C. L. "BUTCH" OTTER
GOVERNOR

November 17, 2009

The Honorable Ken Salazar
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

The Honorable Thomas Strickland
Assistant Secretary for Fish, Wildlife and Parks
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

The Honorable Sam Hamilton
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W., Room 3256
Washington, D.C. 20240

Re: 60-Day Notice of Intent to Sue for Violations of Section 4 of the Endangered Species Act in Connection with: *Listing Lepidium papilliferum (Slickspot Peppergrass)as a Threatened Species Throughout its Range; Final Rule*, 74 Fed. Reg. 52014 (October 8, 2009).

Dear Secretary Salazar, Assistant Secretary Strickland and Director Hamilton:

In my official capacity as the Governor of the State of Idaho, and on behalf of my Office of Species Conservation, I write to inform you of our intent to file a civil suit against the Secretary of the Interior, the Assistant Secretary for Fish, Wildlife and Parks, the Director of the U.S. Fish and Wildlife Service, and the U.S. Fish and Wildlife Service ("Service") (collectively, the "Department") for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"). Additionally, we provide notice of certain violations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, principally 5 U.S.C. § 706, even though such notice is not required as a jurisdictional prerequisite to bring an action under the APA.

This notice is submitted pursuant to sections 11(g)(1)(C) and 11(g)(2)(C) of the ESA due to the failure of the Secretary to "perform any act or duty under section [1533] of this title which is not discretionary." Specifically, I will be seeking declaratory and appropriate injunctive relief to correct and enjoin the continued actions of the Department in violation of the ESA and its

implementing regulations by unlawfully listing Slickspot peppergrass (*L. papilliferum*) as threatened throughout its range. We intend to seek legal fees and costs associated with bringing this legal action.

I urge you to immediately withdraw the Final Rule since it is unlawful, unwarranted and based on unreliable scientific information. Specifically, the Department has listed Slickspot peppergrass through a fatally defective process whereby data sets and information demonstrating the continued viability of the species were arbitrarily ignored, filtered and set aside by agency personnel in favor of information the Federal government previously admitted was unreliable to support the ultimate decision to list.

Perhaps more importantly, the Department's superficial treatment of my robust conservation program for the species and its habitat leaves one to question the legitimacy of any future efforts at collaborative conservation. This situation represents a watershed moment where parties will be extremely reluctant—and justifiably so—to partner with the Service to collaboratively and proactively conserve species because the bar for precluding a listing under the ESA will be unachievable.

Simply shirking the difficult task of analyzing the true effectiveness of my conservation practices by contending that nothing can be done to conserve the species and its habitat is an arbitrary and empty gesture. Notwithstanding the Herculean efforts by the State of Idaho and other non-Federal parties to avoid this moment, permanent frustration may undermine any future collaborative efforts from this point forward. For these reasons and others, the Final Rule should be rescinded.

I. Legal Background

The Secretary may list a species as "endangered" only if the weight of convincing information shows the species "is in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6). Alternatively, the Secretary may list a species as "threatened," if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

In determining whether a species is "threatened" or "endangered," the Secretary is required to consider five factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The listing determination may be made on a positive finding of one or more of the aforementioned factors.

The Secretary must make the listing determination:

> solely on the basis of the best available scientific and commercial data available to him after conducting a review of the status of the species **and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species,** whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

16 U.S.C. § 1533(b)(1)(A) (emphasis added).

The Federal courts have held that a review of a final agency action, for example a final listing determination under the ESA, is governed by the APA under an "arbitrary or capricious" standard; thus an agency's decision should be overturned if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995).

The Department has violated the ESA and the APA by listing Slickspot peppergrass as threatened because the best scientific evidence does not demonstrate that the species is threatened throughout its range. As will be discussed further below, rather than citing biological evidence, data or facts demonstrating that a listing was appropriate or even necessary under the ESA, the Department improperly listed the species based on "surmise" or "speculation." *See Bennett v. Spear*, 520 U.S. 154, 176 (1997).

II. Factual Background

The years of attention to Slickspot peppergrass have been plagued by persistent and substantial questions surrounding the quality and veracity of the "science" underlying each listing determination for this species. The current decision to list is no different. For example, one of the critical pieces of monitoring information extensively relied upon by the Department in this listing determination was thoroughly discredited by the Service in the 2007 Withdrawal Notice. 72 Fed. Reg. 1622 (Jan. 12, 2007) ("2007 Withdrawal Notice"); *see also* (Nov. 18, 2006 Foss Memo to Terry Rabot Re: Background on LEPA Data from IARNG and Meeting on 12/16/06) (hereinafter "Foss Memo") (stating "[w]e learned for the first time...apparently 2/3rds of the plants present may not be counted by the [Idaho Army National Guard's] census methods.") (attached hereto). Rather than analyzing the fatal flaws associated with this discredited "science," the Department chose to wholly ignore this and other substantial defects in the decision to list the species.

