

**VIA FACSIMILE — (202) 208-6965
AND MESSENGER DELIVERY
AND U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

May 21, 2009

Correspondence Control Unit
Attention: Information Quality Complaint Processing
U.S. Fish and Wildlife Service
1849 C Street, NW,
Mail Stop 3238-MIB
Washington, D.C. 20240
Rowan Gould,
Acting Director U.S. Fish and Wildlife Service

USFWS MAY 28 '09 PM2:48

Department of the Interior
1849 C Street NW, Room 3012
Washington, DC 20240

RE: Request for Correction of Information in the Final Determination

Dear Mr. Gould:

This Request for Correction of Information (Request) is hereby submitted under the Information Quality Act (IQA),¹ Guidelines issued by the United States Fish and Wildlife Service (FWS),² the Department of the Interior (DOI),³ and the Office of Management and Budget (OMB).⁴ The OMB Guidelines provide the blueprint for the agencies subject to the

¹ Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. No. 106-554; H.R. 5658) provides in full the following:

(a) IN GENERAL.—The Director of the Office of Management and Budget shall, by not later than September 20, 2001, AND WITH PUBLIC AND Federal agency involvement issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) CONTENT OF GUIDELINES.—The guidelines under subsection (a) shall (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and (2) require that each Federal agency to which the Guidelines apply (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency by not later than 1 year after the date of issuance of the guidelines under subsection (a); (B) establish administrative mechanisms allowing affected persons to see and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and (C) report periodically to the Director (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and (ii) how such complaints were handled.

² Available at www.fws.gov/informationquality

³ 67 Fed. Reg. 36642(May 24, 2002).

⁴ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452(republished Feb. 22, 2002).

IQA mandates, and these agencies have adopted administrative measures that are primarily procedural in nature, but incorporate OMB's substantive requirements as well. Since the various agencies have each adopted Guidelines of their own which incorporate OMB's, for the sake of clarity, all references will be made to OMB Guidelines in the discussion below.

The Sage Grouse Coalition (Coalition) is an affected organization and our members are affected persons within the meaning of the OMB Guidelines. We are a coalition of industry, farmers, ranchers and affiliated businesses who use lands inhabited by sage grouse and who depend upon the availability of those lands to conduct our normal businesses in 11 Western states.⁵ The Coalition is an organization that seeks to facilitate the delivery of accurate and timely information to Congress, regulatory agencies and our members on issues that are pertinent to the FWS determination of whether the sage grouse should be listed under the Endangered Species Act (ESA). This letter and the enclosed Detailed Request List constitute our Request that the FWS correct information included in the 12-Month Finding for Three Petitions To List the Greater Sage-Grouse as Threatened or Endangered (2005 Final Listing Determination). This Final 'Not Warranted' determination was published in the Federal Register on January 12, 2005.

The IQA provides that agencies should not disseminate substantive information that does not meet a basic level of quality. The more important the information, the higher the quality standards to which it must be held. The 2005 Final Listing Determination relies on highly influential information and is a highly influential scientific assessment as it was written in response to requirements of the ESA and is based on highly influential scientific, financial, or statistical information as defined in the OMB Guidelines, and will therefore have substantial economic and social consequences.

The ESA requires that the FWS rely solely on the best scientific and commercial data available for listing decisions. The standards and procedures used by the FWS must ensure that the FWS's administrative mechanisms for information resources management and administrative practices satisfy the standards and procedural requirements of the OMB Guidelines. The 2005 Final Listing Determination fails to meet the requirements of both the ESA and the OMB Guidelines and requires correction accordingly⁶.

In the context of the Sage Grouse Listing determination, strict adherence to the IQA will ensure consideration of, and decision-making based **solely** on the best available scientific and commercial data, as required by the ESA. Further, the rigor imposed will enhance the quality and credibility of any future FWS scientific assessments⁷ where, as here, that information, when disseminated, will have a clear and substantial impact on important public policies and private sector decisions, as defined in the Final Bulletin⁸.

⁵ CA, CO, ID, MT, ND, NV, OR, SD, UT, WA, WY

⁶ Specifically 16 U.S.C. §1536(a). 8 70 Fed. Reg. ,*supra*, at p. 2675.

⁷ Such as biological opinions and critical habitat designations, which if the species is listed must rely on the contents of the listing determination for their determinations.

⁸ 70 Fed. Reg. ,*supra*, at p. 2675.

BACKGROUND

The content of the listing determination is important because, as stated in *Bennett v. Spear*, 520 U.S. 154, 157 (1997):

*The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are "threatened" or "endangered" under specified criteria, and to designate their "critical habitat." 16 U.S.C. § 1533. The ESA further requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." § 1536(a) (2). If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service, as delegate of the Secretary, *ibid.*; 50 CFR § 402.14 (1995), after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat, 16 U.S.C. § 1536(b) (3) (A). If the Service concludes that the proposed action will "jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat]," § 1536(a) (2), the Biological Opinion must outline any "reasonable and prudent alternatives" that the Service believes will avoid that consequence, § 1536(b) (3) (A). Additionally, if the Biological Opinion concludes that the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Service must provide the agency with a written statement (known as the "Incidental Take Statement") specifying the "impact of such incidental taking on the species," any "reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions . . . that must be complied with by the Federal agency . . . to implement [those measures]." § 1536(b) (4)...*

In January 2005, the FWS published the Final Determination that listing of the Greater Sage Grouse under the ESA was not warranted (2005 Final Listing Determination). In this final status review, FWS was required to consider, among other things, whether the greater sage grouse was an endangered species or a threatened species because of the inadequacy of existing regulatory mechanisms.⁹ The language in the final rule repeatedly stated that the FWS had no information on various regulatory protections and to what extent those protections applied to activities on federal, state, and private lands. Further, the 2005 Final Determination, failed to address the statutory question as to whether inadequate regulatory mechanisms threatened the existence of the greater sage grouse. Instead the FWS makes the following unresponsive statement:

*'...existing regulatory mechanisms do not endanger or threaten the greater sage-grouse throughout all or a significant portion of its range.'*¹⁰

⁹ ESA, Section 4(a)(1)(D)

¹⁰ Federal Register, Vol. 70, No. 8, January 12, 2005, pg 2277

In December of 2007, in response to a lawsuit challenging the 2005 Final Listing Determination, U.S. District Court Judge B. Winmill remanded the 2005 Final Rule back to the FWS for revision. The Judge's statements in the final opinion illustrate the FWS's inexcusable failure to ascertain and/or report the true regulatory protections for the sage grouse existing at the time of the listing determination and the consequences of that failure. This is highlighted by Judge Winmill's statements in his final decision:¹¹

...the FWS decision lacked a coherent analysis of the deterioration of habitat and the regulatory mechanisms designed to protect the sage-grouse...

...The FWS also expressed concern that federal and state agencies had no plans in place to protect habitat. For example, the FWS concluded that it "is not aware of any State regulations that conserve greater sage-grouse habitat or encourage habitat conservation efforts on private lands." Id. at 21492.¹²

The Judge had no choice but to defer to the information provided by the Agency, and contained in the 2005 Final Determination. The Court may not substitute its judgment for that of any administrative agency except under specific circumstances.¹³ In this case, the lack of information presented in the 2005 Final Rule regarding the extent of existing regulatory protections for greater sage grouse, as well as the FWS affirmative statements, provided no basis for the Court to question the FWS statements.

