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United States Fish and Wildlife Service
Division of Policy and Directives Management
4401 North Fairfax Drive – MS 2042-PDM
Arlington, VA 22203

Docket No. FWS-R6-ES-2011-0111

Sent electronically to <http://www.regulations.gov>

Re: *Comments in Opposition to Proposed Critical Habitat Designation for the Gunnison Sage-Grouse*

Dear Sir or Madam:

The American Petroleum Institute (“API”) appreciates this opportunity to comment on the U.S. Fish and Wildlife Service’s (“FWS”) proposed designation of critical habitat for the Gunnison sage-grouse. (“Proposed Rule”).¹

API is a national trade association representing over 500 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. If the FWS proceeds with the proposed listing, API members may be subjected to Endangered Species Act (“ESA”) requirements and restrictions that would impact their business operations.

I. INTRODUCTION

API submits these comments concurrently with comments on the proposed endangered listing for Gunnison sage-grouse (“GUSG”).² API hereby incorporates by reference its comments on the proposed

¹ 78 Fed. Reg. 2540, 2543 (Jan. 11, 2013).

listing rule for GUSG. API also incorporates by reference the comments of its member companies (including, but not limited to, Anadarko Petroleum Corporation).

II. CRITICAL HABITAT DESIGNATION WOULD BE CONTRARY TO THE ESA, THE BEST AVAILABLE SCIENCE, THE DATA QUALITY ACT AND SCIENTIFIC INTEGRITY

The ESA requires critical habitat designation where it is “prudent and determinable.”³ Critical habitat designations are not prudent when designation would increase the degree of threats to the species or where designation would not benefit the species.⁴ Critical habitat is not determinable where there is insufficient information to analyze the designation pursuant to the ESA or the biological needs of the species are sufficiently unknown to prevent identification of critical habitat.⁵ For all of the reasons discussed herein, critical habitat designation for GUSG is not prudent or terminable.

The FWS considers 55% of the area within the seven units as currently occupied and 45% as currently unoccupied.⁶ With no support, the FWS then states that “[A]ll units were likely historically occupied....”⁷ But the FWS fails to recognize that sagebrush is the most widespread vegetation in the intermountain lowlands in the western United States⁸ and that GUSG inhabit the extreme southern edge of the range of sage-grouse.

Total critical habitat proposed to be designated is 1,704,227 acres.⁹ However, the habitat actually occupied by the GUGS is only 937,765 acres, or 55%, of what the FWS proposes to designate.¹⁰ The FWS’s identification of this critical habitat is based on data from 2005. In other words, the data the FWS relies upon to designate critical habitat is over nine years old.¹¹ Since then, the federal, state and local governments, private landowners, conservation groups, and many others have engaged in a multitude of activities intended to benefit GUSG and their habitat. By assuming habitat conditions today are the same as nine years ago, the FWS ignores and discounts these important habitat efforts. In fact, the FWS acknowledges, “[it] lack[s] the detailed habitat data throughout the range of the species...”¹² Use of outdated scientific evidence violates the plain language of the ESA. Had the FWS

² 78 Fed. Reg. 2486 (Jan. 11, 2013).

³ 16 U.S.C. § 1533(a)(3).

⁴ 50 C.F.R. § 424.12(a)(1).

⁵ *Id.* at 424.12(a)(2).

⁶ 78 Fed. Reg. 2549.

⁷ 78 Fed. Reg. 2552.

⁸ West and Young 2000

⁹ 78 Fed. Reg. 2550.

¹⁰ *Id.*

¹¹ 78 Fed. Reg. 2547 (relying upon the Gunnison sage-grouse Rangewide Conservation Plan (2005)).

¹² 78 Fed. Reg. 2548.

complied with its statutory mandates under the ESA and the Data Quality Act, it would have found negligible suitable habitat for designation.¹³ A critical habitat designation under these circumstances would be arbitrary, capricious and an abuse of discretion under the Administrative Procedures Act (“APA”).¹⁴

Moreover, in 2005, the FWS properly determined listing the GUSG was not appropriate.¹⁵ In the Proposed Rule, the FWS seeks to designate 45% more habitat than existed when it determined listing GUSG was not warranted. As justification, the FWS avers such a sweeping critical habitat designation is simply “necessary.” The FWS has not provided any quantifiable evidence that excluding these areas would result in extinction of the GUSG. This fails to meet requisite standards under the ESA for the best available science and the Data Quality Act.

