State of Utah

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Office of the Governor
PUBLIC LANDS POLICY COORDINATION OFFICE

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July 7, 2014

Dan Ashe
Director
U.S. Fish and Wildlife Service
Washington D.C.

Public Comments Processing
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FWS-R6-ES-2013-0082
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Via regulations.gov

Re: Comments of the State of Utah on proposed listing of, and proposed designation of critical habitat for, Graham's Beardtongue (*Penstemon grahamii*) and White River Beardtongue (*Penstemon scariosus* ver. a*lbifluvis*), (78 Fed. Reg. 47,590 (August 6, 2013); 78 Fed. Reg. 47,832 (August 6, 2013); 79 Fed. Reg. 25,806 (May 6, 2014)), (Docket Nos. FWS-R6-ES-2013-0081 and -0082).

Dear Director Ashe:

The State of Utah has reviewed the draft economic analysis for the proposed designation of critical habitat for Graham's beardtongue (*Penstemon grahamii*) and White River beardtongue (*Penstemon scariosus* var. *albifluvis*)[1], which may occur if either beardtongue species is listed as threatened or endangered under the Endangered Species Act. The State of

[1] 79 Fed. Reg. 25,806 (May 6, 2014).

Utah commented previously on the proposed listing of the Graham's beardtongue and White River beardtongue and proposed designation of critical habitat in a letter dated October 7, 2013.[2] The State of Utah expressly reaffirms those comments and incorporates them by reference.

FWS recently published the draft Economic Analysis (DEA) for the proposed critical habitat designation for Graham's and White River beardtongue.[3] The DEA consists of two separate documents: the Incremental Effects Memorandum for the Economic Analysis for the Proposed Rule to Designate Critical Habitat (IEM, April 15, 2014)[4], and the Industrial Economics, Inc. Screening Analysis of the Likely Economic Impacts of Critical Habitat Designation (Screening Analysis, May 1, 2014).[5] The purpose of the DEA is to consider the economic impact of listing a proposed species and designating critical habitat on land proposed for critical habitat designation.[6] The Tenth Circuit Court requires FWS to apply the "cumulative" approach to measuring economic impacts of critical habitat designation (sometimes referred to as the "coextensive" approach), examining all economic impacts of listing a propsed species and designating critical habitat on the land in question.[7] However, the DEA fails to apply the cumulative approach, instead only applying a baseline approach which only evaluates the economic impact of critical habitat designation relative to the impact of the beardtongues' listing with critical habitat designation.

By failing to provide a cumulative economic analysis, the DEA is incomplete and cannot be used to fulfill the statutory requirements. The economic impact of critical habitat designation is likely to be much greater and more burdensome upon landowners, lessees of federal land, and the economy of the state than the impact estimated in the "baseline approach" employed in the DEA. In the event that either species of beardtongue is listed as threatened, FWS should not designate critical habitat for the beardtongue because of the failure of the DEA to meet statutory requirements, and the severe economic impacts that would likely result from such designation.

FWS should withdraw the proposal for listing of both species of beardtongue, and then become a signatory to the Conservation Agreement and Strategy for Graham's Beardtongue and White River Beardtongue[8], which was developed jointly by FWS, BLM, Utah DWR, Utah Public Lands Policy Coordination Office, Uintah County, and SWCA Environmental

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[2] *See* regulations.gov, Docket No. FWS-R6-ES-2013-0081, Comment ID No: FWS-R6-ES-2013-0081-0013, Oct. 18, 2014.
[3] *Supra* note 1, at 25,808.
[4] Incremental Effects Memorandum for the Economic Analysis for the Proposed Rule to Designate Critical Habitat for the Graham's beardtongue and White River Beardtongue, April 15, 2014, *available at* http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/20140505IncrementalEffectsMemo.pdf.
[5] Industrial Economics, Inc. Screening Analysis of the Likely Economic Impacts of Critical Habitat Designation for Graham's and White River Beardtongues, May 1, 2014, *available at* http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/20140505ScreeningMemo.pdf.
[6] 16 U.S.C. 1533(b)(2)
[7] *New Mexico Cattlegrowers Ass'n*, 248 F.3d 1277 (10th Cir. 2001), at 1285.
[8] *Supra* note 1, at 25,806, *available at* http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/20140505ConservationAgreement.pdf.