The ESA certainly affords the Secretary authority to list Slickspot peppergrass. The Act, however, does not provide the Department *unfettered* discretion to exercise haphazard decisionmaking. Notwithstanding numerous vexing statements littered throughout the

preamble,[1] the Department has proceeded to list Slickspot peppergrass even though the Final Rule leaves behind more questions than answers. The statutory construct of the ESA does not afford the Federal government such imprecision in listing species.

A. 2002 Department of Defense Data Quality Challenge

Questions concerning the quality of Slickspot peppergrass "science" were raised as early as 2002 when the Department of Defense filed a challenge under the Information Quality Act (also known as the "Data Quality Act"). 67 Fed. Reg. 42666 (June 24, 2002). Dr. Terry Bashore, a U.S. Air Force scientist, and five other scientists pointedly complained that the 2002 proposal to list did not meet the information quality guidelines published by the Service. The Air Force argued, among other 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.*

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).

B. The Species Protection Measures in the Candidate Conservation Agreement

During the six-month extension, the Governor by and through his Office of Species Conservation partnered with the Bureau of Land Management, Idaho Department of Lands, Department of Fish and Game, Idaho Army National Guard ("IDNG"), and several Federal grazing permittees to develop a Candidate Conservation Agreement ("CCA") to conserve the species and its habitat while maintaining predictable levels of land use. The Service was so impressed by the group's preliminary efforts that it decided to participate in the formation of a Steering Committee to guide the development of the CCA for Slickspot peppergrass in July/August 2003.

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1. *See, e.g.,* "Forming a reliable estimate **of any trend in abundance** of *Lepidium papilliferum* over time is **complicated** by multiple factors." 74 Fed. Reg. at 52022 (emphasis added). "The presence of this persistent seed bank **confounds** the ability to determine **any trend in abundance over time,** as the number of above-ground plants that can be counted in any one year represents only a subset of the latent population that is present in the seed bank." *Id.* (emphasis added). "Temperature also appears to play a role in annual abundance of *L. papilliferum* in concert with precipitation, although the exact nature of the relationship is **complex and not well understood**." *Id.* at 52023 (emphasis added). "Because the population dynamics of *Lepidium papilliferum* **are complicated**, surrogate methods of monitoring the status of the species, such as monitoring the status of the ecosystem upon which it depends, **may be preferable** to counts of individual plants." *Id.* (emphasis added).

Throughout the development of the CCA, the Service provided technical expertise on the threats to Slickspot peppergrass as well as specific guidance on the incorporation of the criteria outlined in the Service's Policy for Evaluating Conservation Efforts ("PECE"). The Steering Committee also created a PECE checklist to ensure the document would meet the criteria.

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 United States Air Force in early 2004 for the species. 69 Fed. Reg. at 3094. The conservation measures contained in the CCA and INRMP apply to "approximately 97 percent" of the range occupied by the plant. *Id.*

The conservation measures in the CCA and INRMP are designed to reduce, mitigate and eliminate the potential threats to the species. *Id.* For example, the CCA addresses the threat of wildfire by employing aggressive fire suppression techniques aimed at buffering key Slickspot peppergrass habitat. The Secretary noted in the 2004 Withdrawal Notice that "the ongoing and recently implemented conservation measures, while not preventing future wildfire, will reduce both the short-term and long-term effects of wildfire in the foreseeable future." *Id.* at 3108.

Similarly, the Federal grazing permittees voluntarily and proactively committed to minimize the potential negative impacts to the species from livestock use even though the Service has maintained even to the present 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 objective through: constructing grazing exclosures; changing existing gazing permits to restrict the placement of salt and water sources; and prohibiting trailing of livestock through occupied habitat. 69 Fed. Reg. at 3108.

After analyzing the conservation measures contained in the CCA, the Secretary concluded that there "were sufficient assurances that the conservation efforts have reduced threats over most of the range of the species." *Id.* at 3116.

C. 2004 Withdrawal Notice

On January 22, 2004, the Secretary withdrew the 2002 proposal to list Slickspot peppergrass. 69 Fed. Reg. 3094 (Jan. 22, 2004) ("2004 Withdrawal Notice"). The listing withdrawal was based on the fact "that there is a **lack of strong evidence of a negative 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.* at 3094 (emphasis added). These conclusions remain valid to this day.

