



**Western  
Watersheds  
Project**

WWP Idaho  
PO Box 2863  
Boise, ID 83701  
(208) 336-9077  
[tbrooks@westernwatersheds.org](mailto:tbrooks@westernwatersheds.org)

---

*Working to protect and restore Western Watersheds and Wildlife*

August 19, 2020

David Bernhardt  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240  
[doixecsec@ios.doi.gov](mailto:doixecsec@ios.doi.gov)

Aurelia Skipwith, Director  
U.S. Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, D.C. 20240  
[aurelia\\_skipwith@fws.gov](mailto:aurelia_skipwith@fws.gov)

William Perry Pendley  
Deputy Director  
U.S. Bureau of Land Management  
1849 C Street, NW  
Washington, DC 20240

Jamie E. Connell  
Colorado State Director  
Bureau of Land Management  
2850 Youngfield Street  
Lakewood, CO 80215  
[blm\\_co\\_statedirector@blm.gov](mailto:blm_co_statedirector@blm.gov)

Ann Timberman  
Western Slope Supervisor  
U.S. Fish & Wildlife Service  
Grand Junction, CO Field Office  
445 W. Gunnison Ave Ste. 240  
Grand Junction, CO 81501  
[Ann\\_Timberman@fws.gov](mailto:Ann_Timberman@fws.gov)

Stephanie Connolly  
Southwest District Manager

U.S. Bureau of Land Management  
2465 S. Townsend Avenue  
Montrose, CO 81401

Amy Carmichael  
Acting Field Manager, Uncompahgre Field Office  
U.S. Bureau of Land Management  
2465 S. Townsend Avenue  
Montrose, CO 81401

**RE: 60-day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act Related Section 7 Consultation for the Uncompahgre Field Office (UFO) Resource Management Plan (RMP) and Supporting Biological Opinion (BiOp).**

Dear Secretary Bernhardt, U.S. Fish and Wildlife Service Director Aurelia Skipwith, Deputy Director Pendley, Supervisor Timberman, District Manager Connolly, and Acting Field Manager Carmichael:

We, the undersigned environmental organizations, write to provide notice under 16 U.S.C. § 1540(g) that we plan to file suit for violation of Section 7 of the Endangered Species Act (ESA). The U.S. Fish and Wildlife Service (FWS) and Bureau of Land Management (BLM) violated the Endangered Species Act by failing to ensure that they are not jeopardizing the continued existence of the Gunnison sage-grouse (*Centrocercus minimus*) or adversely modifying its critical habitat by adopting the Uncompahgre Field Office (UFO) Resource Management Plan (RMP) and its attendant Biological Opinion (BiOp).

Listed as threatened under the ESA in 2014, Gunnison sage-grouse exist in just seven populations centered around the Gunnison Basin: the Gunnison Basin, Cerro Summit-Cimarron-Sims Mesa, Crawford, San Miguel, Pinon Mesa, Poncha Pass, and Dove Creek-Monticello populations. Gunnison sage-grouse population numbers are estimated based upon the number of males counted on breeding grounds called leks. Between 2013 and 2020, the number of males counted on leks rangewide declined by over 40 percent. Lek counts both rangewide and in the Cerro Summit-Cimarron-Sims Mesa, Crawford, and San Miguel populations that use lands covered by the UFO RMP reached historic lows in 2019 and 2020.

But the UFO RMP and BiOp fail to act upon, or even consider, the urgent need for concrete action to protect the Gunnison sage-grouse from extinction. The BiOp, completed in December of 2018, completely ignores the recent population losses, relying on Gunnison sage-grouse population information only through 2018. Nevertheless, BLM adopted the UFO RMP in April of 2020 without considering how actions authorized by and carried out under the RMP—including expanded oil and gas development and virtually unaltered harmful levels of grazing—could affect Gunnison sage-grouse persistence in light of those population declines.

Indeed, although the BiOp recognizes that “adverse effects” to the Gunnison sage-grouse will occur from implementation of the RMP, it makes no attempt to measure “take” caused by

those effects, or to cap such take by imposing an Incidental Take Statement (ITS). Consequently, it also contains no useful trigger for reinitiation of consultation. This is particularly troubling, given that the three Gunnison sage-grouse populations that use lands managed by the UFO and subject to the RMP are on life support.

Instead, the BiOp relies on unsupported assumptions that the RMP itself will not cause “take,” that effects of actions taken under the RMP will be considered at the project level, through site-specific analyses and consultations, and that negative changes will be addressed through adaptive management following monitoring. In truth, the undersigned are not aware of any example to substantiate these assumptions and believe such examples are unusual at best.

The BiOp also relies on conservation measures to address oil and gas development, rights of way, grazing allocations, and other threats that are inconsistent with the best available science—including by “recommending” BLM implement the conservation strategy from the obsolete 2005 Gunnison Sage-grouse Rangewide Conservation Plan (RCP). But the RCP conservation measures themselves are not based on the best available science—with respect to grazing, they allow up to 60 percent utilization when the maximum recommended in Gunnison sage-grouse habitat is 25 percent, and permit grass height of as little as four inches during the nesting season when the best available science states that seven inches is required.

And, even where conservation measures apply, they apply only in proximity to sage-grouse leks and not in potential or unoccupied critical habitat. Thus, the BiOp fails to adequately provide for Gunnison sage-grouse recovery on the UFO.

