Strategic Committee Questions on the Endangered Species Act for US Fish & Wildlife Service … July 28, 2013

1. Why is the Gunnison sage-grouse being proposed for listing as Endangered rather than Threatened?

The Fish and Wildlife Service's (Service) proposal to list the species as endangered was based on an analysis of the threats contributing to the species' decline across much of its range, as described in the proposed listing rule. Based on this analysis, the Service concluded that the species is "endangered" within the meaning of the Endangered Species Act (Act). The Act defines an endangered species as one that is in danger of extinction through all or a significant portion of its range, and a "threatened" species as one likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

Since the proposed rule was published in January 2013, the Service has received and continues to receive substantive comments and information regarding the status of the species and the threats to it and its habitat that are relevant to the Service's final determination of whether the species is endangered, threatened, or neither. The Service is currently reviewing these comments and information to inform its final analysis and listing decision.

2. Why is the species proposed for ESA listing when population numbers in the Gunnison Basin are reportedly stable or increasing above the population target defined in the Rangewide Conservation Plan?

The Act defines an *endangered species* as one that is in danger of extinction throughout all or a "significant portion of its range" (SPR); and a *threatened species* as one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. According to the Service's SPR proposed policy (see http://www.fws.gov/endangered/improving_esa/spr.html) and interim guidance, if a species is found to be threatened or endangered throughout all or a significant portion of its range, the entire species is to be listed and protections of the Act would apply range wide.

In our proposed rule to list Gunnison sage-grouse as endangered under the Act, we determined that the species is currently at risk throughout all of its range due to ongoing threats of habitat destruction and modification (Listing Factor A), predation (Listing Factor C), inadequacy of existing regulatory mechanisms (Listing Factor D), and other natural or manmade factors affecting its continued existence (Listing Factor E). Despite a relatively stable population of birds in the Gunnison Basin, a number of threats persist in the area. We found there to be no significant portions of any of the species' range that may warrant a different determination of status. Based on this information, we proposed to list Gunnison sage-grouse as endangered range wide.

3. Could FWS list the smaller, satellite populations as Threatened or Endangered and not list the core population in the Gunnison Basin?

"List-able entities" under the Act include species, subspecies and, for vertebrate taxa, distinct population segments (DPS). These entities may be listed, delisted, or reclassified under the Act. Congress has directed that exercise of DPS authority be used sparingly and only when the biological evidence indicates that such action is warranted. As such, the Services have used this authority relatively rarely. Application of the DPS policy is to be aimed at carrying out the purposes of the Act, conservation of threatened and endangered species and the ecosystems upon which they depend. Three elements are considered in determining whether a DPS exists: 1) discreteness; 2) significance; 3) conservation status of the population segment (see http://www.nmfs.noaa.gov/pr/pdfs/fr/fr61-4722.pdf for more information).

In the proposed rule, the Service did not identify a DPS for Gunnison sage-grouse, per the discreteness and significance criteria. Considering SPR and DPS policies and guidance described above, and in light of Congressional guidance that the authority to list DPS's be used sparingly, listing some or all of the smaller satellite populations and not listing the Gunnison Basin population would require evidence to demonstrate that individual populations, or potentially population groups, are DPS's. Such a decision would also require a determination that the Gunnison Basin population itself is not threatened or endangered, as defined by the Act.

4. How might management for Threatened differ from Endangered? [Please address ways that Director Ashe mentioned: section 4(d) special rule, flexibility, listing without regulating, managing differently in different areas.]

Section 4(d) of the Act provides the Service with flexibility in managing threatened species because it allows the Service to establish special regulations for threatened (not endangered) species, subspecies, and DPS's. These "4(d) rules," when issued by the Service, take the place of the normal protections of the Act and may either increase or decrease the Act's normal protections. The Act specifies that 4(d) rules must be "necessary and advisable to provide for the conservation of such species."