Nor may the FWS rely upon the 2013 proposed listing rule to determine critical habitat. As API points out in its comments on the proposed listing rule, the FWS’s analysis of existing regulatory mechanisms is wholly insufficient.¹⁶ Prior to making critical habitat designations, the FWS must determine whether it has “information sufficient to perform required analyses of the impacts of designation... .”¹⁷ If the FWS lacks such information, it may not make a critical habitat designation.¹⁸ Here, the FWS lacks sufficient, non-speculative, species-specific information on the existing impacts to the GUSG. Accordingly, a critical habitat designation would be contrary to the Obama Administration policies and memoranda on scientific integrity.¹⁹

In Colorado, Utah and New Mexico, the FWS must consider the economic, national security, and other impacts from both the proposed listing and the proposed critical habitat designation.²⁰ The President issued a memorandum to the Secretary of Interior directing him to revise ESA regulations to require the FWS to publish draft economic analyses at the time it proposes critical habitat.²¹ The FWS clearly has not done so here.

Finally, the FWS has failed to complete the required economic impact analysis required by the ESA or the procedural analysis required by the National Environmental Policy Act (“NEPA”).²² As a result, the FWS lacks a baseline upon which to analyze the impacts and lacks information sufficient to make a critical habitat designation.

¹³ 16 U.S.C. § 1533; 44 U.S.C. § 3516.

¹⁴ 5 U.S.C. § 551 *et seq.*

¹⁵ 70 Fed. Reg. 24870 (May 11, 2005).

¹⁶ 78 Fed. Reg. 2547.

¹⁷ 50 C.F.R. 424.12(a)(2)(i).

¹⁸ *Id.*

¹⁹ API’s comments on the Proposed Listing Rule provide additional detail on these issues.

²⁰ *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1471 (2011).

²¹ Presidential [Memorandum of February 28, 2012](#).

²² 78 Fed. Reg. 2558.

III. NEPA ANALYSIS IS REQUIRED

The FWS must fully comply with the requirements of NEPA when designating critical habitat.²³ Compliance with NEPA will almost always require the preparation of an Environmental Impact Statement (“EIS”).²⁴ In this case, compliance with NEPA clearly requires preparation of an EIS. Accordingly, the FWS must consider a range of reasonable alternatives, engage in the process with other federal agencies and state and local governments, and engage in public comment prior to making a decision on critical habitat.²⁵

IV. ONLY ESSENTIAL HABITAT MAY BE DESIGNATED

Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide *essential* life cycle needs of the species; that is, areas on which are found the primary constituent elements (“PCEs”) laid out in the appropriate quantity and spatial arrangement *essential* to the conservation of the species.²⁶ PCEs include the following:

1. Space for individual and population growth and for normal behavior;
2. Food, water, air, light, minerals, or other nutritional or physiological requirements;
3. Cover or shelter;
4. Sites for breeding, reproduction, and rearing (or development) of offspring; and
5. Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.²⁷

Thus, if the habitat does not contain the requisite PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the species, the habitat does not qualify for critical habitat designation. The FWS may only designate critical habitat areas that contain the appropriate quantity and spatial arrangement of PCE’s that are *essential* to the conservation of the species.²⁸

In this case, the FWS failed to adequately explain and substantiate its reasoning defining PCEs for GUSG. The courts have invalidated similar attempts to designate critical habitat.²⁹ Moreover, if the habitat does *not* contain the requisite PCEs in the appropriate quantity and spatial arrangement *essential*

²³ *Catron County Bd. of Comm’rs, New Mexico v. United States Fish & Wildlife Service*, 75 F.3d 1429, 1436 (10th Cir. 1996); *see also Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220, 1231 (10th Cir. 2002).

