that must provide sufficient evidence and analysis to determine whether the agency should issue a "finding of no significant impact" or prepare an "environmental impact statement" ("EIS").

Pursuant to Catron County Board of Comm'rs v. U.S. Fish and Wildlife Service, 75 F.3d 1429 (10th Cir. 1996), the agency must comply with NEPA in making its critical habitat determinations. In the matter of Gunnison sage-grouse, the agency's determination of critical habitat is a "major federal action significantly affecting the quality of the human environment." As such, the Service is required to prepare a full Environmental Impact Statement ("EIS"), in draft and final, as part of the designation process and prior to the final decision.

An EA or EIS must discuss alternatives to the proposed action, including a no-action alternative, which are being considered. The EA may discuss (1) the preferred alternative and identify any other alternatives considered, or (2) if a preferred alternative has not been identified, the alternatives under consideration.

D. Case Law Regarding Economic Analysis.

Under the ESA, the Service may not consider purely economic impacts when making listing determinations. See: 16 U.S.C. §1533(a); See also: N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001). The Service must, however, consider economic and other impacts of critical habitat designation before designating habitat, and may exclude an area from designation if 1) the benefits of exclusion exceed the benefits of designation; and 2) exclusion will not result in a species extinction. See: 16 U.S.C. §1533(b).

Under the "baseline approach", any economic impacts of protecting a species "that will occur regardless of the critical habitat designation – in particular, the burdens imposed by listing … are treated as part of the regulatory 'baseline' and are not factored into the economic analysis of the effects of the critical habitat designation." Arizona Cattle Growers' Ass'n. v. Salazar, 606 F.3d 1160, 1172 (9th Cir. 2010), cert. denied, 131 S. Ct. 1471 (2011).

Under the "coextensive approach," the Service "must ignore the protection of a species that results from the listing decision in considering whether to designate an area as critical habitat. Any economic burden that designating an area would cause must be counted in the economic analysis, even if the same burden is already imposed by listing the species and, therefore, would exist even if the area were not designated." Arizona Cattle Growers, at 1172.

In N.M. Cattle Growers, the Tenth Circuit held that the baseline approach violated the ESA, concluding that the approach 'rendered an economic analysis 'virtually meaningless' because it allowed the agency in all cases to find no economic impacts to the critical habitat designation." N.M. Cattle Growers, at 1283-85).

V. Legal Violation By The Service.

The Service has committed violations of the ESA, the APA, NEPA, relevant case law and a relevant Court order that include:

1. Failure to Properly Analyze Listing Factors.

We concur with the State of Colorado that the Service's decision to list the Gunnison sage-grouse as threatened violated the ESA because the Service failed to properly analyze the five listing factors found in 16 U.S.C. § 1533(a)(l). The Service failed to consider sufficiently the best available science and the impacts of conservation efforts when it evaluated the following factors:

a. Factor A (the present or threatened destruction, modification, or curtailment of the species' habitat or range);
b. Factor C (disease or predation);
c. Factor D (the inadequacy of existing regulatory mechanisms);
d. Factor E (other natural or manmade factors affecting the species' continued existence).

As a result, the Service overestimated the degree of threat to the vast majority of the Gunnison sage- grouse population, which is located in the Gunnison basin. Further, the Service's conclusion that extirpation of the satellite populations would lead to a risk of extinction for the entire species is not supported by the available data.

2. Failure to use the best available scientific or commercial data.

We concur with the State of Colorado that the Service failed to use the best available scientific or commercial data in its Final Decisions. 16 U.S.C. §§ 1533(a)(l), 1533(b)(l)(A). The best available scientific data clearly demonstrates that the species is not warranted for protection under the ESA because the Gunnison basin population, which comprises the vast majority of the species' individuals and occupied range, is not in danger of extinction now or in the foreseeable future. For example:

- The Service arbitrarily discounted that the Gunnison basin population is stable and thriving, including the facts that the current population now exceeds the targets set in the Rangewide Conservation Plan and that the Gunnison Basin lek counts are at an all-time high.

- The Service misinterpreted and selectively ignored population viability analyses (RCP 2005) showing a very low probability (less than one percent) that the species will go extinct within the next fifty years. Current estimated male counts in the Gunnison basin are more than 50% higher than they were when two of the models were developed.