### **PARTIES GIVING NOTICE**

Western Watersheds Project (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 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.

The Center for Biological Diversity 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 over 3,000 in Colorado. Some Center members enjoy recreating in and deriving aesthetic benefit from the habitat of the Gunnison sage-grouse within the Gunnison Basin.

Citizens for a Healthy Community (“CHC”) is a 500-member nonprofit organization located in Paonia, Colorado. CHC was founded in 2010 for the purpose of protecting the Delta County region’s air, water, and foodsheds from the impact of oil and gas development. CHC’s members and supporters include farmers, ranchers, vineyard and winery owners, and other concerned citizens impacted by oil and gas development, who currently live in, and plan to

continue to live in, use, and enjoy the communities and landscapes affected by the FWS and BLM action.

High Country Conservation Advocates (“HCCA”) is a nonprofit organization located in Crested Butte, Colorado with over 900 members. HCCA was founded in 1977 to conserve and protect wild places, rivers, and wildlife in and around Gunnison County. HCCA has worked on oil, natural gas, and coal bed methane development in Gunnison County for over a decade to prevent irreparable harm to its members’ interests. HCCA’s members live in and use and plan to continue to live in, use, and enjoy the communities and landscapes, including public lands, affected by the FWS and BLM action.

Sierra Club is one of the country’s largest and oldest environmental organizations. Sierra Club was founded in 1892 and now has 3.8 million members and supporters. Sierra Club protects and preserves land, air, water, and wildlife with the goal that public lands retain their natural integrity for generations to come. Sierra Club and its members advocate for management of public lands that promotes conservation and continued enjoyment of outdoor spaces. Sierra Club’s Colorado chapter has over 100,000 members and is the largest grassroots environmental organization in the state. Sierra Club’s members use and plan to continue to live in, use, and enjoy the communities and landscapes, including public lands, affected by the FWS BLM action.

WildEarth Guardians (“Guardians”) is a non-profit conservation organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has offices in Colorado, Montana, New Mexico, Arizona, Washington, Idaho, and Oregon. With more than 184,000 members and supporters—including more than 10,000 members and supporters in Colorado—Guardians works to sustain a transition from fossil fuels to clean energy in order to safeguard the West. Guardians has actively engaged in issues related to the federal government’s management of public lands and publicly owned fossil fuel minerals throughout the American West, including in the North Fork Valley of western Colorado. The organization and its members have an interest in ensuring that management of public lands and fossil fuels takes into account concerns such as climate change, water and air quality impacts, and cumulative impacts to the western Colorado landscape.

**This letter serves as notice that unless FWS withdraws the UFO RMP BiOp within 60 days of receipt of this notice, the undersigned intend to challenge FWS’s and BLM’s 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.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA provides a means to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA Section 4. *See id.* § 1533. The ESA defines an “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of

its range.” *Id.* § 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.* § 1532(20).

Congress recognized the importance of timely habitat protections to the conservation and recovery of endangered species when it found that:

[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence. . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then *the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*

H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

Thus, concurrent with listing a species, the ESA requires the designation of critical habitat. 16 U.S.C. § 1533(a)(3)(A)(i); *see also id.* § 1533(b)(6)(C). 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.” *Id.* § 1532(5) (emphasis added). “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.” *Id.* § 1532(3). “[T]he 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.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

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 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. 16 U.S.C. § 1536(a)(2). 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 reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02. “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” *Id.* The ESA also prohibits “take” of a species—which includes harassing, harming, wounding, killing, trapping, capturing, or collecting a listed species. 16 U.S.C. §§ 1538(a)(1), 1532(19).

To fulfill the substantive mandates of section 7 of the ESA, federal action agencies must consult with an expert agency—here, FWS—before undertaking any action with that “may

affect” affect listed species or their habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).<sup>1</sup> If the proposed action “may affect” listed species or their critical habitats, formal consultation is required. 50 C.F.R. § 402.14(a). 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. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. In carrying out the consultation process, “each agency shall use the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2). The BiOp must include “a detailed discussion of the effects of the action on listed species or critical habitat.” 50 C.F.R. § 402.14(h)(1)(ii). The BiOp can either find (1) no jeopardy or no adverse modification; (2) that the action will cause jeopardy or adverse modification but such jeopardy or adverse modification can be avoided by implementing certain reasonable and prudent alternatives to the proposed action as designed; or (3) that jeopardy or adverse modification is unavoidable and thus the action cannot proceed. 50 C.F.R. § 402.14(h)(1)(iv).

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 provide with the biological opinion an “incidental take statement.” 16 U.S.C. §§ 1532(19), 1536(b)(4)(A); 50 C.F.R. § 402.14(i). 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 necessary or appropriate to minimize such impact, and setting forth the “terms and conditions,” including but not limited to reporting requirements, that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). In order to monitor the impacts of incidental take, the agency must report the impact of its action on the listed species to FWS. 50 C.F.R. § 402.14(i)(3). “[A] primary purpose of the [incidental take statement] and its measure of permissible take is to provide a trigger for reinitiating consultation under Section 7(a)(2) of the ESA.” *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 913 (9th Cir. 2012).