²⁴ *Middle Rio Grande*, 294 F.3d at 1225 (citing the district court opinion upheld in *Catron County*, 75 F.3d 1429 (“circumstances in the Tenth Circuit which would relieve the Secretary of the Interior from the duty to prepare an EIS when designating critical habitat will be unquestionably rare.”) (emphasis added)).

²⁵ Codified at 42 U.S.C. § 4321 *et seq.*; 43 Fed. Reg. 55990 (Nov. 28, 1978) (CEQ regulations implementing NEPA).

²⁶ 78 Fed Reg. 2542.

²⁷ 74 Fed. Reg. 28776 (June 19, 2009).

²⁸ 16 U.S.C. § 1532(5); 50 C.F.R. 424.12.

²⁹ *See, e.g., Home Builders Ass’n*, 268 F. Supp. 2d at 1216.

to the conservation of the species, the habitat does not qualify for critical habitat designation.³⁰ The FWS bears the burden to show that the critical habitat designation meets this standard. Furthermore, the FWS must present evidence that designated critical habitat contains *all* of the PCEs, and it must be found throughout the designated habitat, not just in isolated locations.³¹ The FWS has failed to meet its burden in this case.

The FWS's formulation and parameters of GUSG PCEs is nearly incomprehensible. To begin with, PCE 1 appears to consist of areas with a certain composition of sagebrush, that is "of sufficient size and configuration to encompass all seasonal habitats for a given population of the [GUSG] and facilitate movement within and among populations."³² PCEs are to be discreet and quantifiable, i.e. "roost sites, nesting grounds, seasonal wetlands, water quality, tide[, and] soil."³³ In contrast, PCE 1 appears to be a description of what the FWS generally considers suitable GUSG habitat. Furthermore, the description of PCE 1 is riddled with issues, the most glaring of which is the subjective phrase "of sufficient size and configuration." This lack of specificity may exist because, "[n]o particular spatial scale has been determined to best evaluate sage-grouse suitability."³⁴ In sum, PCE 1 is without a scientific basis and generally defies meaningful determination or location.

The remaining PCE's fair little better. PCEs 2 – 5 apparently correspond to habitats associated with the GUSG's life-cycle and seasonal needs. PCEs 2 – 3, breeding and summer-late fall, include tables that nearly impossible to interpret and apply.³⁵ PCE's 4 – 5, winter habitat and "alternative," contain little explanation beyond one sentence, "[a]lterative, mesic habitats used primarily in the summer-late fall season."³⁶ Once again, these PCEs are far from the proper, discrete, quantifiable habitat elements.

The method by which the FWS designates critical habitat in each unit also runs afoul of *Alaska Oil and Gas Ass'n et. al v. Salazar*, Case No. 3:11-cv-0025-RRB; Case No. 3:11-cv-0036-RRB (Jan. 11, 2013). There, the court found that that each unit of critical habitat must contain all of the required physical or biological features of the PCE at issue.³⁷ Here, it is impossible to tell whether each of the units designated by the FWS contains all of the required physical or biological features of the PCEs. In fact, the FWS recognizes it does not even know, stating, "some areas within the mapped proposed critical

³⁰ *Wyoming State Snowmobile Ass'n v. U.S. Fish and Wildlife Service*, 741 F.Supp.2d 1245, 1255 (D.Wyo. 2010)

³¹ *Alaska Oil and Gas Ass'n et. al v. Salazar*, Case No. 3:11-cv-0025-RRB; Case No. 3:11-cv-0036-RRB; Case No. 3:11-cv-0106-RRB (Jan. 11, 2013).

³² 78 Fed. Reg. 2546.

³³ 78 Fed. Reg. 2542.

³⁴ 78 Fed. Reg. 2548.

³⁵ 78 Fed. Reg. 2546.

³⁶ 78 Fed. Reg. 2546.

