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By E-Mail and Certified Mail

December 30, 2014

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Daniel M. Ashe, Director
U.S. Fish and Wildlife Service
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

RE: Notice of Intent to Sue to Remedy Violation of the Endangered Species Act in Regard to the United States Fish and Wildlife Service's Decision to Withdraw the Proposed Rule to List Graham's Beardtongue (Penstemon grahamii) and White River Beardtongue (Penstemon scariosus var. albifluvis) as Threatened Species and Designate Critical Habitat

Dear Secretary Jewell and Director Ashe:

On behalf of the Center for Biological Diversity, Rocky Mountain Wild, Utah Native Plant Society, Southern Utah Wilderness Alliance, Grand Canyon Trust, Western Resource Advocates, and Western Watersheds Project, we provide notice that the U.S. Fish and Wildlife Service's (FWS's) decision to withdraw the proposed listing rule and critical habitat designation for the for the Graham's beardtongue (*Penstemon grahamii*) and White River beardtongue (*Penstemon scariosus var. albifluvis*), 79 Fed. Reg. 46,042 (Aug. 6, 2014), violates the agency's nondiscretionary duties under the Endangered Species Act (ESA). 16 U.S.C. § 1533. We provide this notice in accordance with the 60-day notice requirement of Section 11(g) of the ESA. 16 U.S.C. § 1540(g).

Graham's and White River beardtongues, also called penstemons, are beautiful wildflowers that live on oil shale outcrops in the Uinta Basin of northeastern Utah and northwestern Colorado. The beardtongues live almost exclusively in areas targeted for unconventional oil shale and tar sands development and traditional oil and gas drilling. As a result, the beardtongues are threatened with extinction due to direct habitat destruction from surface mining, drill pads, and the extensive infrastructure necessary to support mining and drilling operations such as roads, transmission lines, and pipelines. Energy development also poses indirect threats from habitat fragmentation, loss and fragmentation of pollinator habitat, spread of invasive weeds, and dust pollution. Additional cumulative threats include livestock grazing and trampling, small population size, and climate change.

ROCKY MOUNTAIN 633 17TH STREET, SUITE 1600 DENVER, CO 80202

T: 303.623.9466 F: 303.623.8083 RMOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

FWS's decision to withdraw endangered species protections for the Graham's and White River beardtongues violates the ESA by failing to rely on the best available science and by failing to ensure that adequate regulatory mechanisms are in place to protect the plants. 16 U.S.C. § 1533. Instead, FWS improperly relies on unenforceable and uncertain future conservation measures contained in a last-minute conservation agreement to conclude threats to the species have been adequately reduced.

I. Graham's and White River Beardtongues Warrant ESA Listing

ESA Section 4 requires FWS to determine whether a species is threatened or endangered based on any one or a combination of five factors:

> (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). 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." Id. § 1532(20). The agency must make any listing determination "solely on the basis of the best scientific and commercial data available . . . after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species." 16 U.S.C. § 1533(b)(1)(A).

After repeatedly finding over three decades that Graham's beardtongue deserved ESA protection, FWS finally proposed to list the species as a threatened species and to designate more than 3,500 acres as critical habitat in 2006. 71 Fed. Reg. 3,158 (Jan. 19, 2006). However, less than a year later, FWS reversed its decision and withdrew the proposed rule. 71 Fed. Reg. 76,023 (Dec. 19, 2006). FWS relied heavily on the U.S. Bureau of Land Management's (BLM's) claims that it would adequately protect the Graham's beardtongue from energy development on federal lands.

The Center for Native Ecosystems (now Rocky Mountain Wild), Southern Utah Wilderness Alliance, Utah Native Plant Society, and Colorado Native Plant Society sued to challenge the withdrawal, and the U.S. District Court for the District of Colorado vacated the withdrawal and reinstated the proposed rule. Ctr. for Native Ecosystems v. Salazar, 795 F. Supp. 2d 1199 (D. Colo. 2011). The court held FWS: (1) failed to consider the combined effects of the ESA's listing factors; (2) failed to adequately consider the best available science on threats from oil and gas development, grazing, and off-road vehicle use; (3) improperly considered speculative, future conservation measures; and (4) arbitrarily concluded undefined lease provisions adequately reduced threats to the species. Id. at 1206-10.

White River beardtongue was first designated as a candidate species for listing in 1983. The Center for Biological Diversity, along with a coalition of prominent scientists, artists and environmentalists, petitioned for this and other candidate species to be listed in 2004. In two settlement agreements reached in 2011 with the Center for Biological Diversity and Wildearth Guardians, FWS agreed to make listing decisions for the White River beardtongue and other candidates.

On August 6, 2013, FWS proposed to list the Graham's and White River beardtongues as threatened species, 78 Fed. Reg. 47,590 (Aug. 6, 2013), and to designated nearly 68,000 acres as Graham's beardtongue critical habitat and nearly 15,000 acres as White River beardtongue critical habitat. 78 Fed. Reg. 47,832 (Aug. 6, 2013). In the proposed rule, FWS found that approximately 91% of known Graham's beardtongue populations and 100% of White River beardtongue populations are threatened by the direct and indirect impacts of oil shale and oil and gas development. 78 Fed. Reg. at 47,602. Additionally, FWS found that both species are threatened by the combined impacts of energy development, competition from invasive weeds, grazing, small population sizes, and climate change. Id. at 47,608.

In late 2013, FWS began working to rapidly develop a conservation agreement with BLM, Utah School and Institutional Trust Lands Administration (SITLA), Uintah County, Utah's Public Lands Policy Coordinating Office, and other state and local entities. The conservation agreement was finalized on July 22, 2014 and signed on July 25, 2014. SWCA Environmental Consultants, Conservation Agreement and Strategy for Graham's Beardtongue (*Penstemon grahamii*) and White River Beardtongue (*P. scariosus* var. *albifluvis*) (July 22, 2014) (hereinafter "CA"). The CA expires after 15 years and terminates "automatically if there is a listing of either species." CA at 43. The CA includes speculative promises of future protections that, even if implemented, are inadequate to protect the species from threats in the reasonably foreseeable future.

