



## INTRODUCTION

1. Plaintiffs GOVERNOR C.L. “BUTCH” OTTER, in his official capacity as Chief Executive of the State of Idaho, and the OFFICE OF SPECIES CONSERVATION (collectively “the Governor”) seek declaratory and injunctive relief against Defendants KEN SALAZAR, in his official capacity as United States Secretary of the Interior; THOMAS STRICKLAND, in his official capacity as Assistant Secretary of the Interior for Fish, Wildlife and Parks; SAM HAMILTON, in his official capacity as Director of the United States Fish and Wildlife Service; and the UNITED STATES FISH AND WILDLIFE SERVICE (collectively “the Secretary”) for violating Federal law.

2. This civil action challenges the Secretary’s October 8, 2009 decision to list Slickspot peppergrass (*Lepidium papilliferum*) as a threatened species throughout its range under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”). *See Listing Lepidium papilliferum* (Slickspot Peppergrass) as a Threatened Species Throughout Its Range; Final Rule, 74 Fed. Reg. 52014 (Oct. 8, 2009). The Governor brings this suit under Section 702 of the Administrative Procedure Act (“APA”), seeking review of a final agency action—namely, the decision to list Slickspot peppergrass as threatened throughout its range under the ESA. 5 U.S.C. § 702.

3. Until the recent unlawful action by the Secretary detailed in this Complaint, the State of Idaho, under the direction of the Governor, has managed Slickspot peppergrass and its habitat according to a Candidate Conservation Agreement (“CCA”)<sup>1</sup> formalized under the ESA.

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<sup>1</sup> Candidate Conservation Agreements are voluntary conservation agreements between the U.S. Fish and Wildlife Service (“Service”) and one or more public or private parties. The Service works with its partners to identify threats to the candidate species, plan the measures needed to address the threats and conserve these species, identify willing landowners, develop agreements  
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The CCA has been in place for over six years, and its signatories include the United States

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Bureau of Land Management, an agency within the Department of the Interior, Plaintiff Office of the Governor by and through the Office of Species Conservation, Idaho Department of Lands, Idaho Department of Fish and Game, the Idaho National Guard (“IDARNG”) and several non-governmental cooperators. During that time, over 90% of approximately 300 voluntary conservation measures have been implemented. The CCA is critical to maintaining the viability of the species and its habitat. The listing of this species arbitrarily removes the Governor’s sovereign right to manage this species and will undoubtedly undermine the policy position of the Governor to collaboratively and proactively conserve this species and its habitat under the CCA, while maintaining predictable levels of land use.

4. The Governor seeks an order from this Court holding unlawful, enjoining implementation of, vacating, and remanding the Secretary’s Final listing determination (“Final Rule”) for Slickspot peppergrass under the APA as arbitrary, capricious, an abuse of discretion and contrary to the law in numerous respects, including but not limited to: (1) arbitrarily listing the species with no credible evidence of data supporting a downward trend in the abundance of the species; (2) arbitrarily relying on data sets that the U.S. Fish and Wildlife Service (“Service”) by and through memoranda from Mr. Jeff Foss, Field Supervisor for the State of Idaho, admitted as being unreliable and mischaracterized (Nov. 18, 2006 Foss Memo to Terry Rabot Re: Background on LEPA Data from IARNG and Meeting on 12/16/06) (hereinafter “Foss Memo”); and (3) irrationally ignoring the significance of the Governor’s conservation efforts.

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and design and implement conservation measures and monitor their effectiveness. *See* [http://www.fws.gov/endangered/candidates/condidate\\_CCAs.html](http://www.fws.gov/endangered/candidates/condidate_CCAs.html).

5. The Governor believes the listing of Slickspot peppergrass as a threatened species represents a watershed moment for collaborative conservation under the ESA. If this Final Rule is left to stand, it will create a chilling effect on the willingness of parties—including agencies of the Federal government—to partner with the Service to collaboratively and proactively conserve species because the standard for preemptively precluding the need to list species will be unattainable. Simply shirking the difficult task of analyzing the effectiveness of conservation practices by contending that nothing, including a listing, can be done to conserve the species and its habitat is an arbitrary and empty gesture. For these and other reasons, the Final Rule is unlawful and should be set aside.