³⁷ *Alaska Oil and Gas Ass'n et. al v. Salazar*, Case No. 3:11-cv-0025-RRB; Case No. 3:11-cv-0036-RRB; Case No. 3:11-cv-0106-RRB, *43, 45 (Jan. 11, 2013). The court also held that critical habitat may not be based on one essential feature that is located in a small portion of the designated habitat. *Id.* at 43. Here, the FWS may designated critical habitat based on a minimum of two PCE's, which under an extension of the court's reasoning could be considered arbitrary and capricious. *Id.*, 78 Fed. Reg. 2546.

habitat may currently lack the site specific physical and biological features (primary constituent elements) necessary to support [GUSG].³⁸ Nonetheless, the FWS repetitively concludes that each unit, “contains the physical and biological features essential to the conservation of the [GUSG].”³⁹

The FWS cannot designate large swaths of land based on one or a few essential features located in a fraction of the entire area set aside. The FWS has not shown that the proposed critical habitat units contain all of the required physical or biological features of the PCEs. In fact, it appears much of the area proposed as critical habitat is dominated by vegetation not associated with the species habitat and does not contain the PCEs necessary for the conservation of the species.⁴⁰ For example, the proposed critical habitat designation improperly includes high elevation areas (i.e. above 9,000 feet) and acreage that is further from sagebrush habitat than recognized dispersal limits for GUSG (165 feet).

In addition, the PCEs are vague, defy meaningful determination, and lack sufficient scientific basis. This makes it impossible to ascertain whether these PCEs are present at a given location, let alone whether particular actions will affect those PCEs. Accordingly, the proposed designation would be arbitrary and capricious under the Administrative Procedures Act.

V. ANY CRITICAL HABITAT DESIGNATED SHOULD EXCLUDE AREAS THAT ARE NOT PRESENTLY OCCUPIED

A significant percentage of the land proposed as critical habitat is not presently occupied. Critical habitat may be designated outside presently occupied areas only when a designation limited to its present range would be inadequate to ensure the conservation of the species.⁴¹ As a threshold matter, the FWS must first determine whether the species can persist on the habitat it currently occupies; otherwise, extra-occupied habitat is by definition non-essential. Here, the FWS attempts to designate extra-occupied habitat as critical without adequate analysis based on the best available information.⁴² Any critical habitat designation should not include areas outside of occupied habitat.

VI. GUSG HABITAT IS NOT IN NEED OF SPECIAL MANAGEMENT CONSIDERATIONS

The habitat within the geographical area occupied by the species at the time of listing must contain the physical and biological features that are essential to the conservation of the species, and be included *only if those features may require special management considerations or protection*.⁴³ Thus, if the critical

³⁸ 78 Fed. Reg. 2557.

³⁹ 78 Fed. Reg. 2552 – 55.

⁴⁰ *See, e.g.* 74 Fed. Reg. 28802-03.

⁴¹ 50 C.F.R. § 424.12(e).

⁴² The FWS makes repetitive conclusory statements in its analysis of each unit, but provides no support for this assertion. 78 Fed. Reg. 2552 – 2556. The FWS’s analysis applying the 2005 Resource Conservation Plan’s 500 GUSG to 100,000 acres quotient does not qualify as justification for designating extra-occupied habitat because, among other reasons, it relies upon nine-year-old habitat information that does not take into account habitat improvement caused by subsequent conservation measures; even when it was current, the model does not take into account the inherent variance in habitat structure and quality over the landscape, and the FWS admittedly lacks detailed habitat data throughout the range of the species. 78 Fed. Reg. 2548.

⁴³ 16 U.S.C. § 1532(5). These same requirements are also phrased as follows: “In identifying those lands, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the

habitat does not require special management considerations (*e.g.*, if it is already protected) then it need not be designated as critical habitat.

Federal, state and tribal acreage, as well as acreage under conservation easement, Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances and the Conservation Reserve Program should not be included in critical habitat.⁴⁴

