

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:15-cv-286

THE STATE OF COLORADO, by and through the Colorado Department of Natural Resources, the Division of Parks and Wildlife, and the Parks and Wildlife Commission,

Plaintiff

v.

UNITED STATES FISH AND WILDLIFE SERVICE,  
DANIEL ASHE, in his official capacity as Director of the United States Fish and Wildlife Service,  
SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior,

Defendants

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**COMPLAINT / PETITION FOR REVIEW OF AGENCY ACTION**

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**INTRODUCTION**

1. Plaintiff, the State of Colorado, acting by and through the Colorado Department of Natural Resources, the Division of Parks and Wildlife, and the Parks and Wildlife Commission (collectively, “Plaintiff” or “Colorado”), brings this action against the United States Fish and Wildlife Service (“FWS”); Daniel Ashe, in his official capacity as Director of FWS; and Sally Jewell in her official capacity as Secretary of the United States Department of the Interior (collectively “Defendants”

or “FWS”). Colorado seeks declaratory and injunctive relief to enforce the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531—1544, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 500—596.

2. Colorado challenges the decision of the FWS to list the Gunnison sage-grouse (*Centrocercus minimus*) as a threatened species under the ESA, 16 U.S.C. § 1533. *See* Threatened Status for Gunnison Sage-Grouse, Final Rule, 79 Fed. Reg. 69,192 (Nov. 20, 2014) (“Final Listing Rule”).

3. Colorado also challenges FWS’s designation of critical habitat for the Gunnison sage-grouse under the ESA. *See* Designation of Critical Habitat for the Gunnison Sage-Grouse, Final Rule, 79 Fed. Reg. 69,312 (Nov. 20, 2014) (“Final Critical Habitat Rule”).

4. The Gunnison sage-grouse is a ground-dwelling bird found in central and southwestern Colorado and southeastern Utah. It is a sagebrush-obligate species, meaning that it depends on sagebrush communities for its survival.

5. Approximately 84% of the members of the species reside in the Gunnison Basin, which is located primarily in Gunnison County, Colorado. This group is called the “Gunnison Basin Population.”

6. Since before the Gunnison sage-grouse was formally recognized as a distinct species in 2000, Colorado has pursued extensive conservation efforts—with a total

cost of over \$40 million—to protect the Gunnison sage-grouse and its habitat.

These efforts include

- a. intensive habitat treatments;
- b. predator control;
- c. purchasing and managing land for use as protected habitat;
- d. lek (breeding activity) monitoring;
- e. research;
- f. translocation of birds to augment small populations;
- g. enrolling private landowners in, and managing, a conservation agreement approved by federal authorities to protect thousands of acres of privately owned habitat; and
- h. captive breeding programs.

7. In addition, through the cooperative efforts of local government, federal officials, and private landowners, more than four-fifths of occupied Gunnison sage-grouse habitat—83%—in the Gunnison Basin includes some level of protection for the species.

8. These efforts have succeeded. The Gunnison Basin Population has grown to exceed, by over 30%, population targets set in 2005 by a team of conservation biologists—including experts from FWS itself.

9. Despite these successful efforts, in November 2014, FWS issued a final rule listing the Gunnison sage-grouse as “threatened” throughout its range. *See* Final Listing Rule.

10. The best available science, however, shows that the Gunnison sage-grouse is not threatened throughout its range. The Gunnison Basin Population—which comprises the vast majority of the species—is not presently in danger of extinction, nor is it likely to be at risk of extinction in the foreseeable future. In fact, experts cited in FWS’s Final Listing Rule estimated that the risk of extinction over the next 50 years is *no more than 1%*.

11. Thus, FWS’s decision to list the Gunnison sage-grouse as threatened was arbitrary, capricious, and not in accordance with law.

12. FWS also issued a separate final rule designating over 1.4 million acres of land in Colorado and Utah as “critical habitat.” *See* Final Critical Habitat Rule.

13. Half of the 1.4 million acres FWS designated as “critical habitat” are currently *unoccupied* by Gunnison sage-grouse, and much of that land is currently unsuitable as habitat. In designating this land as critical habitat, FWS failed to show that currently occupied habitat is insufficient for species conservation or that the designated unoccupied habitat is essential to conservation of the Gunnison sage-grouse. This was a violation of federal law. 16 U.S.C. § 1532(5)(A)(ii); 50 C.F.R. § 424.12(e).