#### **JURISDICTION AND VENUE**

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction); and pursuant to the APA, 5 U.S.C. § 702 (judicial review of final agency action). This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706.

7. Venue is proper in the U.S. District Court for the District of Columbia under 28 U.S.C. § 1391(e) as this action is brought against an agency of the United States and against officers of agencies of the United States in their official capacities which reside and/or are headquartered within the District of Columbia; a substantial part of the events or omissions giving rise to this claim, including the signing of the Final Rule, occurred in this district; and no real property is involved.

8. The Federal government has waived sovereign immunity in this action pursuant to the APA, 5 U.S.C. § 702.

9. The act of publishing the Final Rule in the Federal Register on October 9, 2009

constituted “final” agency action under the APA, 5 U.S.C. § 702, and thus this action is appropriately vested with this Court.

### PARTIES

10. Plaintiff GOVERNOR C.L. “BUTCH” OTTER is the Governor of the State of Idaho and under Art. IV, sec. 5 of the Idaho Constitution, is the Chief Executive of the State and must ensure that the laws of the State of Idaho are faithfully executed. The Secretary’s decision to list Slickspot peppergrass has impaired, impeded and directly injured the Governor’s ability as the Chief Executive of the State to uphold the law, specifically his sovereign responsibility to protect and conserve Slickspot peppergrass. The relief sought herein would directly redress the Governor’s injuries. He brings this action in his official capacity as the Governor of the State of Idaho.

11. Plaintiff OFFICE OF SPECIES CONSERVATION (“OSC”) is an agency within the Executive Office of the Governor and is responsible for implementing programs furthering the Governor’s obligation to faithfully execute the laws of the State of Idaho. Under title 67, section 818(2) of the Idaho Code, the OSC has the authority to: (1) coordinate all State departments and divisions with duties and responsibilities affecting petitioned and listed species under the ESA; (2) participate in regional efforts to cooperatively address petitioned and listed species; (3) provide input and comment to Federal and State agencies on issues related to petitioned and listed species; and (4) serve as a repository for agreements and plans among governmental entities in the State of Idaho for petitioned and listed species.

12. The OSC, under title 67, section 818(2)(f) of Idaho Code, has the authority to negotiate agreements with Federal agencies concerning endangered, threatened, candidate,

petitioned and rare and declining species. Under this authority, the Governor by and through OSC, engaged in a collaborative effort with the Service, the United States Bureau of Land Management (an agency within the Department of the Interior), the Idaho Department of Lands, the Idaho Department of Fish and Game, the Idaho National Guard (“IDNG”) and several Federal livestock permittees to develop the aforementioned CCA to carry out the Governor’s duty to ensure the protection and conservation of the species and its habitat while maintaining predictable levels of land use. If the listing of the plant is permitted to stand, OSC’s statutory mandate to proactively and adaptively manage the species in accordance with the CCA will be rendered null and void, and thus will be directly injured by the Federal action at issue. Invalidating the listing determination as well as the other relief requested herein will redress these injuries.

13. Defendant KEN SALAZAR is the United States Secretary of the Interior. The Secretary of the Interior is the highest ranking Federal official vested with the ultimate responsibility for properly carrying out the ESA and its implementing regulations with respect to terrestrial species. 50 C.F.R. § 402.01. Many of the claims alleged herein, including the proper analysis of the impact of the Governor’s conservation measures, challenge fundamental policy positions of the Department that are ultimately the responsibility, by law, of Secretary Salazar. Additionally, Defendant Salazar’s official place of business is located within the District of Columbia. Defendant Salazar is sued solely in his official capacity.

14. Defendant THOMAS STRICKLAND is the Assistant Secretary for Fish, Wildlife and Parks within the United States Department of the Interior. He oversees the U.S. Fish and Wildlife Service to which the Secretary has delegated the responsibility of implementing the ESA and its regulations with respect to terrestrial species. 50 C.F.R. § 402.01. Defendant

Strickland's official place of business is located within the District of Columbia. Defendant Strickland is sued solely in his official capacity.