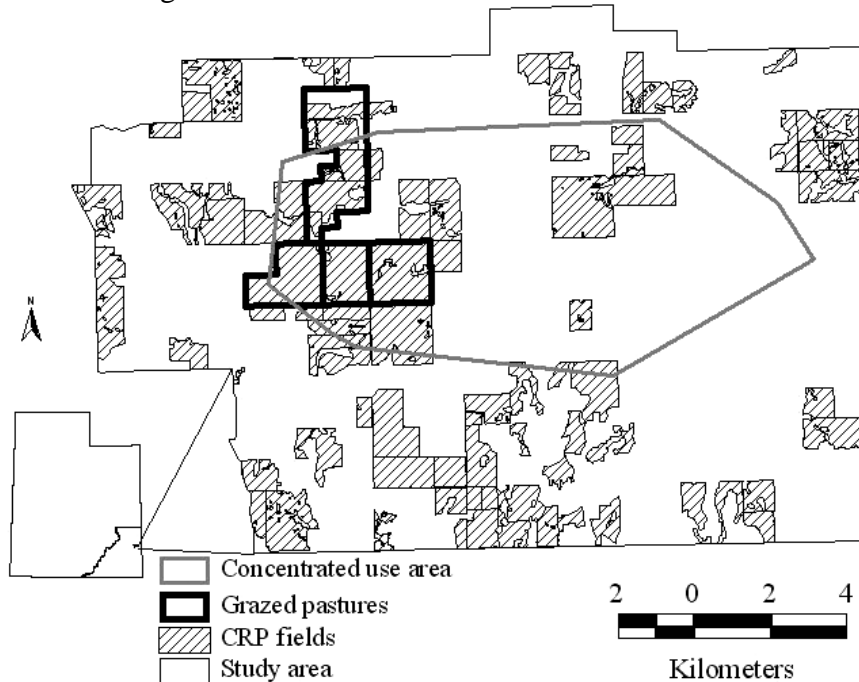


Figure 1. Conservation Reserve Program acreage in San Juan County, Utah.

A. Balancing Test Used to Determine Exclusion

The FWS appears to underestimate the potential economic impacts, national security and other impacts of a critical habitat designation. At the same time, the FWS appears to overestimates the alleged benefits of critical habitat.

With this proposed designation, the FWS is severely limiting industry access to resources. Once designated as critical habitat, the BLM will impose stipulations on oil and gas leases and conditions of approval to applications for permits to drill that will prohibit oil and gas activity in significant portions of the year. This will result in increased administrative costs and operation and permitting delays and curtailment of current and future leases. Ultimately, this will mean less oil and gas production during times of burgeoning national debt and high unemployment.

time of designation, the features essential to the conservation of the subspecies and habitat that is identified, if managed or protected, could provide for the survival and recovery of the subspecies.” 74 Fed. Reg. 28813.

⁴⁴ See *e.g.*, 74 Fed. Reg. 78825 – 28

Even if habitat is found to be essential to a species' needs it may still be excluded from critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion, and if exclusion will not result in extinction of GUSG.⁴⁵ Such is the case here. Specifically, the FWS should consider:

1. Economics and National Security

The FWS is required to consider economics, national security and other impacts in a critical habitat designation.⁴⁶ API assumes it will have the opportunity to comment on a detailed economic analysis of the proposed critical habitat designation and reserves the right to do so. In the meantime, we urge the FWS to consider the following:

The FWS must consider the economic and other impacts that both listing and critical habitat would have.⁴⁷ The FWS must consider the cost of delays due to limited operational windows as well as lost royalties, lost revenues and lost taxes. Costs to operators will also likely include the cost of wildlife or habitat surveys and seasonal restrictions on operations. Modifications to project scope (such as the cost of idle equipment and/or manpower) and the cost of implementing mitigation measures must also be considered. Other costs could include lost mineral extraction, lost wages, lower consumer surplus due to higher prices, lower tax revenue and reduced or terminated business activity.⁴⁸

Continued energy development is critical to the economy in Colorado and Utah. According to the Colorado Oil and Gas Association ("COGA"), oil and gas contributes over \$600 million of annual revenue to State and local governments from severance and ad valorem taxes on production. The University of Colorado, Leeds School of Business performed an Assessment of Oil and Gas Industry Economic and Fiscal Impacts in Colorado in 2011.⁴⁹ It reports:

- Government Revenue
 - In 2010, Colorado's oil and gas industry recorded \$9.2 billion in production value.
 - The oil and gas industry contributed substantial public revenues in 2010—totaling more than \$1.1 billion, of which \$572 million was derived directly from severance taxes, public leases, public royalties, and property taxes.
 - The industry also paid \$242 million in royalties to state and federal governments in 2010, of which \$123.8 million stayed within Colorado.
 - The State of Colorado received almost \$16.5 million in state lease revenue from oil and gas in 2010, a record high.
 - While this industry has substantial operations on state and federal lands, a vast majority—more than 71%—transpires on private lands.
 - Taxes

⁴⁵ 16 U.S.C. § 1533(b)(2).