14. FWS also failed to consider any alternatives to this 1.4-million-acre designation (aside from a “no action” alternative) and to take a “hard look” at the environmental impacts of the designation. This violated both NEPA and the APA.

15. Thus, the decision of FWS to designate critical habitat for the Gunnison sage-grouse was arbitrary and capricious and not in accordance with law.

16. Accordingly, Colorado seeks judicial relief declaring that the Gunnison sage-grouse does not satisfy the requirements of the ESA for listing as a “threatened species,” and that listing the species at this time is not warranted.

17. Colorado further seeks judicial relief declaring that FWS violated the ESA, NEPA, and the APA when it designated critical habitat for the Gunnison sage-grouse.

18. Colorado respectfully requests that the Court vacate the Final Listing Rule and the Final Critical Habitat Rule and remand both with an order that the FWS comply with ESA, NEPA, and the APA.

#### **NOTICE OF RELATED CASES**

19. Two related cases are currently pending in the United States District Court for the District of Colorado: *Center for Biological Diversity, et al. v. U.S. Fish and Wildlife Serv.*, Case No. 1:15-cv-00130 (filed January 20, 2015) and *WildEarth Guardians, et al. v. Dan Ashe, et al.*, Case No. 1:15-cv-00131 (filed January 20, 2015). In the related cases, plaintiffs/petitioners challenge the Final Listing Rule

on the grounds that the Gunnison sage-grouse should have been listed as endangered, rather than threatened. WildEarth Guardians also challenges the Final Critical Habitat Rule, arguing that the designation should have been more extensive.

### **PARTIES**

20. Plaintiff State of Colorado, acting by and through its Department of Natural Resources, the Division of Colorado Parks and Wildlife, and the Parks and Wildlife Commission, has authority over wildlife management within the state. The Division of Parks and Wildlife and the Colorado Parks and Wildlife Commission are responsible for protecting, preserving, enhancing, and managing wildlife and wildlife habitats within the state. Colo. Rev. Stat. §§ 33-1-101, 33-1-104(1). Wildlife within the State of Colorado is the property of the state. Colo. Rev. Stat. § 33-1-101(2).

21. Colorado Parks and Wildlife is authorized to and has acquired properties for management of the Gunnison sage-grouse, and is authorized to and has entered into cooperative agreements with political subdivisions and private landowners for the benefit of the Gunnison sage-grouse. Colo. Rev. Stat. § 33-1-105.

22. FWS's listing of the Gunnison sage-grouse as threatened and its designation of critical habitat interfere with Colorado's primary role in wildlife management. The listing and designation also impair the wildlife management programs

Colorado has developed for sage-grouse management. For example, state wildlife management programs directly impacting Gunnison sage-grouse habitat or that have the potential to disturb any individual sage-grouse may now be conducted only with the prior approval of FWS. This applies to habitat management for other species inhabiting sagebrush areas, including deer and elk, as well. Moreover, the Division of Parks and Wildlife may no longer continue to enroll private landowners in a voluntary conservation program it has been administering since 2006.

23. Defendant FWS is a federal agency within the United States Department of the Interior that has been delegated the responsibility to administer the ESA. FWS has primary authority for day-to-day administration of the ESA with respect to non-marine species.

24. Defendant Daniel Ashe is the Director of FWS, and is sued in his official capacity.

25. Defendant Sally Jewell is the Secretary of the United States Department of the Interior. As Secretary of Interior, Secretary Jewell has ultimate responsibility for implementation of the ESA. She is sued in her official capacity.

### **JURISDICTION AND VENUE**

26. This action arises under federal law, and specifically the ESA, 16 U.S.C. §§ 1531—1544, NEPA, 42 U.S.C. § 4321 *et seq.*, and the APA, 5 U.S.C. §§ 500—596.

27. This court has jurisdiction over this action under 16 U.S.C. § 1540(c) (granting jurisdiction to the district courts over “any actions arising under” the ESA) and 28 U.S.C. § 1331 (granting the district courts federal question jurisdiction).