After the procedural requirements of consultation are complete, however, the ultimate duty to ensure that an activity does not jeopardize a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its ESA section 7 duty is arbitrary and capricious. *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010). In addition, an agency must reinitiate consultation with the FWS if the projected amount of incidental take is exceeded or if : “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;” “the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written

---

<sup>1</sup> In August 2019, the Fish and Wildlife Service issued final regulations amending its procedures for interagency consultation under the Endangered Species Act. 84 Fed. Reg. 44,976 (Aug. 27, 2019). Although those regulatory amendments are currently the subject of ongoing litigation, *see California v. Bernhardt*, No. 19-cv-6013 (N.D. Cal.), *Center for Biological Diversity v. Bernhardt*, No. 19-cv-5206 (N.D. Cal.), and *Animal Legal Defense Fund v. Bernhardt*, No. 19-cv-6812 (N.D. Cal.), the violations described in this Notice of Intent arise directly under the well-defined statutory terms of the Endangered Species Act, and would constitute violations of the Act under either the 1986 or 2019 implementing regulations.

concurrence;” or “a new species is listed or critical habitat designated that may be affected by the identified action.” *Id.* §§ 402.14(i)(4), 402.16(a)(2-4).

## II. FACTUAL BACKGROUND

The Gunnison sage-grouse is a sagebrush obligate bird found only in southwestern Colorado and eastern Utah. It depends upon sagebrush habitat interspersed with native grasses and forbs for survival. Like Greater sage-grouse, Gunnison sage-grouse reproduce on breeding grounds called leks, and return to the same leks year after year. Gunnison sage-grouse populations are typically estimated according to counts of males on leks.

Once widespread in New Mexico, Arizona, Utah, and Colorado, the Gunnison sage-grouse underwent serious population declines and range constrictions that led to it being proposed for ESA listing in 2000. *See Am. Lands All. v. Norton*, 242 F. Supp. 2d 1 (D.D.C. 2003). By the time the species was listed as Threatened in 2014, it was limited to seven small populations of birds, the largest of which inhabits the Gunnison Basin in Colorado. The second largest population is the San Miguel population—but that population is heavily impacted by oil and gas development and a population viability analysis done at the time of the 2014 listing decision anticipated that the population would be extirpated within 30 years. *See Colorado v. United States Fish & Wildlife Serv.*, 362 F. Supp. 3d 951, 972-73 (D. Colo. 2018) (citing Amy Jane Davis, Gunnison Sage-Grouse Demography and Conservation (Ph.D. Dissertation 2012)). “Livestock management inconsistent with local ecological conditions” was contributing to habitat decline in all of the population areas. *See Id.* at 970. Since then, one population, at Dove Creek, appears to have been extirpated, with zero males counted in 2019 and 2020 lek counts.

Three of the seven remaining populations occur at least in part on habitat managed by the UFO under the UFO RMP. These are the San Miguel, Crawford, and Cerro Summit-Cimarron-Sims Mesa populations. Gunnison sage-grouse designated critical habitat occur on the following UFO-managed grazing allotments: In the Cerro Summit-Cimarron-Sims Mesa population, the Hairpin, Rawhide/Coffee Pot, Shinn Park, Lower Horsefly, and Kinnikin grazing allotments; in the Crawford population, the Pine Ridge grazing allotment; and in the San Miguel population, the Little Baldy, Mesa Creek, and Hamilton Mesa grazing allotments. Eighteen other UFO-managed grazing allotments contain unoccupied Gunnison sage-grouse critical habitat.

The San Miguel, Crawford, and Cerro Summit-Cimarron-Sims Mesa populations of Gunnison sage-grouse also substantially overlap both lands and minerals managed by the Bureau of Land Management. The Cerro Summit-Cimarron-Sims Mesa Population Area consists of 71,400 acres (56% of the population area) of federal minerals, including 18,554 acres in occupied habitat. BLM, Gunnison Sage-Grouse Rangewide Draft Resource Management Plan Amendment 3-145 & Table 3.64 (Aug. 2016). The Crawford Population area consists of 59%, or 73,000 acres, of federal minerals, including 31,800 acres in occupied habitat. *Id.* The San Miguel Basin consists of 62%, or 165,300 acres, of federal minerals, including 66,700 acres of federal minerals in occupied habitat. *Id.* at 3-145 & Table 3.64. BLM has previously found that “Surface-disturbing and disruptive activities” resulting from fluid mineral development of federal minerals “could have negative effects of GUSG and GUSG habitat.” *Id.* at 4-16. “Multiple studies have identified the avoidance of oil and gas fields by sage-grouse (Aldridge and Boyce 2007,

Carpenter et al 2010, Doherty et al 2006, Dzialak et al 2012, Holloran et al 2010, Holloran and Kaiser 2007) and other studies have identified declines in sage-grouse lek attendance as a result of energy development (Gregory and Beck 2014, Harju et al 2010, Hess and Beck 2012, Holloran 2005, Walker et al 2007).”*Id.* Although oil and gas development have been identified as most likely to occur within GUSG habitat in the Dry Creek Basin of the San Miguel Population and the eastern portion of the Monticello-Dove Creek population area, *id.*, risk assessment by Colorado Parks and Wildlife and the Fish and Wildlife Service also identified significant threats to GUSG and GUSG habitat from oil and gas development in the Cerro Summit-Cimarron, Sims Mesa, and Crawford population areas, as well as the Hamilton Mesa sub-area of the San Miguel Basin population. U.S. Fish and Wildlife Service, Species Status Assessment for the Gunnison Sage-Grouse (*Centrocercus minimus*) 93 (April 2019).