Yet, the very same day the parties finalized the CA, FWS concluded that actions proposed to be taken under the agreement adequately reduce current and future threats to both beardtongue species such that listing no longer is necessary and withdrew the proposed rules. 79 Fed. Reg. 46,042 (Aug. 6, 2014).[1] FWS improperly relied on speculative future, voluntary conservation measures found in the CA to support its determination that these species do not warrant listing. Indeed, the best available science shows that the CA does not adequately reduce the threats to the species and that the beardtongues remain threatened or endangered throughout their ranges. Accordingly, FWS's decision not to list the beardtongues and designate critical habitat violates the ESA and is arbitrary and capricious.

[1] The notice of withdrawal was dated July 22, 2014, but was not published until August 6, 2014.

II. FWS's Reliance on Future, Speculative Conservation Measures Violates the ESA

FWS's decision to withdraw the proposed rule is based on its claim that the CA will adequately protect the Graham's and White River beardtongues from habitat destruction and modification and other threats. However, the CA is comprised of conservation measures that have yet to be developed, adopted, or defined. As federal courts uniformly have held—and FWS acknowledges—the ESA prohibits FWS from relying on speculative, future conservation efforts to avoid listing.

ESA Section 4 addresses conservation measures in two provisions. First, FWS must consider the threat posed to a species as a result of the "inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D) (emphasis added). As the District of Colorado held in Center for Native Ecosystems, this plain text prohibits FWS from considering "future conservation efforts in making the listing determination." 795 F. Supp. 2d at 1209; see also Ctr. for Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004); Or. Natural Res. Council v. Daley (ONRC), 6 F. Supp. 2d 1139, 1154 (D. Or. 1998); Save Our Springs v. Babbitt, 27 F. Supp. 2d 739, 747 (W.D. Tex. 1997).

Second, Section 4(b)(1)(A) allows FWS to consider "efforts . . . being made" to protect the species by States, political subdivisions of the States, or foreign nations. 16 U.S.C. § 1533(b)(1)(A) (emphasis added).[2] This section "plainly do[es] not allow the Secretary to consider a nonexistent plan or speculate about future events." Fed'n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000); see also Alaska v. Lubchenco, 825 F. Supp. 2d 209, 219 (D.D.C. 2011); In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig., 794 F. Supp. 2d 65, 113 n.56 (D.D.C. 2011); Morgenweck, 351 F. Supp. 2d at 1141; ONRC, 6 F. Supp. 2d at 1153-54. As FWS acknowledges in its own Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE), FWS "may not rely on speculative promises of future action when making listing decisions." 68 Fed. Reg. 15,100, 15,106 (Mar. 28, 2003).

Yet that is exactly what FWS has done in this case. See, e.g., 79 Fed Reg. at 46,067, 46,084 (FWS expressly relying on "future" conservation efforts found in the CA). For example, FWS relies heavily on unenforceable promises by BLM, SITLA, and Uintah County to designate conservation areas and implement the two core conservation measures that are supposed to apply within these areas: (1) surface disturbance caps that limit additional surface disturbance to 5 percent in Graham's beardtongue conservation areas and 2.5 percent in White River beardtongue conservation areas, and (2) 300-foot buffer zones where surface disturbance is limited. See, e.g.,

[2] This provision refers exclusively to conservation efforts being made by "any State or foreign nation, or any political subdivision of any State or foreign nation," and not federal conservation measures. 16 U.S.C. § 1533(b)(1)(A). Accordingly, FWS may consider federal efforts only under Factor D: the "adequacy of existing regulatory mechanisms." Id. § 1533(a)(1)(D); see ONRC, 6 F. Supp. 2d at 1155-56.

Id. at 46,074-75, 46,083-84.[3] These conservation measures were not "existing" or "being made" when FWS decided to withdraw the proposed rule. See Ctr. for Native Ecosystems, 795 F. Supp. 2d at 1209 (rejecting FWS's reliance on possible future amendments to BLM's RMP to protect the Graham's beardtongue from energy development).[4]

Furthermore, the parties to the CA have not yet agreed on how or whether these conservation measures, which FWS deems critical to the plants' survival, will be applied. Instead, they plan to come to agreement in the future. For example, the parties have put off making crucial decisions about how the disturbance caps will be implemented, including the actual amount of surface disturbance that will be allowed within each conservation area. CA at 27. The conservation team intends to determine the existing level of surface disturbance within the next year and, based on this analysis, "will examine and modify the surface disturbance limits if needed . . . to allow for flexibility in siting projects and avoiding plants." Id. (emphasis added). The only limitation is that the disturbance caps cannot be lowered, or made more protective. Id. In other words, the actual level of surface disturbance that will be allowed in each conservation area is speculative and may be much greater than the values that form the basis for FWS's withdrawal decision. Without knowing what level of surface disturbance will occur, FWS cannot rationally conclude that disturbance caps will adequately protect the species. See infra Section V.d.[5]

Any protections provided by the 300-foot buffers are similarly speculative. Although FWS relies heavily on the buffers to prevent habitat destruction, the CA envisions that development will be permitted within the buffer under certain conditions. See, e.g, 79 Fed. Reg. at 46,067, 46,068, 46,084. FWS fails to specify what those conditions are. Compare id. at 46,067, 46,084 (contemplating disturbance within the buffer when it "must occur" or when it is "unavoidable"), with id. at 46,068 (stating disturbance within buffer is permissible "only if it benefits or reduces impacts to the species or habitat"). FWS contemplates that "benefits" would occur through mitigation. But the form and amount of mitigation are entirely speculative: the conservation team plans to develop a "standardized procedure" for mitigating impacts within a year. Id. at 46,068. Yet, FWS relies on this undefined, anticipated mitigation to conclude that it will adequately reduce the impact of an unknown number of buffer violations. Id. at 46,063, 46,075.

