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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT,)	No. 06-cv-277-BLW
)	
Plaintiff,)	PLAINTIFF WWP’S
)	STATEMENT OF FACTS
vs.)	
)	
U.S. FISH AND WILDLIFE SERVICE,)	
)	
Defendant.)	

Plaintiff WWP respectfully submits the following Statement of Facts to support its summary judgment motion under D. Idaho Rule 56, based on documents from the Administrative Record or obtained under FOIA. The facts are presented chronologically to highlight the sequence of events resulting in the January 2005 “not warranted” determination:

December 22, 2003: Plaintiff Western Watersheds Project and others petition the Service to list the greater sage-grouse (*Centrocercus urophasianus*). *AR 1_6 (WWP Exh. 1)*.

April 21, 2004: Service publishes finding that petition presented “substantial information indicating that listing the greater sage-grouse may be warranted.” 69 Fed. Reg. 21484 (4/21/04) (*AR 2_1; WWP Exh. 2*).

May 14, 2004: Notes of Service staff meeting indicate Service Director Steve Williams is “having to respond to Steve Griles” on the sage-grouse listing. *AR MI 30 (GSG 11510)*.

June 2004: Western Association of Fish and Wildlife Agencies (WAFWA) publishes “Conservation Assessment of Greater Sage-Grouse and Sagebrush Habitats,” prepared by Jack Connelly and other leading sage grouse experts. *AR 4_213 (GSG 7002-7611)*.

July 1, 2004: “I just got a call from Griles’ office and the politico’s, including Steve W, will meet next Thursday,” to address “What Fish and Wildlife’s strategy is” and “Who/what groups are involved?” *AR em 8996 (GSG Emails 13870)*.

July 29, 2004: Service memo for BLM meeting: “To date, BLM has not provided the information we have requested and we do not know the basis on which they have concluded that their management practices result in benefits to sage-grouse.” *AR BLM 72 (GSG 10144-47)*.

August 11, 2004: “As expected, it has taken a long time to get approval for the expert panel on sage grouse extinction risk from the Washington office.” *GSG Emails 5610*.

August 11, 2004: Email from Service lead sage-grouse biologist Pat Deibert states: “I am no longer working on the status review this week, as I have 3 days to turn around BLM’s latest draft of the data call. I also have to get a response for Julie MacDonald to my RO within the next day or so.” *GSG Emails 1068*.

August 16, 2004: Email from Pat Deibert states: “I’ve not had a chance to look at your edits. . . Been busy dealing with jm [Julie MacDonald] again today.” *GSG Emails 1028*.

August 16, 2004: Email from Julie MacDonald to Service staff raises numerous questions and objections to validity of WAFWA Conservation Assessment and requests underlying state data, mapping, and lek locations. *GSG Emails 13547-49*.

August 18, 2004: Service memo states that BLM’s sage-grouse conservation plan “still lacks crucial information that we would need to credibly reach any conclusions about the certainty of effectiveness of their future actions – a key problem that we pointed out to them at the meeting in Salt Lake City.” Also, Service did not send memo to BLM “regarding grazing and energy development . . . in light of the comments being made by Julie MacDonald about the type of information that she thought was – and was not – appropriate for us to ask BLM for.” *GSG Emails 1020*.

August 19, 2004: Email from Mary Henry (Ass’t Regional Director, Region 6) to Julie MacDonald: “Your questions [from 8/16 email] remind me of a microscope . . . with a 1000X, 100X and 10X magnification capability.” *AR em 9043 (GSG Emails 13923)*.

August 20, 2004: Email from Julie MacDonald to Service staff demands long list of documents relating to conservation plans for sage-grouse and how Service will analyze them; and states that “it is clear from your response that this office has either an incomplete or

imperfect understanding of what the Service is doing,” and wants a conference call to address various questions about the Service’s analysis of sage-grouse populations. *GSG Emails 1345-46*.

August 20, 2004: Service staff email: “Julie ‘blew up’ at Terry Rabot this morning regarding responses form [sic] sage-grouse folks with regard to her questions . . . Mary Henry is apparently going to try to call Julie to get things calmed down.” *Em 9043 (GSG Emails 13923)*.

August 20, 2004: “We had a 1 ½ hour conference call with Julie [MacDonald] today supposedly to have Julie tell where we were with the review of the BLM conservation plan. Pat Deibert got perhaps one paragraph out and for the rest of the time it was Julie telling us ‘failure is not an option’... that meant BLM’s conservation plan must be acceptable to FWS.” *AR em 8621 (GSG Emails 13545)*.