This Request first discusses the context in which the 2005 Final Determination should be evaluated as a highly influential scientific assessment and its component parts as highly influential information, then reviews the IQA requirements in a general context, and finally provides specific responses to questions posed by the FWS pursuant to OMB Guidelines.

Section 4 of the ESA already mandates that the FWS base listing determinations 'solely on the basis of the best scientific and commercial data available'¹⁴ and does not allow the FWS or any other agency to pick and choose when such data is used, ignore superior data or substitute hypothesis, theory, or supposition for data. The OMB Guidelines and the Final Bulletin set forth standards for ensuring the quality and credibility of the government's scientific information. The 2005 Final Determination violates the ESA mandate in several ways that are illuminated by its failure to meet basic IQA standards for information disseminated by a government agency. As refinements of the IQA, which had little detailed information, OMB's implementing bulletins contain the necessary definitions to determine what is required of the FWS to comply with the provisions of the ESA requiring the use of the 'best scientific and commercial data available'. If the 2005 Final Determination is not

¹¹ U.S. District Court, District of Idaho, Case No. CV-06-277-E-BLW, Memorandum Decision; Western Watersheds Project v. United State Forest Service

¹² *ibid*

¹³ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁴ 16 U.S.C. §1536(a)(2).

corrected, its contents will be incorporated in successive FWS publications and perpetuate the use of information which is inaccurate, biased, incomplete, and unclear.¹⁵ That, in turn, will affect the outcome of the status review and listing determination currently underway as required by Judge Winmill's order remanding the 2005 Final Decision to the FWS.

1. The Highly Influential Nature of the 2005 Final Determination is Evident When Considered in the Context of Persons Affected and the Economic Implications of Significant Regulatory Actions Across 11 Western States.

The potential listing of the greater sage grouse is of great importance to numerous resource and agricultural industries across the 11 states affected. Both renewable and non-renewable energy supplies could be adversely affected by a listing of the species which would have national implications. Further, resource-based industries such as farming, ranching, energy development and mining could be adversely affected by a listing determination. Affected members of these industries and activities form this Coalition. If the greater sage grouse is listed, then critical habitat with its attendant regulatory costs will follow.

The 11 affected states represent 945,952 square miles or 710,174,720 acres, and a population in excess of 61,841,596. States with areas considered sage grouse habitat support resource-based activities that generate over \$1.3 billion in tax revenues and \$76 billion in sales. If the sage grouse is listed under the ESA and reduces those figures by 1.0%, the costs would exceed \$760 million. Because of the magnitude and scope of the potential effects of the listing determination, it clearly meets the threshold for a highly influential scientific assessment. As a result, information used in the determination is subject to the most rigorous standards under the IQA.

If the greater sage grouse is listed, it is likely that energy production will be significantly reduced, and social and economic disruptions will occur throughout the listing areas activities such as hunting, farming, ranching on federal as well as private lands will be severely curtailed or prohibited. Because of the significant social and economic consequences, well in excess of \$500 million, it is imperative that only data be the basis of listing under the ESA in order:

... to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.¹⁶

¹⁵ This is already the case as the 2005 Final Determination is cited as a reference in the Interim Status Review of the Greater Sage Grouse published by the FWS in October of 2008. In the Interim Status Report the FWS states that: "This document is an interim step in completing our greater sage-grouse status review, and will inform our eventual finding on whether the greater sage-grouse should be listed under the ESA." This demonstrates that without correction, the 2005 Final Listing Determination will perpetuate the use of information which fails to meet the standards of the FWS's own IQA Guidelines.

¹⁶ *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

2. The OMB Guidelines and Final Bulletin Refine and Add Definition of Terms to Which the FWS Must Adhere

As refinements of the IQA, which had little detailed information, OMB's implementing bulletins contain the necessary definitions to determine what is required of the FWS to comply with the law. Further, the IQA standards are in harmony with the ESA's requirement that the best available scientific data be used for decisions. Case law supports the interpretation of the ESA requirement for rigor, with courts finding that data need not be conclusive but must support the findings, and that determinations may not be based on mere supposition.¹⁷ If the information included in the 2005 Final Determination is not corrected now, its inaccurate, incomplete, biased and unclear information will become part of a new final rulemaking on the status of the greater sage grouse with devastating consequences to Coalition members as well as others in the 11 affected states and the nation more generally.

The formal administrative record pertaining to listing the greater sage grouse is voluminous and is derived from court actions, reports, public comments on the proposed rulemaking, federal agency actions, independent studies, and comments on agency actions affecting sage grouse, among other things. In the 2005 Final Determination, the FWS ignored a large part of the information available on regulatory protections for the greater sage grouse. This approach violates the requirements of the IQA as specifically detailed in the February 22, 2002 OMB Guidelines. Pertinent requirements of the OMB Guidelines, which are fully incorporated into the FWS IQA Guidelines, are highlighted as follows:

A. OMB GUIDELINES

SUMMARY: These final guidelines implement section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554; H.R. 5658). Section 515 directs the Office of Management and Budget (OMB) to issue government-wide guidelines that, "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." By October 1, 2002, agencies must issue their own implementing guidelines that include "administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency", which does not comply with the OMB guidelines. These guidelines apply to federal agencies subject to the Paperwork Reduction Act (44 U.S.C. §3502(1)). Federal agencies must develop information resources management procedures for reviewing and substantiating the quality (including the objectivity, utility, and integrity) of information before it is disseminated. In addition, agencies must establish administrative mechanisms allowing correction of information disseminated by the agency that does not comply with the OMB or agency guidelines.

¹⁷ *ibid*

The guidelines stress the importance of agencies implementing the standards in a common sense and workable manner. Agencies are required to apply the guidelines in a manner appropriate to the nature and timeliness of the information to be disseminated, and incorporate them into existing agency information resources management and administrative practices.

The IQA denotes four substantive terms regarding information disseminated by Federal agencies: quality, utility, objectivity, and integrity. The OMB Guidelines provide definitions that are designed to establish a clear meaning so that both the agency and the public can readily judge whether a particular type of information to be disseminated does or does not meet these attributes. In the guidelines, OMB defines “quality” as the encompassing term, of which “utility”, “objectivity”, and “integrity”, are the constituents. “Utility” refers to the usefulness of the information to the intended users. “Objectivity” focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased. “Integrity” refers to security the protection of information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification. OMB modeled the definitions on the longstanding definitions in OMB Circular A-130, but tailored them to fit into the context of the guidelines.

This Request addresses specific failures of the FWS to meet the quality requirements of the OMB Guidelines with respect to the accuracy, completeness, clarity, and unbiased representation of the data included in the discussion of the threat of inadequate regulatory mechanisms under the ESA.¹⁸

The 2005 Final Determination is a highly influential scientific assessment as defined in the Guidelines. Its continued dissemination without correction has the potential to adversely affect members of the coalition specifically and citizens of the affected states and the United States more generally. The statements presented below and the enclosed document entitled Detailed Request List present the Coalition’s additional specific comments with respect to the statements contained in the in this matter.