The same non-governmental environmental organization ("NGO") that petitioned for the listing 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*, CV No. 04-168-MHW, 2005 WL

2002473 (D. Idaho Aug. 19, 2005). On August 19, 2005, the district court granted the plaintiff's motion for summary judgment and remanded the case to the Secretary for reconsideration. *Id.* at *19. Specifically, the court expressed concern about the lack of transparency during the "risk management stage" of the structured decisionmaking process. *Id.* at *17 (explaining "[i]f FWS had outlined in detail which quantitative and general factors it considered in its decision to withdraw its proposed rule…then perhaps the Court would not so readily dismiss the FWS's conclusions.").

Also concerning to the court was the Secretary's failure to define the ESA statutory term "foreseeable future" for determining whether the species warranted threatened status. *Id.* at *16 (noting that while the "court is not attempting to establish a bright-line rule for defining 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).

D. 2007 Withdrawal Notice

1. 2006 Status Review

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).

Moreover, the Service found it equally problematic to use habitat trend data as a surrogate for analyzing the viability of the species. For example, the Service cautioned against extrapolating the Idaho Conservation Data Center's ("IDCDC") Habitat Rankings stating that, "[i]t is important to note that these recent changes in rank do not relate to a sudden, dramatic decrease in habitat quality, but instead reflect a change in the way IDCDC ranks are assigned to better represent habitat quality." *Id.* at 40. Additionally, the Service concluded that while the EO rankings provided a broad idea of the health of an EO, it was not a suitable method for tracking subtle change in habitat. *Id.* at 42.

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.*

Relying on the panelists' interpretation of the OTA data and methodology, the Service managers concluded in a November 20, 2006 *pre-decisional* draft 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).

2. OTA Information/Methodology and Menke and Kaye Report

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 details the stunning discovery:

> [w]e learned for the first time, that what we have understood from the [IDNG] 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.**

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

Without the ability to credibly rely on the OTA data and methodology as its primary basis for listing the species, the Service concluded that the other data sets (e.g. the Habitat Integrity Index ("HII") and Habitat Integrity and Population ("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). Furthermore, during the public comment period the Menke and Kaye 2006b report was finalized and concluded that based on an analysis of the HII/HIP data sets, spring precipitation **explained 89% of the variation in *L. papilliferum* abundance.**

On November 21, 2006, the Service convened a third manager panel to review the new information collected during the public comment period, including the Menke and Kaye 2006b Report and the concerns surrounding the OTA data and methodology. The panel concluded: (1) Slickspot peppergrass population trend generally tracks with precipitation over the long term; (2) the rangewide population is increasing since 2003; (3) given the data available, it did not find that LEPA is exhibiting significant population decline across all or a significant portion of its range.

3. The Record Shows that Slickspot Peppergrass Populations are Stable

On January 12, 2007, the Secretary again withdrew the 2002 proposal to list Slickspot peppergrass. 72 Fed. Reg. 1622 (Jan. 12, 2007) ("2007 Withdrawal Notice"). 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).

The action by the Secretary in withdrawing the proposed rule to list Slickspot peppergrass was challenged in U.S. District Court for the District 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 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. The ESA process at issue in this 60-day Notice then ensued.

III. Listing Slickspot Peppergrass as Threatened Violates the ESA

In order to reach the decision to list Slickspot peppergrass, the Department disregarded the Department's previous position over the last five years without convincing evidence and returned to the baseless "science" that plagued the decisionmaking during the 2002 proposal to list. Namely, the Department in the listing determination at issue: (1) failed to offer any credible scientific evidence of population decline sufficient to warrant a threatened determination; (2) failed to meaningfully define the statutory phrase "foreseeable future" in the context of the Final Rule; (3) continued to extensively rely on the discredited OTA information and methodology in violation the ESA's mandate to use the best available science, 16 U.S.C. § 1533(b)(1)(A); and (4) failed to appropriately assess the effectiveness of the Governor's conservation efforts as also required by 16 U.S.C. § 1533(b)(1)(A). Failure to cure these fatal defects renders the Department's decision arbitrary and capricious.

A. The Secretary Listed Slickspot Peppergrass without any Credible Evidence of a Decline in the Abundance of the Species in Violation of the Secretary's Duty to use the Best Available Science

The Final Rule repeatedly reinforces the fact that the Department 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. However, recent analysis of the best available scientific data suggests that *Lepidium papilliferum* numbers **may be trending downward**…." 74 Fed. Reg. at 52051 (emphasis added).