August 23, 2004: “On the conference call with Julie MacDonald last Friday (8/20), a question arose how BLM determined whether a particular management action or conservation effort resulted in a ‘benefit’ to sage-grouse,” but BLM’s one-paragraph response “does not help sort out the key information” for numerous reasons. *GSG Emails 998*.

August 24, 2004: “I am stunned that after 6 months of interaction with BLM they believe one such vague paragraph will suffice to describe the ‘scientific underpinnings’ that Julie M. asked them for, by action, back in July in DC.” *AR Em 8627 (GSG Emails 13554)*.

August 27, 2004: Email from Jean Cochrane states “we are carefully avoiding having the [expert] panel make any ‘recommendations,’ or even forming a consensus. . .” *GSG Emails 971*.

September 15, 2004: “Briefing For The Director” states: “BLM’s submission is still draft and as such is not currently being considered. . . as part of the status review for the greater sage-grouse,” and “expert panel will not recommend a decision nor will they be asked to reach a consensus on threats to the species. They will be asked to independently evaluate the relative

impact of a variety of threats to the species from which an overall risk of extinction will be calculated.” *AR P25 (GSG 11687)*.

September 23, 2004: Industry group “Partnership for the West” submits “Information Quality Act Challenge regarding the Greater Sage-Grouse” to Interior Secretary Norton. *AR IQA1 (GSG 11293-498)*.

September 24, 2004: Emails between Service staff about draft “federal regulations” section state: “It seems to me that we can and must make the point that the [BLM’s] manual direction is not a requirement, is not mandatory, and it does not result in complete protection of habitat. . . I also think this write-up needs to discuss BLM’s BMPs for oil & gas and other direction they have – pointing out the BMPs are voluntary, not required, and that they are extremely general in any case (e.g., ‘consider reducing roads’).” *GSG Emails 1625*.

October 5, 2004: Julie MacDonald email to Service staff states: “I am going to ask Tom Graf and a solicitor from BLM in Denver to help you do the assessment of existing regulatory protections of the sage grouse.” *GSG Email 13074*.

October 6, 2004: Memorandum from Casey Stemler (Service Region 9) to Steve Williams, forwarding above MacDonald email and stating: “What do you want to do? I’m no expert on this process, but this request and ‘their intervention’ seems a little strange to me.” *Id.*

October 12, 2004: Emails between BLM and Service staff regarding BLM’s sage-grouse conservation plan state: “BLM has been ‘putting the final touches’ on this pig since June. You’d think there would be enough lipstick on it by now to convince the F&WS that all is well in the land of Oz. Pay no attention to those men behind the curtain, nor to the woman they represent.” *AR Em 1132 (GSG Emails 3952)*.

October 12, 2004: Email from Jean Cochrane to Pat Deibert regarding materials for expert panel states: “Honestly, they have the CA [Conservation Assessment] already (plenty of reading & all the really important info – we just can’t appear to be ‘endorsing’ it!! stupid).” *AR em 1133 (GSG Emails 3956)*.

October 18, 2004: “Synthesis of Biological and Habitat Information For Use in the Greater Sage-Grouse Extinction Risk Analysis,” presented to expert panel, contains extensive edits and comments from Julie MacDonald, including statements criticizing reliance on WAFWA Conservation Assessment as having: “a. no data, b. no information on the theoretical basis for data reduction (the models). . . No peer review comments (since it was unpublished). Singling the document out in our preface gives it undue weight particularly in light of the Data Quality Act Petitions we have received with respect to its shortcomings.” She challenges description of sage-grouse as a sagebrush obligate species; and responds to statement that “Sage-grouse depend entirely on sagebrush throughout the winter for both food and cover” with the comment: “I believe that is an overstatement, as they will eat other stuff if it’s available.” *AR 3_1 (GSG 958-1156)*.

October 26, 2004: Julie MacDonald email to Service staff criticizes “synthesis” to be provided expert panel because it “relies on both our 90-day finding and the WAFWA report, with many of the comments we received on their data shortcomings ignored. . . . In addition, I note that the FWS takes the findings of the WAFWA Report at face value. . . This is done despite the fact that our staff do not have [data, information on modeling algorithms or assumptions, have seen none of the peer review]. I do not see how this data/information can be used or is consistent with the requirements of the Data Quality Act.” *GSG Emails 13172*.

