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*Working to protect and restore  
Western Watersheds and Wildlife*

September 23, 2020

*Via Electronic and Certified Mail*

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U.S. Department of the Interior  
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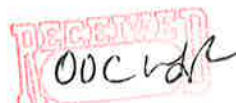
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Margaret Everson, Exercising the Delegated Authority of the Director, National Park Service  
National Park Service  
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Washington, DC 20240

**RE: 60-day Notice of Intent to Sue for Violations of the Endangered Species Act Related to Reliance on the Gunnison Candidate Conservation Agreement Biological Opinion for Livestock Grazing Authorizations in the Gunnison Basin.**



SEP 29 2020

Dear Secretary Bernhardt, U.S. Fish and Wildlife Service Director Skipwith, Acting Bureau of Land Management Director Pendley, Forest Service Chief Christiansen, and Acting National Park Service Director Everson:

The Center for Biological Diversity (Center) and Western Watersheds Project (WWP) provide notice that the Bureau of Land Management (BLM), U.S. Forest Service (Forest Service), National Park Service (NPS) (collectively the Action Agencies), and U.S. Fish and Wildlife Service (FWS) have violated sections 7 and 9 of the ESA by failing to ensure that the adoption and continuing implementation of the Gunnison Basin Candidate Conservation Agreement (Gunnison Basin CCA) and its attendant Biological Opinion (BiOp) authorizing development, recreation, and livestock grazing within occupied Gunnison sage-grouse (*Centrocercus minimus*) critical habitat in the Gunnison Basin do not jeopardize the continued existence of the bird, adversely modify its critical habitat, or result in unauthorized take.<sup>1</sup>

The Gunnison Basin CCA was developed in 2013 following FWS's proposal to list the Gunnison sage-grouse as endangered and designate critical habitat. It was intended to provide coverage to the Action Agencies for incidental take of Gunnison sage-grouse in the event that the species was listed, as well as specify needed conservation measures and monitoring. After deciding to list the Gunnison sage-grouse under the ESA and designate critical habitat for it, FWS adopted its prior analysis of the Gunnison Basin CCA's effects in the BiOp.<sup>2</sup>

Since FWS adopted the BiOp, Gunnison sage-grouse numbers have declined dramatically and the species now stands on the brink of extinction. In the face of this decline, the Action Agencies' continued authorization of livestock grazing, coupled with their failure to adhere to the BiOp's annual reporting requirements, jeopardizes the Gunnison sage-grouse's continued existence, adversely modifies its critical habitat, results in the unlawful take of Gunnison sage-grouse, and violates the ESA. The Action Agencies' and FWS's failure to reinstate consultation in light of the species' decline and the best available science, their failure to implement the BiOp's conservation measures, and the likely exceedance of the BiOp's incidental take statement (ITS), similarly violates the ESA. Even if the situation were not so dire, the BiOp was and remains fundamentally flawed.

The Center is a non-profit conservation organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 81,000 members across the world, including many in Gunnison County, Colorado. Some Center members enjoy recreating in and deriving aesthetic benefit from the habitat of the Gunnison sage-grouse within the Gunnison Basin.

WWP is a nonprofit organization with more than 12,000 members and supporters that is dedicated to protecting and restoring western watersheds and wildlife through education, public policy initiatives, and legal advocacy. WWP works to influence and improve public lands management throughout the West with a primary focus on the negative impacts of livestock

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<sup>1</sup> See 16 U.S.C. § 1540(g).

<sup>2</sup> Adoption of the Gunnison Basin Candidate Conservation Agreement Conference Opinion as the Final Biological Opinion (Dec. 8, 2014).

grazing on 250 million acres of western public lands, including harm to ecological, biological, cultural, historic, archeological, scenic resources, wilderness values, roadless areas, Wilderness Study Areas and designated Wilderness.

Unless the Action Agencies and FWS, within 60 days of receipt of this notice, ameliorate their ongoing violations of sections 7 and 9 by withdrawing the BiOp, reinitiating consultation, and halting activities previously authorized under the BiOp until consultation has been completed, the Center and WWP intend to challenge the agencies' unlawful conduct in court.