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[3] FWS relies on BLM's promise to incorporate these measures into its permitting and budgets within three months and into its resource management plans (RMPs) at some undefined date in the future. 79 Fed. Reg. at 46,069. FWS also relies on SITLA's promise to issue regulations, a director's withdrawal order, or a joint lease stipulation within three months and Uintah County's promise to pass an ordinance within three months. Id.

[4] That BLM, SITLA, and Uintah County agreed to these measures in an unenforceable CA does not change the fact that they are promises of future action and therefore cannot serve as a basis for FWS not to list the beardtongues. See Fed'n of Fly Fishers, 131 F. Supp. 2d at 1165 (rejecting FWS's reliance on future conservation measures found within a finalized Memorandum of Agreement); ONRC, 6 F. Supp. 2d at 1153-54 (same).

[5] FWS also has yet to determine how it will track surface disturbance levels. CA at 27. This process will be difficult given the numerous parties to the agreement and the checker-boarded land ownership.

FWS also relies on numerous commitments to develop conservation plans in the future. According to the CA, BLM intends to develop and implement a livestock grazing and mitigation plan. Id. at 46,070. The conservation teams plans to develop and implement, by consensus, an invasive weed management plan. Id. And the conservation team might—if funding is available—decide to install weather monitoring equipment to collect data to help determine the species' responses to climate change. Id. at 46,071, 46,083. FWS relies on these nonexistent plans to conclude the cumulative threat to the species has been adequately reduced in violation of the ESA. See, e.g., id. at 46,079, 46,081, 46,083, 46,085-86.

FWS claims that its approach with respect to livestock grazing, invasive weeds, and climate change is "adaptive management." Id. at 46,085. However, FWS cannot defeat Congress' intent by cloaking future, speculative measures under the guise of adaptive management. As the court stated in National Wildlife Federation v. National Marine Fisheries Service, "[i]t is one thing to identify a list of actions, or combination of potential actions, to produce an expected survival improvement and then modify those actions through adaptive management to reflect changed circumstances. It is another to simply promise to figure it out in the future." 839 F. Supp. 2d 1117, 1128 (D. Or. 2011). Here, the parties are simply promising to figure out their plans for mitigating impacts from livestock grazing, invasive weeds, and climate change in the future. This is not allowed under the ESA.

In sum, the conservation measures on which FWS relies in concluding threats to the beardtongues have been adequately reduced are speculative promises of future action. FWS's reliance on such measures violates the ESA's plain text.

III. FWS Unlawfully Relies on Non-Regulatory Mechanisms to Conclude That Threats to the Beardtongues Have Been Adequately Reduced

Under ESA Section 4, FWS must consider whether "the inadequacy of existing regulatory mechanisms" poses a threat to the species. 16 U.S.C. § 1533(a)(1)(D) (emphasis added). In the proposed rule, FWS found that existing regulatory mechanisms were inadequate to address the threats to the beardtongues, particularly those from energy development. 78 Fed. Reg. at 47,607-08. In the final rule, however, FWS changes its mind based solely on the CA and concludes that existing regulatory mechanisms are adequate. 79 Fed. Reg. at 46,084. FWS's conclusion violates the ESA.

To be considered "regulatory" conservation measures in a CA must be legally binding and enforceable. Morgenweck, 351 F. Supp. 2d at 1141 (rejecting CA because it was not legally binding); see also ONRC, 6 F. Supp. 2d at 1155 ("[F]or the same reason that the Secretary may not rely on future actions, he should not be able to rely on unenforceable efforts. Absent some method of enforcing compliance, protection of a species can never be assured.").

The CA itself is not a regulatory mechanism because compliance with it is voluntary and it is terminable at will. FWS points to the commitments by BLM, SITLA, and Uintah County in the CA to adopt mechanisms for enforcing the conservation measures, such as zoning ordinances and regulations. 79 Fed. Reg. at 46,083-84. With respect to BLM, however, there is not even a commitment to adopt a mandatory "regulatory mechanism" in the near future.

Over the near term, BLM plans to implement the CA through permitting and budgets, which are not enforceable regulatory mechanisms. Id. at 46,069. BLM manages public lands "in accordance with" land use plans, or RMPs. 43 U.S.C. §§ 1712, 1732(a). Although BLM commits to incorporate the conservation measures into the relevant RMPs "during the next planning cycle," no timeline is provided. 79 Fed. Reg. at 46,069. In fact, it is likely to be a decade or more before BLM completes the planning process for both of the relevant RMPs.[6] At a minimum, BLM must incorporate the CA's conservation measures into final versions of the relevant RMPs before FWS may consider them to be regulatory mechanisms and rely on them to address the threats to the beardtongues. Compare Morgenweck, 351 F. Supp. 2d at 1141 (rejecting FWS's reliance on a nonbinding conservation agreement), with Servheen, 665 F.3d at 1032 (upholding FWS's reliance on existing, binding National Park Compendia and national forest plans).

FWS's heavy reliance on BLM's "mere assurances" regarding the two most critical conservation measures on federal lands is also unreasonable. See Defenders of Wildlife v. Jewell, No. 12-1833(ABJ), 2014 WL 4714847, at *13 (D.D.C. Sept. 23, 2014) (holding that reliance on a purely voluntary measure to address a critical threat to the species was arbitrary). Indeed, BLM has already demonstrated that it does not treat its existing commitments to implement 300-foot buffers as binding. Although the CA gave BLM three months to incorporate the buffers into permits and budgets, BLM had already agreed to prohibit surface disturbance within 300 feet of Graham's beardtongue plants under both the 2007 Conservation Agreement and the 2008 Record of Decision for the Vernal RMP. 79 Fed. Reg. at 46,083.[7] Despite these commitments and the fact that 300-foot buffers were already included in the draft CA, in April 2014 BLM finalized an environmental assessment for an Ambre Energy oil shale exploration project that would authorize drilling of oil shale test wells within 300 feet of Graham's beard tongue plants.[8] And

[6] The RMP that governs the vast majority of the beardtongues' habitat is the Vernal RMP, which the Utah BLM amended in 2008. BLM has no plans to even begin a new planning process in the near future. BLM is currently revising the White River RMP, which governs habitat for the beardtongues in Colorado, to account for increased oil and gas development. However, the CA was signed after completion of the draft RMP amendment, and BLM has not indicated whether the CA's provisions will be incorporated into the final RMP. See http://www.blm.gov/co/st/en/BLM_Programs/land_use_planning/rmp/white_river.html.