28. As required by 16 U.S.C. § 1540(g), Colorado provided Defendants Jewell and Ashe with written notice of their violations of the ESA on December 12, 2014 via electronic and certified mail. More than 60 days have passed since notice was provided, and Defendants have not taken action to address the violations.

29. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391(e) because FWS is an agency of the United States with multiple offices in Colorado, Defendants Jewell and Ashe are employees or officers of the United States, and a substantial part of the events giving rise to this action occurred in Colorado. Specifically, the final rules under challenge were written by a regional office of FWS located in Lakewood, Colorado. Further, the Gunnison sage-grouse is found primarily in Colorado, and is protected by numerous conservation plans developed within Colorado, many of which are overseen or administered by Plaintiff.



## THE ENDANGERED SPECIES ACT

### Listing a Species and the Requirement of “Best Scientific and Commercial Data”

30. Section 4 of the ESA requires FWS to determine whether species are eligible for listing as “endangered” or “threatened” with extinction. 16 U.S.C. § 1533(a).

Listing a species triggers the protections of the ESA for that species.

31. A species is “endangered” if the species is presently in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6); 50 C.F.R. § 424.02(e).

32. A species is “threatened” if it is likely to become in danger of extinction within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02(m).

33. When assessing whether a species is eligible for listing as endangered or threatened, FWS must make its assessment “solely on the basis of the best scientific and commercial data available,” after reviewing the status of the species and considering state and local conservation efforts. 16 U.S.C. § 1533(b)(1); 50 C.F.R. § 424.11(f).

34. Once a species is listed as threatened or endangered, the ESA imposes express prohibitions on “take” of the species. These prohibitions drastically affect actions that may potentially affect a species or its habitat, including any actions to

“harm” members of the species. 16 U.S.C. § 1532(19). “Harm” is broadly defined to include “significant habitat modification or degradation.” 50 C.F.R. § 17.3.

### **Required Evaluation of State and Local Conservation Efforts**

35. When determining whether to list a species, FWS is required to take into account efforts made by states and their political subdivisions to protect the species and its habitat. 16 U.S.C. § 1533(b)(1)(A).

36. FWS has issued a policy to encourage agreements to voluntarily conserve species and their habitat before they are listed. Final Policy on Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726-01 (June 17, 1999). These agreements are called “Candidate Conservation Agreements with Assurances,” or “CCAAs.”

37. According to FWS guidance, the principal goal of CCAAs is to make listing a species unnecessary through coordination of conservation efforts with states, private landowners, and other non-federal partners. Using Existing Tools To Expand Cooperative Conservation for Candidate Species Across Federal and Non-Federal Lands, <https://www.fws.gov/endangered/esa-library/pdf/CCA-CCAA%20%20final%20guidance%20signed%208Sept08.PDF>.

38. Specifically, the policy encourages states and private parties who own land containing habitat for candidate species to undertake measures to implement mutually-agreed-upon conservation measures. In return, participants obtain

assurances that they will not be required to undertake additional conservation measures should the species be listed in the future. 64 Fed. Reg. at 32,733—34.

39. FWS must approve a CCAA before it takes effect, and may do so if “the benefits of the conservation measures implemented by a property owner under [the CCAA], when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, *would preclude or remove any need to list the species.*” 64 Fed. Reg. at 32,726 (emphasis added). Thus, CCAAs are designed to preclude the need to list a species.

40. In 2003, FWS adopted a policy to guide its evaluation of voluntary conservation efforts such as CCAAs when considering whether to list a species. Policy for Evaluation of Conservation Efforts, 68 Fed. Reg. 15,100-02 (Mar. 28, 2003).

41. Under this policy, two primary criteria guide evaluation of conservation efforts in a listing decision: (a) the certainty that a conservation effort will be implemented; and (b) the certainty that the effort will be effective. 68 Fed. Reg. at 15,113.

### **Designating Critical Habitat**

42. Once FWS has determined that a species will be listed as endangered or threatened, FWS must then determine whether any geographic areas are essential

to conservation of the species. If so, FWS may propose to designate those areas as “critical habitat.” 16 U.S.C. § 1533(a)(3).