Gunnison sage-grouse populations that use portions of Cerro Summit-Cimarron-Sims Mesa, Crawford, and San Miguel managed by the UFO have each declined substantially in recent years; males counted on leks located on public lands within and adjacent to the UFO declined from 53 in 2001 to 20 in 2019. One lek in the Cerro Summit-Cimarron-Sims Mesa population occurs on lands managed by the UFO, on the Lower Horsefly grazing allotment. Males counted on that lek declined from 4 birds in 2001 to 0 birds each year from 2003 to 2019, when the lek was not surveyed. Ten active and historic leks in the Crawford population occur on the Green Mountain grazing allotment, on lands managed by the UFO under a different RMP. Males counted on the active leks declined from 28 in 2001 to 7 in 2019. One lek in the San Miguel population occurs on public lands proximal to UFO-managed BLM lands. Males counted on that lek declined from 27 in 2001 to 13 in 2019. Birds from the Cerro Summit-Cimarron-Sims Mesa, Crawford, and San Miguel populations likely use habitat on BLM lands managed by the UFO.

Because Gunnison sage-grouse and their critical habitat are present on lands managed by the UFO under the RMP, the Bureau of Land Management (BLM) prepared a Biological Assessment and initiated consultation with the FWS to ensure the proposed RMP would not jeopardize the continued existence of the Gunnison sage-grouse or adversely modify its critical habitat. On December 17, 2018, the FWS issued the Biological Opinion for the UFO RMP then proposed (BiOp), concurring with the BLM’s finding that the proposed RMP “may affect and is likely to adversely affect” Gunnison sage-grouse, including designated critical habitat. U.S. Dep’t of Interior, Biological Opinion – Revision of the Resource Management Plan for the Uncompahgre Field Office, at 3 (Dec. 17, 2018) (“BiOp”).

Even though the 2018 BiOp anticipated adverse effects to the Gunnison sage-grouse and its critical habitat, it assumed that any such effects would be “of low intensity and severity.” *Id.* at 23, 24. It also presumed that all subsequent actions that would affect Gunnison sage-grouse would be “subject to future Section 7 analysis and consultation requirements.” *Id.* at 23. Consequently, the FWS declined to issue an incidental take statement (ITS) with the RMP BiOp. *Id.* at 24-25.

The BiOp also assumed that conservation measures would address effects of recognized threats to Gunnison sage-grouse. For grazing, it found that “[i]mplementation of the grazing program is unlikely to result in large-scale detrimental effects to GUSG...[because] on-going



monitoring of range conditions will result in the appropriate modification of stocking rate, timing, duration and intensity of grazing in those areas over-utilized by livestock.” *Id.* at 19. It also recommended, “The UFO should consider full implementation of the conservation strategy presented in the GUSG Rangewide Conservation Plan,” including, “[w]ithin proposed critical habitat, incorporate GUSG habitat objectives and management considerations into all BLM grazing allotments through allotment management plans or permit renewals.” *Id.* at 27. The habitat objectives from the Rangewide Conservation Plan (RCP) were developed 15 years ago in 2005, and include allowing up to 60 percent annual utilization and stubble heights of as little as 3.9 inches—a significant departure from the best available science’s recommendations for sage-grouse conservation.

Moreover, in practice, these assumptions are unfounded. On BLM lands in Colorado, including on the UFO, monitoring is commonly not completed; when it is completed, habitat degradation is rarely linked to grazing; and grazing permit modifications rarely occur. In one example, a National Environmental Policy Act process related to renewal of grazing permits on allotments in the Crawford population has been in progress since 2001 and has still not been completed while habitat conditions continue to fail standards for Gunnison sage-grouse. Livestock grazing is the primary, if not only, human-caused impact on Gunnison sage-grouse in many of the population areas (particularly Cerro Mesa-Cimmaron-Sims, Crawford, and parts of San Miguel), demonstrating that the only departure from natural conditions that could possibly be causing Gunnison sage-grouse declines is domestic livestock and associated infrastructure and activity. To the extent the RCP strategy has been implemented in the Gunnison Basin over the past 15 years, it has not arrested population declines there.

With respect to oil and gas development, while the BiOp recognizes that fluid mineral potential occurs within or near Gunnison sage-grouse populations, it assumes that any effects from fluid mineral development will be avoided by a No Surface Occupancy stipulation within occupied critical habitat and Controlled Surface Use within unoccupied critical habitat. While recognizing that the BLM could grant exceptions, modifications, or waivers to these stipulations, FWS assumed these would be rare and subject to additional Section 7 consultation. The BiOp also fails to acknowledge the RMP’s practical effect of re-opening GUSG habitat that had been effectively protected from new oil and gas leasing since 2005 by ending the operation of BLM Instruction Memorandum 2014-100, Gunnison Sage-Grouse Habitat Management Policy on Bureau of Land Management-Administered Lands in Colorado and Utah, which provides “Since the RCP (2005) was signed, the BLM Colorado’s policy has been to defer leasing of occupied GUSG habitat until new FO land use planning has been completed, as these documents detail significant new information on GUSG not addressed in current plans. The BLM will continue to defer leasing in occupied habitat to avoid affecting decisions related to future management decisions.”