[7] See BLM, Vernal Field Office, Record of Decision and Approved Resource Management Plan (Oct. 2008) ("Vernal ROD"), available at http://www.blm.gov/style/medialib/blm/ut/vernal_fo/planning/rod_approved_rmp.Par.12251.File.dat/VernalFinalPlan.pdf.

[8] See BLM, Ambre Energy Seep Ridge Oil Shale Exploration Application, Environmental Assessment, DOI-BLM-UT-G010-2014-0081-EA UTU 89280 at 8 ("Ambre Energy EA"), available at https://www.blm.gov/epl-front-office/projects/nepa/38323/47786/51848/EA_UTU_89280_Seep_Ridge_Exploration_Plan.pdf.

just two weeks after signing the 2014 CA, allegedly committing BLM once again to the 300-foot buffers, BLM requested that FWS sign off on the plan.[9]

Additionally, even if the 300-foot buffers are eventually incorporated into "regulatory mechanisms," the CA provides for waivers that prevent them from being considered binding. The buffers may be waived when disturbance within the buffer is "unavoidable" or when waiving the buffer somehow "benefits or reduces impacts to the species or habitat." See, e.g., id. at 46,068, 46,075. Although FWS claims the resulting harm to the beardtongues will be mitigated, those mitigation measures are undefined and unsubstantiated. Id. at 46,067-68; see also supra Section II.

IV. FWS's Conclusions in its PECE Evaluation Violate the ESA and are Arbitrary

FWS justifies its reliance on future, speculative measures by arguing that it analyzed the CA under the PECE. 79 Fed. Reg. at 46,060; see also PECE Evaluation for the Graham's and White River Beardtongues 2014 Conservation Agreement and Strategy, at 21-22 (July 25, 2014) (hereinafter "PECE Evaluation"). According to FWS, the PECE provides guidance on evaluating recently formalized conservation efforts to ensure that they will be implemented and effective. 79 Fed. Reg. at 46,073. To the extent that FWS is arguing that it can rely on undefined and unproven future conservation measures, FWS's position is inconsistent with the ESA's plain text. See supra Section II. In fact, the PECE explicitly recognizes that FWS "may not rely on speculative promises of future action when making listing decisions." 68 Fed. Reg. at 15,106.

Under the PECE, FWS specifically looks at whether the "regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation efforts are in place." Id. (emphasis added). Here, no laws, regulations, or ordinances were in place at the time FWS withdrew the proposed rule. FWS's PECE evaluation defies logic by concluding that regulatory mechanisms were "in place" because they would "take place" after the listing decision was made. PECE Evaluation at 21-22. Foreseeing scenarios exactly like the one at hand, in which states or other parties adopt a hastily created plan in an attempt to prevent listing, FWS cautioned in the PECE that "last-minute agreements . . . often have little chance of affecting the outcome of a listing decision." 68 Fed. Reg. at 15,101. Despite this warning, FWS relied on a last minute agreement as the sole basis for withdrawing the proposed rule here. FWS's reliance on the CA's promises of future action is prohibited by the ESA and the PECE.

In evaluating whether conservation measures are reasonably certain to be implemented under the PECE, FWS is to look at the each party's prior track record of conservation. Id. at 15,106. FWS concludes that the CA signatories have a "track record of implementing conservation measures for this species since 2007." PECE Evaluation at 36; see also 79 Fed. Reg. at 46,073, 46,085-86. FWS's conclusion is inconsistent with its own prior findings and the record in this case. Indeed,

[9] See, BLM, Memorandum from Vicki L. Wood, Acting Field Manager, Green River District, Vernal Field Office to Larry Crist, Utah Supervisor, Utah Field Office, Ecological Services, FWS (Aug. 4, 2014) (attached as Ex. B) (obtained via Freedom of Information Act request and on file with attorneys).

FWS cherry picks the few actions that did occur, while ignoring the overall poor track record of the parties to this agreement that led FWS to propose listing in August 2013.

FWS relies heavily on implementation of the 2007 Conservation Agreement (2007 CA), a voluntary 5-year agreement developed by FWS, BLM, Uintah County, Utah Department of Natural Resources (DNR), and SITLA. 79 Fed. Reg. at 46,042; 78 Fed. Reg. at 47,607. The 2007 CA was never signed by Uintah County or SITLA. 78 Fed. Reg. at 47,607. In August 2013, FWS concluded that "SITLA has not expressed an interest in protecting Graham's beardtongue on lands they manage." Id. at 47,607. FWS also stated that "[t]o date, SITLA has not required project proponents to protect Graham's beardtongue, White River beardtongue, or other rare or listed plant species in the Uinta Basin where oil and gas development . . . exists." Id. at 47,607. FWS offers no explanation for why it reversed its prior finding and now concludes that STILA has a proven track record of protecting the species.

As FWS notes, the 2007 CA was "developed with the vision that the conservation measures would be implemented and effective to conserve the species, and would also preclude the need to list the species under the ESA in the future." PECE Evaluation at 4. FWS concedes that the 2007 CA was only "partially implemented," 79 Fed. Reg. at 46,042, and that it was not successful in protecting the species. PECE Evaluation at 5 ("[T]he measures identified in the 2007 CA were inadequate to protect Graham's beardtongue, and did not include protections for White River beardtongue, so we proposed to list both species as threatened under the ESA in 2013."). FWS cannot rationally conclude that partial implementation of a failed agreement for one of the beardtongues amounts to a proven track record of protecting either species.