October 26, 2004: Following meeting with Assistant Secretary of Interior for Parks, Fish and Wildlife Roger Manson, Steve Williams, and “Barry and Mike from the Solicitor’s office,” Service email states that Information Quality Act challenge from Partnership for the West is to be provided to expert panel. *AR Em 4894 (GSG Emails 7487-88)*.

October 26, 2004: Correspondence to Expert Panel members includes an “additional section of the synthesis of biological information document that summarizes existing regulatory mechanisms,” along with “Bureau of Land Management submission to the Service in response to our solicitation for comments in our 90-day finding” and “submission from Partnership for the West regarding the Information Quality Act that should be considered along with other comments previously provided.” *AR E27 to E33 (GSG 11188-202)*.

October 27, 2004: Email about “Julie M. comments on synthesis” states: “JM was not just commenting but had already edited much of the document with select edits – but she does not show those edits until you compare it with what we sent out. . . Either intentionally or from ignorance JM is reflecting a lack of basic understanding of what the synthesis document is, what the scientific process is and how to cite literature.” *AR em 8859 (GSG Emails 13687)*.

October 28, 2004: Julie MacDonald email to Mary Henry stating: “I was concerned about the public comments because in my reading of the synthesis document it appeared to me that a number comments were completely ignored, you will see this in the comments I have on the document.” *GSG Emails 13201*.

October 28, 2004: “Julie MacDonald is apparently calling states directly to obtain raw data used in the CA [Conservation Assessment].” *AR em 8803 (GSG Emails 13654)*.

October 31, 2004: Emails about Julie MacDonald’s edits and comments on the “synthesis” document given to the expert panel state that: “87% of Julies comments or edits

either create an error or inconsistency in the synthesis document or are simply her opinion (e.g., 'don't cite the CA'). Pretty telling if this holds." *AR Em 5098 (GSG Emails 8719)*.

November 1, 2004: "Tom Graf reports that SOL [Solicitor of the Interior] Woolridge wants him to attend the sage-grouse expert panel meeting to represent SOL." *GSG Emails 8863*.

November 1, 2004: Email from state wildlife official states: "Apparently an Assistant Secretary of Interior (Julie Macdonald) is attempting to build a case for not listing the bird to rebut a possible Service decision and/or trying to find a way to circumvent the ESA process without appearing to interfere with the Service effort." *AR em5168 (WWP Exh. 15)*.

November 2, 2004: "The Regional Solicitor's office is involving itself in biological issues in ways that I think are inappropriate. Further, the lawyer involved, Tom Graf, has been directed (he says by the SOL in DC) to attend our meeting with the Expert Panel...I am sure to keep tabs on what we are doing for Bob Comer and Julie M." *AR em8860 (GSG Emails 13696)*.

November 2, 2004: Julie MacDonald emails Service staff to make sure that "my annotated document" is given to the expert panel, and copies Ass't Secy Roger Manson and others; and she is assured that her version will be provided to the panel "with the caveat they are from an anonymous review." *AR Em 8209 (GSG Emails 13292-93)*.

November 3-4, 2004: Expert Panel meets, and votes on relative threats and extinction timeframes for sage-grouse. *AR E1a-E2h*. Memorandum prepared by Service's Regional Director Ralph Morgenweck (Decision Team member) states (*GSG Emails 13702-04*):

"Just prior to that meeting, I become aware of actions by a member of the Denver Regional Solicitor's office that involved contact with the state of Wyoming asking for information relevant to the sage grouse finding but asking the state not to inform the Fish and Wildlife Service of the contact. . . Tom Graf, the attorney from the Regional Solicitor's office who is assigned to the sage grouse issue, apparently is the person that made the contact with Wyoming. . . During the first day of the expert panel's deliberations, Mr. Graf was seated some distance behind me with two other observers. It was reported to me . . . that Mr. Graf continuously muttered his disagreement with statements made by expert panel members to the

point that he was disturbing those around him. . . Mr. Graf was also overheard to ask the expert panel members whether they thought the species should be listed or not when that was clearly not the role of the expert panel. . . During the second day of the panel's deliberations. . . Mr. Graf rose from his seat and stood over the computer operator copying each score into his notes [even though the] expert panel's votes were to be anonymous. . . Mr. Graf continued to engage the panel members in conversation during breaks and appeared to press them with questions and opinions that would support a not warranted finding.” (AR em8864)

November 5, 2004: Decision Team votes on listing determination. AR E3a-E4, E24.