As the Colorado Department of Natural Resources has detailed in its July 2019 protest of the RMP, the UFO RMP’s provisions governing fluid mineral development within Gunnison sage-grouse habitat, especially including provisions for waiver, exception, and modification of surface occupancy restrictions, fail to provide adequate protections for fragile satellite populations. “Colorado is concerned, however, that BLM has not provided further protections to these fragile populations through other resource allocations and management decisions.”

Colorado Department of Natural Resources, Protest of the Uncompahgre Field Office Proposed Resource Management Plan 5 (July 29, 2019). The state agency charged with management of the Gunnison sage-grouse has endorsed the Service’s prior position that “because Gunnison sage-grouse satellite populations are small, generally declining, and highly imperiled, BLM’s management direction should explicitly prohibit any additional impacts to the bird and its habitat in these satellite populations.” *Id.* at 6 (emphasis added)

Moreover, these “conservation” measures are also not consistent with the best available science concerning management to promote sage-grouse persistence, which recommends excluding energy development from all sage-grouse priority habitats and limiting energy disturbance density to one per 640-acre section. BLM itself, in the RMP-FEIS, has expressly acknowledged that the “refined” management measures in its final plan “fall short of accepted minimum protection standards to maintain sage-grouse viability.” UFO RMP-FEIS at 4-145. The final RMP adopts a decision that “[b]reeding habitat would be protected with similar stipulations as Alternative C (NSO-31/SSR-32), and would similarly fall short of accepted minimum standards to maintain sage-grouse viability (Knick and Connelly 2011).” *Id.* at 4-144 (emphasis added). Although the FEIS contemplates that “additional conservation measures could be applied as needed under the CSU stipulation within breeding (non-lek) habitat to conserve high-quality sage-grouse habitat and to avoid habitat fragmentation and cumulative effects,” *id.* at 4-145, the discretionary nature of that stipulation, combined with the possibility of waivers, exceptions, and modifications, provides no certainty that any “additional conservation measures” will be applied, nor that measures, if applied, will be effective or based on best available science.

The RMP’s promise that new rights-of-way for (transmission lines, roads, pipelines, others) will be “excluded” in Gunnison sage-grouse occupied critical habitat and “avoided” in other Gunnison sage-grouse habitats is also inconsistent with the best available science, which recommends excluding new rights-of-way from *all* sage-grouse priority habitats.

On September 20, 2019, BLM notified the FWS of changes BLM had made to the RMP after the FWS’ concurrence; BLM determined that these changes would not affect the species or habitat the BLM consulted with the FWS about in 2018. Even though by September 20, 2019, the 2018-19 Gunnison sage-grouse population declines were evident, neither BLM nor the FWS introduced information about those declines into the consultation process. Instead, the agencies relied only on population information through 2018.

### **III. ENDANGERED SPECIES ACT VIOLATIONS**

#### **A. The Agencies Failed To Consider The Best Available Science.**

The ESA requires that in carrying out the consultation process, “each agency shall use the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2). The ESA’s “best available science” standard “prohibits [the Service] from disregarding available scientific evidence that is in some way better than the evidence it relies on.” *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (citations and alterations omitted); *see also Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016). An agency may not ignore available biological information or fail to develop projections of implementation-level activities that may indicate

conflicts with the listed species. *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (Fish and Wildlife Service must consider effect of entire agency action).

But here, the agencies did just that when they disregarded the shocking population declines Gunnison sage-grouse suffered both rangewide and within the UFO RMP planning area between 2018 and 2019. Updated information about the species' abundance was available by September 20, 2019, when BLM notified the FWS about changes to the proposed action. Both agencies were obligated to consider that information but did not.

The failure to consider the updated information about the species' population numbers, or status within the planning area, also infected the FWS' conclusion that any losses to Gunnison sage-grouse individuals or critical habitat from RMP implementation were likely to be "widely distributed across GUSG habitat in the UFO" and "of low intensity and severity." BiOp, 24. How could any impact to a species that has declined by over 40 percent in the six years since it was listed—or, for that matter, a population of sage-grouse where lek counts have declined from 28 to 7 over a 20-year span—be of low intensity or severity? For a species as gravely imperiled as the Gunnison sage-grouse has become, rangewide and within the UFO, the loss of any member of the species, or any habitat for the species, is a significant loss. The agencies' failure to factor the species' decline into their evaluation of impacts was arbitrary and capricious.

The BiOp also failed to make projections about the effects of the RMP on the Gunnison sage-grouse based upon the best available science. While the FWS claimed that those effects were not identifiable at the RMP level and would be addressed in site-specific consultations, the Ninth Circuit has rejected this approach. In *Burford*, the Ninth Circuit held that the FWS' obligation to avoid jeopardy to a protected species requires it to consider "all stages" of an agency action, including by making projections based on potential locations and levels of site-specific development activities. 848 F.2d at 1454. Indeed, the entire purpose of an RMP is to provide a broad framework for such activities. By failing to make those projections here, the FWS failed to consider the effects of the whole action in rendering the BiOp and consequently also failed to fulfill its obligation to avoid jeopardy to the species.