FWS points to the fact that Uintah County and Utah DNR have funded surveys for the species, but FWS fails to identify any regulatory mechanisms or meaningful on-the-ground protections provided by these entities. In fact, FWS previously relied, in part, on the lack of such mechanisms as a reason why listing was necessary. See, e.g., 78 Fed. Reg. at 47,607 ("We are not aware of any . . . county ordinances or zoning that provide for protection or conservation of Graham's and White River beardtongues and their habitats."). The only on-the-ground protection FWS identified was BLM's alleged commitment to prohibit surface disturbance within 300-ft buffers, a conservation measures that FWS had previously determined is insufficient to protect the species. 78 Fed. Reg. at 47,599, 47,607. FWS also failed to acknowledge that—despite its commitment in the 2007 CA, the 2008 Vernal RMP, and the 2014 CA—BLM plans to approve oil shale test wells within 300 feet of Graham's beardtongue plants.[10]

FWS also ignored BLM's failure to consider a proposal to designate Graham's beardtongue habitat in Utah as an Areas of Critical Environmental Concern (ACEC). In the Record of Decision for the Vernal RMP, issued six years ago, BLM admitted that it "mistakenly overlooked" a proposal by conservation organizations to designate an ACEC.[11] Although BLM agreed to consider ACEC designation at its earliest opportunity, it has failed to do so.

[10] Ambre Energy EA at 8.

[11] BLM, Vernal ROD, at 18, 24.

Additionally, FWS fails to address how its withdrawal of the proposed rule would affect the likelihood that the CA would be implemented and effective. Many of the parties to the agreement, including BLM, Utah's Public Lands Policy Coordinating Office, Uintah County, and SITLA, have consistently opposed ESA listing for the plants. [12] In fact, they insisted that the CA include language stating that it terminates if either species is listed. See CA at 43. There is also evidence that the looming threat of ESA listing was the motivating factor for some parties to the agreement. For example, just a month after the proposed listing rule's publication, one of the CA's signors, the acting district manager of BLM's Green River District wrote, "the official game clock's ticking, so we can't delay if we want to beat a listing decision."[13] Months later, a senior policy analyst for Utah's Public Lands Policy Coordinating Office wrote that "a court may eventually rule the Agreement comes up short. However, the fundamental purpose of this agreement is to provide sufficient conservation to forestall a listing."[14] Given the parties poor track record at conserving these species, it was not rational for FWS to fail to address the effect of the withdrawal on the CA's implementation.

Finally, FWS arbitrarily concludes the measures are reasonably certain to be implemented based on funding commitments. PECE Evaluation at 22. Under the PECE, there must be a high level of certainty that parties to a conservation agreement "will obtain the necessary funding." 68 Fed. Reg. at 15,115. The policy states "at least 1 year of funding should be assured, and [FWS] should have documentation that demonstrates a commitment to obtain future funding." Id. at 15,108. The PECE Evaluation makes no reference to any allocated funding for the next year. And the CA expressly disclaims any mandatory funding requirements. CA at 40 ("It is expected that, although not mandated, funding and/or in-kind services to enact the conservation actions outlined in this Agreement may be provided by [the signatories].").

Although the PECE Evaluation states that "[o]ther conservation actions . . . will be funded by BLM, Uintah County, private landowners and leasees," that "leasees or project proponents will be responsible for paying for surveys," and that conservation measures will be funded by "[m]onies received from mitigation," the CA does not establish these funding mechanisms. PECE Evaluation at 22. The CA lacks any requirement that project proponents pay for surveys and states only that mitigation measures—which are not yet defined—may include payments to a mitigation fund. CA at 27. It is arbitrary to presume that this money "will be used" to implement conservation efforts when the existence of such funding is entirely speculative.

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[12] See, e.g., Comments from Uintah County to FWS, (Oct 7, 2013), available at http://www.regulations.gov/#!documentDetail;D=FWS-R6-ES-2013-0081-0015.

[13] Email from Michael Steiwig, Acting District Manager of BLM's Green River District, to Carmen Bailey, Policy Analyst for the Utah Public Lands Policy Coordination Office (Sept. 6, 2013) (attached as Ex. C) (obtained via Freedom of Information Act request and on file with attorneys).

[14] Email from John Harja, Senior Policy Analyst for Utah Public Lands Policy Coordinating Office, to Tova Spector, Botanist, Utah Field Office U.S. FWS and Jessi Brunson, Botanist, Vernal Field Office BLM (Feb. 26, 2014) (attached as Ex. D) (obtained via Freedom of Information Act request and on file with attorneys).

V. FWS's Conclusions that Threats Have Been Adequately Reduced Are Unsupported and Not Based on the Best Available Science

Under the ESA, "[t]he Secretary shall make [listing] determinations . . . solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). FWS may not make its decision based on "possible economic or other impacts." 50 C.F.R. § 424.11(b); see also 79 Fed. Reg. at 46,059 (FWS recognizing that "the Act does not allow us to consider economic impacts in our decision on whether to list a species"). Furthermore, FWS must consider whether a species is threatened as a result of the "inadequacy" of existing regulatory mechanisms. 16 U.S.C. § 1533(a)(1)(D). FWS cannot simply speculate that the conservation measures are adequate to protect a species; it must support its decision with a rational explanation and evidence in the record. Defenders of Wildlife v. Norton, 258 F.3d 1136, 1146 (9th Cir. 2001); Ctr. for Native Ecosystems, 795 F. Supp. 2d at 1209-10; W. Watersheds Project v. U.S. Fish & Wildlife Serv., 535 F. Supp. 2d 1173, 1187 (D. Idaho 2007) ("The FWS's failure to coherently consider the adequacy of existing regulatory mechanisms renders its decision arbitrary and capricious." (emphasis added)); Friends of Wild Swan, 945 F. Supp. at 1398.