15. Defendant SAM HAMILTON is the Director of the United States Fish and Wildlife Service. He oversees the administration and implementation of the ESA for the Service. Director Hamilton was directly responsible for delegating the responsibility of signing the Final listing determination for Slickspot peppergrass to Daniel M. Ashe, Deputy Director of the Service. The Final Rule was signed at the Service's headquarters, which is located within the District of Columbia. Director Hamilton is sued solely in his official capacity.

16. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency within the Department of the Interior to which the Secretary has delegated the responsibility of implementing the ESA and its regulations with respect to terrestrial species. *Id.* The Service, headquartered within the District of Columbia, developed and promulgated the final listing determination at issue under the direction of the Secretary and the Director.

### **LEGAL FRAMEWORK**

#### **Endangered Species Act**

17. The purposes of the Endangered Species Act are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section." 16 U.S.C. § 1531(b).

18. The ESA directs the Secretary to determine, by regulation, whether any species is an endangered species or threatened species based on five enumerated factors. 16 U.S.C. § 1533(a)(1). The Secretary must make these determinations "solely on the basis of the best

scientific and commercial data available to him,” and only after taking into account those efforts “...being made by any State...to protect such species.” *Id.* § 1533(b)(1)(A). An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range.” *Id.* 1532(6). A “threatened species” is, “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

19. Plaintiffs have filed, concurrently with this Complaint, a 60-day notice letter to the Defendants regarding violations of the ESA in adopting the Final listing determination for Slickspot peppergrass pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). Should the Defendants fail to cure the fatal defects alleged therein; Plaintiffs intend to seek additional relief by amending their Complaint through the addition of ESA claims alleged in the notice of intent.

#### **Administrative Procedure Act**

20. The Governor has suffered a “legal wrong because of agency action” and is “adversely affected or aggrieved” by the decision to list Slickspot peppergrass. 5 U.S.C. § 702. The APA thus affords the Governor judicial review of this final agency action. *Id.*

21. The APA also provides the applicable process a Federal agency must follow when it proposes and adopts final rules and regulations. 5 U.S.C. § 553; *id.* § 551(4)-(5). The Secretary arbitrarily reinstated the 2002 proposal to list the species as the basis for this final listing determination without an adequate notice and comment or determination of whether the scientific information remained current.

## **FACTUAL BACKGROUND**

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### **Proposed Listing of Slickspot Peppergrass**

22. On July 15, 2002, in response to a petition, the Secretary proposed to list Slickspot peppergrass as an endangered species under the ESA. 67 Fed. Reg. 46441.

### **Department of Defense Data Quality Challenge**

23. Following the proposal to list, the United States Air Force filed a challenge under the Information Quality Act (also known as the “Data Quality Act”) raising substantial questions concerning the quality of Slickspot peppergrass “science.” 67 Fed. Reg. 42666 (June 24, 2002).

24. Dr. Terry Bashore, a U.S. Air Force scientist, and others pointedly complained that the science underlying the proposal to list the species did not meet the information quality guidelines published by the Service. The Air Force argued, among many things, that the Service did not have sufficient scientific evidence to support a listing determination; and that the habitat integrity index (used in assessing and monitoring occupied habitat) required peer review prior to use in a listing determination. *Id.*

25. Based on the Air Force’s critique, the Secretary determined that a six-month extension to the final deadline was warranted. 69 Fed. Reg. 3094, 3099 (Jan. 22, 2004). Under the ESA, if the Secretary finds “substantial disagreement” regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six-months for purposes of soliciting additional data.” 16 U.S.C. § 1533(b)(6)(B)(i) (emphasis added).

### **Candidate Conservation Agreement**

26. During the six-month extension, the State of Idaho by and through Plaintiff Governor and Plaintiff Office of Species Conservation partnered with several Federal and State

agencies as well as Federal livestock grazing permittees to develop a CCA to conserve the species and its habitat while maintaining predictable levels of land use.