November 9, 2004: Interior Secretary Norton says that listing sage-grouse poses “very significant potential” to disrupt oil and gas development in the West. AR G22.

November 9, 2004: Director Williams “requested an in-person briefing regarding the panel and . . . accepted the recommendation of the Decision Support Team.” GSG Emails 4657.

November 10, 2004: Service staff brief Assistant Secretary Manson and others on Expert Panel and Decision Team meetings. GSG Emails 9089.

November 16, 2004: BLM releases final version of its “National Sage-Grouse Habitat Conservation Strategy.” GSG 10282.

November 19, 2004: “We are hearing that BLM has told WAFWA that our finding is NW. . . apparently, Julie M. shared our finding with BLM and the rest is history.” AR Em 9367 (GSG Emails 14117).

November 23, 2004: Service email: “I have been instructed by Julie to provide her with a copy of the sage grouse rule in whatever shape it is in. Per Julie, Judge Manson agrees that she should start reviewing the rule now, and not be kept to the concurrent review process the Region envisions.” GSG Emails 9406.

December 1, 2004: Email from Sharon Rose, External Affairs, addresses draft press release on not warranted finding, and queries (AR Em 5435; GSG Emails 10091):

“With this ‘rigorous scientific process’ that includes risk determination, structured analysis, etc, -- how do we address the question – Why now, why not for the prairie dog or other

wide ranging species. . . . If it's so good and brings in experts that can only help the process, you should use it every time. . . . How can you go back to the 'old way' when you have a new and improved system. . . . THIS SEEMS LIKE IT COULD BE A QUESTION THAT A REPORTER, CONGRESSIONAL REP, ETC WOULD ASK."

December 1, 2004: Email from Thomas Graf states: "The Solicitor is still waiting for [sic] the materials you promised us... everything that went to the panel and everything produced by the panel. . . . Please send that material ASAP." *GSG Emails 10223*.

December 3, 2004: Draft of petition finding says "Regional Solicitor" was part of "decision support team" – deleted in later drafts. *AR Em 5442-a1 (GSG Email 010112)*.

December 6, 2004: Memo from Thomas Graf to Ralph Morgenweck: "We have grave concerns about the content of the draft Not Warranted finding." *FOIA C2*.

December 7, 2004: Mary Henry email: "please communicate that we have heard from several reviewers and have caught the 'tone' issue and will clean it up.. Tom Graf objected to the 'tone' too...it reads as if we will say 'warranted' but we say 'not warranted'." *AR Em 8325 (GSG Emails 13369)*.

December 8, 2004: Comments from reviewer of draft finding state "Wow... this seems to argue for a 'warranted' finding!" *GSG Emails 10627-28*.

December 9, 2004: Pat Deibert email stating (*GSG Emails 10747*):

"I just received a phone call from Joe Bohne, the head of the Interagency Framework Sage-Grouse Team. He believes the effect of Julie MacDonald's comments in the Synthesis regarding the WAFWA conservation assessment is that WAFWA is getting mixed messages from DOI about the State's data and ability to do science. His concern is that these comments will further erode any support to continue with a rangewide conservation strategy if DOI believes the conservation assessment is 'bogus'."

December 14, 2004: "Julie is working on Prebles, will do sage grouse next. . . . I get the feeling she is likely to spend considerable time on both." *GSG Emails 11129-30*.

December 23, 2004: Email from Thomas Graf transmitting “a copy of the [not warranted finding] with our changes/comments.” *GSG Emails 11315*. Solicitor’s changes include adding, at end of summary of factors/habitat conversion, the concluding paragraph: “While conversion occurs today, it is such low levels we do not consider it a threat.” *AR Em5704* (p. 11202).

January 6, 2005: Pat Deibert email stating: “we have just received word that the finding HAS to be on the 4 pm shuttle to the FR [Federal Register] TODAY (order of Manson). We are doing a few final edits here, and DC is handling Julie M’s comments this a.m.” *AR Em 1787 (GSG Emails 6473)*.

January 12, 2005: “Not warranted” determination for Greater Sage-Grouse published in the Federal Register. 70 Fed. Reg. 2244-82 (1/12/05) (*AR 24527-702*).

Dated: April 9, 2007.

Respectfully submitted,

 /s/ Laird J. Lucas
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