B. SPECIFIC RESPONSES TO REQUEST FOR CORRECTION PROCEDURES

The FWS’s version of the OMB Guidelines requires that specific information be provided as part of the request for correction. The following is a list of the specific information requirements and our responses.

1. Statement that the Request for Correction of Information is submitted under FWS Information Quality Guidelines.

¹⁸ Section 4(a)(1)(D)

This Request is submitted under the FWS Information Quality Guidelines.

2. Requester Contact Information. The name, mailing address, telephone number, fax number, email address, and organizational affiliation (if any). Organizations submitting a request must identify an individual to serve as a contact.

Chris West
Sage Grouse Coalition
c/o PacWest
8600 SW St. Helens Drive, Suite 100
Wilsonville, OR 97070

3. Description of Information to Correct. The name of the FWS publication, report, or data product; the date of issuance or other identifying information, such as the URL of the web page, and a detailed description that clearly identifies the specific information contained in that publication, report, or data production for which a correction is being sought.

The Coalition seeks correction of particular influential information included in the 12-Month Finding for Three Petitions to List the Greater Sage-Grouse as Threatened or Endangered. This Final 'Not Warranted' determination was published in the Federal Register on January 12, 2005. Specifically, the Coalition seeks correction of statements made in the discussion of the lack of adequate regulatory protections in the document which imply that there are insufficient regulatory protections available for the greater sage grouse or which state that the FWS is unaware of any such protections. These assertions violate the objectivity requirement of the OMB Guidelines promulgated by OMB, DOI, and the FWS. Specific requests are attached.

4. Effect of the Alleged Error. Provide an explanation that describes how the requester specifically uses the information, how the alleged error affects the requester in a material way and how a correction would resolve the error.

The Secretary's 12-month finding on a petition to list the greater sage grouse is a highly influential scientific assessment, as its contents and conclusions will govern the operations of federal lands under the control of BLM and the US Forest Service, agricultural activities, both non-renewable and renewable energy development, mining, ranching and agricultural activities on both federal, state, tribal and private lands. The listing determination could result in significant regulatory actions. A finding that the greater sage grouse is threatened by inadequate regulatory authority is sufficient to make a determination that listing is warranted. By failing to recognize existing regulatory authorities (as opposed to voluntary actions) the FWS biases the determination toward listing.

A court has already relied in part on the statements regarding the adequacy of regulatory mechanisms included in the 2005 Final Listing Determination, to find the FWS determination that listing was 'not warranted' was arbitrary and capricious. As a result the 2005 Final Listing Determination was remanded by a federal judge to the FWS for correction. The remand has forced the Coalition to undertake the public participation process under the rulemaking once again, with its attendant costs and the threat of significant regulatory burden if the species is listed.

Failure to explicitly correct this information would allow and likely force the FWS to rely upon it for a subsequent finding that listing the greater sage grouse is warranted. Failure to correct this information would lead any subsequent Court reviewing the FWS ultimate decision on a listing of the greater sage grouse to rely on the information in the 2005 Final Listing Determination which fails to meet the quality standards required by law. Such a determination would lead to the social and economic effects and attendant costs identified earlier. The contents of the 2005 Final Determination are still being relied upon by the FWS and disseminated by the government.

The Coalition represents individuals who live, work and do business in the 11 affected states. Coalition members are vitally interested in a status review that is clear, accurate, unbiased and complete. If the information in the 2005 Final Determination is not corrected, and the FWS relies upon it and defends its quality to the Courts and others, it is possible that listing of the sage grouse will ensue based simply on an inaccurate assertion that the greater sage grouse is threatened by inadequate regulatory mechanisms. If the greater sage grouse is listed under the ESA, economic and social disruption as a result of regulatory activities of the FWS will accrue to businesses, ranchers, and farmers in the 11 affected states, many of whom are members of and/or represented by the Coalition. Coalition members in allied industries will also be damaged, as their livelihoods are dependent on the resource-based activities at risk if the information in the 2005 Final Listing Determination Analysis is not corrected.

By correcting the errors in the 2005 Final Listing Determination, the bias in the listing determination created by those errors will be removed. The injury to the Coalition members and their communities caused by those errors can be avoided by correction of this information. The information currently in the 2005 Final Listing Determination misleads the public and any other user with respect to the adequacy of existing regulatory mechanisms and the greater sage grouse.

The data support the requested correction, and the ESA and IQA require their acknowledgement and prompt revision. The ESA requires that determinations

be based on the best available data; the data regarding regulatory authority exists and is readily available. It can be demonstrated that the FWS was or should have been aware of this data as they participated directly in the application of many of these regulatory actions through NEPA and other internal and external reviews and program development.

5. A specific description of how the information does not comply with OMB, DOI, and/or FWS Information Quality Act Guidelines. The petitioner should cite the specific locations in the text of the document where the alleged error occurs and should state specifically how the information should be corrected and why the corrections should be made.

The IQA requires that federal agencies ensure the quality, objectivity, utility and integrity of information (including statistical information) disseminated by the agency. The guidelines promulgated as a result of the IQA by OMB, DOI, and the FWS all define 'quality' as being a combination of utility, objectivity, and integrity. The FWS definition of objectivity states:¹⁹

III-8 Objectivity means ensuring information is unbiased. Objective information is presented accurately, clearly, and completely, and any limitations are stated explicitly. Objectivity involves two distinct elements: presentation and substance.

(a) Information disseminated by the FWS will be presented accurately, clearly, and completely.

(b) Information disseminated by the FWS will be treated in an unbiased fashion. In a scientific, financial, or statistical context, we will analyze the original and supporting data and develop our results using sound statistical and research methods to ensure, to a reasonable extent, that our results are not subject to bias. Where a potential for bias is identified, the FWS will address it.

The information presented with respect to existing regulatory protections in the 2005 Final Determination is biased, inaccurate, and incomplete. The conclusions and statements included in the 2005 Final Determination also fail to meet the ESA requirement that listing determinations be based on the best scientific and commercial *data* available. Instead of acknowledging multiple regulatory authorities at the local, state and federal levels used to protect the sage grouse, the 2005 Final Determination either neglects to document them, or feigns ignorance as to their existence. There is no mention of the FWS's participation in development of these regulatory protections and in some

¹⁹ <http://www.fws.gov/informationquality/topics/IQAguidelines-final82307.pdf>

cases the FWS's actions requiring their implementation. The 2005 Final Determination is:

- incomplete, inaccurate, unclear and biased in that it fails to acknowledge the readily-available information on federal, state, and in some cases local regulatory authority which have been and are applied daily and which result in actions which protect sage grouse.
- incomplete, inaccurate, unclear and biased in that it states the FWS does not know of the existence of any state or local laws protecting sage grouse. Yet, readily-available information identifies laws in the 11 affected states that would have allowed the FWS to assess the existing regulatory authority at the state level at a minimum.
- incomplete, inaccurate, unclear and biased in that it arbitrarily limits the definition of existing local regulatory authorities to those that provide protection specifically for the greater sage grouse or their habitats on private land.
- incomplete, inaccurate, unclear, and biased in that it fails to acknowledge general authorities available to federal authorities and routinely applied to specifically protect sage grouse, with the active involvement of the FWS.
- incomplete, inaccurate, unclear and biased in that by limiting their reference to the existence of laws specific to sage grouse, the FWS avoids acknowledging laws, regulations and policies which provide federal agencies with the general authority to protect species and which are currently applied, with the active assistance of the FWS, to protect sage grouse specifically.
- incomplete, inaccurate, unclear and biased in that while reciting the numerous laws and authorities governing federal agencies it fails to acknowledge or even reference the current and specific applications of those laws to protect sage grouse.
- incomplete, inaccurate, unclear and biased in that it disingenuously implies that federal agencies proceed with their activities unilaterally, implying that the FWS has no knowledge of their activities when in fact, various statutes require the participation of the FWS.
- incomplete, inaccurate, unclear and biased in that it fails to acknowledge that permits for activities on federal lands are subject to multiple levels of review and conditions on operations, many of which are imposed outside of the authority of the ESA.
- incomplete, inaccurate, unclear and biased in that it fails to acknowledge the regulatory structure that limits waivers to stipulations and conditions on oil and gas activities and requires environmental documentation which is subject to review by the FWS.