A 4(d) rule may be used to minimize the regulatory burden for activities that are not likely to impact the species, and reduce conflicts between people and the protections provided by the Act, provided the Service finds that those conflicts would adversely affect recovery and that the reduced protection would not slow the species' recovery. For example, for the lesser prairie-chicken (proposed as threatened on December 11, 2012), the Service is proposing a special 4(d) rule that would allow "take" of the species incidental to activities consistent with approved conservation plans and the Natural Resources Conservation Service's Lesser Prairie-Chicken Initiative. The proposed rule is based on the Service's finding that those specific agricultural activities do not threaten the lesser prairie-chicken. If the Gunnison sage-grouse is listed as threatened, the Service would consider whether issuance of a 4(d) rule authorizing incidental take of the species for certain activities or including other provisions would be consistent with the Act.

5. How would a Threatened or Endangered listing affect management of private land? [Please explain land covered by CCAA v. not under CCAA.]

If Gunnison sage-grouse is listed, properties and landowners enrolled in the CCAA are covered for take resulting from land use activities and projects specified under and consistent with the program because enrollment in the CCAA includes coverage under a Section 10 permit authorizing such take. Properties and landowners not enrolled in the CCAA would not be provided take coverage, unless they apply for and are granted coverage under other provisions or tools, such as an incidental take permit through a Habitat Conservation Plan or Safe Harbor Agreement.

If the Gunnison sage-grouse is listed as threatened or endangered, "take" of the species would be prohibited under Section 9 of the Act, unless specifically permitted by the Service. Furthermore, projects, actions, or activities carried out, funded, or authorized by Federal agencies on private lands would be subject to section 7 consultation requirements of the Act. *Take* is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. *Harm* is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. *Harass* is defined by the Service as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

Based on these definitions, causing death or injury to a Gunnison sage-grouse would constitute take of that species under the Act. Significant habitat modification or degradation have the potential to harm Gunnison sage-grouse and thus may also result in take of the species. Likewise, some human disturbances may disrupt or harass birds, potentially resulting in take of Gunnison sage-grouse. If the species is listed, the Service can provide technical assistance to landowners who have concerns regarding the impacts of their activities on Gunnison sage-grouse or its habitat.

Section 10 of the Act provides the Service with authority to permit take of a listed species. For example, the Service may issue an "incidental take permit" for take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Such permits are generally supported by a habitat conservation plan relevant to the permitted area or activity. The Service may also issue a Section 10 permit authorizing take pursuant to other tools, such as a "safe harbor agreement."

6. Would all land managers in the Gunnison Basin be able to use the CCA and CCAA guidelines in sage-grouse habitat without additional FWS restrictions?

If Gunnison sage-grouse is listed, the Gunnison Basin CCA and Gunnison sage-grouse CCAA would provide authorized "take" and fulfill the requirements of the Act for only those enrolled entities and properties and their specified projects and activities. For take authorization, projects and activities on those lands must be in compliance with the terms

and conditions of the programs. We believe both programs provide good models for advancing the conservation of Gunnison sage-grouse on Federal and private lands. However, these are incentive-based programs designed to promote the conservation of a species prior to a Federal listing. While future conservation efforts will likely be similar and build upon principles developed in the CCA and CCAA, we cannot assure other entities or landowners that restrictions on other lands will be identical to these existing programs.

7. What is lacking in current local regulations, and would Gunnison County's MOU and Conservation Agreement satisfy the disparity? If not, what further actions would FWS like to see implemented?

Gunnison County has set a standard for implementing local regulations designed to avoid or minimize impacts on Gunnison sage-grouse caused by land development and improvements. However, the regulations do not prevent or mitigate habitat loss and fragmentation, or cumulative effects, due to land development. Implementing a habitat mitigation program to offset impacts from development would vastly improve local regulations for Gunnison sage-grouse conservation.