FWS withdrawal notice for the Graham's and White River beardtongues fails in this respect. FWS concludes that the CA has "reduced the magnitude of potential impacts in the future such that these species no longer meet the definition of a threatened or endangered species." 79 Fed. Reg. at 46,085. However, FWS fails to consider the reasonably foreseeable threats to the species beyond the 15 year term of the CA. FWS's conclusions also lack a reasoned basis and are based on possible economic impacts rather than the best available science.[15]

A. FWS failed to consider whether the 15-year CA was adequate to protect the beardtongues from the reasonably foreseeable threats

Under the ESA, a threatened species is one that is "likely to become an endangered species within the foreseeable future." 16 U.S.C. § 1532(20) (emphasis added); see also id. § 1533(a)(1)(A) (requiring FWS to consider the "present or threatened destruction" of habitat) (emphasis added). Accordingly, FWS must analyze reasonably foreseeable threats to the species. In the proposed rule and the withdrawal notice, FWS recognizes energy development, including unconventional oil shale and tar sands and traditional oil and gas development, as a reasonably foreseeable future threat. 78 Fed. Reg. at 47,608; 79 Fed. Reg. at 46,076-77. Yet, in the withdrawal, FWS concludes that the 15-year CA is sufficient to ameliorate the threats to the beardtongues for the "foreseeable future." 79 Fed. Reg. at 46,086. This conclusion is not based on the best scientific and commercial data available.

FWS does not claim that the energy development threat does not persist beyond 15 years, nor could it. See, e.g., 79 Fed. Reg. at 46,064 (public comment stating that the Enefit mining plan extends for a period of 30 years). Instead, FWS claims that it will have a better sense of the

[15] To the extent that FWS is relying on the CA to ameliorate the threat posed by the "present or threatened destruction, modification, or curtailment of its habitat or range" under Section 4(a)(1)(A), FWS must still consider whether it is an adequate existing regulatory mechanism under Section 4(a)(1)(D). As discussed in Section III, the CA fails in this respect.

extent of the oil shale threat after 15 years. Id. at 46,086. FWS makes no such claims regarding traditional oil and gas development. Id. Therefore, there is no basis to conclude that the limited term of the CA will adequately address this threat. Furthermore, with respect to oil shale, while FWS may have more information in 15 years, FWS is required by the ESA to make a decision based on the "best scientific and commercial data available" at this time.
16 U.S.C. § 1533(b)(1)(A); see also W. Watersheds Project v. Foss, No. CV 04-168-MHW, 2005 WL 2002473, at *15 (D. Id. Aug. 19, 2005) ("Simply because some conservation efforts prolong the inevitable by a mere twenty-years, does not reasonably push the 'projected time when the species has a high risk of extinction to beyond the foreseeable future,' as the FWS suggests."). The available evidence demonstrates a threat beyond 15 years. Although FWS states that the CA "may be renewed" after 15 years, whether that happens is entirely speculative. Indeed, FWS is aware of vehement opposition by oil shale companies to long-term conservation for areas where future energy development is planned.[16]

B. FWS's decision not to list was a predetermined outcome

When FWS signed the CA, it essentially agreed not to list the Graham's or White River beardtongues. CA at 43 (stating that the CA will terminate if either species is listed). Given FWS's agreement to the termination clause in the CA, it could not come to any other conclusion than to withdraw the proposed rule. Moreover, because of the last-minute nature of the agreement, FWS did not leave itself time to properly analyze the final terms of the CA prior to determining that the CA was sufficient to support withdrawal of the proposed rule. Indeed, the CA was finalized the same day as the withdrawal notice, and all of the parties did not even have a chance to sign the CA until three days later. Accordingly, FWS decision to withdrawal the proposed rule was a predetermined outcome, not one based on an objective analysis of whether the CA adequately protects the species from the reasonably foreseeable threats, as required by the ESA.

C. FWS's claim that the conservation areas are adequate to protect the species is unsupported

In the proposed rule to designate critical habitat, FWS identified 75,846 acres of total protected critical habitat that is "essential to the conservation of the species." 78 Fed. Reg. at 47,832-33; see also 79 Fed. Reg. at 46,061.[17] In the withdrawal decision, however, FWS concludes that

[16]"As you are well aware, we are not willing to put any of these areas in a long-term or perpetual conservation easement, but rather we will support the County in their participation in the limited-term conservation agreement (assuming the final terms are acceptable)." Email from Ryan Clerico, Head of Development and Environment at Enefit American Oil to Jonathan Streamer, Uintah County Attorney (Jan. 10, 2014), then forwarded by Mr. Streamer to Tova Spector and Paul Abate, FWS (Jan. 15., 2014) (attached as Ex. E) (obtained via Freedom of Information Act Request and on file with attorneys).

[17] FWS proposed 67,759 acres of critical habitat for Graham's beardtongue and 14,914 acres for White River beardtongue. 78 Fed. Reg. at 47,832. However, some of this habitat is overlapping. According to FWS the total acreage proposed for both species was 75,846 acres. 79 Fed. Reg. at 46,601.

limited and voluntary protection of only 44,373 acres is sufficient to ensure the survival of the species. 79 Fed. Reg. at 46,043. FWS offers no explanation for this dramatic reduction in protected habitat. See Servheen, 665 F.3d at 1028 ("Having determined what [habitat] is 'necessary,' the Service cannot reasonably rely on something less to be enough.").

FWS's states that the conservation areas include approximately 64 percent of the known Graham's beardtongue plants and 76 percent of the known White River beardtongue plants. 79 Fed. Reg. at 46,074. But FWS offers no explanation for why this is sufficient to protect the species. Cf. Pac. Coast Fed'n of Fishermen's Associations v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1093 (9th Cir. 2005) (rejecting the National Marine Fisheries Service's "conclusory" assertions that maintaining 57 percent of river flows would avoid jeopardy to a salmon species).

FWS's conclusion is also called into question by the methods it used to arrive at the conservation area boundaries. FWS claims boundaries "were drawn based on plant occurrences, densities, and population sizes of the range for each species." 79 Fed. Reg. at 46,066; see also id. at 46,067 (claiming boundaries were selected to encompass large populations and to ensure species' viability and smaller populations to provide connectivity and represent the range of the species"). In fact, however, the CA and other evidence demonstrates that FWS ultimately drew the boundaries to specifically exclude state and private lands where oil shale or other development is planned, including habitat with high densities of Graham's and White River beardtongues.