43. Critical habitat may be designated in either occupied or unoccupied areas of the species’ range. 16 U.S.C. § 1532(5)(A).

44. FWS may designate unoccupied areas “only when a designation limited to [a species’] current range would be inadequate to ensure the conservation of the species.” 50 C.F.R. § 424.12(e). In addition, FWS must make a finding that all unoccupied areas designated as critical habitat are “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii). Thus, designation of *unoccupied* areas is prohibited absent a finding that designation of *occupied* lands is “insufficient” and designation of unoccupied lands is “essential.”

45. FWS is required to consider the economic impacts of a proposed critical habitat designation by preparing an Economic Impact Analysis. 16 U.S.C. § 1533(b); 50 U.S.C. § 424.19.

46. Furthermore, NEPA requires FWS to study and consider the direct and indirect environmental impacts of a proposed critical habitat designation. *Catron County Bd. Of Comm’rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996).

## **Judicial Review**

47. Final listing decisions and designations of critical habitat are reviewable under the Administrative Procedure Act, 5 U.S.C. § 505, *et seq.* Under the APA, a reviewing court may set aside an administrative decision “if the decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

48. An agency’s failure to draw rational conclusions from the evidence before it constitutes arbitrary and capricious action. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## **SPECIFIC ALLEGATIONS REGARDING THE UNLAWFUL LISTING AND DESIGNATION**

### **The Gunnison sage-grouse (*Centrocercus minimus*)**

49. The Gunnison sage-grouse is a chicken-sized ground-dwelling bird that depends on sagebrush communities, including native grasses and forbs (i.e., herbaceous non-grass plants), for food and cover. The species is well-known for its elaborate male courtship displays, in which males and females congregate on open areas called “leks.”

50. The Gunnison sage-grouse was officially designated as a distinct species in 2000. It is currently found only in southwestern Colorado and southeastern Utah. By contrast, its larger and more widespread relative, the Greater sage-grouse

(*Centrocercus urophasianus*) inhabits parts of north-central and northwestern Colorado, as well as parts of ten other western states.

51. Within its current range, the Gunnison sage-grouse is grouped into seven widely scattered populations. The largest population, found in the Gunnison Basin (located in Gunnison and Saguache Counties, Colorado), comprises approximately 84% of all known birds and covers 62% of the occupied habitat of the species. As of 2014, this population was estimated to contain 3,978 individuals. Final Listing Rule at 69,198.

52. The remaining 16% of the species is divided among six “satellite populations,” the largest of which, located in San Miguel County, Colorado, has only an estimated 206 birds. Final Listing Rule at 69,198. Three of the satellite populations contain fewer than 100 birds.

53. Estimates of the historic range of the Gunnison sage-grouse vary widely, are highly uncertain, and are based on anecdotal and unverifiable sources of information. At various times, the species may have occupied parts of Arizona and New Mexico, as well as parts of Colorado and Utah. At all times, however, the species occupied only portions of the total area; it never occupied the entire range at a single point in time.

54. In the Gunnison Basin, 67% of occupied Gunnison sage-grouse habitat is owned by the federal government, 30% is in private ownership, and 2% is owned by Plaintiff.

### **Pre-Listing Conservation Efforts**

55. In 2005, a group of conservation biologists drawn from numerous state and federal agencies—including FWS—prepared an extensive and detailed Rangewide Conservation Plan (“RCP”) for the Gunnison sage-grouse. Gunnison Sage-grouse Rangewide Conservation Plan (April 2005),

<http://cpw.state.co.us/learn/Pages/GunnisonSagegrouseConservationPlan.aspx>.

56. The purpose of the RCP was “to protect, enhance, and conserve Gunnison sage-grouse populations and their habitats” by “providing a rangewide perspective, guidance and recommendations to local working groups and other interested or affected parties and stakeholders.” The plan provided for “consistent and timely habitat improvements and population expansions” that would “eventually remove this species from listing consideration with the USFWS.”

57. Among other things, the RCP provided population targets for each of the seven populations of Gunnison sage-grouse.

58. Through extensive efforts by state and local government, federal officials, and private landowners, the population and habitat protection goals of the RCP for the Gunnison Basin Population have been realized.

