



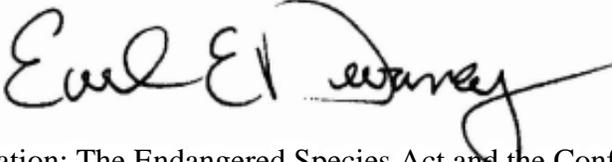
# United States Department of the Interior

OFFICE OF INSPECTOR GENERAL  
Washington, D.C. 20240

DEC 15 2008

## Memorandum

To: Secretary Kempthorne

From: Earl E. Devaney  
Inspector General 

Subject: Report of Investigation: The Endangered Species Act and the Conflict between Science and Policy

With this memorandum, I am transmitting the Report of Investigation on the Endangered Species Act (ESA) decisions influenced by the former Deputy Assistant Secretary for Fish and Wildlife and Parks (FW), Julie MacDonald. This investigation was initiated by request of Senator Ron Wyden who believed that 18 ESA decisions may have been improperly affected by MacDonald. Our investigation was expanded by requests from Chairman Nick J. Rahall, II, House Committee on Natural Resources, and Congressmen Jay Inslee and Peter DeFazio, who requested that we add two other decisions to those under our review.

As you know, in previous investigations we determined that MacDonald injected herself personally and profoundly in a number of ESA issues. We determined that MacDonald's management style was abrupt and abrasive, if not abusive, and that her conduct demoralized and frustrated her staff as well as her subordinate managers.

Our findings from this investigation are much the same, although we found that the nature and extent of MacDonald's influence varied dramatically from one decision to another. For example, in one instance we found that MacDonald went to extraordinary efforts to influence a particular decision, but her efforts ultimately had no effect on the outcome. In other instances, her involvement clearly caused a particular result. Ironically, in several instances, she played no role in the decision-making process, but because of her reputation, FW personnel believed that she had, in fact, been exerting influence, as did members of Congress and the public.

Overall, however, MacDonald's zeal to advance her agenda has caused considerable harm to the integrity of the ESA program and to the morale and reputation of the FW, as well as potential harm to individual species. Her heavy-handedness has cast doubt on nearly every ESA decision issued during her tenure; of the 20 decisions we reviewed, her influence potentially jeopardized 13 ESA decisions. MacDonald's conduct was backed by the seemingly blind support of former Assistant Secretary for

Fish and Wildlife and Parks, Judge Craig Manson. Judge Manson so thoroughly supported MacDonald that even when a known error in a *Federal Register* notice, which was caused by MacDonald's calculations, was brought to Manson's attention, he directed that the notice be published regardless of the error. MacDonald was also ably abetted in her attempts to interfere with the science by Special Assistant Randal Bowman, Office of the Assistant Secretary for Fish and Wildlife and Parks, who held the position and authority to advance the unwritten policy to exclude as many areas as practicable from Critical Habitat Determinations, as well as Attorney Thomas Graf, Office of the Solicitor, whose remarkable lack of recollection leaves one to speculate whether he was doing MacDonald's bidding or was a rogue actor simply emulating her policy style.

In the end, the cloud of MacDonald's overreaching, and the actions of those who enabled and assisted her, have caused the unnecessary expenditure of hundreds of thousands of dollars to re-issue decisions and litigation costs to defend decisions that, in at least two instances, the courts found to be arbitrary and capricious. (Ironically, in many of the decisions that ended up in litigation, advice from the Office of the Solicitor (SOL) had been ignored, yet the SOL subsequently had to suffer the indignity of defending decisions that it had deemed legally flawed.) These costs are in addition to the monies expended by the OIG on three separate investigations into MacDonald's influence over ESA decisions.

Perhaps most importantly, however, is that our investigation revealed an enormous policy void, which MacDonald was able to readily exploit. While the ESA affords the Secretary great discretion in several areas - exclusions of habitat being one example - the absence of policy in exercising that discretion has resulted, in MacDonald's case, a wholesale lack of consistency, a process built on guess-work, and decisions that could not pass legal muster. This dearth of policy and guidance seems less than coincidental. For many years, through several administrations, this appears to be an area of intentional failure to clarify, in order to maximize the agenda *du jour*.

The Department owes the public a fair and consistent application of rules in making its ESA decisions. When the career FW staff responsible for building the evidence for an administrative record does not know what the rules are - because they changed, sometimes on a daily basis - surely, the public cannot have confidence in the process.

As it stands, lawsuits are driving nearly everything FW does in the ESA arena. Lawsuits should not be driving regulatory decisions. As Fish and Wildlife Service (FWS) Director Dale Hall has explained, FWS has developed draft regulations that would purportedly address the most problematic areas in implementing the ESA. He also noted that the ESA implementing regulations have not been revised since 1986. Revised regulations, Hall said, would reflect over 20 years of working knowledge of the law and could clearly define what criteria would be evaluated in making ESA decisions.

Short of issuing regulations, FWS should develop policy to lend a sense of consistency, to guide ESA decisions where discretion is allowed, and to provide the

public the transparency that is fundamentally lacking in this high-profile program. Whether by regulation or policy, action is necessary to restore the integrity of the ESA program, and the morale and reputation of the FWS in the eyes of the public and of Congress. Seeking direction and support from Congress would certainly bolster the legitimacy of any such effort, and would ensure that FWS is in keeping with Congressional intent.

Recognizing that this comes late in your tenure as Secretary of the Interior, we are providing this report to you for whatever action you deem appropriate; however, it is also my intention to thoroughly brief and refer this report to your successor.

Attachment

cc: Assistant Secretary for Fish and Wildlife and Parks  
Director, Fish and Wildlife Service  
Solicitor



# Investigative Report

## *The Endangered Species Act and the Conflict between Science and Policy*

Report Date: December 10, 2008  
Date Posted to Web: December 15, 2008

This report contains information that has been redacted pursuant to 5 U.S.C. §§ 552(b)(2), (b)(6), and (b)(7)(C) of the Freedom of Information Act. Some references indicating gender were written in the masculine form to protect the identities of individuals and to facilitate the reading of the report. Supporting documentation for this report may be obtained by sending a written request to the OIG Freedom of Information Office.

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## **RESULTS IN BRIEF**

On November 30, 2007, U.S. Senator Ron Wyden requested that the U.S. Department of the Interior's (DOI) Office of Inspector General (OIG) investigate 18 endangered species decisions undertaken by the U.S. Fish and Wildlife Service (FWS) because he believed the decisions may have been improperly affected by former Deputy Assistant Secretary for Fish, Wildlife and Parks Julie MacDonald.