Consultants and will provide necessary protections for both species without listing or critical habitat designation.

FWS must use the cumulative approach to measure the economic impacts of critical habitat designation instead of the baseline approach

The Tenth Circuit has ruled in *New Mexico Cattlegrowers Ass'n v. Salazar* that FWS does not have the discretion to determine which economic impacts it may consider in designating critical habitat, but that FWS must consider the cumulative impacts of critical habitat designation.[9] The Tenth Circuit found that "The statutory language is plain… [we are] compelled by the canons of statutory interpretation to give some effect to the congressional directive that economic impacts be considered at the time of critical habitat designation."[10] The Court found that Congress, in enacting the ESA, required the Department of the Interior and FWS to consider the cumulative economic impacts, including those caused by listing the species, when deciding whether to designate critical habitat. This consideration of the cumulative economic impact is precisely what the DEA fails to do.[11]

The ESA requires the Secretary of the Interior to consider "the economic impact… and any other relevant impact, of specifying any particular area as critical habitat."[12] The ESA also states that an area may be excluded from critical habitat designation if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless…the failure to designate such area… will result in the extinction of the species concerned."[13] The Tenth Circuit found that this language is unambiguous and requires FWS to consider the full, cumulative economic impacts of listing and critical habitat designation on the land on question.[14] FWS may not limit its economic analysis to the post-listing economic impact of critical habitat designation versus the economic impact of non-Critical Habitat land still burdened by section 7 consultation.[15] In other words, FWS must apply the "cumulative" approach, not the "baseline" rule applied in the beardtongue DEA[16]

Within the State of Utah, FWS must follow the 10th Circuit's interpretations of the ESA

Graham's and White River beardtongue exist primarily in Utah and a small portion of Colorado, therefore the beardtongue habitat is entirely within the jurisdiction of the Tenth Circuit. The Tenth Circuit has determined that the language of the ESA is unambiguous,[17]

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[9] *Supra* note 7, at 1285.
[10] *Id.*
[11] *Supra* note 4, at 1.
[12] 16 U.S.C. 1533(b)(2).
[13] 16 U.S.C. 1533(b)(2).
[14] *Supra* note 7.
[15] *Id.*
[16] *Id.* See also *Wyoming State Snowmobile Ass'n*, 741 F.Supp. 2d 1245, 1264 (D. Wyo. 2010) (FWS must consider the cumulative analysis of the economic impacts of critical habitat designation instead of merely conducting an analysis of the economic impacts).
[17] *Supra* note 7.

therefore, FWS must perform a cumulative analysis of the economic impacts of both listing and critical habitat designation on land proposed for critical habitat designation.[18]

In 1978, the ESA was amended to require the Department of the Interior to consider "that economics and other factors be considered prior to designating critical habitat."[19] Courts have found that the "economic impact" provision of ESA is meant to cause FWS to look beyond biology when making a listing decision. *Wyoming State Snowmobile Ass'n* states that "Congress wanted the Secretary to understand the costs on human activity of making a designation before he made a decision and thereby provide an opportunity to minimize potential future conflicts between species conservation and other relevant priorities at an early opportunity."[20]

The Draft Economic Analysis for the proposed critical habitat designation fails to consider the full economic impact of critical habitat designation