In fact, the reason the Department cannot find evidence of a decline in the abundance of the species is because the data collected since the 2007 Withdrawal Notice actually demonstrates a viable, if not **increasing** population. Buried deep within the Final Rule, the Department

concedes through the Service's peer reviewers that "**2008 was the highest population year on record.**" *Id.* at 52059 (emphasis added).

Nowhere in the listing analysis does the Department refute or explain the conclusions of the Service's peer reviewers. Lastly, one peer reviewer also noted that the discovery of new occurrences since monitoring efforts have intensified indicate a positive or at least a stable population trend (affirming that "between 1998 (45 extant EOs) [discovered] and 2008 and will **continue to increase**"). *Id.* (emphasis added).

While the Department may disagree with outside peer reviewers, the APA requires that the Secretary provide a reasoned explanation for the deviation. *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). Here, the Department did not meet this burden in refuting the criticisms of the majority of its peer reviewers. The Department's rebuttal to these criticisms fall short of the APA's expectation for a reasoned explanation. Instead of agreeing with the majority of the peer reviewers, the Department chose to hide behind the shield of the best available science mandate. The Final Rule brazenly states, "[w]e acknowledge that forming a reliable estimate of trend in the abundance of *L. papilliferum* over time is complicated by multiple factors; however, we are mandated by the Act to use the best available and commercial data in our assessment." 74 Fed. Reg. at 52054.

Even setting aside the compelling evidence pointing to a stable or increasing population as noted by the peer reviewers, the hypothetical "may be declining" negative trends the Department relies on are nonetheless insufficient to warrant a listing. These unsupported assumptions and observed trends may someday correspond with predicted trends, but that correlation has yet to be demonstrated. The Department has not articulated any standard that would indicate when Slickspot peppergrass will be "threatened" and thus this final agency action is fatally flawed as a matter of law.

B. The Failure to Define the "Foreseeable Future" for Purposes of Determining the Listing Status of Slickspot Peppergrass Renders this Listing Fatal

Equally lacking the requisite precision is the definition of what will constitute the "foreseeable future" for purposes of calibrating projections of when *L. papilliferum* is likely to become an endangered species. *See* 16 U.S.C. § 1532(20). The Final Rule states, "[w]e consider the "foreseeable future" to be that period of time over **which events can reasonably be anticipated**." 74 Fed. Reg. 52055 (emphasis added). The definition of foreseeable future used in this listing determination **provides no objective basis** to afford critical review of the Department's decision.

Even if the Department's irrational definition of "foreseeable future" is accepted, the current data still does not support a threatened listing. The Final Rule admits, "[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). Thus, without any evidence of decline, the

Department somehow believes it can meet the statutory requirements of the ESA by **reasonably anticipating** that such evidence will exist in a convincing manner within the undefined "foreseeable future." The ESA does not permit such monumental leaps of faith. Moreover, such reasoning runs counter to the aforementioned evidence, and therefore, violates the Secretary's obligation under the ESA and APA to "articulate[] a rational connection between the facts found and the choice made." *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).

This standard is in stark contrast to perhaps the most conspicuous listing decision of a species determined to be "threatened," the polar bear, where the Service attempted to apply some level of scientific discipline to the determination. In that decision, it was determined that, among other factors that were fully explained, several generations of polar bear over a 45-year period constituted an appropriate and measurable analytical time frame for the "foreseeable future." Nothing approaching this level of scientific rigor appears in this Final Rule.[2]

Instead, we are advised that due to the "complex" nature of the plant's reproductive tendencies (e.g. the fact that the seed bank remains viable for over twelve years), the "foreseeable future"—a statutory, mandatory definitional term, is simply what is "reasonably anticipated" for the Secretary.[3] This imprecision cannot stand because although the posture of this matter is in the initial decision to list, it also becomes paramount in determining appropriate conservation measures "necessary to bring any…threatened species to the point at which the measures provided pursuant to this Act are no longer necessary," e.g., delisting of the species.

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2. *See* 73 Fed. Reg. 28212, 28253-54 (May 15, 2008):

> The 40-50 year timeframe for a reliable projection of threats to habitat corresponds closely to the timeframe as determined by the method described in the following paragraph. Long-term studies have demonstrated, and world experts (e.g., PBSG) are in agreement, that three generations is an appropriate timespan to use to reliably assess the status of the polar bear and the effects of threats on population-level parameters (e.g., body condition indices, vital rates, and population numbers).
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> This is based on the life history of the polar bear, the large natural variability associated with polar bear population processes, and the capacity of the species for ecological and behavioral adaption (Schliebe et al. 2006a, pp.59-60). Although not relied on as the basis for determining "foreseeable future" in this rule, the correspondence of this timeframe with important biological considerations provides greater confidence for this listing determination.