Senator Wyden's request was followed by a request from U.S. House of Representatives Chairman Nick J. Rahall, II, Committee on Natural Resources, to "examine whether improper influence affected the proposal to delist the Virginia Northern Flying Squirrel." Further, on January 16, 2008, Congressmen Jay Inslee and Peter DeFazio requested that the OIG "investigate whether improper influence affected the decision to not afford protection to the Washington population of the western gray squirrel under the ESA [Endangered Species Act]."

As a result of these three requests, we reviewed a total of 20 FWS Endangered Species Act (ESA) decisions made by FWS.

In furtherance of this investigation, we gathered substantial information through a standardized questionnaire that we disseminated to all FWS regions. We also conducted 89 interviews and reviewed over 20,000 e-mails and other documents. Our investigation revealed that MacDonald potentially jeopardized the ESA decisional process in 13 of those 20 matters. We also determined that former Assistant Secretary for Fish, Wildlife and Parks Craig Manson enabled her behavior and that she was occasionally aided and abetted by Special Assistant Randal Bowman, Office of the Assistant Secretary for Fish, Wildlife and Parks (ASFWP), and Attorney Thomas Graf, Office of the Solicitor (SOL). In one decision, the U.S. District Court for the District of Arizona determined that statements made by high-level FWS career employees during the decision-making process appeared to "exemplify an arbitrary and capricious agency action."

The nature and extent of MacDonald's influence varied greatly. For example, in one instance we found that MacDonald went to extraordinary efforts to steer a particular decision, but ultimately her efforts had no effect on the outcome. In other instances, her involvement clearly caused a particular result to occur. Ironically, in several instances she played no role in the decision-making process, but because of her reputation FWS personnel believed she had, in fact, been exerting influence. One FWS employee told us that MacDonald's influence was so prevalent that "it became a verb for us – getting MacDonaldded."

We reaffirmed findings from previous OIG investigations which showed that MacDonald pursued her agenda by exerting political influence on the FWS Washington Office, regional offices, and field offices. She frequently contested the scientific findings of FWS biologists and often replaced their scientific conclusions with her own, even though she was not a biologist. MacDonald also acted as an economist – again without professional training – in her efforts to restrict critical habitat designations (CHD). In fact, her attempts to perform an analysis of the economic impact of one particular CHD resulted in "math errors" of "an order of magnitude" that led to the exclusion of critical habitat from the rule published in the *Federal Register*.

According to FWS personnel, the agency spent approximately \$100,000 to republish a corrected version of the rule.

MacDonald's zeal to foster her agenda caused significant harm to the integrity of the ESA decision-making process, along with potential harm to FWS' reputation among its state and local sister agencies. Moreover, MacDonald's actions resulted in the untold waste of hundreds of thousands of taxpayer dollars in the form of unnecessary litigation costs defending lawsuits, as well as those costs associated with redoing ESA decisions mandated by the courts. Indeed, MacDonald's attempts to manipulate the "best available science" was not lost on the federal courts; in its ruling overturning FWS' greater sage grouse decision, the U.S. District Court for the District of Idaho observed, "MacDonald's principal tactic is to steer the 'best science' to a pre-ordained outcome ...." The court concluded, "For that reason, MacDonald's extensive involvement in the sage-grouse decision is an independent reason for the Court's finding that the Director's 12-Month Finding is arbitrary and capricious ...."

Finally, we found that many FWS employees believe their daily work continues to be hampered by the lack of clear and established policies for implementation of the ESA. In instances where policies do exist, they appeared to change from listing decision to listing decision. One employee told us he would wake in the morning and ask, "Okay, what's the agency doing today?" This, he concluded, was "a problem." MacDonald was clearly able to use these policy voids to impose her will on the ESA process.

## **BACKGROUND**

Former Fish, Wildlife and Parks Deputy Assistant Secretary Julie MacDonald is a civil engineer with a master's degree in management. As the DOI Deputy Assistant Secretary for Fish, Wildlife and Parks, MacDonald had oversight of FWS operations, including the examination of ESA listing decisions, CHDs, recovery plans, and 5-year status reviews of listed species.

In December 2006, the DOI-OIG completed an investigation of MacDonald based on an anonymous complaint alleging that she had been involved in unethical and illegal activities. Specifically, the complainant alleged that MacDonald had bullied, insulted, and harassed the professional staff of FWS to change documents and alter biological reporting regarding the Endangered Species Program. Our report confirmed those allegations. In addition, we also developed information that MacDonald had disclosed nonpublic information to private sector sources.

Shortly after the issuance of this investigative report, MacDonald resigned from her position as Deputy Assistant Secretary on May 1, 2007.

That same month, Congressmen George Miller and Nick J. Rahall, II, requested another investigation into allegations that MacDonald participated in an endangered species review process that resulted in the Sacramento splittail fish being removed from the endangered species list. MacDonald and her husband owned a revenue-generating farm that was located in the same region as the splittail. Our investigation confirmed that MacDonald owned a farm in Dixon, CA,

near the habitat and spawning area for the Sacramento splittail. Despite this potential conflict, MacDonald significantly participated in the editing process for the splittail.

### DOI Internal Action

Three weeks after MacDonald resigned from her position with DOI, DOI Deputy Secretary P. Lynn Scarlett issued a memorandum to FWS Director H. Dale Hall stating the following:

Based on the questions that have been raised about Julie MacDonald's alleged involvement in certain projects and listing packages that were prepared by the Fish and Wildlife Service, please review all work products that were produced by the Service and reviewed by Ms. MacDonald and determine if any of those packages require any revision based on her involvement. Please provide the list of those needing attention by June 21, 2007. I look forward to the results of your review and your recommendations.

Based on Scarlett's request, all FWS regions submitted memoranda to FWS Director Hall identifying decisions, if any, the regions believed might need "revision based on [MacDonald's] involvement". FWS Director Hall then issued a memorandum to Scarlett on July 12, 2007, stating the following:

The nationwide review performed by the Regions identified ten decision actions that, in the opinion of the Regions, should be re-examined to ensure a final decision that is clear and comports with best available science.

The memorandum identified the following 10 decisions:

- Arroyo toad critical habitat
- California red-legged frog critical habitat
- Marbled murrelet 5-year review
- Bull trout critical habitat
- 12 species of picture wing flies critical habitat
- White-tailed prairie dog 90-day finding
- Lynx critical habitat
- Preble's meadow jumping mouse 12-month finding/proposed delisting
- Preble's meadow jumping mouse critical habitat
- Southwest willow flycatcher critical habitat

The next day, Scarlett e-mailed FWS Director Hall thanking him for the review FWS conducted in order to arrive at the list of 10 decisions.