The conservation measures BLM and the FWS assumed would avoid or minimize harms to the Gunnison sage-grouse and its habitat from implementing the RMP are also inconsistent with the best available science on the species' conservation needs. The RMP contains no specific measures to protect Gunnison sage-grouse from the effects of livestock grazing. However, the FWS recommended that BLM consider "full implementation of the conservation strategy presented in the GuSG Rangewide Conservation Plan." BiOp, 27. Not only has implementation of that 2005 strategy failed to arrest Gunnison sage-grouse population declines in the decade and a half since it was adopted, but the grazing measures upon which it relies are inconsistent with the best available science on sage-grouse conservation. In 2006 Dr. Clait E. Braun published a "conservation strategy" for Gunnison sage-grouse that recommended, among other things, limiting utilization in Gunnison sage-grouse habitat to 25 to 30 percent, but the RCP conservation measures allow utilization of 40 to 60 percent in Gunnison sage-grouse habitat. *See Braun (2006)*. Whereas the best available science recommends a 7-inch grass height to provide adequate hiding cover for Gunnison sage-grouse, the RCP allows 3.9 to 5.9 inches. *See Connolly et al. (2000), Hagen et al. (2007), Stiver et al. (2017)*.

The RMP measures which the BiOp presumes will protect the Gunnison sage-grouse from the effects of energy development and rights-of-way are also inconsistent with the best available science. In 2011, the National Technical Team (NTT) issued a report proposing conservation recommendations for Greater sage-grouse that are also the best available science concerning Gunnison sage-grouse management (the “NTT Report”). The NTT Report recommended “[g]iven impacts of large scale disturbances [from oil and gas development]...across seasons and impact demographic rates, applying NSO or other buffers around leks at any distance is unlikely to be effective.” Sage-grouse Technical Team, A Report on National Greater Sage-Grouse Conservation Measures, 20 (Dec. 21, 2011) (“NTT Report”). It recommends excluding energy development and other large-scale disturbances entirely from sage-grouse priority habitats. *Id.* at 21. In addition, it recommended limiting surface disturbances in sage-grouse priority habitats to 1 per section with no more than 3 percent disturbance in that section. *Id.* at 23. But the RMP and BiOp rely upon a No Surface Occupancy (NSO) stipulation in occupied critical habitat to protect Gunnison sage-grouse from the effects of oil and gas development and rely on Controlled Surface Use and Timing Limitations within buffers around leks in other habitats, without imposing any cap on surface disturbance. Similarly, while the NTT Report recommends that all sage-grouse priority habitats should be exclusion areas for new rights-of-way, the BiOp concludes that excluding new rights-of-way within 0.6 miles of a sage-grouse lek in occupied sage-grouse habitat and avoiding new rights-of-way within a 4-mile radius of sage-grouse leks will avoid impacts to Gunnison sage-grouse. *Id.* at 12.

BLM and FWS, in violation of ESA Section 7(a)(1), have declined to adopt reasonably available, science-based conservation measures that would mitigate known impacts to fragile Gunnison sage-grouse satellite populations from energy development and associated infrastructure, road construction, and road use. Unlike BLM’s Alternative B, which would have excluded new rights-of-way from both the immediate vicinity of leks and from designated critical habitat, BLM’s selected alternative E excludes rights of ways from only 1330 acres within a scientifically-inadequate 0.6-mile radius around leks, with an additional 12,840 acres managed under vaguely-defined and non-binding “right-of-way avoidance.” FEIS at T-117. The Final RMP and BiOp fail to either (a) analyze and quantify the effects of potential oil and gas development and associated road construction on habitat and population in the San Miguel, Crawford, and Cerro Summit-Cimmaron-Sims Mesa population areas, and (b) to employ conservation measures supported by best available science and recommended by both the Colorado Department of Natural Resources and FWS’s own prior conclusions, including prohibition of all additional impacts to satellite population habitats, limits on noise impacts across all sage-grouse habitats, and reservation to BLM of the ability to implement area closures and prohibit rights-of-way within occupied and unoccupied habitats. DNR Protest at 6-7.

The BiOp also fails completely to analyze the direct, indirect, and cumulative effects of energy development on the San Miguel Basin satellite populations, which is affected by BLM land management decisions both within the Uncompahgre planning area and the neighboring Tres Rios management area. The BiOp acknowledges that “past, present, and reasonable foreseeable future actions,” including “mineral exploration and development,” will continue to affect Gunnison Sage-Grouse. BiOp at 23. It fails altogether, however, to analyze or quantify the

acknowledged and significant threat to the San Miguel Basin subpopulation from existing and foreseeable oil and gas development within the Dry Creek Basin. *See* SSA at 44, 93, or to consider the cumulative effects of this foreseeable development with and BLM management decisions for the Uncompahgre portion of the San Miguel Basin population area. Similarly, even with only one operating oil and gas well, the UFO's Crawford population has been in dramatic decline since 2000, requiring supplementation with Gunnison Basin birds in 2011 at 2013. Rangewide DEIS at 3-14. The BiOp fails to analyze or quantify the potential effects on this extremely fragile population of effectively lifting the 2005 policy of no new mineral leasing within GUSG habitat in the Crawford population area.