59. The RCP set a goal of securing and maintaining 90% of seasonally important habitat on private lands in the Gunnison Basin through enrollments in the CCAA. This goal is very close to being met: enrollments have reached 98% of the target enrollment of 55,302 acres. Final Listing Rule at 69,263. Because the Gunnison sage-grouse is now a listed species, however, private landowners may no longer enroll in the CCAA.

60. Gunnison County and other counties have adopted land use regulations that ensure new development avoids sensitive Gunnison sage-grouse habitat, and have engaged in numerous other conservation-related activities as well.

61. Extensive areas of habitat in the Gunnison basin are protected from disturbance or development, including habitat on private land and on federal land. More than four-fifths of occupied Gunnison sage-grouse habitat in the Gunnison Basin—83%— includes some level of protection through

- a. intensive federal management,
- b. conservation easements (i.e., voluntary, legally binding, and perpetual restrictions on land use to prevent future development on restricted property),
- c. private land enrollment in the CCAA, and
- d. Gunnison County land use regulations.



62. Additionally, 82% of the most important Gunnison sage-grouse habitat in the Gunnison Basin—habitat located within four miles of leks (i.e., courting grounds)—has some level of protection against development or disturbance.

63. Due in part to these extensive conservation efforts, the Gunnison Basin Population now exceeds the population target set in the 2005 RCP by over 30%. RCP at 256 (Table 32).

64. In 2005, the RCP estimated the risk of extinction for the Gunnison Basin Population to be less than 1% over the next 50 years, assuming stable population growth. RCP at 303 (Table 41). Since that calculation was made, the Gunnison Basin Population has grown by almost one-third, to almost 4,000 birds.

65. With a population size near 4,000, the Gunnison Basin Population is significantly less susceptible to the perils of small population size and structure than the much-smaller satellite populations.

66. According to scientific analyses, disease, drought, and fire do not pose significant threats to the Gunnison Basin Population in the foreseeable future.

67. According to FWS, current residential development is a threat of “low magnitude to the persistence of [the Gunnison Basin] population.” Final Listing Rule at 69,236.

68. FWS itself considers the Gunnison Basin Population to be relatively stable and resilient. Final Listing Rule at 69,178.

69. In the Final Listing Rule, FWS acknowledged the effectiveness of state and local conservation efforts and in particular noted their impact in the Gunnison Basin. FWS opined that proposed conservation programs involving habitat protections on private and federal land for Gunnison sage-grouse will provide a long-term, net benefit for the Gunnison sage-grouse on a landscape scale.

70. Colorado has spent at least \$40 million engaging in and managing conservation efforts for the Gunnison sage-grouse and its habitat. These efforts include intensive management actions by Colorado Parks and Wildlife such as habitat treatments, predator control, purchasing property and managing it for Gunnison sage-grouse, translocating birds to augment small populations, lek monitoring, research, and captive breeding programs.

71. Additionally, Colorado established and maintained a Candidate Conservation Agreement with Assurances, or CCAA, for the Gunnison sage-grouse. The CCAA, to which FWS is a party, has protected thousands of acres of privately owned habitat.

### **The Listing and the Critical Habitat Designation**

72. In 2000, the year the Gunnison sage-grouse was recognized as a distinct species, FWS received a petition to list it under the ESA. FWS determined that the species was warranted for listing but the listing was precluded by higher priority actions.

73. Upon further study, in 2006 FWS determined that the species did not warrant protection under the ESA. Final Listing Determination for the Gunnison Sage-Grouse as Threatened or Endangered, 71 Fed. Reg. 19,954 (April 18, 2006).

74. A coalition of conservation groups and others challenged this determination, and the parties subsequently reached an agreement under which FWS agreed to complete a new status review for the Gunnison sage-grouse by June 2010.

75. In September 2010 the FWS determined that listing the Gunnison sage-grouse was warranted but precluded by other priorities, and the grouse was placed on the Candidate Species list. Determination for the Gunnison Sage-grouse as a Threatened or Endangered Species, 75 Fed. Reg. 59804 (Sept. 28, 2010).