On July 19, 2007, FWS' Region 1 Regional Director Ren Lohofener sent a memorandum to FWS Director Hall clarifying Region 1's initial response to Hall's request for decisions needing review. In the memorandum, Lohofener asked that two of the decisions the region initially forwarded to Hall be removed from the list of decisions warranting review due to MacDonald's improper involvement. Specifically, Lohofener asked that the marbled murrelet 5-year review

and the bull trout CHD decisions be removed because “[n]either of these decisions should have been included in the Pacific Region’s [Region 1]’s recommendations as neither decision involved the inappropriate use of science.”

Based on Lohofener’s clarification memorandum, FWS Director Hall issued a clarification memorandum on July 20, 2007, to Scarlett modifying FWS’ initial report from 10 decisions to 8 decisions. That same day, FWS issued a news release describing its actions and the agency’s decision to review eight endangered species decisions. Simultaneous with the news release, FWS also issued a “Q’s and A’s” document explaining its actions and the reason behind its decision to review the eight endangered species decisions.

On November 23, 2007, FWS sent a letter to U.S. House of Representatives Committee on Natural Resources Chairman Nick J. Rahall, II, detailing the revisions FWS determined were needed in relation to the eight decisions identified in the agency’s July 20, 2007 news release.

### Congressional Requests for OIG Investigations

On November 30, 2007, U.S. Senator Ron Wyden requested that DOI Inspector General Earl Devaney investigate the species decisions undertaken by FWS for 18 species. In his letter, Wyden stated the following:

In my correspondence with the Department [of the Interior], I requested an Agency review of sixteen endangered species decisions in which Julie MacDonald played a critical role. Of those sixteen, the Department agreed to review three, in addition to five other decisions that they identified. The Fish and Wildlife Service declined to review thirteen endangered species decisions from my original request. I have reason to believe that Julie MacDonald improperly influenced all of those decisions and that the Fish and Wildlife Service’s review failed to capture the impact of her involvement in those decisions ....

In addition to this original set of species decisions, new information has emerged about additional species and yet others were only recently brought to my attention.

Wyden further stated, “As has been noted by many working in the arena of endangered species protection, the eight species identified by the Fish and Wildlife Service may be just the tip of the iceberg,” and, “Without a more thorough review of the additional decisions in which Ms. MacDonald was involved, we really will not have a complete picture of how far her actions extended or what further actions need to be taken to rectify the situation.”

Specifically, Wyden requested that the OIG “look at how the Fish and Wildlife Service reached its decisions on actions for these species and whether there was any improper political influence in these decisions.” In making the request, Wyden specifically requested that the review identify what, if any, involvement in the decisions MacDonald had.

On December 18, 2007, Chairman Rahall requested by letter that Inspector General Devaney “examine whether improper influence affected the proposal to delist the Virginia Northern Flying Squirrel.” According to Chairman Rahall, he was “concerned about the justification used to support delisting” the squirrel.

On January 16, 2008, Congressmen Jay Inslee and Peter DeFazio requested that Inspector General Devaney “investigate whether improper influence affected the decision to not afford protection to the Washington population of the western gray squirrel under the ESA”. According to Congressmen Inslee and DeFazio, they were “concerned that this listing determination may have been improperly influenced by political manipulation, and was not based on the best available science.”

As a result of these requests, the OIG reviewed a total of 20 FWS ESA decisions.

### Endangered Species Act (ESA)

Congress enacted the ESA in 1973 (16 U.S.C. § 1531 et seq.). The purpose of the ESA is to conserve, or recover, the ecosystems upon which endangered and threatened species depend. Section 4 of the ESA directs the Secretary of the Interior to determine by regulation whether a given species should be listed as endangered or threatened, based upon the “best scientific and commercial data available ... after conducting a review of the status of the species....”

#### **FWS Internal Candidate Assessment**

One way that a species can be assessed for potential designation as an endangered or threatened species is through FWS’ internal candidate assessment process. FWS’ Web site states the following regarding the process:

Through our candidate assessment process, we identify species for which the best scientific and commercial data available indicates that a proposal for listing is appropriate, using the listing factors in Section 4 of the ESA.

The listing factors are:

1. the present or threatened destruction, modification, or curtailment of the species’ habitat or range;
2. overutilization for commercial, recreational, scientific, or educational purposes;
3. disease or predation;
4. the inadequacy of existing regulatory mechanisms; and,
5. other natural or manmade factors affecting the species’ continued existence.

Also, we re-assess species previously identified as candidates to update their status and determine if they can be removed from the candidate list or if their listing priority should change.

The species assessment document (including citations of the scientific literature and other sources of information), prepared by the Candidate Conservation staff, is provided to the Service Director, who makes the final decision as to whether a species should be elevated or removed from candidate status or have its listing priority number changed.

### **Listing Petition Reviews**

In addition to FWS' internal candidate process, species may be added to the list of endangered or threatened species via a listing petition filed with FWS. FWS' Web site states the following regarding the petitions:

[Listing] Petitions are formal requests to list a species as endangered or threatened under the Endangered Species Act. They require published findings. We (or the National Marine Fisheries Service for most marine species) must make a finding within 90 days of receiving a petition (to the extent practicable) as to whether or not there is 'substantial information' indicating that the petitioned listing *may be* warranted. If this preliminary finding is positive, a [12-month] status review is conducted. Within one year of receipt of the petition, we must make a further finding that the listing either *is* or *is not* warranted. A positive one-year finding can be incorporated into a proposed listing or, if a prompt proposal is precluded by other listing activities, the proposal may be deferred. These 'warranted but precluded' proposals require subsequent one-year findings on each succeeding anniversary of the petition until either a proposal is undertaken or a 'not warranted' finding is made.

A detailed discussion of the listing of a species as threatened or endangered is included in an attached FWS publication.

### **Critical Habitat Designations (CHDs)**

Once a species is listed as either endangered or threatened, FWS then considers areas of habitat that are deemed essential to the species' conservation. FWS' Web site states the following regarding the habitats:

When a species is proposed for listing as endangered or threatened under the Endangered Species Act (Act), we must consider whether there are areas of habitat we believe are essential to the species' conservation. Those areas may be proposed for designation as 'critical habitat.' The determination and designation of critical habitat is one of the most controversial and confusing aspects of the Act. Here are answers to some of the most frequently asked questions about critical habitat.

- What is critical habitat?

