



VIA FACSIMILE AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

March 29, 2010

Ken Salazar
Secretary of the Interior
Department of the Interior
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Rowan Gould, Acting Director
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Re: Notice of Violations of the Endangered Species Act for determination that listings of the bi-state population of greater sage grouse and the greater sage grouse as threatened or endangered species are “warranted but precluded,” due to the lack of “expeditious progress” in listing other species

Dear Secretary Salazar and Acting Director Gould:

The Center for Biological Diversity, Desert Survivors and Western Watersheds Project hereby notify you of violations of Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, by the United States Fish and Wildlife Service (“Service”) in determining that the bi-state population of the greater sage grouse and the greater sage grouse itself are warranted but precluded by higher priority listing of species because you are failing to make expeditious progress in listing these higher priority species. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). The reasons for this notice are set out in greater detail below.

Background

Greater sage grouse once occupied parts of twelve western states and three Canadian provinces and historically occurred in such numbers that huge flocks were reported to “blacken the sky.” However, sage-grouse populations have declined by 45-80 percent since the 1950s as their habitat has been fragmented and eliminated by a host of threats.

In California, sage-grouse occur only in two subregions: the Mono Basin area and the Modoc Plateau area. Recent scientific evidence has demonstrated that the Mono Basin area sage grouse found in California and parts of Nevada is genetically distinct from other greater sage-grouse populations and is significant to the population as a whole.

Like all greater sage grouse populations across the West, this unique population segment has declined dramatically since the early 1900's. A species that was once described as abundant now only exists in small, isolated populations. Vast portions of Mono Basin area sage grouse habitat has been significantly degraded or eliminated by livestock grazing, off-road vehicles, roads, wildfire, conifer encroachment, and development. Poor land management continues to fragment an already tattered landscape in the Mono Basin area, threatening the Mono Basin sage-grouse with extinction. Immediate action is needed to ensure that this majestic symbol of the West is preserved forever.

For the foregoing reasons, on November 10, 2005, Sagebrush Sea Campaign, Western Watersheds Project, Center for Biological Diversity, and Christians Caring for Creation submitted a detailed petition to the Service seeking to list the Mono Basin area sage-grouse as a threatened or endangered distinct population segment under the Endangered Species Act. On December 19, 2006, the Service initially issued a negative 90-day finding regarding the DPS, 71 Fed. Reg. 76058 (Dec.19, 2006), and after litigation by the Center for Biological Diversity, Western Watersheds Project, Sagebrush Sea Campaign, and Desert Survivors that decision was remanded to the Service. On April 29, 2008, the Service issued a positive 90-day finding for the DPS. 90-Day Finding on Petitions To List the Mono Basin Area Population of the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered⁷³ Fed. Reg. 23173 (April 29, 2008).

On December 29, 2003, the American Lands Alliance, Center for Biological Diversity, Western Watersheds Project, and nineteen other organizations submitted a petition to list the greater sage grouse as a threatened or endangered species.

On March 3, 2010, the Service's Acting Director signed a finding determining that both the distinct population segment of the Greater sage grouse in the Mono Basin area (now termed the bi-state population) and greater sage grouse are "warranted, but precluded." On March 5, 2010, the Service publicly announced the finding and posted it to their website. On March 23, the findings were published in the Federal Register. Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered⁷⁵ Fed. Reg. 13910-14012 (March 23, 2010)

Violations of Section 4(b)(3)(B)

Section 4(b)(3)(B) of the ESA provides:

Within 12 months after receiving a petition that is found . . . to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

- (i) The petitioned action is not warranted
- (ii) The petitioned action is warranted
- (iii) The petitioned action is warranted, but that –
 - (I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and
 - (II) expeditious progress is being made to add qualified species to either [the endangered species list or the threatened species list] and to remove from such lists species for which the protections of this chapter are no longer necessary.

Accordingly, in order to determine that a species is warranted but precluded, the Service must demonstrate that listing of a species is in fact precluded by listing of species of a higher priority and that it is making “expeditious progress” in actually “add[ing]” species to the lists of endangered and threatened species.

As the Ninth Circuit stated, “[t]he circumstances under which the Secretary may invoke [the warranted but precluded] excuse, however, are narrowly defined; Congress emphasized that providing for the ‘warranted but precluded’ designation was not designed to justify ‘the foot-dragging efforts of a delinquent agency.’” *Center for Biological Diversity v. Norton*, 254 F.3d 833, 838 (9th Cir. 2001) (citing to the ESA’s legislative history). “Specifically,” the court went on, “the Secretary must show that she is ‘actively working on other listings and delistings and must determine and publish a finding that such other work has resulted in pending proposals which actually precluded [her] proposing the petitioned action at that time.’ . . . For that reason, ‘the Secretary must determine and present evidence that she is, in fact, making expeditious progress in the process of listing and delisting other species.’” *Id.* (citing legislative history) (emphasis added).

The most recent CNOR issued on November 9, 2009 notes listing of only one species, a Hawaiian plant called *Phyllostegia hispida*, since the previous notice was published on December 10, 2008. 74 Fed. Reg. 57816. Likewise, CNORs for 2005, 2006, 2007 and 2008 identify listing of eight, six, zero and one species, respectively. Thus, during the last five years, the Service only listed a total of sixteen species for a rate of roughly three species per year. By comparison, during the eight years of the Clinton administration, the Service listed an average of 65 species per year or a total of 522 species.

At the present rate of listing, it is unlikely that either the bi-state population or greater sage-grouse will receive protection any time soon. Currently, there are 249 candidate species, of which nearly half are priority two according to the Service’s priority ranking system, compared to the bi-state population’s ranking of three and the greater sage-grouse’s ranking of eight. This

means that most of these species will have to be listed first, which at a rate of three species per year could take literally decades. Sage grouse have already lost substantial range and the Service considers threats to be imminent and of a “high” magnitude to the bi-state population and “moderate” to the greater sage-grouse. Clearly, delay of protection of the sage grouse by decades is not what Congress envisioned in requiring the Service to make expeditious progress.

Because the Service is failing to make expeditious progress, its findings that listings of the bi-state population and greater sage grouse are precluded are arbitrary, capricious and an abuse of discretion, in violation of the ESA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706.

Conclusion

The Service’s latest refusal to take the action that the dire plight of the sage grouse demands – listing as an endangered species – has once again caused the Service to violate the ESA. If the Service does not remedy these violations, the Center intends to commence an appropriate action in United States District Court.

If you believe any of the foregoing to be in error, have any questions, or wish to discuss this matter, please do not hesitate to contact me.

Sincerely,



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