Attached to this Request are specific and detailed requests for correction of statements in the 2005 Final Listing Determination, with supporting documentation.

6. Identification of any other public proceeding, including public comments, legal proceedings, or communications in which the requester has previously or is simultaneously requesting consideration of the same or similar corrections. Failure to provide such information will be considered an indication of a bad faith submission.

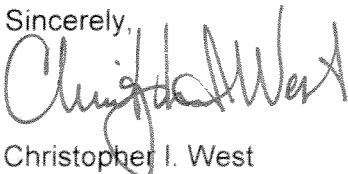
The Coalition and its members commented on the proposed listing which resulted in the 2005 Final Determination and have requested copies of the scientific references included in the Interim Status Report under the Freedom of Information Act (FOIA). Access to these references will enable them to comment more particularly on the Interim Report as well as any future final agency action on the listing petition. However, to date those references have not been provided. In addition, some of the Coalition Members were parties to the proceedings in Judge Winmill's Court;²⁰ in that instance the Coalition Members were defending the Government's position on the 2005 Final Determination.

The Coalition requests the identified information be corrected so that courts, the public, Congress and the citizens of the affected states and those the Coalition represents have accurate, unbiased, complete, and clear information as required by the ESA and the IQA as to the existing regulatory protections for the greater sage grouse.

CONCLUSION

For the reasons stated above and in the attachment, the Coalition strongly urges the FWS to adhere to the legal requirements of the ESA and the IQA in evaluating this Request for Correction of Information. As required specifically in the DOI Guidelines, please notify us within 10 business days of your receipt of this letter. Thank you for your attention.

Sincerely,



Christopher I. West
Sage Grouse Coalition

CW/mcm

²⁰ U.S. District Court, District of Idaho, Case No. CV-06-277-E-BLW, Memorandum Decision; Western Watersheds Project v. United State Forest Service

Information Quality Complaint Processing
U.S. Fish and Wildlife Service
May 21, 2009
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Enclosure: Consolidated IQA Detailed Request List

CC via Facsimile:

Hon. Nancy Sutley, Chairman, Council on Environmental Quality

Hon. Ken Salazar, Secretary, Department of the Interior

Hon. Gary Locke, Secretary, Department of Commerce

Hon. Eric Holder, U.S. Attorney General

Affected Members of Congress:

California Delegation

Colorado Delegation

Idaho Delegation

North Dakota Delegation

Nevada Delegation

Oregon Delegation

South Dakota Delegation

Utah Delegation

Washington Delegation

Wyoming Delegation

Hon. Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

CONSOLIDATED IQA DETAILED REQUEST LIST

NOTE: All page numbers referenced are to the Wednesday, January 12, 2005 Federal Register Final Determination that Listing of the Greater Sage Grouse is Not Warranted; Vol. 70, No. 8

REQUEST FOR CORRECTION 1 --Quotations from DISSEMINATED INFORMATION; Page 2271

Request that the FWS replace statements that they are unaware of any ordinances to protect greater sage grouse specifically, and clarify that at least one exists in Moffat County, Colorado. Further request that general statements regarding the FWS lack of knowledge be replaced with data, and analysis based on the available data demonstrating existing local ordinances used to protect sage grouse and their habitats.

"We are not aware of any county or city ordinances that provide protection specifically for the greater sage-grouse or their habitats on private land..."

The statement is inconsistent with the requirements of the FWS IQA Guidelines because:

- The statement is **inaccurate** as there is at least one county in Colorado which applies ordinances specifically to the greater sage grouse and which is referenced in the Northwest Colorado Sage Grouse Conservation Plan to which the FWS is a signatory. An internet search identified a number of local ordinances promulgated by government entities in the species range that are designed to preserve wildlife, ecosystem and natural environments, and that could assist with conservation of the species or its habitat. The FWS had to have knowledge of those local protections;
- The statement is **unclear**. The reader is left to assume that as part of a yearlong study of the status of the sage grouse, the FWS conducted at least minimal research into the existence of regulatory authority and the use of such authority locally. In fact, based on the contents of the final rule, and the ease of identification of many of these regulatory authorities, it appears that not even minimal investigations into the existence of regulatory protections were conducted.
- The statement is **incomplete**, as the FWS should have disclosed that not even cursory examinations of regulatory authorities and their applications were conducted or alternatively, disclosed there were a number of general ordinances that could be used to protect sage grouse, but that those were not considered.

- The statement is **incomplete** as the FWS should have disclosed that the ESA does not regulate the use of private lands,¹ and that in fact, only local and state authorities have the power to do so through ordinances and state law.
- The statement is **biased** as it is designed to leave the impression that no such ordinances exist, when in fact, no search was made

A cursory review of local ordinances using an internet search engine identified documentation of local ordinances which are designed to preserve wildlife, ecosystem and natural environments. The extent of such ordinances and their use is a question of fact, the information is readily available, and the FWS either failed to do the most rudimentary research on whether such ordinances exist or feigned ignorance as to their existence.²

The FWS is charged with determining whether the greater sage grouse (GSG) is threatened by inadequate regulatory mechanisms. By failing to do sufficient research on the existence of such ordinances, and by actively denying any knowledge of them, FWS does not meet its responsibility to ascertain whether:

- a) The FWS even looked for any ordinances general or specific which could protect sage grouse, and;
- b) Those existing general county or city ordinances that provide sufficient authority to impose protections for sage grouse were applied in such a way as to provide protection for sage grouse and its habitat.

The existence of such ordinances is a matter of a simple research, well within the means of the FWS. The 11 states affected by the proposed listing are under the purview of 3 Regional Offices, and between them there are 44 field offices. The research to identify county ordinances is simple and straightforward. The information is readily available on line and would be even more so from the local field offices.

The ESA requires that the FWS determinations be supported by data. In the case of existing regulatory protection and its adequacy, the FWS failed to provide any data to support a finding that such protection was inadequate and instead inexcusably pled ignorance.

¹ The 9/23/05 FWS Press Release on the designation of critical habitat for the bull trout states: "*The designation of critical habitat 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. A critical habitat designation does not impose restrictions on private lands unless federal funds, permits or activities are involved.*"

REQUEST FOR CORRECTION 2 --Quotations from DISSEMINATED INFORMATION;
Page 2271

Request that the statement be removed as it is speculative, does not address the question of whether the sage grouse is threatened by the inadequacy of existing regulatory mechanisms.