Critical habitat is a term defined and used in the Act. It is a specific geographic area(s) that contains features essential for the conservation of a threatened or endangered species and that may require special management and protection. Critical habitat may include an area that is not currently occupied by the species but that will be needed for its recovery. An area is designated as ‘critical habitat’ after we publish a proposed Federal regulation in the *Federal Register* and then we receive and consider public comments on the proposal. The final boundaries of the critical habitat area are also published in the *Federal Register*.

- What is the purpose of designating critical habitat?

Federal agencies are required to consult with us on actions they carry out, fund, or authorize to ensure that their actions will not destroy or adversely modify critical habitat. In this way, a critical habitat designation protects areas that are necessary for the conservation of the species.

A critical habitat designation has no effect on situations that do not involve a Federal agency—for example, a private landowner undertaking a project that involves no Federal funding or permit.

Under the ESA, FWS must designate critical habitat “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.”

The legal review and clearance procedure for rule-making documents prepared under Section 4 of the ESA, which was modified in 2004, describes the path listing packages and CHD packages take to be published in the *Federal Register*: After a draft report is completed, the regional office, including the Regional Solicitor’s Office, reviews the field’s findings; the Regional Solicitor’s Office conducts a draft legal analysis of the report, which is sent to FWS’ Washington Office; at FWS’ Washington Office, the Assistant Director for Endangered Species and the Department Solicitor’s Office review the report for legal issues and other concerns. Changes and comments can be made to the draft, but then it is sent back to the regional office for a formal legal review by the Regional Solicitor’s Office. The regional attorney assigned to the review can surname the document if he/she agrees that the report has legal sufficiency (i.e. can withstand a potential lawsuit); the attorney can also disagree and not surname the final draft.

Whether the draft is surnamed or not, it goes back to the Department’s SOL, the FWS Director, and ASFWP, which included MacDonald prior to her resignation. According to the practice of this Administration, the document must be surnamed before leaving DOI. Barry Roth, Deputy Associate Solicitor for Parks and Wildlife, usually performs this function. The Chief of Staff for the Department, Brian Waidmann, also reviews all packages before they go to the *Federal Register* for publishing.

## Recovery Plans

After a CHD occurs for a listed species, FWS then develops a recovery plan to assist the recovery of the species. FWS' Web site states the following:

- What do we mean by recovery?

Recovery is the process by which the decline of an endangered or threatened species is arrested and threats are removed or reduced, ensuring the long-term survival of the species in the wild. At that point the species is recovered, and protection of the ESA is no longer necessary.

- How does the Recovery Program work?

The FWS Recovery Program staff works with partners to take measures to prevent the extinction of species, and prepares, coordinates, and implements recovery plans.

Recovery plans provide a roadmap with detailed site-specific management actions for private, Federal, and State cooperation in conserving listed species and their ecosystems. A recovery plan is a non-regulatory document. It may apply to one species or an ecosystem.

## 5-Year Status Review

FWS is required by statute to conduct a review of every listed species at least every 5 years. This is to determine whether, based on the best available science, each listed species should have its status either lowered from endangered to threatened, raised from threatened to endangered, delisted altogether, or remain unchanged. FWS conducts these 5-year reviews of species on the endangered species list under Section 4(c)(2)(A) of the ESA. A *Federal Register* notice published by FWS states the following regarding the reviews:

The purpose of reviews conducted under this section of the Act is to ensure that the classification of species as threatened or endangered on the List of Endangered and Threatened Wildlife and Plants (List) is accurate.

The 5-year review is an assessment of the best scientific and commercial data available at the time of the review.... If the present classification of this species is not consistent with the best scientific and commercial information available, we may, at the conclusion of this review, initiate a separate action to propose changes to the List accordingly.

## **DETAILS OF INVESTIGATION**

During the course of our investigation, we reviewed over 20,000 pages of e-mails, decision documents, and correspondence, along with reviewing dozens of *Federal Register* notices and court decisions. Additionally, we conducted 89 interviews with ASFWP and FWS employees, ranging from staff biologists to the FWS Director, along with other current and former departmental political appointees. Julie MacDonald declined to be interviewed.

This report is divided into two parts. Part I of this report explains factual occurrences that led to the 20 FWS decisions questioned by congressional inquiry, including MacDonald's personal role, if any, in each decision. We also identify the current status of all 20 decisions.

Part II addresses other issues identified in furtherance of the investigation. Specifically, we discuss informal, ever-changing documents called "Lessons Learned." These documents were essentially substituted for formalized policy related to FWS' decision-making process during MacDonald's tenure. Finally, following a review of the "Lessons Learned" documents, the report concludes with interviews of key individuals offering insight into the decision-making processes for endangered species decisions during the MacDonald era.

For the convenience of the reader, at the end of the report, we have provided a list of acronyms referenced. We have also provided an Addendum with a chart listing all species (and their respective regions) mentioned in the report and whether the integrity of the processes leading to their decisions was jeopardized.

In furtherance of this investigation, we produced a standardized questionnaire that was disseminated to all FWS regions. The questionnaire specifically asked the regions to describe the process they followed when preparing packages for the following types of ESA decisions:

- 1) The listing or delisting of a threatened or endangered species
- 2) The designation of a critical habitat for a listed species
- 3) The issuance of a recovery plan for a listed species
- 4) Five-year status review of a listed species
- 5) Biological opinions

Beyond a description of the process they followed in preparing ESA decision packages, the regions were asked to describe how those processes were followed, or deviated from, in relation to the 20 ESA decisions the OIG was asked to investigate. The regions were further asked to detail their knowledge of involvement by MacDonald, or any other political appointee, in the processes (if any). Finally, of the 20 decisions the OIG was asked to investigate, the regions were asked for a detailed explanation as to why their region did not recommend review of those decisions in response to FWS Director Hall's request for decisions that may have been improperly influenced by MacDonald.

During his interview, FWS Director Hall explained how FWS determined which decisions the agency would review in order to assess whether MacDonald improperly influenced the science underlying the decisions. According to Hall, in May 2007, he held a meeting with FWS Region

8's ecological group, where he directed the group to review all of the packages the region issued that it believed might have been altered or changed by MacDonald that caused harm to a species. Immediately after he had this discussion with Region 8, DOI Deputy Secretary Scarlett issued a memorandum to Hall directing him to similarly review all packages/decisions issued by FWS nationwide. In response to Scarlett's request, Hall stated that he held a conference call with all of the FWS regional directors and the Assistant Director for Endangered Species, Brian Arroyo, during which he directed all of the regions to provide him with a list of decisions they felt might have been improperly influenced by MacDonald.