The draft economic analysis (DEA) of the proposed critical habitat designation fails to consider the full economic impact of critical habitat designation. First, threats to the White River beardtongue and Graham's beardtongue are significantly overstated. The Incremental Effects Memorandum (IEM) portion of the DEA[21] boldly claims that "Approximately 91% of all known Graham's beardtongue plants and 100% of all known White River beardtongue plants will be subject to direct or indirect impacts from energy development."[22] This claim in the IEM is inaccurate. Reasonably foreseeable development of oil shale on federal lands (described by FWS as the primary threat to the species) has been limited by regulatory action by the Bureau of Land Management to limit future oil shale leasing. Similarly, natural gas development (a lesser threat due to the possibility of relocation of pads and directional drilling) is not economically feasible in species habitat at current and foreseeable natural gas prices. Due to BLM regulation and the reality of the natural gas market, it is unreasonable and erroneous for the IEM to unequivocally state that 91% of Graham's beardtongue and 100% of White River beardtongue plants would be subject to the impacts of energy development.

Second, the Screening Analysis[23] portion of the DEA ironically underestimates potential future energy development. FWS's DEA contains a significant inconsistency between the contentions in the IEM that substantial energy development is highly likely in plant habitat while the screening analysis assumes a much lower level of energy development activity.[24] The screening analysis states that "Substantial uncertainty exists regarding the timing, location, and intensity of future oil shale and tar sands development."[25] The screening analysis for the DEA estimates that incremental section 7 consultation costs will only be around $130,000 in a given

[18] *Supra* note 7, at 1285.
[19] H.R. Rep.No. 96-167 at 7 (1979) *reprinted in* 1979 U.S.C.C.A.N. 2807, 2812.
[20] *Wyoming State Snowmobile Ass'n*, 741 F.Supp. 2d 1245, 1266. (D. Wyo. 2010)
[21] *Supra* note 3
[22] *Supra* note 3, at 4.
[23] *Supra* note 2.
[24] *Supra* note 6, at 34.
[25] *Supra* note 6, at 28.

year, and that it is unlikely that more than one new energy development project will be initiated each year within the critical habitat during the 10 years.

The state rejects the DEA's conclusion that incremental section 7 costs could be $130,000 a year as not a complete analysis of the true costs of the proposal. Changes in energy markets, technological improvements, climatic conditions, and international affairs could alter energy development in the near future, and the economic impact of designating critical habitat will likely be much more severe than estimated in the DEA. Because the Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," and the economic impact findings in the DEA contain "substantial uncertainty," the FWS does not have enough information at this time to make a well-informed critical habitat designation.

The DEA does not consider any economic impacts to School and Institutional Trust Lands Administration (SITLA) or state funds from energy project delays caused by Section 7 consultations, or areas placed off limits due to required conservation measures such as the pollinator buffers.[26] For state school trust lands, these lost revenues would affect the Permanent School Fund. For federal lands, the State mineral lease fund, which provides financial support to local communities, would be affected as nearly half of mineral revenue from federal lands is required by the Mineral Leasing Act to be distributed to the states.

The "best scientific and commercial data" available shows that neither the Graham's beardtongue or White River beardtongue is threatened or in need of critical habitat designation

First, recent discoveries of thousands of additional plants of both species in multiple areas (both as referenced at 79 FR 25811, and in surveys since the publication of the May 6, 2014 notice), indicate that the proportion of plant populations actually threatened by the above-referenced activities is much smaller than acknowledged by FWS in its analysis. Indeed, the FWS meeting notes of beardtongue scientists dated December 12, 2012 (described below, and cited by USFWS as support for the listing, conclude:

> Given current status and current threats, both species are likely to be viable in the near future (100 years)
>
> No one thinks that PESCAL [White River] and PEGR [Grahams] are currently unstable. PEGR has such a large range that it is likely to persist in the future.[27]

[26] SITLA is an independent state agency responsible for managing lands granted by Congress to Utah at statehood for the financial support of public education and other public institutions in the state. SITLA manages approximately 3.4 million acres of state trust lands, and over 1 million additional acres of severed mineral estate, on behalf of the Utah land grant trusts. Revenue from school trust lands is deposited in the Utah Permanent School Fund, a perpetual endowment providing financial support to each K-12 public and charter school in Utah.
[27] FWS Meeting Notes, December 12, 2012 "The purpose of today's penstemon expert's meeting".