3. *Cf.* 74 Fed. Reg. at 52055:

> We consider the "foreseeable future" to be that period of time over which events can reasonably be anticipated. In considering threats to the species and whether they rise to the level such that listing the species as threatened or endangered is warranted, we assess factors such as the imminence of the threat (is it currently impacting the species, and is it reasonable to expect the threat to continue into the foreseeable future?), the scope or extent of the threat, the severity of the threat, and the synergistic effects of all threats combined.

16 U.S.C. § 1531(3) (definition of "conservation"). This framework has thus set into motion the very real possibility that it will be impossible to ever recover this species as a matter of law.

The failure to define when a species is likely to be in danger of extinction in the foreseeable future effectively prohibits an informed and objective review of the Department's decision and ignores the requirements of the ESA. Such a "**we know a threatened species when we see one**" standard is not a legally sufficient, convincing or persuasive benchmark for those who have invested significant amounts of time and resources in an effort to conserve this species and its habitat.

Since the Department cannot point to any convincing or objective information in support of its decision to list the species, it has violated the mandate of section 4 of the ESA to use the best available scientific information. 16 U.S.C. § 1533(b)(1)(A). The Department should therefore rescind the Final Rule.

C. The Secretary Arbitrarily Relied on Previously Discredited OTA Data and Methodology to List Slickspot Peppergrass in Contravention of the ESA's Mandate to use the Best Available Science

The most appalling and egregious error in this listing determination is the Department'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 species. Prior to the 2007 Withdrawal Notice, the Service had prepared a *pre-decisional* Federal Register notice listing the species as threatened because it believed 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) (emphasis added).

In late November 2006, the Service discovered that the primary basis for this inference proved unreliable. Accordingly, the Service turned to the HII/HIP rangewide data sets as the best available information and determined the species did not warrant the protections of the Act.

Rather than confront the implications of IDNG's misrepresentation during the relevant status review, the Department re-wrapped the OTA data in an illusory package and presented it to Sullivan and Nations for their statistical review. Without providing the proper context for IDNG's contortion of the data,[4] the Service alleges that the statisticians (Sullivan and Nations)

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4. On information and belief, instead of the Service providing the proper context for the OTA data sets, Sullivan and Nations explain that their assumptions about the data are "based on personal communications from Dana Quinney, a biologist at the OTA." Sullivan and Nations, p. 28. Thus, the Service decided to confront the problems associated with the OTA data by permitting the fox to guard the proverbial hen house.

effectively jumped to the same conclusion as the outside expert panel did in May 2006.[5] The Final Rule states, "[t]he relative value (e.g. the "best available data") of the OTA dataset is supported by the analysis of Sullivan and Nations...." 74 Fed. Reg. at 52023.

With the Sullivan and Nations' review acting as their shield to seemingly cure this fatal defect, the Department unabashedly repeated the same faulty 2006 *pre-decisional* conclusion in the Final Rule. "We believe it is reasonable to infer that this negative trend may be similar or possibly even greater rangewide in areas outside the high quality habitat of the OTA...." 74 Fed. Reg. at 52023. Obviously, without the ability to credibly rely on the OTA data sets, the Department's listing foundation rapidly deteriorates.

The Department's continued reliance on these faulty data sets and the mere itemization of threats—without any critical evaluation—typifies the Department's preference for speculation and surmise over scientific fact in this listing process. This preference violates the ESA's mandate to use the best available science. *See Building Industry Ass'n of Southern California v. Norton*, 247 F.3d 1241, 1246-47 (D.C. Cir. 2001); *American Wildlands v. Norton*, 193 F. Supp. 2d 244, 251-52 (D.D.C. 2002).

More importantly, the Department fails to grapple with the most fundamental question—which is: if the species is really in need of Federal protection based on the speculated someday impacts of wildfire, invasive species and climate change to its habitat, then why can't the Department *discern anything more than a hunch* that the abundance of the species may be in decline? Thus, the Department should rescind this listing determination.