Specifically, Hall stated that he directed the regional directors to work with their field stations and those scientists who formulated the packages in order to compile a list of any packages they believed MacDonald "interfered with, changed, altered in some way, or caused a change to the outcome by messing with the science." Hall further stated that he did not restrict the regions to only reviewing endangered species listing decisions in compiling such a list, but rather he stated that he gave them free rein to reconsider any and all decisions reached by their respective regions that may have been affected by MacDonald.

Hall stated that, in response to his request, each region provided a memorandum to him identifying decisions that it believed were detrimentally affected by MacDonald's improper meddling with the science produced by FWS field scientists. The regions initially identified a total of 11 decisions. Shortly thereafter, Hall held a teleconference with the regional directors and asked them if this list represented all of the decisions. Hall stated that he was personally surprised that the number of decisions was so low because MacDonald had been in her position as the Deputy Assistant Secretary for 5 years.

According to Hall, during this conference call, Region 2 Regional Director Benjamin Tuggle identified the northern Mexican gartersnake listing decision as a decision his region felt warranted review. However, Region 1 Regional Director Ren Lohofener informed Tuggle that he was the Assistant Director for Endangered Species in Washington at the time the northern Mexican gartersnake package was sent to Washington and he was the person who decided the package was inadequate, not MacDonald. As a result, Tuggle stated that he wished to withdraw that decision from his list.

Additionally, Region 1 decided to withdraw two of the decisions it originally listed because, after reconsidering the criteria Hall outlined for the list, the region believed MacDonald did not interfere with the science related to the packages but rather made policy decisions within her prerogative as Deputy Assistant Secretary. Region 1 ultimately issued a written memorandum to Hall explaining its decision to remove the marbled murrelet 5-year review and the bull trout CHD decisions. Accordingly, the final FWS list was pared down to eight decisions.

Hall stated that after the directorate reviewed the eight decisions, FWS management (Hall) decided that FWS would perform a full review of seven of the eight decisions. Hall noted that the regions indicated that MacDonald attempted to improperly influence many other decisions, yet the regions were successful in "pushing back."

According to Hall, the ESA refers only to the Secretary of the Interior; however, the authority to make decisions regarding the ESA is delegated to both himself, as Director of FWS, and ASFWP. Hall said he is delegated to make any final decisions regarding the listing of a species under the ESA, yet ASFWP has been delegated to make final decisions regarding CHDs. He explained that whereas the decision to list a species is strictly based upon the science, a decision to designate a critical habitat also considers economic factors.

Hall further explained that there was a two-prong analysis related to CHDs. One prong of the analysis considered whether the designation was “essential” for the conservation of the species, and FWS performed this analysis. The second prong considered whether there was a need for special management or extra protection, and this analysis considered economic impact. According to Hall, ASFWP ultimately decided this second prong because it represented a “policy call.” Hall then stated that Regions 1’s acknowledgement of the ASFWP prerogative to make this policy call was the reason why Region 1 withdrew its request to have the bull trout CHD decision reviewed.

The following are our findings related to the 20 specific decisions the OIG was asked to investigate.

## Questioned Decisions

### **1. Tabernaemontana Rotensis Listing (Region 1)**

#### *Summary:*

Our investigation determined that MacDonald had no direct involvement with the decision not to list the *Tabernaemontana rotensis*, whereas Special Assistant Randal Bowman, within ASFWP, was significantly involved. While several FWS regional and staff employees believed that Bowman unilaterally directed that the *Tabernaemontana rotensis* be removed from the final listing rule, we determined that the former Chief of FWS’ Conservation and Classification for the Endangered Species Program, Chris Nolin, actually made the final decision not to pursue the listing of the *Tabernaemontana rotensis*.

#### *Details:*

On June 1, 2000, a proposed rule to list three plant species from the islands of Guam and Rota was published in the *Federal Register*; the species the proposed rule included were the *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* (65 FR 35025). In conjunction with the proposed rule, FWS issued a news release describing the action; the following is an excerpt of that release:

#### Three Mariana Islands Plants Proposed for Listing as Endangered Species

The U.S. Fish and Wildlife Service today proposed to list two rare plant species found on Rota and one found on Rota and Guam as endangered under the

Endangered Species Act. A species is designated as endangered when it is at risk of extinction throughout all or a significant portion of its range.

The three plant species — *Nesogenes rotensis*, *Osmoxylon mariannense*, and *Tabernaemontana rotensis* — are threatened primarily by loss of their native habitat. Over the years, native vegetation on Rota and Guam has been altered by ranching, invasive alien plant species, agricultural and road development, and military activities during World War II. In recent years, both islands have been affected by frequent typhoons.

‘Thirty or fewer mature plants remain of each of the three species. With so few plants remaining, another storm could eliminate any of the three species,’ said Anne Badgley, the Service’s regional director for the Pacific Region. ‘The people of Rota and Guam have an opportunity to save these plants found nowhere else in the world for future generations to enjoy’....

*Tabernaemontana rotensis* is a small tree in the plumeria family. Approximately 32 mature trees plus additional seedlings and saplings are known to exist: two on Rota, 28 on Andersen Air Force Base on Guam within the Guam National Wildlife Refuge and two on Government of Guam land in the Ano Conservation Reserve. The remaining trees on Rota do not appear to be producing seeds, perhaps because their pollinator no longer exists or because of insect, mouse, or rat predation. Road maintenance, random environmental events, and human-caused fires also threaten the species. Vandalism of this species also has occurred in the past.

According to FWS Region 1’s response to the OIG’s request for information, further action was “delayed by higher priority work until a Settlement Agreement approved by the U.S. District Court for the District of Hawaii on August 21, 2002” required FWS to “make a final listing decision on the three species by April 1, 2004.” Subsequent to the agreement, FWS issued a *Federal Register* Notice on January 9, 2004, reopening the comment period to the original proposed rule (69 FR 1560).

We interviewed a Biologist, Division of Endangered Species and Ecological Services for Region 1, regarding his knowledge of the draft final rule. He stated that he reviewed the draft final rule that came in from the FWS field office in Hawaii for formatting, grammar, punctuation, and presentation of biological findings.

According to the Biologist, after the regional SOL reviewed the draft rule, it was forwarded to Region 1 Regional Director Dave Allen. On February 27, 2004, Allen surnamed the draft final rule and forwarded it to the FWS Washington Office.

Scott McCarthy is the Candidates and Species at Risk Conservation Coordinator for Region 1. He stated that he was working at the FWS Washington Office at the time the proposed rule to list the *Tabernaemontana rotensis* was forwarded to that office from the FWS field office in Hawaii. According to McCarthy, the biologists in the Hawaii field office felt the science fully supported a

listing of the *Tabernaemontana rotensis* and the package made a compelling argument supporting the taxonomy of the species. McCarthy reviewed the package and the FWS Washington Office surnamed it prior to it being forwarded to ASFWP.