The multi-county MOU and conservation agreement communicate intent of the Counties to implement conservation efforts and actions in the future. It remains to be seen what exactly these efforts will be, whether they will be regulatory (non-discretionary) or otherwise, and how effective they will be at conserving Gunnison sage-grouse and its habitat. Further, under the Act, the "inadequacy of regulatory mechanisms," is but one of several factors upon which the Service's determination to list a species is based. As noted in the proposed listing rule, there are multiple other threats likely contributing to the species decline range wide. Therefore, even the most protective of local regulations may be insufficient, in and of themselves, to address threats to the species, or arrest recent declines in many of the populations, such that protection of the species under the Act is not warranted. We encourage continuation of these conservation efforts, however, since we believe these in combination with other ongoing and future conservation actions are necessary for the species continued survival and persistence.

8. If the Counties' Conservation Agreement were accepted in lieu of listing, how would we know if it was providing the regulatory certainty that's needed? What standards would be used to measure progress, and what role would FWS play?

Also see answer for #7 above. Local regulations are but one component of the regulatory framework we consider in making our final listing determination. We must consider and evaluate other regulatory mechanisms at multiple levels, including Federal and State legislation, regulations, and policy. Further, under the Act, the "inadequacy of existing regulatory mechanisms" is but one of several factors upon which the Service's determination to list a species must be based. As noted above, we have determined that multiple other threats are likely contributing to the species decline. Therefore, even the most protective of local regulations may be insufficient, in and of themselves, to address threats to the species, or arrest recent declines in many of the populations, such that

protection under the Act is not warranted. We encourage continuation of these conservation efforts, however, since we believe these in combination with other ongoing and future conservation actions are necessary for the species continued survival and persistence. The uncertain nature and effectiveness of future conservation efforts associated with the MOU are also factors in the Service's consideration of the Counties' Conservation Agreement in its listing determination.

If the Service were to withdraw a proposed listing based on one or more conservation efforts, the Service would first need to evaluate the certainty (likelihood of implementation) and anticipated effectiveness of those conservation efforts. If the Service's final determination is not to list Gunnison sage-grouse under the Act, based on its assessment of the species status and threats to that species and its habitat, the Service's involvement in the future management of the species would likely be very limited since it would no longer be a Federal trust resource (candidate, proposed, threatened, endangered species, etc.).

9. How would listing *actually* affect someone's recreation permit, building permit, or ability to access/use the public lands?

Also see answer to #5 above. Take of a listed species without a Federal permit is prohibited under the Act, regardless of land ownership. If the subject project or activity would result in take, then it would need to be covered by a take permit (see answer to #5 above for examples) in order to avoid violating the Act.

Furthermore, projects, actions, or activities carried out, funded, or authorized by Federal agencies are subject to section 7 consultation requirements of the Act. Section 7 of the Act, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species. Accordingly, Federal agencies are required to consult with the Service on any project or action that may affect a listed species or its critical habitat (but see answer to #10 below for CCA and CCAA discussion). Typically, section 7 consultations result in project modifications (location, timing, extent, etc.) to avoid or minimize impacts on listed species or its habitat. It is impossible to predict in the abstract, however, whether and what project modifications will be required of a particular project or activity that may affect Gunnison sage-grouse, if the species is listed.

10. How would the ESA affect existing grazing permits on public lands in Gunnison County? Would the CCA help insure the continuation of public lands grazing?

If the species is listed, the recently completed Gunnison Basin CCA and the Service's conference opinion regarding the CCA pursuant to ESA section 7 would authorize incidental take of Gunnison sage-grouse associated with livestock grazing permits, among other activities, on Federal lands in the Gunnison Basin over the next 20 years. Implementation of the CCA, including its terms and conditions, monitoring program, and other requirements for livestock grazing will guide future management of livestock grazing on public lands in this area. Provided the requirements of the CCA and

conference opinion are met, we anticipate the program will ensure seamless continuation of public lands grazing in the Gunnison Basin into the future.