- The Service acknowledged that current residential development is a threat of "low magnitude to Gunnison basin birds at the population level," but concluded that residential development *elsewhere,* in some of the satellite populations, poses a threat to the species range wide, including the Gunnison Basin and that future development in Gunnison County continues to pose a threat.

- The Service accorded little or no weight to scientific evidence submitted by CPW regarding the degree of threat to the Gunnison Basin population posed by disease, drought, fire, and climate change.

- In determining that the Gunnison Basin population could not likely survive if the satellite populations were extirpated, the Service engaged in speculation that is unsupported by the best available commercial science and data.

- In evaluating threats to sagebrush habitat in the Gunnison Basin, the Service misinterpreted the best available commercial science and data regarding the historical range and distribution of the species. The Service overestimated the extent of historical range and relied on an improper understanding of habitat fragmentation as applied to the Gunnison sage-grouse.

- The Service did not properly evaluate and credit conservation efforts (regulatory and other) that have reduced or eliminated threats to the species.

3. Failure to Appropriately Consider Conservation Efforts.

The Service underestimated the level of protection that has been provided via federal, state, local, and private conservation efforts to conserve sagebrush habitat in the Gunnison basin. The Gunnison Basin area has met or exceeded the Rangewide Conservation Plan target for conservation and protection of seasonally important habitat on private lands (RCP 2005; CPW 2014). Federal and State of Colorado agencies responsible for management of publicly owned habitat have entered into a formal agreement to protect sage-grouse habitat on their lands, and other federal programs have also resulted in the protection, improvement and restoration of habitat in the Gunnison basin. The Service's conference opinions on the CCAA and the CCA found that implementation of the programs would provide a long-term, net benefit for the Gunnison sage-grouse on a landscape scale. The Service acknowledged the effectiveness of these efforts and noted that they have had the most impact in the Gunnison basin, but did not adequately weigh them in the Listing Decision.

4. Misuse of Policy for Evaluation of Conservation Efforts.

The Service engaged in a formal analysis of conservation efforts under its Policy for Evaluation of Conservation Efforts ("PECE"), but never released a draft or final version of the analysis the public for review. At a minimum, this was not in accordance with procedural requirements under the ESA and APA designed to enable informed public comment. Accordingly, Gunnison County is unable to evaluate whether the analysis was reasonable and gave sufficient weight to the many ongoing conservation programs.

5. Failure To Establish Gunnison Basin Population Is "Threatened"

The Service failed to establish that the Gunnison Basin Population is "threatened" or facing material threats.

Gunnison County and the State of Colorado established, in their respective comments, that:

- The Gunnison Basin Population is a stable, growing, healthy stronghold, likely to persist and with a risk of extinction in the next 50 years of less than ½ of one percent.

- Gunnison County has established and maintained a robust, regulatory regime to conserve Gunnison sage-grouse.

- Residential development and habitat "fragmentation" and "loss" are significantly less than the Service conjectures.

- Gunnison County has developed and implemented the best scientific tool available to identify Gunnison sage-grouse critical habitat, the HPT. The HPT was not employed by the Service.

6. Davis (2012) #1.

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

The Service placed such significant emphasis on one "population viability analysis" - Davis (2012) – in the Listing Decision that Davis (2012) is among the most critical material used by the Service in its analysis and conclusions. The Listing Decision makes over one hundred references to Davis (2012) and refers to it and a companion study –

Davis et al. (in press) as "the most current and best available scientific information regarding the viability of Gunnison sage-grouse." 79FR69295. (Emphasis added.)

However, while Davis (2012) was available to the Service at the time the draft Listing Decision was published on January 11, 2013, the Service failed to disclose to the public the Service's knowledge or use of Davis (2012) until the final Listing Decision.

As noted above, under APA notice and comment requirements, "(a)mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which agency relies (in its rulemaking)." Chamber of Commerce v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006).

7. Davis (2012) #2.

The Service downplayed the limits of Davis (2012) identified by the author herself in that document.