The potential civil action to this Final Rule notwithstanding, you are strongly encouraged to personally review the memorandum prepared by Mr. Jeff Foss recounting the misrepresentation by IDNG staff. I am mindful of and agree with the Obama Administration's commitment to relying on quality scientific information; however, permitting the agency to list the species based on this faulty information will embolden agency scientists to "zealously but unintelligently pursu[e] their environmental objectives." *Bennett v. Spear*, 520 U.S. at 154.

Therefore, the Department should follow its own precedent in dealing with these types of issues and rescind this decision. Continued reliance on this data is not only arbitrary and capricious but is disingenuous.

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5. The Sullivan and Nations Report clearly does not provide the "slam dunk" case articulated in the Final Rule. The report states, "[s]lickpot 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 in the "rough census" survey. Sullivan and Nations, p. 2 (emphasis added). Thus, even with the authors assuming the best about the OTA data, the Secretary still does not have sufficient evidence to warrant the listing of the species.

D. The Secretary Failed to Adequately Assess the Effectiveness of the Governor's Conservation Efforts in Violation of the ESA

I know of no better and effective exemplar of state-based conservation for a species and its habitat than those contained in the CCA. The Act's requirement that the Secretary must take "into account those efforts…being made by any State…to protect such species," 16 U.S.C. § 1533(b)(1)(A), as a prerequisite to a listing decision is directed at rewarding robust efforts at species conservation and collaboration. Notwithstanding years of efforts as articulated in the Final Rule, we are advised that due to the inability of the Service to predict measurable results, the efforts must seemingly be regarded as irrelevant (stating that, "most [conservation measures] have not been demonstrated at this time to effectively reduce or eliminate the most significant threats to the species)". 74 Fed. Reg. at 52050.

The facts, however, portray a different picture. For example, in one breath the Final Rule downplays the importance of the CCA by stating, "[a]lthough a majority of the conservation measures identified in the CCA have been implemented to date, relatively few have been determined at this time to be measurably effective for conserving *Lepidium papilliferum*," while several pages earlier the document recites a different conclusion, "[h]owever, 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). Obviously, the conservation measures regarding livestock management are having a discernable positive impact on the species.

This is not the only example of the Department's flip-flopping on the adequacy of conservation measures. The Department boldly claims that "these efforts are not sufficient to offset the threats described in this rule to the point we consider it unlikely that *L. papilliferum* will become endangered within the foreseeable future." While at another point in the Final Rule, the Federal government notes that, "conservation efforts implemented at the OTA [] have been **successful in controlling the effects of wildfire on *L. papilliferum* habitats**." (emphasis added). Again, incurable discrepancy exists within the Department's analysis.

Astonishingly, the Final Rule concludes that, "[o]ur latest evaluation of planned future conservation efforts, taking into consideration the most recent information provided by the implementing agencies, again concludes that **35 out of roughly 600** individual management actions identified in the 5 formalized conservation plans for *Lepidium papilliferum* are certain to be implemented and effective." 74 Fed. Reg. at 52050. In support of this conclusion, the Department cites to the criteria contained in the Policy on Evaluating Conservation Efforts ("PECE") (60 Fed. Reg. 15100 (Mar. 28, 2003)).

The PECE was envisioned to function as "a policy for evaluating this second category, i.e. those conservation efforts that have not been implemented or have not yet demonstrated effectiveness." Such is not the case with the CCA which has been in place for over six years, implemented over 90% of its individual conservation measures, and has been effective, as admitted by the Department, in addressing and reducing threats to the species.

Instead of analyzing the CCA under the parameters of the PECE policy, the Department should have used the following questions to guide the effectiveness evaluation: (1) when does the evaluation of conservation measures shift from the PECE analysis—or after a warranted decision has been reached—to a question of whether these measures are "adequate" for conserving the species under the required five-factor analysis?; and (2) what is the plan's holistic impact on the status of the species both now and into the "foreseeable future?" The Department makes no attempt to answer these questions.

CONCLUSION

The Final Rule was rendered fatally defective through a process whereby studies showing Slickspot peppergrass is on a survival trajectory were minimized, the slender reed of articulated "new information" were maximized to the greatest possible extent, and studies that were determined to be flawed were "papered over" without serious analytical rigor. The Secretary's decision to list Slickspot peppergrass, therefore, triggers the admonition issued by the U.S. Supreme Court in *Bennett v. Spear*:

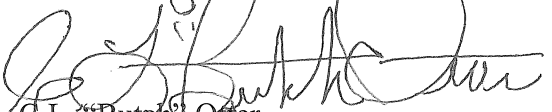
> the obvious purpose of the requirement that each agency "use the best scientific and commercial data available" [the language appearing both in ESA § 4(b) for listing and § 7(a)(2) for constraints on federal agency actions] is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that *another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.*

520 U.S. 154, 176-77 (1997) (emphasis added).

More importantly, after years of good-faith collaboration with the Federal government on advancing conservation values to protect Slickspot peppergrass, the Department has declared an about-face and simply determined that the CCA must be rendered incompetent. This final agency action is fatal under the law, but perhaps has also rendered fatal any future commitment to proactive species conservation by the State of Idaho and other interested non-Federal parties.