11. Would livestock grazing, recreation, roads and suburban development still be allowed in Critical Habitat?

The effect of a critical habitat designation is that it requires Federal agencies to consult with the Service on any of their actions that may affect critical habitat. The Service can then recommend ways to minimize any adverse effects of on the habitat. The designation of critical habitat does not, therefore, automatically preclude any ongoing or future land uses in designated critical habitat. It does not affect land ownership or establish a refuge, wilderness, reserve, preserve or other conservation area. It does not allow government or public access to private lands. It imposes no requirements on state or private actions on state or private lands where no Federal funding, permits or approvals are required.

However, all other protections afforded by the Act apply both within and outside of designated critical habitat. Listed species, both within and outside of critical habitat, are protected from 'take,' which includes harming (e.g., shooting, killing, trapping, collecting) and harassing individual animals. As described above, incidental take that may result from, but is not the purpose of, otherwise legal activities may be allowed with a permit available from the Service. Pursuant to ESA section 7, Federal agencies are also required to consult with the Service regarding any action authorized, funded or carried out by the agency that may affect a listed species, both within and outside of critical habitat, to ensure that the Federal action does not jeopardize the existence of any listed species.

12. Could a private group or citizen initiate a takings claim against a private landowner under the ESA? ...or is this not possible?

We assume your question is whether a private group or citizen can bring a claim alleging illegal take of listed species in violation of section 9 of the ESA. Section 11(g) of the Act, 16 U.S.C. § 1540(g), does authorize citizens to bring suit to enjoin any person from violating the ESA or its implementing regulations. In order for the court to consider this lawsuit, however, the private group or citizen must first prove that it has “standing” to bring this claim, which means, at minimum, that it must demonstrate that the alleged violation of the ESA’s take prohibitions injured it, that the claimed injury was caused by the alleged violation and that the injunctive or other relief sought would redress the claimed injury. If the private group or citizen cannot prove that it has standing to assert the illegal take claim against the private landowner, then the court will dismiss their claim.

13. Is there the ability for a private group or citizen to file lawsuit seeking an injunction against a legitimate grazing permittee, asking to cease their grazing activities on public lands, BLM or FS, even if the permittee is in compliance with the CCA (assuming it is implemented)? ...and if so, how would FWS deal with this type of action?

A private group or citizen always has the ability to file a lawsuit seeking injunctive relief against grazing on public lands on any number of grounds. Whether a suit brought under the Act's citizen suit provisions to enjoin grazing on federal lands will succeed depends on whether the group or citizen has standing to assert the claim and can prove that the grazing permittee is violating the Act and/or its implementing regulations in some fashion.

The Service recently completed a conference opinion for the Gunnison Basin CCA, which covers livestock grazing in this area on BLM, USFS, and NPS lands. If the species is listed as threatened or endangered, the Service will adopt this conference opinion as a biological opinion satisfying ESA section 7's formal consultation requirements if it finds there have been no significant changes in the CCA or in the information used in preparing the conference opinion. The Service is not currently aware of any changes to the CCA or new information that would preclude adoption of the conference opinion as a biological opinion for the Gunnison Basin CCA if Gunnison sage-grouse is listed.

The conference opinion includes an incidental take statement that authorizes a certain amount of take of the species incidental to livestock grazing, among other activities, covered by the CCA. If a permittee is in compliance with the terms of the Gunnison Basin CCA for livestock grazing on covered Federal lands, and assuming Gunnison sage-grouse is listed and the conference opinion is adopted as a biological opinion, then incidental take of the species by the permittee as a result of this grazing activity would be authorized pursuant to the incidental take statement in the Service's conference opinion/biological opinion. In other words, in the Service's view, if the species is listed, and the conference opinion is adopted as the biological opinion for the CCA, then all requirements under sections 7 and 9 of the Act for the permittee, the action agency, and the Service would be satisfied as long as the permittee and action agency are acting in compliance with the CCA.

The Service is a committed participant of the Gunnison Basin CCA. Its section 7 conference opinion (and biological opinion if Gunnison sage-grouse is listed) is intended to satisfy the legal requirements of the Act. Provided the requirements of the CCA are being followed, the Service would support the permittee and associated action agency in continued implementation of those activities.