> "If my study had been conducted just a few years earlier (or later) I might have found a different trend across time…If the next year [in] the time series was a good year (the best year from my simulated data with a lambda of 1.27) the population projections change from obviously declining to widely variable." (Davis 2012:92)

8. Davis (2012) #3.

The Service compounded its non-disclosure and misuse of Davis (2012) by using Davis (2012) to truncate and avoid an appropriate analysis of "significant portion of the range."

9. Davis (In Press 2014).

The Service downplayed the limits of Davis (2012) identified by the author herself in Davis (In Press 2014). Dr. Davis's (In Press, 2014) model provides important insights into her previous (Davis, 2012) conclusions, as well as providing improved modeling techniques to estimate population viability with imperfect data. The Service provided little analysis, if any, and accorded little weight, if any, to Davis (In Press 2014). Indeed, Davis (In Press 2014) was minimally mentioned. This failure magnified the service's misuse of Davis (2012).

10. Services's Failure to Consider Accurately Other PVAs

Gunnison County notes that the years 2005 and 2006 were an all-time high in lek attendance and that a population viability analysis (PVA) commissioned by the Service in 2005 (the Garton PVA) found that Gunnison sage-grouse populations were stable. This is because this PVA looked at increasing years prior to 2005, with 2005 as the peak. The Davis PVAs started at the population peak. Therefore the Service's analysis of the Davis PVAs, and the chance of extinction of the Gunnison Basin population are in error.

11. Service's Failure to Analyze Accurately Conservation Actions In Gunnison Basin.

The Service failed to analyze accurately the scope and efficacy of regulatory and non-regulatory actions to conserve the Gunnison Basin Population of the Gunnison sage-grouse.

12. Service's Overstatement of Threats to Satellite Populations.

The Service has significantly overstated the magnitude, immediacy and causes of alleged threats to the satellite populations of Gunnison sage-grouse.

13. Service's Failure to Analyze Accurately Conservation Actions in Satellite Populations.

The Service failed to analyze accurately the scope and efficacy of regulatory and non-regulatory actions to conserve the satellite populations of the Gunnison sage-grouse.

14. Service's Disregard of Habitat Prioritization Tool.

The Service blithely discarded the "Habitat Prioritization Tool" with one mention in the Listing Decision and only the statement in the Designation of Critical Habitat Decision that the Service "looked at" it. This does not satisfy the ESA requirement "to use the best available scientific and commercial data available."

15. Designation of Critical Habitat.

Regarding designation of critical habitat, we concur with the State of Colorado, that the Service violated the ESA, 16 U.S.C. §§ 1533(a)(3) and 1533(b)(2), when designating critical habitat for the Gunnison sage-grouse. The ESA requires the Secretary to consider economic impacts in designating critical habitat. 16 U.S.C. § 1533(b)(2). The Service had an economic analysis prepared that dismissed or failed to consider relevant economic impacts. Moreover, the Service did not take the results into account when designating critical habitat. Further, the Service included areas as critical habitat that are not suitable for Gunnison sage- grouse, and failed to demonstrate that inclusion of currently unsuitable habitat was essential to the conservation of the species. The Service also determined that all currently occupied areas are essential for the persistence and conservation of the Gunnison sage-grouse, even though under the ESA at 16 U.S.C. § 1532(5)(C), barring unusual circumstances, critical habitat should not include the entire geographical area which can be occupied by the species.

In addition:

a. The Environmental Assessment does not analyze a true “no action” alternative of not designating against the alternative of designating.

b. The Service arbitrarily performed an Environmental Assessment instead of an Environmental Impact Statement.

c. The Economic Analysis used did not comply with the requirements of N.M. Cattle Growers Ass’n v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001).

d. The Economic Analysis improperly focused on the national economy.

e. The Economic Analysis understated or did not consider multiple areas of regional and local economic impacts, and impacts to specific economic sectors.

f. The Economic Analysis did not evaluate the potential loss of local and state investment in protecting the species.

18. Service’s Failure to Respond to Comments.

The Service failed to respond to comments of the State of Colorado, the State of Utah, and Colorado and Utah counties (which are subdivisions of their respective states).

19. Failure Regarding Peer Reviews.

The failure of the Service to comply with the ESA is manifest in the peer reviews obtained by the Service and in the failure of the Service to apply the peer reviews.