McCarthy stated that the U.S. Air Force challenged the taxonomy of the species under the Scientific Integrity Act and ASFWP Special Assistant Randal Bowman questioned FWS about the challenge. According to FWS Region 1's response to the OIG's request for information, "In response to [Bowman's] input, the draft final rule was revised in the [FWS] Washington Office in late March 2004 to list *N. rotensis* and *O. mariannense* and to withdraw the proposed listing of *T. rotensis*," and, "The final rule was signed by Marshall Jones, FWS Deputy Director on April 1, 2004, and published in the Federal Register on April 8, 2004 [69 FR 18499]." The following are excerpts from a news release issued by FWS the same date describing this action:

Two plant species – *Nesogenes rotensis* and *Osmoxylon mariannense* – found only on the island of Rota in the Commonwealth of the Northern Mariana Islands were designated as endangered species today. A third species, *Tabernaemontana rotensis*, was withdrawn from consideration for listing ....

Although *Tabernaemontana rotensis* is recognized as endemic on Guam and Rota, published work has identified it as part of the widespread species *Tabernaemontana pandacaqui*. The Service originally proposed listing *Tabernaemontana rotensis* with the other two species, but in developing the final rule has reconsidered its status.

Because there is no indication that *Tabernaemontana pandacaqui* is endangered or threatened throughout all or a significant portion of its range, and because *Tabernaemontana rotensis* does not appear to be a separate species, the Service does not believe there is a basis for listing at this time.

According to a Region 1 Biologist and McCarthy, they believed the decision to remove the *Tabernaemontana rotensis* from the final rule was made unilaterally by Bowman. In fact, McCarthy stated that there was no question in his mind that Bowman was the person who unilaterally decided to change the FWS recommendation to list the species. McCarthy additionally stated that he was fairly certain that Bowman did not have a degree in taxonomy and he did not believe Bowman conferred with anyone within FWS prior to making his decision not to list the species. McCarthy believed Bowman's decision was contrary to the best available science and purely politically driven.

Chris Nolin was formerly the Chief of FWS' Conservation and Classification for the Endangered Species Program from 2001 through February 2008 and therefore was responsible for reviewing listing decisions, CHDs, and internal candidate actions. According to Nolin, she reported directly to the FWS Assistant Director for Endangered Species, and any package that needed to be reviewed by the FWS Director or the department went through her office. Regarding the *Tabernaemontana rotensis* listing package, Nolin stated that she was involved with the decision and there was a significant amount of discussion about the package. Nolin stated that she reviewed the package and forwarded it to ASFWP, specifically Bowman.

According to Nolin, after reviewing the package, Bowman questioned the validity of the species. Based on his concerns, Nolin stated that she asked the FWS botanist responsible for the *Tabernaemontana rotensis* recommendation to address Bowman's concerns. Nolin said other experts in taxonomy were contacted, including a taxonomist from the Smithsonian Institution, in order to determine if the taxonomy of the species could be established to a level of certainty that would warrant its listing. Ultimately, Nolin said she felt that the validity of the species could not be firmly concluded based on the uncertainty of the scientific community, and for that reason, Nolin stated that she decided to withdraw the positive recommendation for the *Tabernaemontana rotensis*' listing in order to be "conservative." Nolin said she supported her decision by stating that FWS had clear direction at that time from ASFWP to be conservative when contemplating potential species listings and not err in favor of the species.

When interviewed, Bowman stated that he had been in his position since April 2002 and reported directly to Assistant Secretary for Fish, Wildlife and Parks Craig Manson until Manson retired. While working for Manson, Bowman said, 75 percent of his duties involved ESA issues, where he worked alongside MacDonald. Since Manson's retirement from DOI, Bowman said his predominant duties no longer involved ESA issues. Bowman stated that he was a GS-15 career employee and, prior to working for ASFWP, he had worked in DOI's Office of Congressional and Legislative Affairs since 1985.

Bowman said his duties under Assistant Secretary Manson included reviewing ESA packages forwarded to ASFWP from FWS. Regarding the proposed listing of the *Tabernaemontana rotensis*, Bowman stated that, after reviewing the package, he informed FWS that it needed to address the "published peer review" that undermined the proposed listing by stating that the *Tabernaemontana rotensis* was not a valid species. According to Bowman, FWS had not satisfactorily addressed this peer review and it needed to do so before he would reconsider the package. Bowman provided the comments he sent to FWS concerning this matter and the pertinent section of the comments read:

Policy concern – the response to comment 7 is extremely disturbing. What we are proposing to say, from the perspective of critics of how the Service administers the ESA, is that we will disregard the only available peer reviewed treatment of the species if it does not fit our preconceived desire to list the species and we can find some individual scientists to support our position. This cannot go out as written.

According to Bowman, Nolin did not respond to his comments but rather FWS decided to withdraw the listing proposal for the *Tabernaemontana rotensis* on its own accord.

According to FWS Region 1's response to the OIG's request for information, the *Tabernaemontana rotensis* listing decision was not recommended for reconsideration in response to Director Hall's memorandum because the memorandum "was specific to rules that may have been improperly influenced by MacDonald" and Region 1 had "no records of any direct involvement by MacDonald."

## 2. Bull Trout Critical Habitat Designation (Region 1)

### *Summary:*

We determined that MacDonald was heavily involved with excluding large amounts of areas from the bull trout CHD; she accomplished this goal by making several policy decisions. Many FWS staff whom we interviewed believed MacDonald's ad hoc policy decisions resulted in a final CHD rule that was not based upon the best available science and was harmful to the recovery of the species. In fact, one FWS manager who supervised the development of the CHD rule stated that the final rule – after MacDonald's exclusions – defied logic, and he stated that he would be unable to defend the final rule in a court of law if asked to do so by a judge.

Several other high-level FWS employees said they believed that while MacDonald's exclusions probably did not amount to improper political influence, she "pushed the limits" in making her discretionary exclusions to the CHD. The final rule is currently in litigation in the U.S. District Court for the District of Oregon.

### *Details:*

According to a fish biologist for Region 1, he worked with other technical staff from other FWS field offices in Regions 1 and 6 to evaluate what areas should be designated as critical habitat for this CHD rule. The Region 1 Biologist stated that he personally began working on this CHD in the summer of 2003 together with the recovery team.