...we recognize that such ordinances could be proposed as rural governments and local sage-grouse working groups investigate strategies to protect sage-grouse on private lands.

- The statement is inconsistent with the requirements of the ESA and the FWS IQA Guidelines because it is **biased** in that it implies while there could be protections, they do not currently exist.

REQUEST FOR CORRECTION 3 --Quotations from DISSEMINATED INFORMATION;
Page 2271

Request that the statement be revised to acknowledge that there are multiple existing ordinances that address agricultural lands, transportation, and zoning for various types of land uses have the potential to influence sage grouse.

Request that the statement be revised to acknowledge that the FWS failed to evaluate the application and location of the ordinances in relation to the sage grouse habitats and threats.

We recognize that county or city ordinances that address agricultural lands, transportation, and zoning for various types of land uses have the potential to influence sage-grouse (e.g., zoning that protects open space can retain suitable sage-grouse habitat, and zoning that allows a housing development and associated roads can result in destruction and/or fragmentation of habitat occupied by sage-grouse during some part of their life cycle). However, we have no detailed information regarding the nature or extent of zoning efforts within the species range and its direct or indirect effects on populations and habitats.

The statement is inconsistent with the requirements of the FWS IQA Guidelines in that:

- The statement is **inaccurate** as the FWS has access to full information on state and local land use regulatory structures through its field offices, its participation in voluntary local working groups for sage grouse conservation, and its participation in the NEPA process.
- The statement is **unclear** in that it fails to acknowledge that ordinances exist that can be used to protect greater sage grouse and its habitat.

- The statement is **incomplete** in that it fails to acknowledge that the FWS failed to evaluate the application of the existing regulatory authority and to collect readily available information on local government ordinances in the sage grouse range to determine whether together these were adequate to protect the greater sage grouse or to support conservation of its habitat.
- The statement is **biased** in that it fails to recognize the statute asks whether existing regulatory authority is adequate to protect the sage grouse.

The ESA and the IQA require that data and analysis support a determination that existing regulatory authority is insufficient to protect the sage grouse.

Rather than examine the question, using readily available information and data, the FWS failed to establish whether any regulatory authority existed, never examined whether any regulatory power was being brought to bear to protect sage grouse, and finally, never examined whether sage grouse were declining in particular areas as a result of activities that were occurring due to inadequate regulatory authority.

REQUEST FOR CORRECTION 4 --Quotations from DISSEMINATED INFORMATION; Page 2271

Request that the following statement be revised to state that the FWS did not review existing local regulatory authorities to determine what was available for the protection of greater sage grouse and that as a result, no analysis of their application was conducted.

We have no detailed information regarding the nature or extent of zoning efforts within the species range and its direct or indirect effects on populations and habitats.

The statement is inconsistent with the requirements of the FWS IQA Guidelines in that:

- The statement is **inaccurate** as the FWS is signatory to at least one conservation plan (which implies that the FWS was aware of the contents of the plan) that details zoning and regulatory authorities available and invoked on behalf of the sage grouse.³
- The statement is **incomplete** as the FWS fails to acknowledge that in many cases, zoning laws and regulations are effective authorities for protecting species and habitats. This is because unlike state and federal laws which must be more

³ Colorado Greater Sage-grouse Steering Committee. 2008. Colorado greater sage-grouse conservation plan. Colorado Division of Wildlife, Denver, Colorado, USA.

general, local ordinances are tailored to specific habitats and threats to those habitats in the particular geographic areas to which they apply.

- The statement is **unclear** in that it implies that the information is not available, when in fact, the information is readily available, the FWS failed to collect and make use of it.
- The statement is **biased** in that it leaves the erroneous but clear impression that there is no zoning effort and thus no information available, when in fact, there are zoning efforts, and information is readily available, the FWS simply failed to enquire (presumably, since they are 'unaware') as to its existence.

The statement raises several questions:

1. Did the FWS gather any information regarding county and city zoning authorities available to protect the greater sage grouse and its habitat?
2. Did the FWS have any information regarding local efforts through local regulatory authorities which were designed to provide benefits to sage grouse, whether or not that information is detailed?
3. If the FWS has information regarding such zoning efforts, was there any attempt to collect detailed information?

It is incredible that the FWS parsed statewide conservation plans into over 300 individual local conservation activities within the sage grouse habitat and failed to request that their 44 field offices in sage grouse range gather this relatively available information and ask the questions outlined above.

In conducting the analysis required under Section 4 of the ESA, the FWS is required to make a determination whether the greater sage grouse is threatened by inadequate regulatory authority based solely on the best available data. There is no indication that the FWS spent any time examining the nature or extent of existing zoning (and related regulatory) protection available through county and local authority, and the application of that protection within the range of the sage grouse, despite the fact that FWS states that it the FWS parsed statewide conservation plans into over 300 individual local conservation activities within the sage grouse habitat. Furthermore, FWS apparently failed to request that their 44 field offices in sage grouse range gather this relatively available information and ask the questions outlined above. A very brief examination of readily available information local governments in the region make available to the public demonstrates multiple authorities and significant awareness and apparent willingness to conserve the greater sage grouse.

The FWS failed to perform even a cursory search for existing zoning laws or regulations and did not examine whether they were applied in such a manner as to protect sage

grouse and its habitat. If the FWS did perform that search, none of the readily available information was presented in the final rule. Further, the statements in the rule are designed to narrow the response to the statutory question to such an extent that they are meaningless with respect to answering the question of whether the greater sage grouse is threatened by a lack of existing regulatory authority.

REQUEST FOR CORRECTION 5 -- Quotations from DISSEMINATED INFORMATION; Page 2271

Request correction of the following statement to reflect the fact that while 5 percent of the total landscape dominated by sagebrush in the United States is directly managed by State agencies, all private and non-federal land is managed through the exercise the state's primary and extensive authority to regulate and protect wildlife within their borders.

State agencies directly manage 5 percent of the total landscape dominated by sagebrush in the United States and various State laws and regulations identify the need to conserve wildlife habitat

The statement is inconsistent with the requirements of the FWS IQA Guidelines in that:

- The statement is **inaccurate** in that it fails to make a distinction between state lands (those owned by the state) and private and non-federal lands within a state's borders which may also be managed by the state through various laws.
- The statement is **incomplete** in that it fails to recognize that in addition to the 5 percent of lands directly managed by state agencies, an additional private lands are protected and in some cases managed under state law.
- The statement and the rule are **incomplete** in that neither addresses regulation of non-governmental lands in any meaningful way.
- The statement is **unclear** because it blurs the distinction between the very small areas of lands owned and thus directly managed by state agencies and the much larger area of non-federal and private lands which are not owned, but whose management is governed by state law.
- The statement is **biased** in that it leads the reader to believe that a very small proportion (5 percent) of lands are affected by state management, which ignores the state management of private lands within its borders.