In the withdrawal notice, FWS acknowledges that "losses of [beardtongue] populations on private and State lands would result in indirect impacts from habitat fragmentation and the loss of population connectivity." 79 Fed. Reg. at 46,076. Yet, after identifying more than 15,000 acres on private lands as "potential conservation areas," FWS excluded all of these areas due to "active lease or development status." CA at 15; see also CA App. B, Figures A-3, A-4, A-5 (excluding large areas of private land). FWS also excluded more than 3,300 acres of active SITLA oil shale leases or on private lands where development is anticipated by designating them as "interim areas," providing no protection. See, e.g., CA App. B, Figures A-2, A-3.[18] FWS identified more than 1,400 acres on state and private land as "core population areas" for the White River beardtongue. Yet, FWS sacrificed two-thirds of this habitat to development: FWS eliminated 213 acres from consideration "due to active lease or development status" and designated 717 acres as unprotected interim areas. See, e.g., CA at 19; CA App. B, Figure A-5.

The CA and data obtained from FWS and BLM demonstrate that FWS failed to provide any protections within the proposed project areas of a number of oil shale projects that FWS previously recognized as posing significant threats to the beardtongues. According to FWS, the TOMCO Energy project has the potential to disturb more than 15 percent of the total Graham's beardtongue population. 79 Fed. Reg. at 46,076. Although FWS identified almost the entire project area as a potential conservation area, the agency ultimately designated it as an unprotected interim area. Id. (FWS stating that the area is "likely to be developed during the 15-year 2014 conservation agreement"); see also Map, Enefit and Tomco Development Areas and

[18] As FWS recognized, protections for plants within these areas is entirely speculative. 79 Fed. Reg. at 46,061 (FWS admitting that interim conservation areas "are subject to development at any time and do not provide certainty of protection for either species").

Penstemon Conservation Areas (hereinafter "Enfit and Tomco Map") (attached as Ex. A) (showing the Tomco property boundary exactly corresponding with the interim area).[19]

Likewise, FWS states that the Enefit American Oil (EAO) project has the potential to affect 15 percent of the total Graham's beardtongue population and 24 percent of the total White River beardtongue population. 79 Fed. Reg. at 46,076. As FWS recognized in the proposed rule, Enefit is also located in an important connectivity corridor between Colorado and Utah populations of the Graham's beardtongue and in the "heart" of the White River beardtongue's distribution. 78 Fed. Reg. at 47,600. Although FWS identified proposed conservation areas within the project boundary, it excluded all habitat within the Enefit South area that will be developed initially. See Enefit and Tomco Map (showing the EAO preliminary mine, plant, and utility area); see also 78 Fed. Reg. at 47,599 (stating that Enefit expects to begin development in 2017 with commercial production online by 2020). FWS never analyzed the significance of the populations that would be destroyed within this area or the impacts on connectivity.

Other planned oil shale projects also were excluded from the conservation areas. The Red Leaf oil shale project has the potential to affect almost 4 percent of the total Graham's beardtongue population, and the Ambre Energy project has the potential to affect a small amount of Graham's beardtongue plants and more than 8 percent of the White River beardtongue total population. The CA provides no protection for habitat affected by the Red Leaf project. 79 Fed. Reg. at 46,076 (Table 6); see also id. at 46,054 ("[T]he 2014 CA does not provide protections for Graham's beardtongue on the property leased by Red Leaf."). For Ambre Energy, FWS designated less than 10 acres in an unprotected interim conservation area. Id. at 46,076. Furthermore, BLM is already planning to authorize Ambre Energy to drill within 300 feet of Graham's beardtongue plants on federal lands.

In sum, the evidence shows that after identifying oil shale development as one of the greatest threats to the Graham's and White River beardtongues, FWS declined to provide protections for a significant portion of the habitat most threatened in the immediate and foreseeable future. Although FWS claims that it identified potential conservation areas based on the needs of the plants, it eliminated large portions of the identified habitat to satisfy the concerns of developers—an inappropriate factor for ESA listing decisions. 50 C.F.R. § 424.11(b). Moreover, once FWS eliminated protections for the habitat most under threat, it failed to explain why the remaining conservation areas were sufficient to protect the species. FWS's conclusions, standing alone, are not a sufficient basis to uphold the withdrawal. See Pac. Coast Fed'n of Fishermen's Associations, 426 F.3d at 1092 (holding that FWS must provide an explanation for how conservation measures protect a species; the court should not simply "take [FWS's] word for it").

[19] Earthjustice prepared the map using Geographic Information Systems ("GIS") software. FWS and BLM provided the data layers for the Enefit Project Study Area, the Tomco Property Boundary, and the Conservation Area designations. The Enefit American Oil (EAO) General Property Boundary and EAO Preliminary Mine, Plant and Utility Area were developed by georeferencing a map produced by Enefit American Oil, and used in a PowerPoint presentation by Rikki Hrenko-Browning, CEO.

D. Inadequacy of buffers

FWS concludes that a 300-foot buffer is adequate to protect the beardtongues from a variety of threats from energy development and road construction, including direct mortality, dust, pollinator loss, and habitat fragmentation. 79 Fed. Reg. at 46,061, 46,074-75, 46,077, 46,080. Although the buffers may help prevent direct mortality, there is no support that they adequately reduce the indirect effects of energy or road development to the point that species are not at risk of becoming endangered.

In fact, in the proposed listing, FWS concluded 300-foot buffers do not adequately protect against such indirect effects: "Although direct impacts to Graham's and White River beardtongues on Federal lands will be minimized because existing conservation measures protect plants by 91 m (300 ft.), the existing conservation measures are inadequate to minimize impacts from . . . indirect effects," including habitat fragmentation, fugitive dust, and invasive weed encroachment. 78 Fed. Reg. at 47,599; see also id. at 47,607 (stating 300-foot buffer is "not sufficient to protect against landscape-level habitat fragmentation, loss of pollinator habitat and population connectivity, increased dust, and invasive weeds" that will occur with expanded energy development). FWS provides no new information or explanation in its withdrawal notice for why it now concludes that a 300-foot buffer is sufficient to protect against these indirect effects. Cf. Gen. Chem. Corp. v. United States, 817 F.2d 844, 846 (D.C.Cir.1987) (agency action is arbitrary and capricious if "internally inconsistent and inadequately explained").