⁴⁶ 16 U.S.C. § 1533(b)(2).

⁴⁷ *Catron County Bd. of Comm'rs, New Mexico v. United States Fish & Wildlife Service*, 75 F.3d 1429, 1436 (10th Cir. 1996).

⁴⁸ Available at: http://perc.org/publications/articles/esa_costs.php?s=2.

⁴⁹ Richard Wobbekind, Brian Lewandowski, Emily Chritensen, Cindy DiPersio, *Assessment of Oil and Gas Industry Economic and Fiscal Impacts in Colorado in 2010*, Business Research Division, Leeds School of Business, Univerisy of Colorado Boulder (December 2011) available at: http://www.coga.org/pdf_studies/cu_econbenefits.pdf

- The industry is among the largest contributors to state and local taxes in Colorado.
 - The oil and gas industry is subject to taxes and assessments beyond what other industries contribute.
 - Ad valorem taxes, for instance, are 3 times higher for oil and gas production than for commercial property within the state and 11 times higher than residential property. Oil and gas property taxes topped \$360 million in 2010.
 - This industry relates to other industries like manufacturing, which imports investment, exports goods, pays above-average wages, and contributes substantially to public revenues; retail trade, which facilitates the collection of public revenues through taxes on goods sold; and gaming, which pays additional taxes and operates in rural areas.
- Jobs
 - The industry supplied 22,400 direct drilling, extraction, and support jobs with average annual wages in excess of \$103,000. Coupled with the oil and gas supply chain within Colorado—transportation, refining, wholesalers, parts manufacturers, and gasoline stations—direct employment totaled more than 43,800 jobs, with average wages over \$72,000, which are 51% higher than the state average for all industries
 - Collectively, the oil and gas industry contributed nearly \$3.2 billion in employee income to Colorado households in 2010, 2.6% of total Colorado salary and wages.
- Specific Counties
 - Delta
 - value of production: \$0 million
 - severance and mineral lease distributions accounted for \$352,378
 - Dolores
 - value of production: \$4 million;
 - severance and mineral lease distributions accounted for \$82,268
 - Gunnison
 - value of production: \$7 million
 - severance and mineral lease distributions accounted for \$532,656
 - Hinsdale
 - value of production \$0 million
 - severance and mineral lease distributions accounted for \$29,847
 - Mesa
 - 847 primary oil wells; 997 primary gas wells
 - value of production \$163 million
 - 9.1% of total wages is from oil and gas
 - wages for those in the oil and gas industry is 67.6% higher than for all other industries in the county
 - contributed 6.64% of the county's total tax revenues (\$132,570)
 - severance and mineral lease distributions accounted for \$1,502,676
 - Montrose
 - value of production \$0 million
 - severance and mineral lease distributions accounted for \$256,665
 - Saguache
 - value of production \$0 million
 - severance and mineral lease distributions accounted for \$20,786
 - San Juan
 - value of production \$0 million

- severance and mineral lease distributions accounted for \$39,796
- San Miguel
 - value of production \$27 million
 - severance and mineral lease distributions accounted for \$140,663

The oil and gas industry provides 120 full-time jobs per drilling rig.⁵⁰ Direct jobs and earnings are those in which spending or employment is directly from the industry or firm. Spending or employment in related industries impacted by the oil and gas development are indirect effects. Induced effects are changes in household expenditures due to direct spending and employment. Every direct job generates an additional 1.67 indirect and induced jobs.⁵¹