By failing to recognize that in fact, state law and regulation also apply to private lands within the state, power not available to the federal government even under the authority of the ESA,⁴ the Final determination fails to identify an important set of regulatory

⁴ "The designation of critical habitat 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. **A critical habitat designation does not impose restrictions on private lands unless federal funds, permits or activities are involved.**"; 9.23.2005, FWS Press Release Designating Critical Habitat for the Bull Trout.

protections currently available to the greater sage grouse. State agencies own and directly manage some lands, but the major effect of state management is evidenced in the laws that exist for the protection of wildlife within the state, regardless of ownership. Nevertheless, in the Final Rule the FWS fails to outline the available protection under existing state law or to address the legal structure available in the states within the sage grouse range. The FWS has direct access to this information through their interaction and close working relationship with the various state natural resources department and the information is readily available.

In preparation of this IQA Significant information regarding existing state level statutory authorities and implementation was collected using a general internet search engine. The ESA and the IQA require that the FWS conduct a more detailed search than is evident from this document into the available scientific and commercial data available when preparing a highly influential scientific assessment of the adequacy of existing regulations for protection of the greater sage grouse. At a minimum such a search should have included discussions with the 11 affected states and the agencies responsible for protection of the state's natural resources. The FWS could have at least collected the pertinent statutes and implementing regulations and assessed their relative strength and reach. This type of search was conducted for the effects of mining, energy production and other activities within the sage grouse range, to such an extent that unpublished graduate work was used. However, readily available information on existing regulatory authority was neither collected, identified, nor addressed in the 2005 Final Status Determination for the Sage Grouse. The FWS failed to use the best available data in making their determination under Factor D of Section 4 of the ESA and answer the question of whether the greater sage grouse was threatened by the inadequacy of existing regulatory mechanisms.

**REQUEST FOR CORRECTION 6 -- Quotations from DISSEMINATED INFORMATION;
Page 2271**

Request that the statements regarding management of state lands be removed or:

- 1. Clarified to identify which states have such lands;**
- 2. Clarified to identify which of those lands are actually occupied by sage grouse, as opposed to being 'suitable' for sage grouse;**
- 3. Clarified to identify what proportion of total sage grouse range they represent;**
- 4. Clarified to identify what wildlife protections exists for those occupied state lands;**

'...some States have laws that directly address the management of certain State lands and require that it be based on maximizing financial returns...'

'...State lands which are managed to enhance economic returns for the benefit of education trust funds may or may not include benefits for wildlife habitat...'

'... The Service does not have complete information pertaining to all State laws and regulations that directly or indirectly relate to greater sage-grouse habitat on these lands...'

The statements are inconsistent with the requirements of the FWS IQA Guidelines in that they:

- Fail to be based on the best available scientific and commercial data as required by the ESA;
- Are **unclear** in that they fail to identify the location of such lands by state, the extent of occupied sage grouse habitat in such lands, and the laws and regulations which pertain to such lands and the state's duty with respect to the protection of wildlife on those lands;
- Are **incomplete** in that they fail to identify the location of such lands by state, the extent of occupied sage grouse habitat in such lands, and the laws and regulations which pertain to such lands and the state's duty with respect to the protection of wildlife on those lands
- Are **biased** in that the statements are written in such a way as to lead the reader to believe that the FWS was unable to identify any wildlife protections, when in fact, it is not evident that any effort was made to identify such protections.

This discussion is singularly unhelpful in discerning whether the existence of some state lands, with unknown management criteria which may or may not have habitat and species protections have an effect on sage grouse. First, the FWS highlights these 'other goals' implying that they likely adversely affect sage grouse. However, the FWS fails to identify which states have such lands, how many acres are affected by these 'other' goals; whether the affected lands are in fact sage grouse habitat; and what requirements and wildlife protections exist on those lands. This failure occurs despite the fact that such lands are identified and controlled through statute and regulation for each and every one of the 11 affected states. Further, after raising the issue, the FWS simply pleads ignorance, despite the fact that it is well established that FWS works closely with state resource agencies.

The statements are biased, in that they imply, with no data to support the implication, that there are significant lands which are routinely managed so as to maximize benefits and ignore impacts to sage grouse. The statements are incomplete in that the FWS clearly has some information as to the management and conditions of these lands, as they qualify their statements noting they do not have 'complete' information on all the laws and regulations. The statements are incomplete as they fail to provide the acreage affected, whether it includes sage grouse habitat, and whether any protections exist for sage grouse.

If the issue of state managed lands which have goals which may conflict with sage grouse conservation is a threat to the species, then the final rule must provide clear, complete, accurate and unbiased information as to the area of such lands, the extent of

existing sage grouse habitat that occurs on them, and explanation of the inability to provide for sage grouse conservation on the lands.

The final rule provides no data to support the implication that state lands managed for other purposes are managed in such a manner as to threaten sage grouse.

REQUEST FOR CORRECTION 7-- from DISSEMINATED INFORMATION; Page 2272-2274 regarding protections by Federal Agencies, the BLM discussion explicitly

Request that the information included in the 2005 Final status report be revised to explicitly recognize the process (including the FWS involvement) in developing Resource Management Plans (RMPs) for BLM lands.

Request the information included in the 2005 Final status report be revised to explicitly recognize the process used for developing permits for activities on federal lands and how Resource Management Plans (RMPs) and the FWS participate in that process.

Request that the information included in the 2005 Final status report be revised to explicitly recognize the legal protections for federal lands, in terms of consequences for failure to comply with permit conditions.

Request that the information included in the 2005 Final status report be revised to explicitly recognize the process for requesting and receiving a waiver, and include the FWS participation in the process.

Request that the information included in the 2005 Final status report be revised to explicitly and specifically recognize the protections afforded to candidate species by the FWS and by BLM.

The FWS description of BLM's existing regulatory authorities which apply to the greater sage grouse are inconsistent with the FWS IQA Guidelines in that they are unclear, incomplete, biased, and inaccurate.

- The description of the BLM general protections for sage grouse are **unclear** in that they fail to explain that how BLM authorities and responsibilities under the FLPMA, NEPA, the ESA and their related regulations require protection of wildlife and its habitats which include sage grouse.
- The description of BLM regulatory protections for sage grouse is **unclear** in that it fails to communicate the BLM's regulatory and statutory requirements regarding protection of sage grouse and the habitats it relies upon.

- The description of the BLM specific protections for sage grouse are **incomplete** and **unclear** in that they fail to identify the provisions of Manual 6840 which address species of special concern, of which the greater sage grouse is one.
- The description of the effectiveness of the regulatory protections provided by the BLM is **inaccurate** in that it fails to acknowledge the material participation of the FWS in developing and implementing the protections imposed by the BLM under its regulatory authorities.
- The description is also **inaccurate** in that it fails to recognize that BLM by regulation, maintains records of all waivers for protections of the sage grouse, performs NEPA analysis of those waivers and that the FWS is provided copies for review and comment on all such environmental documentation.
- The description of the regulatory protections for the sage grouse is **inaccurate** as it misleads the public as to the depth and breadth of the FWS involvement in all BLM activities which may affect sage grouse.
- The description of the regulatory protections provided by the BLM is **incomplete** as it fails to acknowledge the extensive regulatory protections imposed by the BLM on behalf of the sage grouse through its permitting authorities.
- The description of the regulatory protections provided by BLM is **biased**, and designed to imply that there are no certain protections available to sage grouse on federal lands.