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27. The Service participated in the formation of a Steering Committee to guide the development of the CCA. Additionally, throughout the development of the CCA, the Service provided technical expertise on the threats to the species as well as specific guidance on the incorporation of the criteria outlined in the Service's Policy for Evaluating Conservation Efforts ("PECE").

28. On October 30, 2003, the Service published a notice in the Federal Register announcing the availability of the draft CCA for public review. 68 Fed. Reg. 61821 (Oct. 30, 2003). A parallel conservation effort, an Integrated Natural Resource Management Plan ("INRMP"), was also completed by the U.S. Air Force in early 2004 for the species. 69 Fed. Reg. 3094, 3105 (Jan. 22, 2004). Taken together, the conservation measures in the CCA and INRMP apply to "approximately 97 percent" of the range occupied by the plant. *Id.*

29. The conservation measures in the CCA and INRMP are designed to reduce, eliminate and mitigate the potential threats to the species. *Id.* For example, the Federal grazing permittees voluntarily and proactively committed to minimizing the potential negative impacts to the species from livestock use even though the Service has continuously maintained that "statistical analyses of monitoring data available at this time have not demonstrated a significant correlation between livestock use and the abundance of *L. papilliferum* on a rangewide basis." 74 Fed. Reg. at 52038. The CCA accomplishes this through: constructing grazing exclosures; changing existing grazing permits to restrict the placement of salt and water sources; and prohibiting the trailing of livestock through occupied habitat. 69 Fed. Reg. at 3108.

**2004 Withdrawal Notice**

30. On January 22, 2004, the Secretary published a notice withdrawing the 2002 proposal to list Slickspot peppergrass. 69 Fed. Reg. 3094 (Jan. 22, 2004) (“2004 Withdrawal Notice”). The withdrawal notice was based on the fact “that there is a *lack of strong evidence of a negative population trend*, and the conservation efforts contained in formalized plans have *sufficient certainty that they will be implemented and will be effective*,” in reducing the risks to the species to a level below the statutory definition of endangered or threatened. *Id.* (emphasis added). These conclusions still remain valid.

31. The entity that originally petitioned for the listing of Slickspot peppergrass filed a civil suit in the U.S. District Court for the District of Idaho challenging the 2004 Withdrawal Notice. *See Western Watersheds Project v. Foss*, No. CV 04-168-MHW, 2005 WL 2002473 (D. Idaho Aug. 19, 2005). On August 19, 2005, the court granted the plaintiff’s motion for summary judgment and remanded the case to the Secretary for reconsideration. *Id.* at \*19. Specifically, the court was concerned about the Secretary’s failure to define the statutory term “foreseeable future” for the species. *Id.* at \*16 (noting that while the “court is not attempting to establish a bright-line rule for defining the foreseeable future,” the agency making the decision “must articulate a satisfactory explanation for their action to permit effective judicial review.”) (internal quotations and citations omitted).

**2007 Withdrawal Notice**

32. On remand, the Service compiled the new information collected since the 2004 Withdrawal Notice in a document entitled the “Draft Best Available Biological Information for Slickspot Peppergrass (*Lepidium papilliferum*).” (“DBABI,” Feb. 27, 2006). Within the DBABI, the Service repeatedly emphasized that “areas of scientific uncertainty and substantial

information gaps remain.” *Id.* at 6. Additionally, the Service continued to admit its inability to meaningfully detect a population trend, “[b]ecause the count numbers collected for *L. papilliferum* at different EOs [element occurrences] have occurred on different years with varying precipitation patterns and often with incomplete survey data, making an accurate estimate of the number of *L. papilliferum* individuals is [sic] impossible given current information.” *Id.* at 23 (emphasis added).