76. Notwithstanding the extraordinary conservation efforts undertaken by Colorado, local governments, and private landowners, in January 2013 FWS published a rule proposing to list the Gunnison sage-grouse as endangered throughout its range, along with a rule proposing to designate 1.7 million acres of critical habitat for the species. Endangered Status for Gunnison Sage-Grouse, 78 Fed. Reg. 2486 (Jan. 11, 2013).

77. Colorado, through its Department of Natural Resources and Division of Parks and Wildlife, provided extensive comments on the proposed rules explaining why ESA protection for the species was not warranted.

78. In November 2014, FWS published a final rule listing the Gunnison sage-grouse as “threatened” under the ESA. *See generally* Final Listing Rule. At the same time, FWS published a final rule designating approximately 1.4 million acres of critical habitat across nine counties in Colorado and two counties in Utah. *See generally* Final Critical Habitat Rule.

79. The Final Listing Rule dismissed many of the successful conservation efforts implemented by Colorado, local governments, and private landowners.

80. The Final Listing Rule does not provide a detailed analysis pursuant to the Policy for Evaluation of Conservation Efforts, 68 Fed. Reg. 15,100 (Mar. 28, 2003), and the discussion it does provide does not recognize the certainty and effectiveness of many of the conservation efforts, whose success has been demonstrated over the past decade.

81. Without providing meaningful explanation, the Final Listing Rule states that existing regulatory mechanisms do not adequately address the substantial threats faced by the species.

### **FWS’s Improper Evaluation of Potential Threats to Gunnison sage-grouse**

82. In the Final Listing Rule, FWS identified the most substantial threats to the species as (a) habitat decline due to human disturbance; (b) small population size and structure; (c) drought and climate change; and (d) disease. FWS’ determination of the magnitude of these threats, especially in the Gunnison Basin Population, is

not based on the best available scientific information, and often conflicts with the data presented in the Final Rule itself.

### ***Habitat Decline***

83. As explained above, the efforts of Colorado, local government, and private landowners have been highly successful in preserving and protecting habitat for the Gunnison sage-grouse, particularly in the Gunnison Basin where most of the birds reside. FWS did not adequately recognize or credit those efforts.

### ***Population Size and Structure***

84. FWS's conclusions regarding small population size and structure are not consistent with the best available scientific information.

85. According to the RCP, the Gunnison Basin Population is large enough to maintain a reasonably large degree of genetic variation over time. RCP at 202.

86. The Gunnison Basin Population has sufficient redundancy to survive stochastic (i.e., random) events that are likely to occur in the basin.

87. Taken together, the four population viability analyses relied up on by the FWS indicate that the species is unlikely to face extinction within the foreseeable future.

88. One analysis cited by FWS, prepared in cooperation with the Steering Committee for the RCP, estimated the probability of extinction for the Gunnison Basin Population in the next 50 years to be less than 1%.

89. Another analysis cited by FWS also reported a less than 1% probability of extinction, absent catastrophic environmental events.

90. The author of the only analysis that shows a greater than 1% chance of extinction in the next 60 years cautioned that her data—six years of demographic data—were based on a cyclical period when the population was experiencing a decline. She notes that if her study had been conducted a few years earlier or later, a different picture would have emerged, more consistent with the other population viability analyses. Her subsequent paper, proposing a more integrated model, showed an essentially stable population.

91. Although conservation efforts for some of the satellite populations have been successful, and enhancing these populations contributes to the conservation and vitality of the species, the size and stability of the Gunnison Basin Population alone indicate that the species can survive, based on all foreseeable threats, even if the satellite populations do not.

### ***Drought and Climate Change***

92. Gunnison sage-grouse are well-adapted to relatively short-term drought. The driest summer on record in the Gunnison Basin occurred in 2002. The Gunnison Basin Population declined during that period, but has since rebounded to pre-drought numbers, with virtually all lek complexes (i.e., courtship groups) recovering.

93. Current models of climate change suggest that increased temperatures and drought conditions will not impact the Gunnison Basin in the same way or with the same magnitude as drier, lower elevation areas to the west.