According to the Biologist, in order to designate critical habitat, one of the listed primary constituent elements must be identified as being present in the particular habitat; the primary constituent elements are basically the criteria that need to be met prior to designating a certain area as critical habitat. By using this approach, he stated that FWS biologists worked with the recovery team, consisting of several state agencies, utility companies, and other entities, in identifying critical habitat areas because the recovery team had already been in place and was an excellent source for the essential data needed to make critical habitat determinations.

The Biologist stated that in using the primary constituent elements approach, the biologists determined that several streams met the criteria needed to designate them as critical habitat for the bull trout. Once these streams were identified, the biologists then articulated whether the streams were *proven* to be occupied by bull trout or whether they *could* be occupied by bull trout. In addition, the streams were identified as spawning-and-rearing areas, migrating corridors (streams), or foraging areas. According to the Biologist, *all* of the areas identified as spawning-and-rearing areas were designated as critical habitat inasmuch as they were the most important areas leading toward the bull trout's recovery, whereas only *most* of the migrating corridors and foraging areas were designated as critical habitat.

The Biologist explained that in identifying critical habitat areas for any fish, it is well accepted scientific methodology to use "inference" in determining habitat. In the matter of the bull trout CHD, if bull trout were located in two separate areas that were connected by a stream or river that had similar qualities (e.g., clarity, temperature, etc.), biologists believe it could be inferred

that the connecting stream or river would also be inhabited by bull trout and, thus, should be included in the CHD. However, according to the Biologist, he learned from his supervisor that MacDonald had directed FWS not to include any “uninhabited” streams that could not be proven to contain bull trout.

The Biologist stated that he strongly disagreed with MacDonald’s direction not to include the unoccupied streams as critical habitat for the bull trout. He explained that, by their nature, bull trout were difficult to find, and it was not possible for FWS to survey every stream for the existence of bull trout, yet bull trout were fish and obviously “they move around.”

He stated that, ultimately, MacDonald’s direction to FWS not to include these connecting streams as critical habitat resulted in decreasing the CHD identified by the biologists by approximately one-half and subsequently resulted in a CHD that was unconnected and represented a patchwork map.

The Biologist identified a map of the CHD included in the final rule and stated that it was nonsensical to have a CHD spread out in several separate areas that were unconnected. He pointed out that fish do not climb out of a stream and walk to the next CHD area; obviously they need to swim from one area to another. He summarized his feelings by also pointing out that many of the unoccupied areas were essential because the bull trout had already lost such a large amount of their historical areas of distribution.

The Biologist opined that MacDonald’s direction to the FWS scientists to ignore scientifically accepted methods in identifying critical habitat was clearly not the best use of the science. He explained that by removing these areas from the CHD, the public and the recovery teams were not provided an opportunity to even evaluate the occupancy of the streams. According to the Biologist, if a technical recovery team containing biologists recommended certain areas to fall within a CHD and a political appointee removed those areas from the CHD in the face of a scientifically accepted methodology, harm could obviously befall the species. He pointed out that if the scientists did not think the areas needed to be included in the CHD, they would not have made that recommendation.

Beyond MacDonald’s decisions to remove unoccupied streams and all streams on federal lands from the CHD, the Biologist also pointed out that ASFWP made the policy decision to attribute costs to the bull trout’s recovery in the economic analysis that were not directly attributable to recovery attempts specific to the bull trout, thus inflating the costs of recovery.

The Biologist stated that, beyond MacDonald’s involvement in directing the scientists how to perform their science, ASFWP made several exclusions to the already reduced CHD at the 11<sup>th</sup> hour. He stated that the final rule significantly reduced the amount of areas the scientists identified as critical habitat, and the rule contained several contradictions. He surmised that several of these contradictions were probably a result of many edits being made without methodical or thorough review of the final product. He summarized his thoughts on this issue by stating that he did not believe the final rule represented the best available science identified by the biologists. He stated that the final rule still had some “core science,” yet it was greatly pared down.

The Biologist lamented that the biggest residual impact of the final rule released by FWS on the bull trout CHD was the loss of credibility of FWS with other entities, such as the states and municipalities that worked with the FWS biologists in creating the original designations. He explained that the state biologists were very frustrated with the “shoddiness” of the final rule that came out of the department. He explained that this frustration was very poignant because the state scientists knew what was originally recommended by FWS field biologists prior to ASFWP’s policy changes.

Following the interview, the Biologist also provided the following written statement concerning ASFWP’s involvement in the economic analysis of the bull trout CHD:

With respect to the bull trout Critical Habitat Economic Analysis, it was pointed out to [ASFWP] that many of the costs attributed to bull trout were actually shared costs with other ESA listed fish species, primarily salmon. ESA listed salmon species overlap much of the bull trout’s distribution. The technical staff had contended that at the very least shared costs should be equally divided between bull trout and salmon. Even this approach does not necessarily reflect an accurate distribution of costs between the species given that many ESA-related mitigation or conservation actions have been primarily initiated for listed salmon species while acknowledging secondary benefits to bull trout (for example fish passage around certain dams). My recollection is that a decision (presumably at [ASFWP]) was made to not divide shared costs, and as a result the overall cost attributed to designating critical habitat for bull trout was significantly inflated. In fact, it is misleading to the public because it indicates that designating critical habitat occupied by both bull trout and salmon costs twice as much than it actually does.

In addition, FWS Region 1’s response to the OIG’s request for information stated the following:

DAS MacDonald advocated the use of a coextensive economic analysis, including attributing all costs incurred as the result of salmon management that also benefitted bull trout as costs of designating bull trout critical habitat. This approach was questioned by Service [FWS] economists as it did not allow the Service to determine those costs directly attributable to the designation of critical habitat. There have been subsequent court decisions that bring into question the validity of the coextensive costs analysis. The Service is currently employing in its economic analyses the incremental costs approach, which identifies those costs attributable only to the critical habitat.

When interviewed, Scott McCarthy, the Candidates and Species at Risk Conservation Coordinator for Region 1, stated that MacDonald improperly influenced the bull trout CHD decision by giving direction to FWS biologists not to include in their identification of CHD any rivers or streams they could not prove the bull trout inhabited. McCarthy explained that “inference” was a well-accepted scientific methodology to use in determining habitat for a

specific species and therefore occupancy of streams connecting two separate inhabited areas could be inferred and thus should have been included in the CHD.

According to McCarthy, MacDonald's direction to the biologists not to include any streams or rivers in the CHD that could not be proven to be inhabited by bull trout was analogous to her directing the biologists not to use the best available science. He said it interfered with the science and was not strictly a policy call that MacDonald had discretion to make. Furthermore, he stated that this type of influence did not represent a matter within the discretion of ASFWP because it involved the *identification* of CHD, and not the *exclusion* of a CHD based on economic or other factors.