33. Because of inconsistencies in data collection methods, the Service consulted a panel of seven outside experts to “provide assistance in understanding the ecology and biology of *Lepidium papilliferum*.” 72 Fed. Reg. 1622, 1643 (Jan. 12, 2007). The panel repeatedly pointed to the trend data in the Orchard Training Area (“OTA”) as evidence of a negative population trend. *Id.*

34. Relying on the panelists’ interpretation of the OTA data, the Service managers concluded in a November 20, 2006 *pre-decisional* Federal Register notice that the species warranted ESA protection because it was “reasonable to infer beyond the strict evidence of *conclusive data* that the declines at the OTA are likely representative of declines rangewide.” (Pre-decisional—Draft Working Document, Nov. 20, 2006, p. 14) (emphasis added).

35. During a subsequent public comment period, however, Jeff Foss (Field Supervisor for the Service) detected a discrepancy in how the IDNG staff had characterized their monitoring methods and information at the OTA. In a memorandum to the Portland Regional Office, Mr. Foss detailed the stunning discovery:

[w]e learned for the first time, that what we have understood from the IARNG staff to be census data is better characterized as “rough census” data as termed by Dana [Quinney]. Dana explained that the rough census methodology is *not designed to count every plant in every occupied Slickspot in the area as we previously understood*. In her words, ‘the rough census likely accounts for

approximately 1/3rd of the total population of the area surveyed by this method.’  
~~In other words, up to 2/3rds of the plants are not counted by this method.~~

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(Foss Nov. 18, 2006 Memo, p. 3) (emphasis added).

36. Without the ability to credibly rely on the OTA data as a primary basis for listing the species, the Service concluded that the other data sets (e.g. Habitat Integrity Index/Habitat Integrity and Population Monitoring (“HII/HIP”)) represented the best available data for the species. *See* 72 Fed. Reg. at 1627 (concluding “[i]n general, the HII and HIP data from 1998-2005 indicate that the abundance of *L. papilliferum* range-wide remained relatively stable over this time interval.... We consider this range-wide data to be the best available at this time.”) (emphasis added).

37. On this basis, the Secretary again withdrew the 2002 proposal to list Slickspot peppergrass. 72 Fed. Reg. 1622. The 2007 Withdrawal Notice for a *second time* concluded that “there is little evidence of negative impacts on the abundance of *L. papilliferum*.” *Id.* The Secretary noted that fluctuations in the population were “*strongly correlated with spring precipitation*, therefore a high degree of variability in annual abundance is to be expected.” *Id.* (emphasis added).

38. The action by the Secretary in withdrawing the proposed rule to list Slickspot peppergrass was challenged in the U.S. District Court of Idaho, alleging the Secretary violated the ESA and APA. *See Western Watersheds Project v. Kempthorne*, No. CV 07-161-E-MHW, 2008 WL 2338501 (D. Idaho 2007). On June 4, 2008, the court granted plaintiff’s motion for summary judgment and remanded the decision back to the Secretary for reconsideration. *Id.* at \*18. Specifically, the court was concerned about the Service’s failure to re-consult the outside expert panel after it received the new information collected during the public comment period. *Id.* at \*15.

**2009 Threatened Listing Determination**

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39. After the issuance of the court's decision, the Service published a public notice reinstating the July 15, 2002 proposed rule to list Slickspot peppergrass as endangered and announced the reopening of a public comment period on September 19, 2008. 74 Fed. Reg. at 52014.

40. During this public comment period, the State of Idaho by and through OSC provided the following suggestions to the Service:

...given the controversy surrounding the data collected at the Orchard Training Area, the State requests an exhaustive independent, third-party audit of the information collected at that site. Concurrent with that audit, the Service needs to examine both the use of that data in other scientific forums as well as the inferences the Service has drawn from such research. Without such an audit, the State would have little confidence in the Service's ability to correctly determine the appropriate listing status for the species.

(State of Idaho Comments, October 28, 2008).

41. In response to the State's request for an audit of the OTA information, the Service contracted with Joseph Sullivan and Christopher Nations to perform an "Analysis of Slickspot Peppergrass (*Lepidium papilliferum*) Population Trends on Orchard Training Area and Rangewide Implications." (hereinafter "Sullivan and Nations"). The final report was received on April 13, 2009.