Chief among the Services failures identified by the peer reviews and not corrected by the Service in the final rules are:

a. The frequent use of speculation and commentaries as empirical evidence.

b. Flaws in the analysis of Gunnison sage-grouse behavior, movements and demography.

c. Inaccurate analysis of potential threats of additional anthropogenic infrastructure based on assumption of increasing human populations.

d. Frequent use of vague language (e.g. “may have” or “is likely to”).

e. Misuse of the concept and definition of “fragmentation” and other concepts (e.g. “connection” of landscape).

f. Compounding the misuse of the concept pf “fragmentation” by conclusions that certain activities (e.g. residential, exurban and commercial development and associated infrastructure) are “threats”.

g. Disagreement with the Service regarding the extent of loss of habitat and any result and fragmentation of the landscape.

h. Service estimates and conclusions regarding “presettlement” or historic distribution of Gunnison sage-grouse.

i. Service’s failure to accurately acknowledge ongoing conservation efforts.

j. Service’s use of genetic diversity as a basis for listing the species.

k. Vulnerability of estimates and projection of human population growth.

l. Conflation of residential density and residences.

20. Service’s Failure Regarding “Historic Range”.

The Service has made impermissible, inconsistent and internally conflicting assumptions, uses and conclusions regarding “historic range.”

21. Service’s Failure Regarding Significant Portion of the Range Policy.

The Service inappropriately applied its SPR Policy. By arbitrarily making the threshold determination that Gunnison sage-grouse are threatened throughout the entire range, the Service inappropriately avoided the necessary analysis of whether any satellite populations aggregated, are a “significant portion of the range.”

22. Violation of Court Order.

The Service violated the Order, dated May 6, 2014, (“Order”) in WildEarth Guardians v. Salazar, Case 1:10-mc-00377-EGS. In that matter, the Service informed the Court, in “Defendants’ Unopposed Motion To Extend Final Listing Determination For The Gunnison sage-grouse Under Guardians Agreement,” (“Motion”) dated May 5, 2014 that: “The Service believes that, if it determines to list the (GUSG) as threatened, the concurrent issuance of a final 4(d) rule could be paramount in order to provide measures that are specifically tailored to the conservation needs of the Gunnison sage-grouse and

to avoid unnecessary public confusion as to expectations of what type of actions may be prohibited upon listing." Motion, p.6.

The Court in its Order required that "(t)he Service, on or before November 12, 2014, submit to the Federal Register a final listing decision for the Gunnison sage-grouse and, if listed, a final critical habitat designation, and if listed as threatened, a final special rule, if any." (Emphasis added.)

The Service neither ever provided public notice of such a 4(d) rule – in time for adoption by November 12, 2014 or otherwise – nor adopted such a 4(d) rule.

23. Inconsistency of Final Decisions.

The Listing Decision and the Designation of Critical Habitat Decision are internally inconsistent.

VI. Conclusion.

One of the purposes of the ESA's citizen suit provision, 16 U.S.C. §1540(g), is to encourage discussions among parties in order to avoid potential litigation. We encourage the Service to seriously consider the concerns detailed in this notice and ask that you discuss with us the steps the Service may take going forward to remedy these legal violations and to avert the need for litigation. Towards this end, we would be happy to meet with the Service to discuss the issues raised in this notice letter. However, if the aforementioned violations are not remedied within 60 days of the date of this letter, we intend to file a suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and attorneys' fees and costs concerning these violations.

Grounds for the injunctive relief will include that administration of the rules will damage both ongoing state, local government and private property owner efforts to conserve Gunnison sage-grouse, its habitat and the species itself.

If you believe any of the above information is incorrect, have any additional information that might help avoid litigation, or wish to discuss this matter further, please feel free to contact us through David Baumgarten, Gunnison County Attorney, 200 E. Virginia, Gunnison, CO 81230; Telephone No: 970-641-5300
or dbaumgarten@gunnisoncounty.org.

Sincerely,

THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF GUNNISON, COLORADO

Paula Swenson Chairperson	Phil Chamberland Vice-Chairperson	Jonathan Houck Commissioner