94. The sagebrush ecosystems where Gunnison sage-grouse reside have “low” vulnerability to climate change. Indeed, montane sagebrush stands, already widespread and dominant in the Gunnison Basin, are considered likely to expand with changing climate conditions. Gunnison Basin Climate Change Vulnerability Assessment [http://wwa.colorado.edu/publications/reports/TNC-CNHP-WWA-UAF\\_GunnisonClimChangeVulnAssess\\_Report\\_2012.pdf](http://wwa.colorado.edu/publications/reports/TNC-CNHP-WWA-UAF_GunnisonClimChangeVulnAssess_Report_2012.pdf) at B-27. Low-elevation sagebrush shrublands are considered to be in fair to good condition now, and are presumed stable in the face of expected climate change. *Id.* at B-29.

### ***Disease***

95. FWS’s conclusion that widespread disease, specifically West Nile virus, presents a grave threat rangewide is not based on the best available scientific information.

96. To date, West Nile disease has not been documented in Gunnison sage-grouse.

97. Speculation that the virus may spread to Gunnison sage-grouse fails to distinguish between different climatic conditions across the species’ habitat. Colder spring temperatures and shorter summer seasons at higher elevations decrease

mosquito breeding activity and shorten the amount of time for West Nile virus to spread in the mosquito population to the extent required for transmission of the virus to avian hosts.

98. West Nile virus does not present a future threat to the Gunnison sage-grouse rangewide. Given the relatively high elevation of the Gunnison Basin and the stability and resiliency of the Gunnison Basin Population, West Nile virus would not challenge the survival of the Gunnison Basin Population.

#### **Designation of Critical Habitat Was Improper**

99. FWS's designation of critical habitat for the Gunnison sage-grouse was likewise deficient.

#### ***Failure to Consider Alternatives***

100. Before designating critical habitat for the Gunnison sage-grouse, FWS prepared an Environmental Assessment, available at [http://www.fws.gov/mountain-prairie/species/birds/gunnisonsagegrouse/GUSG\\_FinalEA\\_11122014.pdf](http://www.fws.gov/mountain-prairie/species/birds/gunnisonsagegrouse/GUSG_FinalEA_11122014.pdf).

101. On November 10, 2014, FWS issued a Finding of No Significant Impact, determining that the proposed critical habitat designation would not have a significant impact on the environment. See [http://www.fws.gov/mountain-prairie/species/birds/gunnisonsagegrouse/GuSG\\_FONSI\\_11122014.pdf](http://www.fws.gov/mountain-prairie/species/birds/gunnisonsagegrouse/GuSG_FONSI_11122014.pdf).

102. The only alternatives FWS studied in the Environmental Assessment were a “no-action” alternative and FWS's proposed designation of over 1.4 million acres. In



violation of Department of Interior directives, FWS did not study any variations on its proposed action, nor did it consider any other alternatives. Dep't of Interior, Fish and Wildlife Service Manual, 550 FW 1 at 20.

***Improper Designation of Unoccupied Habitat***

103. In the Final Critical Habitat Rule, FWS designated 1,429,551 acres of critical habitat, of which 45%, or 644,940 acres, is currently unoccupied by Gunnison sage-grouse.

104. Other than conclusory statements, FWS made no showing that the extensive tracts of unoccupied areas designated as critical habitat are essential to the conservation of the species or that currently occupied habitat is insufficient for conservation of the species.

105. Large areas have been included as critical habitat that are not currently, nor will likely ever be, considered suitable habitat. Many of the unoccupied areas are not essential to the conservation of the species, in part because they cannot sustain the ecosystem needed by the Gunnison sage-grouse.

106. FWS identified some unoccupied areas as habitat that “could be suitable for occupation of sage-grouse if practical restoration were applied.” 79 Fed. Reg. at 69,335. These areas are “most commonly former sagebrush areas overtaken by pinon-juniper woodlands.” *Id.* FWS did not make a showing that restoration of these areas is feasible, much less practical. Some of the areas contain extensive

stands of old-growth pinyon-juniper. Destruction of these stands to encourage growth of sagebrush is prohibitively expensive and unlikely to provide long-term sagebrush habitat.