The assertion that there are no protections available to the sage grouse on public lands could not be farther from the truth. In fact, the protections that BLM provides under FLPMA and the related policies and regulations exceed that of the ESA. Under the ESA federal agencies cannot jeopardize the continued existence of a species or adversely modify or destroy its critical habitat. Critical habitat is specifically defined in statute and may not encompass the entire range of a species. The regulatory authorities of the ESA are narrowly defined in Section 7 of the Act. However, the protections imposed by the BLM for the protection of habitat and species on those federal lands far exceed those that which are provided by the ESA. Generally, the FLPMA requires federal agencies to protect wildlife and the health of federal lands for multiple uses. Specifically, the BLM has imposed regulatory structures designed (with

the help of the FWS) to conserve and protect sage grouse to such an extent listing will not be necessary.⁵

REQUEST FOR CORRECTION 8 -- from DISSEMINATED INFORMATION; Page 2272 regarding protections by Federal Agencies, the BLM discussion explicitly

Request that the FWS revise the 2005 Final Status Determination to recognize that they were substantially and fully involved in the process used to develop the standards and/or prescriptions and that those rely explicitly on the same 'data' cited and used in the 2005 Final Status Determination.

However, the BLM does not provide or describe the criteria or process used to determine that the standards and/or prescriptions listed in this report contribute positively to sage-grouse habitat or sagebrush conservation (BLM 2004a).

The FWS statements regarding the criteria and process used to determine the standards and prescriptions listed in the referenced report are inconsistent with the requirements of the FWS IQA Guidelines as they are unclear, incomplete, biased, and inaccurate.

- The statement is **inaccurate**, because the FWS itself provided the information used to develop the standards or prescriptions, and those were based on the same documents used in the 2005 Final Status Decision;
- The statement is **unclear** as it fails to explain how, despite their collaboration on development of the standards and the report, the FWS has no information on the process or criteria;
- The statement is **incomplete** as it fails to acknowledge the FWS nearly continuous participation in the development of management activities and standards for BLM lands.
- The statement is **biased**, in that it is designed to lead the reader to believe that BLM took its conservation actions unilaterally, and failed to rely on the expertise of the FWS or the scientific literature recommended by the FWS. By pleading ignorance the FWS in effect 'hides the ball' when discussing the actual requirements imposed on BLM for the protection of greater sage grouse.

All of the federal lands managed by BLM are subject to Resource Management Plans. These plans are adopted through an elaborate planning process that takes years, entails extensive public review and comment, and which involves the FWS extensively. Resource Management Plans are subject to NEPA and the ESA, both of which require

⁵ Report to the US Fish and Wildlife Service in Response to Notice of 90 day Petition Finding for the Greater Sage Grouse. US Department of the Interior, Bureau of Land Management; US Department of Agriculture, Forest Service. Washington D.C, July 1, 2004.

consultation with the FWS. Once the RMP process is complete, there is a Record of Decision which formalizes the BLM's adoption of the Resource Management Plan.

Each Resource Management Plan contains detailed information on how lands will be managed, species and habitats protected, and activities regulated. Often, RMPs provide a template for actions and decisions that are in and of themselves separately subject to the requirement of NEPA and ESA processes before they can proceed.

The statement in the final rule regarding the lack of criteria and process for determining whether actions contribute positively to sage grouse is misleading and biased. In making the statement, the FWS fails to identify the fact that it is involved in every step of the process for identifying and implementing conservation actions for any species, and sage grouse particularly. For example, NEPA documents are subject to review and comment by the FWS. The final decision on a management plan is reviewed under the ESA and the FWS routinely includes conservation conditions which are binding and protect species other than just listed species.⁶

The statement in the final rule ignores detailed descriptions provided to the FWS by BLM detailing the planning process for management of federal lands (including management of sage grouse and their habitats), assessment of the condition of the sage grouse habitat, and protection and management of sage grouse habitats. In 2000, in cooperation with the FWS, BLM developed sage grouse management guidelines. Both BLM and FWS were signatory to the Memorandum of Understanding for developing a range-wide strategy for conserving sage grouse and their habitats. In 2003 BLM and the US Forest Service issued procedures for habitat assessment for species of conservation concern in sagebrush ecosystem.⁷ In July of 2004 BLM issued a Greater Sage Grouse Conservation Assessment and Strategy. These documents were implemented through Instruction Memoranda issued by the Director of the BLM. These documents rely on the same authors, literature, and recommendations used by the FWS in preparation of this final rule.

The statement in the final rule that the BLM does not provide or describe the criteria or process is **unclear, biased, incomplete and inaccurate**, as the BLM relies on the data, research, and experts which the FWS has explicitly identified as the best available by citing them in this rule.

⁶ In fact, the FWS is known to include requirements for sage grouse protections in biological opinions for RMPs.

⁷ Wisdom, M. J., M. M. Rowland, L. H. Suring, L. Schueck, C. Wolff Meinke, B. C. Wales, and S. T. Knick. 2003. Procedures for regional assessment of habitats for species of conservation concern in the sagebrush ecosystem. March 2003 Report, Version 1, Pacific Northwest Research Station, 1401 Gekeler Lane, La Grande, OR 97850.

Request that the statement in the 2005 Final Status Determination be revised to recognize that by regulation, all waivers or stipulations may only be granted under limited circumstances, are required to be documented, required to undergo a NEPA review, and that the FWS plays a part in the decision-making process.

The Service does not have information on the type or number, or the basis for, exceptions, modifications, or waivers of stipulations pertaining to the greater sage-grouse and/or their habitat that have been granted by BLM.

The FWS statement regarding waivers is inconsistent with the requirements of the FWS IQA Guidelines as it is unclear, incomplete, biased, and inaccurate.

- The Statement is **inaccurate** in that all waivers are documented by BLM and accordingly would have been available to the FWS as readily available data.
- The Statement is **inaccurate** because the FWS participates in every waiver through the NEPA process and thus has direct knowledge of every waiver that is requested.
- The statement is **incomplete** in that it fails to acknowledge the BLM must document all waivers and that the information was available to the FWS had they requested it.
- The statement is **incomplete** in that it fails to acknowledge that the FWS participated in every decision when a waiver was requested.
- The statement is **biased** in that it misleads the reader into a conclusion that BLM is not enforcing stipulations and routinely waives the requirements, when in fact the FWS is materially involved in all waiver decisions.

An exception, waiver, or modification to an oil or gas stipulation must be based on one of two explicit criteria. Regulations⁸ allow waivers only under specific circumstances and BLM instructions require that waivers be documented and the appropriate environmental documentation under NEPA be prepared for the waiver. Such documentation is required by law to be reviewed by the FWS. Further, these NEPA and waiver documents would have been readily available to the FWS in the course of preparation of this Final Determination. In addition, lease stipulations can be modified to be more restrictive after their execution if there are changed circumstances.

⁸ 43 CFR 3101.1-4, "A stipulation included in an oil and gas lease shall be subject to modification or waiver only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if the proposed operations would not cause unacceptable impacts."

There is no adequate explanation for the FWS's failure to identify and acknowledge the existence of this documentation and their participation as reviewers, or for the FWS's failure to summarize the magnitude and appropriateness of existing waivers.