In the Uinta Basin in Utah, oil and gas exploration and production accounted for 4,932 direct jobs in 2007. By including the 5,650 indirect and induced jobs, this industry was responsible for 0.6% of jobs in the State of Utah. Earnings accounted for 0.7% of the state's total with \$330 million in direct earnings and \$155 million in indirect and induced earnings. As oil and gas jobs generally pay above-average wages, earnings account for a higher share of the state's total than employment. Projected impacts from 2009-2038 indicate 10,180 to 17,020 new jobs and \$2.4 to \$3.2 billion in earnings.⁵²

The Obama Administration has recognized the significant economic and national security benefits from a healthy domestic oil and gas industry.⁵³ In this case, critical habitat designation would dramatically impact severance taxes, royalties to mineral owners (including the state school lands), jobs and the economy in Colorado and Utah. Critical habitat designation will result in delays and decisions to move operations, or forego operations, in areas of Gunnison sage-grouse habitat. As discussed above, each rig accounts for 120- full-time jobs and ripple effects in the economy. Economic impacts would fall to oil and gas operators, local communities and the region. National security depends upon a strong economy.⁵⁴ Accordingly, the proposed critical habitat designation could have corresponding impacts to national security.

2. Private Landowners

The designation of critical habitat on private lands would significantly reduce the likelihood that landowners will support and carry out conservation actions.⁵⁵ The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire

⁵⁰ Source: North Dakota Department of Mineral Resources.

⁵¹ (Lisa A. McDonald, Ph.D., Holly Wise Bender, Ph.D., Eric Hurley, Sheri Donnelly, Booz Allen Hamilton, David Taylor, *Oil and Gas Economic Impact Analysis*, Colorado Energy Research Institute (June 2007) <http://www.ceri-mines.org/CERIOil&Gas.pdf> [accessed Feb. 21, 2013].

⁵² (Bureau of Economic and Business Research, *The Structure and Economic Impact of Utah's Oil and Gas Exploration and Production Industry Phase I – The Uinta Basin*, Utah Governor's Office (October 2007) <http://governor.utah.gov/publiclands/PLPCOStudies/EconomicImpactofO&GIndustryALL.pdf> [accessed Feb. 21, 2013]

⁵³ <http://energy.gov/articles/president-obama-outline-plan-americas-energy-security> (last visited Jan. 12, 2013).

⁵⁴ See e.g., Alice M. Rivlin, Brookings Institution. Available at: <http://www.brookings.edu/blogs/up-front/posts/2010/12/30-security-economy-rivlin>.

⁵⁵ Main *et al.* 1999, p. 1263; Bean 2002, p. 2; Brook *et al.* 2003, pp. 1644–1648.

management, and control of invasive species) are necessary for species conservation.⁵⁶ The exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery.⁵⁷

3. Voluntary Conservation Measures

Even the FWS recognizes the negative impacts of designating critical habitat. “[I]n many instances the regulatory benefit of critical habitat is minimal when compared to the conservation benefit that can be achieved through other means.⁵⁸ In fact, designation of critical habitat can be counterproductive.⁵⁹ Thus the benefits of excluding areas that are covered by partnerships or voluntary conservation efforts can often be high.

It follows that private lands included in conservation easements, Candidate Conservation Agreements with Assurances (“CCAAs”) or fee title acquisitions by land trusts should be excluded from any critical habitat designation. Existing oil and gas fields as well as acreage subject to oil and gas leases should also be excluded. Oil and gas leases are already subject to many conditions of approvals, timing stipulations and other measures designed to address threats to species such as the GUSG. Private lands enrolled in Conservation Reserve Program lands should be excluded as well. These efforts clearly justify exclusion of these lands from the critical habitat designation. In fact, the FWS has done so in the past.⁶⁰

4. Intergovernmental Cooperation

Designating lands within approved management plan areas as critical habitat would have a negative effect on the FWS’s ability cooperate with state and local governments and to address landscape-level conservation of species and habitats.⁶¹ By excluding land covered by existing conservation measures, the FWS can preserve its current partnerships and encourage new ones.⁶² Accordingly, tribal, federal, state and local government–owned land should be excluded from critical habitat. As the Bureau of Land Management (“BLM”) has stated:

Numerous laws, regulations, and policies have been developed to assist the agency in management of these lands. All Federal agencies are required to adhere to NEPA for projects they fund, authorize, or carry out... (2) BLM’s [Range Management Plans] are the basis for all actions and authorizations involving BLM-administered land and resources... They provide a framework and programmatic guidance for site-specific activity plans. These plans address livestock grazing, oil and gas development, travel

⁵⁶ Bean 2002, pp. 3–4.