FWS's primarily justification for the 300-foot buffers is that it is the distance FWS has been using in other Section 7 consultations on plants in the Uinta Basin. 79 Fed. Reg. at 46,061, 46,075. But this says nothing about the biological needs of the Graham's and White River beardtongues or why the buffer is sufficient to protect against the indirect effects of energy development.

Although FWS concludes that the buffers will provide habitat and connectivity for pollinators, this statements conflicts with both FWS's prior conclusion and other evidence in the withdrawal notice. 79 Fed. Reg. at 46,075. FWS previously determined that a buffer of 700 m (2,297 ft.) for Graham's beardtongues and 500 m (1,640 ft.) for White River beardtongues is "essential" habitat for the plants' pollinators. 78 Fed. Reg. at 47,836-39; see also 79 Fed. Reg. at 46,055 (recognizing these foraging distances as the "best scientific . . . information available"). FWS never explains how a buffer that protects just 1.7 and 3.3 percent of the "essential" pollinator habitat around Graham's and White River beardtongues, respectively, provides the pollinators adequate habitat or connectivity.

FWS's attempt to address the impacts of dust from energy development is based on economic concerns rather than the best available science. FWS acknowledges that the effects of fugitive dust include "changes in species composition, altered soil properties, blocked stomata, reduced foraging capacity of pollinators, dehydration, reduced reproductive output, and a decline in reproductive fitness." Id. at 46,074. FWS also recognizes that dust can negatively affect plants up to 1,000 m (3,280 ft.) away, and that some additional effects from ground disturbance occur up to 2,000 m (6,562 ft.) from the disturbance. Id. at 46,056, 46,061, 46,074. But FWS chose a buffer significantly less than either of these distances—only 300 feet—to "balance the protection

of the species with energy development." Id. at 46,061. The decision violates the ESA because FWS must make listing decisions based on the best available science "without reference to possible economic or other impacts." 50 CFR § 424.11(b).

Furthermore, FWS's conclusion that the 300-foot buffer is adequate depends on undefined mitigation measures. FWS envisions that if plants are destroyed within the buffer, the damage will be offset by mitigation measures that have yet to be developed. Id. at 46,705. FWS speculates that mitigation could include protecting other areas or by paying money into a fund, but they offer no analysis of these mitigation measures or their effectiveness. Id. Without knowing what mitigation will be employed and under what circumstances, FWS cannot rationally conclude that it is adequate to protect the species when buffers are violated.

E. Inadequacy of surface disturbance caps

FWS concludes that surface disturbance caps of 5 percent and 2.5 percent for Graham's and White River beardtongue, respectively, adequately reduce threats from energy development. See, e.g., 79 Fed. Reg. at 46,084-85. FWS states that it selected the caps to be less that full-field development for oil and gas with 40-acre spacing, which results in around 13% disturbance. Id. at 46,061. But other than being less than 13 percent, FWS provides no basis for the cap values.

FWS also does not explain how the caps are adequate to address threats from energy development. For example, FWS acknowledges it does not know the amount of existing surface disturbance. Id. at 46,065. Absent such knowledge, there is no way for FWS to know the total disturbance level or to rationally conclude that such disturbance will not pose a threat to the species.[20]

Additionally, FWS fails to address limitations on BLM's authority to implement caps and buffers. For example, much of the federal land in the conservation areas is subject to existing oil and gas leases and therefore BLM is restricted in its ability to impose surface disturbance buffers or caps in the future. See id. at 46,078 (noting that 27 and 12.5 percent, respectively, of all known Graham's and White River beardtongue plants fall within existing BLM or state oil and gas leases). As the court recognized in Center for Native Ecosystems, existing leases may contain a variety of lease terms that will affect BLM's authority with respect to future development. 795 F. Supp. 2d at 1209-10; see also 43 C.F.R. 3101.1-2.[21] FWS's failure to consider these limitations before determining that the CA is adequate to protect the beardtongues is arbitrary.

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[20] FWS also fails to consider the fact that surface disturbance caps do not control where development occurs within a conservation area. Therefore, it is entirely possible that development could be concentrated in particular areas of high importance to the plants, such as connectivity corridors. See, e.g., 79 Fed. Reg. at 46,074 (acknowledging that roads can act as a barrier to pollinator movement).

[21] Similarly, FWS failed to address BLM's limitations with respect to existing livestock grazing permits. Not only is FWS relying on BLM's promise to come up with a plan to address grazing, it has not addressed what limitations BLM will be subject to if it develops a grazing plan.

FWS also failed to analyze the exception to the surface disturbance caps for access road construction. If roads are required across federal lands to provide access to state or private minerals, those roads may violate the caps. CA at 35, 37. The project proponent must simply "coordinate with the conservation team." Id. at 35, 37. FWS did not provide any analysis of how often this is likely to occur. Nor has FWS developed or analyze any specific mitigation measures. Absent consideration of these important issues, FWS cannot rationally conclude that the surface disturbance caps described in the CA adequately protect the plants.

Conclusion

The best scientific and commercial data available demonstrate that Graham's and White River beardtongue are threatened or endangered species. FWS ignores this information, and relies on future, speculative measures as a reason not to list the beardtongues. In doing so, FWS has failed to perform its mandatory duties under Section 4 of the ESA. As provided by the ESA citizen suit provision, 16 U.S.C. § 1540(g), if FWS does not act within 60 days to correct these violations, the above named groups and other interested parties may institute legal action and seek declaratory and injunctive relief as appropriate, as well as recovery of their costs and expert and attorney fees pursuant to the ESA citizen suit provision and/or the Equal Access to Justice Act.

Sincerely,

Robin Cooley
Earthjustice Rocky Mountain Office
633 17th Street, Suite 1600
Denver, CO 80202
303.623.9466
rcooley@earthjustice.org

Lori Ann Burd
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
971.717.6405
laburd@biologicaldiversity.org