REQUEST FOR CORRECTION 10 -- Quotations from DISSEMINATED INFORMATION; Page 2273

Request the statement in the 2005 Status Review Final Determination be corrected to acknowledge that the FWS routinely evaluates the effectiveness of management and BMPs imposed by BLM in its RMPs, and that monitoring is required and that information would have been available to the FWS had it been requested.

The Service has no information regarding the results of BLM monitoring and evaluation of the effectiveness of these or similar BMPs that may have been adopted previously in BLM planning documents or as part of other, more site-specific planning decisions.

The FWS statement regarding monitoring and evaluation of BMPs is inconsistent with the requirements of the FWS IQA Guidelines as it is unclear, incomplete, biased, and inaccurate.

- The statement is **inaccurate** as it does not acknowledge the extent to which FWS participates in the preparation and review of NEPA documentation, the identification of effects of the project, identification of conservation and recovery activities and BMPs, and finally, produces a biological opinion on the effects of the agency's proposed action which includes binding performance requirements on BLM.
- The statement is **incomplete** as it fails to acknowledge the extent to which the FWS is included in the development, review, and finalization of the contents of BLM Resource Management Plans and their related BMPS, stipulations, and management plan.
- The statement is **unclear** as it fails to adequately communicate the level of participation of the FWS in planning and implementing ongoing conservation activities on federal and state lands.
- The statement is **biased** in that it implies there is little to no control, oversight, or enforcement of BLM management of federal lands with respect to sage grouse.
- The statement is **biased** in that it fails to recognize the substantial role played by the FWS in shaping and imposing requirements enforced under the RMPs, and by doing so, leads the reader to believe there is little to no consideration of sage grouse in RMPs and that requirements for conservation of the sage grouse or its habitat developed in the RMPs are unknown to the FWS.

Some examples illustrating the FWS's explicit knowledge of the conditions included in RMPs include:

- The biological opinion for the Casper RMP in Wyoming requires BLM undertake the following activities to benefit sage grouse:
 - ✓ Implement programs;
 - ✓ Conduct and maintain inventories;
 - ✓ Conduct surveys for occupancy;
 - ✓ Provide for conservation through preparation and implementation of recovery plans;
 - ✓ Ensure actions are evaluated to determine if special status species objectives are being met;
 - ✓ Ensure results of formal section 7 consultations including terms and conditions in incidental take statements are implemented.
 - ✓ Require grazing management practices that incorporate the kinds and amounts of use that will restore, maintain, or enhance habitat to assist in the conservation of species of concern;
 - ✓ Requires BLM to initiate coordination with the FWS to include conservation measure determined appropriate by the Service;
 - ✓ Requires the BLM to manage all public lands to conserve and improve habitats of special status species to prevent the need for listing and to maintain or improve conservation of special status species habitats;
 - ✓ When planting or seeding vegetation in areas identified as special status species habitat, only native species may be used;
 - ✓ Use stipulations shall be imposed on grazing permits as they are renewed. Grazing management practices will restore, maintain, or enhance habitats to assist in the conservation of species of concern.
 - ✓ No heavy equipment is allowed near sage-grouse leks without consultation of a resource advisor;
 - ✓ Evaluate and adopt the Sage-grouse Conservation and Assessment Strategy.

In the Formal Biological opinion for the Record of Decision on the Casper RMP, the FWS opines that implementation⁹ will ensure that actions authorized by the Bureau do not contribute to the need for a species to become listed.

- The biological opinion for the Richfield RMP in Utah contains extensive binding conservation measures to be included in the RMP¹⁰ for the conservation of special status species. A partial list includes:
 - ✓ Transportation planning (reduce road density and traffic volume);
 - ✓ Compensatory mitigation;
 - ✓ Noise reduction;

⁹ The statement is referencing the binding conservation measures included in the Incidental take Permit.

¹⁰ Biological Opinion for the Richfield BLM Resource Management Plan, page 132

- ✓ Installation of anti-raptor perches in greater sage grouse habitat;
- ✓ Monitoring of populations during drilling operations;
- ✓ Avoidance of human activity between 8am and 8pm within .25 miles of occupied wells between March 1 and May 15;
- ✓ Closed drilling systems;
- ✓ Remote well monitoring;
- ✓ Below ground well heads;

The FWS states in the biological opinion that the listed conservation measures are binding species-specific measures intended to protect and minimize the potential for adverse impacts on special status species. The FWS notes that other modified versions of the measures may be imposed following further analysis or reviews and or consultation or coordination with the FWS. The Service notes that alterations may be applied to activities for which consultation is already complete.

The Biological Opinion for the Kanab RMP recognized the importance and effectiveness of conservation measures included in an RMP. The Service found that the standards in the RMP were sufficient to protect special status species and included no reasonable and prudent measures in the biological opinion. The biological opinion illustrates the close working relationship between the FWS and BLM with respect to development and implementation of RMPs and their effectiveness.

The three biological opinions above are a random sample of those available on the internet. They illustrate the extent to which the FWS is involved and controls the conditions imposed by the BLM in its resource management plans with respect special status species. This control is exercised despite the absence of listing of the species under the ESA.

REQUEST FOR CORRECTION 11 -- Quotations from DISSEMINATED INFORMATION; Page 2276

Request correction of the statement to recognize that all federal agencies and individual states have regulations regarding invasive species, and since invasive species were identified as a threat to greater sage grouse, the control and regulation of these species is a benefit.

Although individual States have regulations regarding invasive species, we were unable to determine if these regulations will affect sage-grouse habitats.

- The 2005 Status Review Final Determination identified invasive species as a threat to sage grouse, and yet the statement questions whether controlling invasive species will affect sage grouse. The statement is unclear as it appears

to question the value of controlling invasive species, which were identified as a threat to greater sage grouse.

- The statement is **inaccurate** as the existence of any federal or state regulation governing invasive species is a matter of public record, and therefore readily available data
- The statement is **incomplete** in that it fails to identify which areas of sage grouse habitat are subject to invasive species control or eradication or restoration programs, all of which is readily available data.
- The statement is **biased** in that it fails to recognize that since invasive species are identified as a threat to sage grouse, the very existence of programs to eradicate, control or restore areas affected by invasive species is beneficial to greater sage grouse.

This section of the 2005 Status Review Final Determination is designed to imply that there is no clear benefit that can accrue to the sage grouse as a result of implementation of controls on invasive species. However, the management structure of federal lands and the state laws regarding management of sage grouse and their habitat identified earlier in this document all have protection and restoration of native vegetation and species as their ultimate purpose. To the extent that regulations regarding invasive species prevent their spread and facilitate preservation and restoration of native habitats and species, such laws can only benefit of the sage grouse and the habitats upon which they depend.

The FWS has 44 field offices within the range of the greater sage grouse. It is clear that no inquiry was made into the status of invasive species control in within the purview of each of those offices.

REQUEST FOR CORRECTION 12 -- Quotations from DISSEMINATED INFORMATION; Page 2273

Request that the statement be revised to address the question posed in Section 4 (1)(1)(D) of the ESA: Is the greater sage grouse threatened because of the inadequacy of existing regulatory mechanisms?

Based on the best scientific and commercial data available we have concluded that existing regulatory mechanisms do not endanger or threaten the greater sage-grouse throughout all or a significant portion of its range

The statement does not meet the required finding in the ESA and is thus inconsistent with both the ESA and the FWS IQA Guidelines.