## **I. THE ENDANGERED SPECIES ACT**

Enacted in 1973, the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>3</sup> The ESA provides a means to conserve endangered and threatened species and the ecosystems upon which they depend.<sup>4</sup> To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as "endangered" or "threatened."<sup>5</sup> The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range."<sup>6</sup> 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."<sup>7</sup>

Recognizing the importance of timely habitat protections to the conservation and recovery of endangered species, the ESA requires the designation of critical habitat concurrently with listing a species.<sup>8</sup> Critical habitat means "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) *essential* to the conservation of the species and (II) which may require special management considerations or protection;" and unoccupied areas "*essential* for the conservation of the species."<sup>9</sup> "Conservation" is defined as all methods that can be employed to "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary."<sup>10</sup> As such, "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery."<sup>11</sup>

Once a species is listed and critical habitat is designated, section 7 of the ESA imposes a substantive obligation on federal agencies to "insure that any action authorized, funded, or

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<sup>3</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

<sup>4</sup> 16 U.S.C. § 1531(b).

<sup>5</sup> *See id.* § 1533.

<sup>6</sup> *Id.* § 1532(6).

<sup>7</sup> *Id.* § 1532(20).

<sup>8</sup> *Id.* § 1533(a)(3)(A)(i); *see also id.* § 1533(b)(6)(C).

<sup>9</sup> *Id.* § 1532(5) (emphasis added).

<sup>10</sup> *Id.* § 1532(3).

<sup>11</sup> *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

carried out by such agency ... is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for such species.<sup>12</sup> Thus, “[i]t is the action agency’s burden to show the absence of likely adverse effects on listed species.”<sup>13</sup> Jeopardy results where an action reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by impacting the reproduction, numbers, or distribution of that species.<sup>14</sup> “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.”<sup>15</sup> The ESA also prohibits “take” of a species—which includes harassing, harming, wounding, killing, trapping, capturing or collecting a listed species.<sup>16</sup> “Take” includes direct as well as indirect harm and need not be purposeful.<sup>17</sup>

To fulfill the substantive mandates of section 7 of the ESA, federal agencies must consult with an expert agency—here, FWS—before undertaking actions with potential to affect listed species or their habitat.<sup>18</sup> If the proposed action “may affect” listed species or their critical habitats, formal consultation is required.<sup>19</sup> Once consultation is initiated, “the Federal agency and the permit or license applicant [cannot] make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.”<sup>20</sup> To complete formal consultation, FWS must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat.<sup>21</sup> In carrying out the consultation process, “each agency shall use the best scientific . . . data available.”<sup>22</sup>

If the biological opinion concludes that the proposed action (or implementation of any reasonable and prudent alternatives) is *not* likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat, but will result in the incidental take of the species, FWS must concurrently provide an “incidental take statement.”<sup>23</sup> The incidental take statement must specify the impact (amount or extent) of incidental taking on the species, any “reasonable and prudent measures” that FWS considers

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<sup>12</sup> See 16 U.S.C. § 1536(a)(2).

<sup>13</sup> *Forest Guardians v. Johanns*, 450 F.3d 455, 463 (9th Cir. 2006) (citing 16 U.S.C. § 1536(a)(2)).

<sup>14</sup> 50 C.F.R. § 402.02.

<sup>15</sup> *Id.* (2014).

<sup>16</sup> 16 U.S.C. §§ 1538(a)(1), 1532(19).

<sup>17</sup> See 50 C.F.R. § 17.3 (definitions of “harass” and “harm”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995).

<sup>18</sup> 50 C.F.R. § 402.14(a), (b).

<sup>19</sup> *Id.* § 402.14(a).

<sup>20</sup> 16 U.S.C. § 1536(d).

<sup>21</sup> *Id.* § 1536(b); 50 C.F.R. § 402.14.

<sup>22</sup> 16 U.S.C. § 1536(a)(2).

<sup>23</sup> 50 C.F.R. § 402.14(i).