107. Other areas designated as unoccupied critical habitat have been converted to agriculture or exurban development. FWS lacks both the legal authority and the resources to carry out systemic change in these existing patterns of private land use.

108. The designated critical habitat also includes “vacant or unknown areas” that have not been adequately inventoried. 79 Fed. Reg. at 69,335.

***Failure to Consider Economic Impacts***

109. The Economic Impact Analysis of the proposed critical habitat designation forecast an annual loss of economic activity resulting from lost oil and gas production in Colorado of \$160 million. The analysis also showed a \$1.5 million annual regional impact from grazing reductions associated with the designation of critical habitat. FWS dismissed these impacts as insignificant, and did not explain the inclusion of areas where economic impact is disproportional to benefit of special management considerations.

**First Claim for Relief:  
Violation of Section 4 of the Endangered Species Act by Listing the  
Gunnison Sage-grouse as Threatened**

110. Plaintiff incorporates by reference Paragraphs 1-109 of this Complaint as if restated here in full.

111. Defendants violated the ESA by failing to use the best available scientific data and information when considering whether to list the Gunnison sage-grouse under section 4 of the ESA, and by failing to draw rational conclusions from the evidence before them.

112. Defendants arbitrarily and capriciously determined that the Gunnison sage-grouse is threatened throughout its range when the vast majority of the population—i.e., the Gunnison Basin Population—is stable and thriving, and not highly susceptible to foreseeable threats.

113. Defendants arbitrarily and capriciously failed to acknowledge or give sufficient weight to the certainty and efficacy of conservation efforts, including existing regulatory mechanisms.

114. Accordingly, Defendants' Final Listing Rule is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

**Second Claim for Relief:  
Violation of Section 4 of the Endangered Species Act by Improperly  
Designating Critical Habitat**

115. Plaintiff incorporates by reference Paragraphs 1-109 of this Complaint as if restated here in full.

116. Section 4 of the ESA mandates that unoccupied areas may only be designated as critical habitat upon a finding that they are essential to the conservation of the species.

117. ESA regulations require that unoccupied areas may only be designated upon a determination that protection of occupied areas is insufficient for the conservation of the species.

118. Defendants designated unoccupied areas as critical habitat without showing that protection or special management of those areas is essential to the conservation of the species or that designation of only occupied areas was insufficient for the conservation of the species.

119. Defendants arbitrarily dismissed the results of the Economic Impact Analysis.

120. Accordingly, Defendants' designation of critical habitat for Gunnison sage-grouse is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

**Third Claim for Relief:  
Violation of the National Environmental Policy Act and  
the Administrative Procedure Act**

121. Plaintiff incorporates by reference Paragraphs 1-109 of this Complaint as if restated here in full.

122. NEPA requires that FWS take a hard look at the direct and indirect environmental impacts of its decision to designate critical habitat for the Gunnison sage-grouse.

123. FWS guidance requires that its Environmental Assessment include the proposed action, a no action alternative, and reasonable alternatives that satisfy the purpose and need of the proposed action.

124. Defendants' decision to study only the proposed action and a no-action alternative resulted in a failure to take a hard look at the impacts of the proposed action, violated NEPA, and is arbitrary and capricious and an abuse of discretion in violation of the APA.

**REQUEST FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully requests that this Court enter a judgment in favor of Plaintiffs and against Defendants as follows:

1. Declare that the Gunnison sage-grouse does not satisfy the requirements of the ESA for listing as a "threatened species" and that listing the species at this time is not warranted;

2. Declare that Defendants abused their discretion and acted arbitrarily, capriciously, and not in accordance with the ESA in issuing the Final Listing Rule and the Final Critical Habitat Rule;
3. Declare that the Final Critical Habitat Rule is unlawful because Defendants did not comply with NEPA;
4. Vacate the Final Listing Rule and the Final Critical Habitat Rule;
5. Remand both rules to FWS for further proceedings consistent with the Court's findings;
6. Award Plaintiff its costs and expenses, including reasonable attorneys' fees under the citizen suit provision of the ESA and/or the Equal Access to Justice Act; and
7. Grant Plaintiff such other relief as the Court deems just and equitable.

Dated this 10<sup>th</sup> day of February, 2015.

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