14. Would more predator control be permitted under the ESA?

The Act does not directly authorize, or increase, predator control efforts. Other legislation, regulations, and policies would guide those efforts as appropriate, regardless of the final listing determination for Gunnison sage-grouse. If Gunnison sage-grouse is listed, and the Service determines that recovery of the species may depend on more predator control, then such efforts may increase to meet recovery objectives.

15. Why does the Critical Habitat map include high elevation and forested areas? Does Critical Habitat apply only to public lands?

The broad, landscape scale upon which the critical habitat maps were based resulted in the inclusion of habitats that contain non-sagebrush vegetation communities and other habitat types that might not be suitable for Gunnison sage-grouse at the local level. However, based on the vegetation data and models used to develop the maps, at least 25 percent of primarily sagebrush land cover occurs within a .9-mile radius of any given location within the mapped proposed critical habitat areas. In such cases, available sagebrush habitat would be adequate and sufficiently near unsuitable habitat types to support Gunnison sage-grouse life history needs, which may include bird movements between populations and occupied habitats. As stated in the proposed rule, if the site-scale habitat types and characteristics (PCEs 2 through 5 which includes breeding habitat, summer-late fall habitat, winter habitat, and alternative, mesic habitats) are not present in a given area, then that particular site would not be considered critical habitat.

The proposed critical habitat includes Federal, State, Tribal, and private lands. Regarding the legal implications of a critical habitat designation on Federal versus non-Federal lands, please refer to the answer for #11 above.

16. Assuming a building or driveway improvement and/or development is not within .6 mile of a lek, what amount of minimal disturbance or take of habitat could be done without any consequence to the property owner?

See answers for questions 5, 9, and 11 above. Take of a listed species without a Federal permit is prohibited under the Act, regardless of land ownership. For any project or activity on private lands, the likelihood or risk of take of a listed species is the primary concern and question. The likelihood of take would depend on numerous factors including habitat type, location and distribution, occupancy of the species, timing of the project, duration of the project, intensity of the development, future frequency of use or operations, and similar questions. Without those details, we cannot evaluate the likelihood of take for a given project.

Land use projects and activities on private lands and any associated incidental take may be addressed and covered under tools such as incidental take permits supported by a habitat conservation plans or safe harbor agreements. Such programs are designed to provide regulatory certainty for the landowner (e.g., through conservation measures or project design criteria), provide legal coverage for incidental take of a species, as well as promote conservation of the species, which may include habitat mitigation and offset measures.

17. If a property owner wishes to build in an area that could be avoided, but this is not the preference because of view, construction feasibility, cost of construction, etc., what is the extent of habitat “take” that could be done without consequence? If mitigation alternatives were imposed (fees, habitat improvement, banking, etc.), what would be the magnitude of this mitigation requirement relative to the “take” that occurs?

See answer above for #16.

18. If someone has received prior approval from the County for development or improvement (driveway permit, road permit, subdivision approval, etc.), and the bird becomes listed as Threatened or Endangered, would s/he be clear to proceed or would the approval be subject to further assessment and/or permitting?

Take of a listed species without a Federal permit is prohibited under the Act. The Act's prohibition of take of listed species applies irrespective of the type, nature, or status of the project, action, or activity in question. Therefore, if take is anticipated as a result of the project, a permit from the Service would be required to avoid violating the Act.

In addition, if a Federal authorization or funding is involved in the project and has not been finalized before a species is listed under the Act, section 7 of the Act requires the relevant Federal agency to consult with the Service regarding the proposed action to ensure that it is not likely to jeopardize the continued existence of the species and, if the project is located in critical habitat, is not likely to result in the destruction or adverse modification of this habitat.

19. If someone has an existing, legal requirement to make improvements to a property that results in take of habitat (water augmentation plan implementation, binding commitment to construct a barn/fence/etc. on common lands of a community), would they need to obtain permits or undergo an assessment?

See answers above for questions 16-18.