### **B. The Biological Opinion Relies On Unsupported Assumptions About Future Actions.**

Conservation or mitigation measures supporting findings of no jeopardy... must be "reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." *Rocky Mountain Wild v. Dallas*, No. 15-CV-01342-RPM, 2017 WL 6350384, at \*15 (D. Colo. May 19, 2017), quoting *Center for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1001 (D. Ariz. 2011).

But the BiOp's no jeopardy finding here relies upon three assumptions about future actions that are either unlikely to be true or proven false. First, the BiOp assumes that ongoing monitoring of range conditions and modification of grazing permits will avoid "large-scale detrimental effects" to Gunnison sage-grouse. BiOp, 18-19. In practice, however, monitoring of range conditions has been spotty and grazing is rarely modified as a result of monitoring. For instance, an Environmental Assessment (EA) to support modification of several grazing permits in the Gunnison Gorge (Crawford population) has been in process since 2001 but not completed; the permits were renewed for six years under a Determination of NEPA adequacy in 2005. In 2013, BLM issued a new 6-year permits to graze the allotments without any further NEPA analysis. The permits do not contain any terms and conditions to address Gunnison sage-grouse needs, even though the allotments encompass Gunnison sage-grouse leks and occupied critical habitat. Further, even where permits *are* modified to incorporate Gunnison sage-grouse habitat concerns, they are only modified to incorporate the RCP habitat standards, which are inadequate, and those standards are rarely enforced.

Second, the BiOp assumes that BLM's granting of waivers, exceptions, and modifications to oil and gas lease stipulations intended to protect Gunnison sage-grouse will be rare. The BiOp states that "waivers, exceptions, and modifications are rare in the UFO, and there is no known waiver, exception or modification that was granted while listed species were present." BiOp, 11. This assumption ignores the basic fact that no such waivers, exceptions, or modifications have been relevant as leasing in GUSG habitat has been deferred under the Rangewide Conservation Plan and IM 2014-100 since at least 2005, so there have been no leases issued with the relevant NSO stipulations that would be subject to waiver, exception, or modification. Moreover, FWS itself acknowledges that "[w]hile BLM assumed they would not grant waivers, exceptions, or modifications unless there were changed conditions or new

information leading to the conclusion that there would be no effect on listed species . . . the Service cannot rely of this assumption for our effects analysis.” *Id.* 11-12. Despite this caveat, however, the BiOp fails to actually conduct an effects analysis. Instead, it asserts:

For the purposes of this biological opinion, we assume that the BLM granting of exceptions, modifications, or waivers, to stipulations or controlled surface uses, or timing restrictions within critical habitat for the GUSG will be rare and requires separate section 7 consultation. We make this assumption for purpose of a simplified effects analysis. It is not possible to anticipate use of exceptions, modifications, or waivers, therefore we cannot reasonably predict or quantify the negative effects to GUSG or their critical habitat associated with their use. The use of exceptions, modifications, and waivers within critical habitat for the GUSG may require reinitiation of section 7 consultation.

By refusing to analyze the effects of waiver, exception, or modification in the name of “simplified effects analysis,” without actually requiring subsequent section 7 consultation and/or reinitiation of consultation, the Service has failed in its obligation to “[e]valuate the effects of the action and cumulative effects on the listed species or critical habitat,” 50 C.F.R. § 402.14(g)(3).

Third, the BiOp assumes that “all subsequent actions that affect [Gunnison sage-grouse] will be subject to future section 7 analysis and consultation requirements.” But reliance on piecemeal site-specific consultations does not obviate the need to consider the likely effects of implementing the RMP at the programmatic level. And, in truth, BLM frequently side-steps site-specific ESA consultations. For instance, BLM frequently renews grazing permits under amendments to Section 402 of the Federal Lands Policy and Management Act, without any ESA consultation or other analysis. Similarly, in March 2017, BLM issued nine oil and gas leases within the neighboring Tres Rios Field Office, immediately adjacent to GUSG critical habitat and with access roads traversing GUSG critical habitat, without consultation with the Fish and Wildlife Service. *See San Miguel County v. BLM*, No. 1:17-cv-2432 (D. Colo.) (argued March 12, 2020).

President Trump’s recent (and unlawful) Executive Order urging agencies to evade ESA compliance in interests of rushing forward projects and authorizations in listed species habitat only virtually ensures that this pattern of evading ESA compliance will continue. Executive Order on Accelerating the Nation’s Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities June 4, 2020. The Executive Order requires, within 30 days of the date of the Order, that “the heads of all agencies . . . shall identify planned or potential actions to facilitate the Nation’s economic recovery that may be subject to the regulation on [section 7] consultations in emergencies, see 50 C.F.R. 402.05.” The Executive Order also requires the Department of the Interior to approve projects during this 30 day period, and provide a report including a list of projects that “have been expedited” along with additional projects that will be approved in the future under their emergency authorities. It further provides that the “heads of all agencies are directed to use, to the fullest extent possible and consistent with applicable law, the ESA regulation on consultations in emergencies, to facilitate the Nation’s economic recovery.” In addition, the Secretaries of the Interior and Commerce “shall ensure” that the Director of the FWS and the Assistant Administrator for Fisheries for NMFS,

respectively, “shall be available to consult promptly with agencies and to take other prompt and appropriate action concerning the application of the ESA’s emergency regulations.” Given the clear indication that agencies are being instructed to disregard the consultation requirements of ESA Section 7 under dubious “emergency” justification, FWS’s reliance on an assumption that there will be subsequent site-specific implementation-level consultations to address impacts of actions authorized by the RMP is thus arbitrary and capricious.