We appreciate your consideration of the claims described in this notice and urge the Department to quickly resolve these issues. Please contact David Hensley at (208) 334-2100 or Thomas Perry at (208) 334-2189 with any questions or to discuss these matters.

As Always—Idaho, "Esto Perpetua"



C.L. "Butch" Otter
Governor of Idaho

(Attachment)

November 18, 2006

To: Terry Rabot, ARD-ES-R1

From: Jeff Foss, SRFWO Field Supervisor

Subject: Background on LEPA Data from IARNG and Meeting on 12/16/06

Yesterday I briefly described over the phone discussions we had this week with staff biologists from the Idaho Army National Guard (IARNG) regarding their census data for LEPA. The bottom-line is that we learned this week, for the first time, of the IARNG's mis-characterization of their LEPA census data methodology. Before this week we have used the description of census methodology provided by the IARNG staff in January 2006. From discussions with IARNG staff this week we learned;

1) the Orchard Training Area (OTA) census methodology described by the IARNG in January 2006 as *"certain areas of the OTA are searched for LEPA plants..... count all the plants"* is now described by the IARNG as *"certain areas of the OTA are searched for relative numbers of plants."*

2) the census area at OTA was described by the IARNG in January 2006 as *"these areas contain approximately 98% of the LEPA on OTA"* is now described by the IARNG as *"these areas contain approximately 98% of the LEPA in OTA that was discovered before 2003."*

We also discussed with IARNG staff (Dana Quinney and Marjorie McHenry) the findings of the 2005 study by URS on LEPA at the Orchard Training Area (OTA).

I will highlight the chronology of our staffs' understanding and use of the OTA census data and summarize key points from our discussion with IARNG staff.

- January 2006 personal communication from Dana Quinney of the IARNG [Attachment 1]
  - *"Each year between mid-May and 1 July, certain areas of the OTA are searched for LEPA plants. These areas contain approximately 98 % of the LEPA in OTA. All living plants observed are counted and classed into reproductive individuals and nonreproductive individuals. This effort is called by the IARNG the annual LEPA census, and it has been occurring each year since 1991 (except for 1998, when it did not take place). Traditional ground areas defined by IARNG staff are walked by trained vegetation technicians who walk parallel lines through habitat approximately 20 meters apart through the entire area of each traditional census ground area. When a slickspot is noted, technicians walk to it and count all the plants. Totals for each traditional area are recorded and the information added to the IDARNG LEPA Census table."*

- February 2006 Draft BAI released for public and peer review [Attachment 2]

    - Page 29 of our FWS document states *"A census effort has occurred at the OTA between mid-May and July 1 each year since 1991, where observers walk in parallel transects approximately 20 m (65.6 FT) apart across approximately 98 percent of the LEPA habitat at OTA. When a slickspot is seen, technicians walk to the slickspot and count all the plants (Quinney pers. Com. 2006c)."*

- March 2006 peer review comments from Danna Quinney, Marjorie McHenry, and Jay Weaver of the IARNG on the Draft BAI did not offer any changes to the FWS description of the IARNG's census methodology [Attachment 3]. Included in their 12 pages of comments was;

    - *"our plot data are about as non-subjective as plot data come, and the precipitation data and LEPA census data are objective enough to be published"*

    - *"while it is possible for a few plants to be missed on the overall census, it is almost impossible for a plant to be missed on the plot count data."*

    - *"we don't like the phrase: the subjective nature of plant counts. Yes the annual censuses have a subjective element. But no, the plant counts on the plots are not subjective....."*

- November 8, 2006 letter from Major General Lawerence F. Lafrenz of the IARNG provided a summary of their activities, monitoring, and research but did not offer any changes to the FWS description of the IARNG's census methodology as described in the Draft BAI which was made available for comment [Attachment 4]. We did discover an error in the IARNG letter pertaining to 2006 census monitoring where they showed 6, 981 plants which was later corrected via a phone conversation when Gina Glenne on our staff called Dana and the correct number of 8,986 was confirmed (the correct number of 8,986 was provided in a report from the IARNG on September 18, 2006)