42. Sullivan and Nations concluded that "Slickspot peppergrass data from 'rough census' area and special use plot surveys conducted between 1990 and 2008 on the OTA *provide limited evidence* for declining populations in that trends were negative but only statistically significant for the 'rough census' survey." Sullivan and Nations, p. 2 (emphasis added). Critical understanding of the IDNG's methodology at the OTA was proffered by Dana Quinney,

a biologist at OTA. (Sullivan and Nations, p. 28) (stating “[t]he methods presented are based on personal communications from Dana Quinney, a biologist at the OTA.”).

43. Sullivan and Nations did note, at least partially, some of the controversy surrounding the OTA data sets stating, “[q]uestions have been raised in the past regarding why surveys conducted by URS [another IDNG contractor] in 2005 recorded higher numbers of Slickspot peppergrass than had been observed previously. The large number of Slickspot peppergrass plants counted by URS resulted from searching a larger area and searching that area *more intensively.*” (Sullivan and Nations, p. 2) (emphasis added).

44. Characterizing the Sullivan and Nations’ review as validating the veracity of the OTA data, the Service irrationally accepted that data as the best available despite its previous conclusions discrediting it. *See* 74 Fed. Reg. at 52020.

45. Based on an irrational characterization of Sullivan and Nations, the Secretary listed Slickspot peppergrass as a threatened species throughout its range on October 9, 2009. 74 Fed. Reg. 52015.

### **CLAIMS FOR RELIEF**

#### **COUNT I—APA, 5 U.S.C. § 706(2)(A)**

**(The Secretary arbitrarily and capriciously listed Slickspot peppergrass without any credible evidence of a decline in the abundance of the species)**

46. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 45 of this Complaint, as though fully set forth below.

47. The Final Rule repeatedly reinforces the fact that the Secretary cannot document a discernable downward trend in the abundance of the species stating, “[a]s with the 2007 finding...*we do not see strong evidence* of a steep negative population trend for the species.” 74 Fed. Reg. at 52051 (emphasis added).

48. In fact, the data collected since the 2007 Withdrawal Notice actually demonstrates a viable, if not increasing population. Buried deep within the Final Rule, the Secretary concedes through the Service's peer reviewers that "2008 was the highest population year on record." *Id.* at 52059 (emphasis added). The Secretary does not adequately explain his listing determination in light of this information demonstrating an increasing abundance.

49. Additionally, the Final Rule states, "[a]s we have not yet observed the *extirpation of local populations or steep decline in the abundance of the species*, we do not believe the status of the species is such that it is presently in danger of extinction." *Id.* at 52052 (emphasis added). Again, the Secretary has arbitrarily listed Slickspot peppergrass despite abundance information that runs counter to his decision.

50. Listing Slickspot peppergrass without any credible evidence of population decline is irrational, arbitrary, capricious and contrary to law. The APA requires the Secretary to "articulate[] a reasoned connection between the facts found and the choice made." *See Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). The Secretary has not provided such an explanation. Under the APA Section 706, therefore, this Court has authority to hold the listing determination unlawful.

#### COUNT II—APA, 5 U.S.C. § 706(2)(A)

**(The Secretary arbitrarily relied on previously discredited OTA data and methodology to list Slickspot peppergrass)**

51. Plaintiffs reallege and incorporate by reference all of the allegations of the Complaint in paragraphs 1 through 50, as though fully set forth below.

52. The most appalling and egregious error in this listing determination is the Secretary's reversion to and reliance on the OTA data and methodology to create the appearance

of a “negative association” between habitat degradation and the abundance of the plant. 74 Fed. Reg. at 52043.

53. Prior to the 2007 Withdrawal Notice, the Service had prepared a *pre-decisional* Federal Register notice listing the species as threatened largely based on the Service’s conclusion that, “it was reasonable to infer beyond the strict evidence of conclusive data that the declines at the OTA are likely representative of declines rangewide.” (Pre-decisional—Draft Working Document, Nov. 20, 2006, p. 14).