Clearly, expert scientific opinion cited by FWS shows that populations of both species are viable and should not be listed as threatened or be placed under critical habitat designations.

Second, the state reiterates the lack of scientific basis for critical habitat buffers based on pollinator flight distance. In the August 6, 2013 Notice, the literature citation for pollinator issues provides FWS staff notes (Service 2012a) as a citation to Section 7 Consultation Guidance, which has no relevance to pollinator issues. Assuming that this reference is simply an error, and the citation was meant for meeting notes described as Service 2012b, the only information in the record on pollinator buffers in those notes is a conclusory statement that FWS would be using based on pollinator information from other plants, with no further backup or information of relevance as to Graham's and White River beardtongue.

FWS does not fully evaluate the protections provided by the Conservation Agreement for Graham's beardtongue and White River beardtongue

Despite its objections to the proposed listing, the state participated in the development of the Conservation Agreement (CA) described in the May 6, 2014 notice, together with FWS, BLM, SITLA, and Uintah County. With financial support from PLPCO and Uintah County, SITLA expended approximately $50,000 in consulting fees with SWCA, a private consulting firm, to develop the technical basis for the CA, specifically geospatial development and literature support.

The state believes the proposed CA provides a substantial net benefit to the two species as compared to listing of the species, because of the commitment of SITLA and Uintah County to impose development restrictions on state trust and private lands. A critical point for FWS is that threatened and endangered plants on state and private lands are not protected by the Endangered Species Act – the landowner is not required to take any protective action, and may freely disturb or destroy populations and their habitat. A federal listing would not provide additional protection to the significant populations of the two species on state and private lands. Accordingly, binding commitments by state and private landowners – as exemplified by the CA – are necessary to fully protect the two species. The CA will provide legally-binding protections during the 15-year term of the agreement on almost 10,000 acres of occupied habitat on state and private lands for which no protection would otherwise be available. Included within these lands are full conservation status for 2,355.9 acres of SITLA lands, with over 3,000 additional acres of SITLA lands in interim conservation status that is likely in most cases to be permanent.

In addition, the state, SITLA and the county have devoted, and will continue to devote, significant funding and staff time to ensuring the success of the agreement and the continued viability of the species, including the joint conservation team that will work to develop better science on maintaining and restoring plant populations. The state has funding available through the Endangered Species Mitigation Account. With the CA, all of the parties are in alignment and are working to preserve these species. In contrast, with a listing, the non-federal parties lose any incentive to protect the species, and the significant conservation areas on state and private lands will lapse with the automatic termination of the CA.

Upon signature of the CA, SITLA will enact binding regulation, or other binding action, to enforce the provisions of the CA with respect to state trust lands identified as conservation areas. Uintah County will similarly enact zoning regulations to enforce the provisions of the CA within conservation areas. These required actions constitute enforceable regulatory mechanisms to protect the subject species that would not exist if the species are listed.

Conclusion

In conclusion, the FWS cannot rely upon the proposed economic analysis when deciding whether to designate critical habitat for the beardtongue because it is incomplete. The proposed listing should be withdrawn, but if either beardtongue species is listed, FWS should not designate any critical habitat for either species due to the insufficiencies in the draft Economic Analysis.

The state requests that USFWS finally withdraw the proposed listing decisions, refrain from listing the two species as threatened or endangered, and work with the state and Uintah County to proactively protect the plants through the cooperative efforts exemplified by the CA.

Thank you for the opportunity to comment. Please feel free to contact John Harja, at (801) 537-9802 with any questions or concerns.

Sincerely,

Kathleen Clarke
Director