- November 16, 2006 a meeting was held between me (Gary, and Gina) and Dana Quinney and Marjorie McHenry of the IARNG at my request (Attachment 5]. I contacted Charlie Chambers of the IARNG that morning to set up the meeting because of questions I had about the IARNG's census data and the 2005 URS report. At this meeting my staff and I learned for the first time that

    - The census methodology is more of a "rough census method" that is <u>not</u> designed to count every LEPA plant in every slickspot in the area surveyed

- In Dana's words *"the rough census likely accounts for approximately 1/3 of the total population of the area surveyed by this method."*

- In other words, when the census is conducted by walking 20 meters apart, all observed LEPA plants are counted but not all LEPA plants present in the rough census area are observed by this method. Apparently 2/3rds of the plants present may not be counted by the IARNG's census methods. [part of the explanation for the missed plants is that the sagebrush landscape can be such that it is difficult to spot every slickpsot and therefore not observe every LEPA plant present in the rough census area when walking 20 meters apart].

- We discussed how much of the total LEPA on OTA is surveyed by the "rough census." We were told by Dana that "up until a few years ago the census areas contained approximately 98% of the LEPA on OTA." I asked what changed. Dana explained that new discoveries of LEPA on the OTA, such as those noted in the 2005 URS Report, has expanded the population of LEPA on the range.

- We briefly discussed the 2005 URS Report that was also made available to the public during this most recent public comment period. This report documents a survey inventory that was conducted across several areas of the OTA . Included in the URS Report is a total of plants counted as a result of the survey inventory. Across the OTA, the URS survey inventory identified 365 new slickpsots with LEPA, 125 historic slickspots with LEPA present (previously occupied by LEPA as identified by visual markers), and 66 historic slickspots without LEPA present). Total number of slickspots was 556 and total LEPA plants counted was 43, 925. I asked how the URS inventory areas relate to the locations of the INRNG'S rough census survey areas. Dana drew on a map the location of the rough census areas. By visually comparing maps of the URS inventory areas with the IARNG rough census areas (see attached maps), it appears that the rough census areas to a large degree overlap 2 of the 5 URS inventory areas (Red Tie Region and Orchard Corner Region). The Red Tie Region inventoried by URS appears to cover somewhat of a larger area than the IARNG's rough census area at Red Tie. By a visual comparison of the maps and looking at the IARNG rough census data and the URS Report for the Red Tie Region (27, 089 LEPA plants) and Orchard Corner Region (3,600 LEPA plants), the following rough comparison can be made

    - IARNG Rough Census for 2005 reported 18, 599 LEPA plants

    - URS Report for 2005 reported 30, 689 LEPA plants in the Red Tie and Orchard Corner Regions

- November 17, 2006 I received a fax [Attachment 7] from Dana Quinney that provided 6 pages of information including a revised description of the "Rough Census Transect Methods" and maps of their plot locations. Below is the text (italics) provided in the fax with the identification of primary changes (underlined) and changed/deleted text (strikeout) from the January 2006 methods provided by the IARNG.

    - *IDARNG LEPA Rough Census Transect Methods*
      Dana Quinney, State of Idaho Military Division

      "Each year between mid-May and 1 July, certain areas of the OTA are ~~searched~~ sampled for relative numbers of Lepidium papillferum plants by means of walking transects. These areas contain approximately 98 % of the LEPA in OTA that was discovered before 2003. All living plants observed are counted and classed into reproductive individuals and nonreproductive individuals. This effort is called by the IDARNG the annual LEPA rough census, and it has been occurring each year since 1991 (except for one year with incomplete data, ~~when it did not take place~~). The traditional rough census ground ~~areas~~ transects are walked by trained ~~vegetation~~ technicians who walk parallel lines through the habitat approximately 20 meters apart through the entire area of each traditional census ground area. When a slickspot is noted, technicians walk to it and ~~count all the plants~~ if Lepidium papillferum is present, count all the plants enumerating the number of reproductive plants and number of nonproductive plants. Totals for each traditional area are ~~recorded~~ summed and the information added to the IDARNG LEPA Rough Census ~~table~~ spreadsheet."

The changes noted in this memo require additional discussion within the FWS as we interpret LEPA data and complete the analysis for the final listing determination. One consideration to discuss it that the changes to the rough census methodology as described by the IARNG above are different than the IARNG census methodology that was shared with the science panel and manager panel in May 2006.

I will be in the Regional Office on November 22 to discuss this memo and to highlight our analysis of public comment and new information.