Thus, the BiOp’s reliance on assumptions about future actions to address effects to Gunnison sage-grouse from implementation of the RMP is arbitrary and capricious and violates the ESA.

### **C. The Biological Opinion Fails To Consider Gunnison Sage-Grouse Recovery.**

The FWS in the consultation process must consider the effects a proposed action will have on a species’ recovery, not just its survival. *See e.g., Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 885 (D. Or. 2016). “Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.” 50 C.F.R. § 402.02. “The only reasonable interpretation of the jeopardy regulation requires [agencies] to consider recovery impacts as well as survival.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 933 (9th Cir. 2008).

Here, the FWS completely overlooked impacts of the UFO RMP on Gunnison sage-grouse recovery. The BiOp does not mention the word “recovery” in its Gunnison sage-grouse analysis at all. Because actions authorized in principle by, and carried out under, the UFO RMP will impact not only Gunnison sage-grouse survival but also the species’ potential for recovery, the BiOp was obligated to consider those impacts but it did not.

### **D. The Biological Opinion Does Not Include An Incidental Take Statement Even Though It Anticipates Take Will Occur From Implementing The RMP.**

Further the FWS *must* provide an incidental take statement “[i]f 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....” 50 C.F.R. § 402.14(i) (emphasis original). “[A] primary purpose of the ITS and its measure of permissible take is to provide a trigger for reinitiating consultation under Section 7(a)(2) of the ESA.” *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 913 (9th Cir. 2012).

But here, even though the FWS concluded that “low levels” of adverse effects—in other words, take—to Gunnison sage-grouse and their critical habitat will occur from implementation of the RMP, it declined to provide the required Incidental Take Statement. It reasoned that “evaluating the species and critical habitat response to the proposed action [is] difficult if not impossible to predict.” BiOp, 23. However, “it was not impractical for the expert agencies to determine that the revised plans would not violate 16 U.S.C. section 1536(a)(2) and that the plans would result in some level of harmful impacts to listed species.” *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 623 F. Supp. 2d 1044, 1052–53 (N.D. Cal. 2009). And

further, the Gunnison Basin Candidate Conservation Agreement BiOp related to Gunnison sage-grouse found a way to arrive at a numerical measure of take from similar programmatic-level actions. As a consequence of the BiOp's failure to include the required Incidental Take Statement, it also does not provide the necessary trigger for reinitiating consultation under Section 7 of the ESA. Where, as here, the FWS finds that adverse effects to a listed species are likely to occur, the regulations require it to issue an Incidental Take Statement; its failure to do so was arbitrary and capricious and violated the ESA.

#### **E. The Agencies Must Reinitiate Consultation.**

Finally, agencies must reinitiate consultation “[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b).

To the extent the agencies were not required to consider the new information about Gunnison sage-grouse population declines when they revisited their 2018 conclusions in September of 2019, the new population information warrants reinitiation of consultation. The species' population is critically low, rangewide and in the UFO RMP planning area. In light of these declines, effects to Gunnison sage-grouse habitats, populations, or individuals are likely to be more pronounced—as previously noted. The agencies need to consider the population declines in order to fully understand the effects of implementing the RMP.

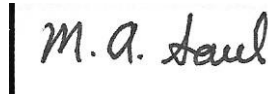
#### **CONCLUSION**

For the reasons stated herein, FWS and BLM violated ESA Section 7 and its implementing regulations. BLM and FWS must undertake a new consultation and/or reinitiate consultation on the Uncompahgre Field Office RMP, and halt any new habitat-disturbing activities within the planning area until the agencies fully analyze whether the Final RMP Amendments will jeopardize the continued existence of the Gunnison Sage-Grouse, or destroy or adversely modify their habitat.

The names, addresses, and telephone numbers of the parties giving this notice are as follows:



Talasi Brooks  
Western Watersheds Project  
P.O. Box 2863  
Boise, ID 83701  
(208) 336-9077  
[tbrooks@westernwatersheds.org](mailto:tbrooks@westernwatersheds.org)





Michael Saul  
Center for Biological Diversity  
1536 Wynkoop Street, Suite 421  
Denver, CO 80202  
(303) 915-8308  
[msaul@biologicaldiversity.org](mailto:msaul@biologicaldiversity.org)

*s/ Natasha Léger*  
Natasha Léger  
Interim Executive Director  
CITIZENS FOR A HEALTHY COMMUNITY  
303.667.1544  
[natasha@citizensforahealthycommunity.org](mailto:natasha@citizensforahealthycommunity.org)

*s/ Matt Reed*  
Matt Reed  
Public Lands Director  
High Country Conservation Advocates  
716 Elk Avenue  
P.O. Box 1066  
Crested Butte, CO 81224  
[matt@hccacb.org](mailto:matt@hccacb.org)

*s/ Rose Monahan*  
Rose Monahan  
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
415.977.5695

*s/ Jeremy Nichols*  
Jeremy Nichols  
Climate and Energy Program Director  
WILDEARTH GUARDIANS  
2590 Walnut St.  
Denver, CO 80205  
303.437.7663  
[jnichols@wildearthguardians.org](mailto:jnichols@wildearthguardians.org)