⁵⁷ 74 Fed. Reg. 28814.

⁵⁸ 74 Fed. Reg. 17288, 17332

⁵⁹ *Id.* at 28815.

⁶⁰ *See e.g.*, 74 Fed. Reg. 78825 – 28 (discussing the San Diego County Multiple Species Conservation Program).

⁶¹ *Id.*

⁶² *Id.*

management, wildlife habitat management and other activities... (3) BLM policy and guidance for species of concern occurring of BLM administered lands is addressed under BLM's 6840 Manual "Special Status Species Management"... The objectives for BLM special status species are "to conserve and/or recover ESA listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species and to initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species..."⁶³

Finally, we question whether the FWS fully complied with its statutory duty to cooperate with the State and the Tribes to the maximum extent practicable prior to designating critical habitat.⁶⁴

5. There are No Benefits to Designation

Potential benefits of designating land as critical habitat are inapplicable under the present circumstances. The FWS has recognized that critical habitat designation affords little extra protection to most species, and can result in harm. This harm may be due to negative public sentiment to the designation, to inaccuracies in the initial area designated, and to the fact that there is often a misconception among other federal agencies that if an area is outside of the designated critical habitat area, then it is of no value to the species.⁶⁵ The FWS has also recognized that designation of critical habitat as ineffective and expensive:

In 30 years of implementing the [ESA], the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the [ESA] can protect species with and without critical habitat designation, critical habitat designation may be redundant to other consultation requirements of section 7. . . ."⁶⁶

⁶³ FWS-R8-ES-2012-0058: 4500030113 (Sept. 4, 2012) (Comments on tiger beetle).

⁶⁴ 16 U.S.C. § 1535(a)(1988); *see also* 50 C.F.R. § 424.16; Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34275 (July 1, 1994).

⁶⁵ Available at http://www.fs.fed.us/r9/wildlife/tes/docs/esa_references/critical_habitat.pdf.

⁶⁶ *See, i.e.* 69 Fed. Reg. 53135, 53135 (Aug. 31, 2004).

API believes designation of critical habitat is unnecessary for all of the reasons discussed herein. However, if the FWS chooses to designate critical habitat, it should exclude areas already under protection.⁶⁷

VII. CRITICAL HABITAT IS DUPLICATIVE OF LISTING

Even when there is no critical habitat designation, federal agencies must consult with the FWS to ensure any action they carry out, fund, or authorize is not likely to jeopardize the continued existence of a listed species. In situations where there is little difference between the adverse modification inquiry and the jeopardy analysis (*e.g.*, when PCEs are more localized than the species' population density), then the critical habitat designation is redundant.⁶⁸ Such is the case here.

VIII. CONCLUSION

For the reasons above, API urges the FWS not to designate critical habitat for the GUSG. Critical habitat designation will do little for conservation, but much to harm the economy. The Proposed Rule flies in the face of dire economic consequences and significant conservation effort. It also comes at a time of deep recession, joblessness and budget deficits. Accordingly, designation of critical habitat as the FWS has proposed would violate the standards of the ESA, the Data Quality Act and the APA. If the FWS chooses to designate critical habitat, we urge you to exclude tribal, federal and state lands, existing oil and gas fields and lands subject to existing oil and gas leases, and private lands subject to conservation easements and CCAAs.

Should you have any questions, please contact the undersigned at 202.682.8057, or via e-mail at rangerr@api.org.

Thank you for considering this request.

Very truly yours,



Richard Ranger
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⁶⁷ See *e.g.*, 74 Fed. Reg. 78825 – 28 (discussing the San Diego County Multiple Species Conservation Program).

⁶⁸ *Id.*