54. As alleged above, the Foss Memorandum in late November 2006 resulted in the Service repudiating the primary basis for this inference. (Foss Nov. 18, 2006 Memo, p. 3).

55. On information and belief, the Service ignored the substantial defect of the previously discredited OTA data and methodology and submitted the faulty data to the statisticians (Sullivan and Nations).

56. The Service irrationally concluded that Sullivan and Nations effectively jumped to the same conclusion as did the outside expert panel in May 2006. 74 Fed. Reg. at 52023. In fact, Sullivan and Nations could only detect “*limited evidence* for declining populations” at the OTA. (Sullivan and Nations, p. 2) (emphasis added).

57. Continued reliance on this data set without proper explanation is arbitrary, capricious and an abuse of discretion. 5 U.S.C. § 706(2)(A).

**COUNT III—APA, 5 U.S.C. § 706(2)(A)**

**(The Secretary irrationally ignored the significance of the Governor’s conservation efforts)**

58. Plaintiffs reallege and incorporate by reference all of the allegations of the Complaint in paragraphs 1 through 57, as though fully set forth below.

59. The CCA is an exemplar of state-based conservation under the ESA. The agreement has been in place since 2003; has implemented over 90% of its voluntary conservation measures; and has been effective, as admitted in the Final Rule, in reducing and mitigating threats to Slickspot peppergrass and its habitat.

60. The 2004 Withdrawal Notice explained that the Secretary's decision not to list the species was due to, in large part, the conservation measures in the CCA having "*sufficient certainty that they will be implemented and will be effective*" in reducing the risks to the species to a level below the statutory definition of endangered or threatened. 69 Fed. Reg. at 3094 (emphasis added). Thus, a sufficient amount of these conservation measures were deemed PECE compliant—e.g. certainty of implementation and effectiveness—to preclude the need to list the species.

61. The Final Rule, however, represents a dramatic, unexplained and arbitrary departure from the Service's conclusions in 2004. Notwithstanding the years of continued conservation efforts for the benefit of the species, the Secretary irrationally concluded that the conservation measures are no longer relevant (stating that, "most [conservation measures] [e.g. only 35 out of roughly 600 individual management actions meet PECE] have not been demonstrated at this time to effectively reduce or eliminate the most significant threats to the species"). 74 Fed. Reg. at 52050.

62. The facts, however, support the Service's 2004 conclusion that enough conservation measures met PECE to preclude the need to list. For example, the Final Rule applauds the effectiveness of the livestock management measures by stating that, "the current livestock management conditions and associated conservation measures *address this potential threat such that it does not pose a significant risk to the viability of the species as a whole.*" 74

Fed. Reg. at 52027 (emphasis added). Furthermore, the Final Rule notes that “conservation

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measures at the OTA [] have been *successful in controlling the effects of wildfire on L.*

*papilliferum* habitats.” 74 Fed. Reg. at 52027 (emphasis added). Again, incurable discrepancy exists within the Secretary’s analysis.

63. Under the APA, the Secretary’s unexplained repudiation of the effectiveness of the Governor’s conservation effort is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §§ 706(2)(A). Under APA Section 706, this Court has the authority to remand, set aside and vacate the Final Rule as unlawful.

**PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs respectfully requests this Court enter judgment in their favor, and

1. Order, declare and adjudge that the Secretary has violated the Administrative Procedure Act because his decision to list Slickspot peppergrass as a threatened species on October 8, 2009 was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. 5 U.S.C. §§ 706(2)(A);

2. Vacate, reverse and remand the Secretary’s October 8, 2009 listing determination;

3. Enjoin and restrain Defendants, their agents, employees, successors, and all persons acting in concert or participating with them from enforcing or applying, or requiring others to enforce or apply, the Secretary’s October 8, 2009 listing determination;

4. Award Plaintiffs their costs of litigation, including reasonable expert witness fees and attorneys fees, pursuant to the Equal Access to Justice Act, and/or any other applicable law; and

5. Grant Plaintiffs such other relief as may be necessary and appropriate or as the

Court deems just and proper.

Respectfully submitted,



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