McCarthy stated that MacDonald also influenced the process by requiring FWS to include in its economic analysis of the CHD all costs associated with *any* project, past or present, which might benefit the bull trout. He explained that this resulted in FWS having to include the full cost of projects that were put in place primarily to benefit other species, such as salmon, into the economic analysis of the bull trout CHD. According to McCarthy, this approach was dubbed as a "coextensive" approach, whereas an "incremental" approach would only include the pro rata cost of the projects that actually benefited the bull trout. McCarthy stated that this coextensive approach to attributing costs to the bull trout CHD economic analysis resulted in a highly inflated dollar figure.

McCarthy believed that, if the current rule establishing the bull trout CHD was not overturned in court, MacDonald's influence in the bull trout CHD would have a lasting impact on how future exclusions would be determined for all CHDs.

McCarthy stated that the policy changes emanating from ASFWP regarding the creation of the bull trout CHD were continuous and ultimately resulted in a major distrust by the field biologists of the process and their expectations. He stated that one area where these policy changes affected the process involved the methodology used to exclude certain areas from the CHD identified by the field biologists. According to McCarthy, the areas identified by the field biologists as CHD should have been considered exactly what they were called: "critical" habitat designations. However, he stated that ASFWP, specifically MacDonald, was determined to exclude as many areas as possible from the CHD identified by the biologists, yet there was no policy in place that guided the methodology used to exclude certain areas. McCarthy stated that this lack of clear policy and guidelines resulted in many exclusions made by MacDonald that he felt FWS simply would be unable to support in litigation.

McCarthy went on to say that MacDonald's actions during her tenure as Deputy Assistant Secretary resulted in the inculcation of FWS staff to a degree where the biologists and regions simply started not to make recommendations based on the best available science because they knew the recommendations would be denied by ASFWP. According to McCarthy, this inculcation resulted in a situation where MacDonald did not even need to change or deny certain recommendations from the regions because the region became so well "trained" not to even make such recommendations.

McCarthy stated that FWS biologists were so tired of being "yelled at," they simply acquiesced to the culture created by MacDonald and gave up the fight.

Theresa Rabot is the Assistant Regional Director for Ecological Services for FWS Region 1. Rabot has been in her current position since August 2003 and has been with FWS since 1981. In her position, Rabot administers all of the programs within the Ecological Services Division of Region 1, including endangered species listings and CHDs. She manages five field offices and reports directly to the Deputy Regional Director.

According to Rabot, FWS issued a final rule for the bull trout CHD in 2004, yet FWS remanded the rule in April 2005 due to litigation. In furtherance of attempting to designate critical habitat for the new rule, Rabot stated that she worked extensively in designating the critical habitat for the bull trout and that MacDonald was very involved in excluding areas designated by the region.

According to Rabot, MacDonald was adamant in trying to exclude all federal lands from the bull trout CHD. Rabot stated that she did not believe this was a proper approach based on the science, and the region initially submitted a CHD to Washington with only one federal area excluded. Rabot said MacDonald was not satisfied with the CHD, and while Rabot was on annual leave, then-Regional Director Dave Allen informed her that MacDonald would be in Rabot's office to discuss the CHD the Monday morning that Rabot returned to work.

Rabot said MacDonald stayed in Portland, OR, for 2 weeks working on finding ways to exclude lands from the bull trout CHD. Representatives from the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) participated in the discussions, Rabot said. MacDonald developed an approach toward excluding federal lands based on the land management plans of the two agencies, she said.

FWS Region 1's response to the OIG's request for information stated the following:

DAS [Deputy Assistant Secretary] MacDonald directed that the Service revise the rule to exclude Federal lands. DAS MacDonald became heavily involved in the rule at this point, coming out to the Region to work with a team composed of Forest Service, Bureau of Land Management, and Fish and Wildlife Service personnel. The team was tasked with building an administrative record to support Federal land exclusions. DAS MacDonald spent a week in the Regional office working directly with this team.

Rabot believed the exclusion of lands from a CHD was a policy decision within the purview of ASFWP; however, Rabot said she was very frustrated with the fact that the policy decisions dictated by MacDonald were being made without following any clearly defined form or process. Rather, she said it was clear to her that MacDonald was making it up as she went along. Rabot stated that FWS did the best job it could creating arguments supporting MacDonald's predeterminations to exclude all federal lands from the CHD.

Rabot stated that she supported the notion that administrations have the purview to guide political aspects of the ESA decision making. However, she said there was no clear policy or guidance in place as to how FWS should follow the political preferences of a sitting administration. In sum, Rabot stated that FWS found it very difficult to support a predetermined

position of the Administration because the Administration was not capable of pointing to an established, published policy or set of guidelines supporting its decisions. As a result, Rabot said many decisions driven by MacDonald were done so on a decision-by-decision basis and thus could not be successfully defended when challenged in court.

Rabot stated that every rule had a different approach and there was no consistency in the direction coming from ASFWP. Rabot recounted many times where she felt obligated to tell ASFWP that the region simply did not know how to get to the predetermined outcome that was desired by ASFWP.

Ken Berg is the Project Leader for the Lacey, Washington State Field Office in FWS Region 1. Berg stated that his field office did not make any “decisions” regarding listing decisions and CHDs, but rather the office performed analysis and made recommendations to the ultimate decision makers. He said the FWS Director was the ultimate decision maker in the case of listing decisions, and with regard to CHDs, ASFWP was the ultimate decision maker. Berg stated that the creation of the bull trout CHD rule spanned a period of 5 to 6 years and went through much iteration. According to Berg, his role in the process was to guide the biologists in identifying CHD recommendations and potential exclusions; in sum, he supported the technical role for the CHD rule for western Washington.

Berg stated that he worked with Rabot in identifying how private lands might qualify for exclusions to the CHD. Berg said he took the lead on this issue and worked with an SOL Attorney, Rabot, and others in the regional office for a 2-week period. He stated that he had heard that MacDonald was also at the regional office at that time working on the issue, yet Berg said he did not actually meet her.

Berg confirmed that in identifying critical habitat areas for any fish, it was well accepted scientific methodology to use “inference” in determining habitat. However, according to Berg, MacDonald stated that she did not want “inference” to be used in the regulatory process; accordingly, MacDonald directed the biologists not to use the method in developing CHDs, but rather they could only identify CHDs where bull trout were proven to have been present (occupied streams). Berg stated that all of the biologists involved in identifying the CHD for the bull trout strongly disagreed with MacDonald’s direction not to include the unoccupied streams as critical habitat.

Berg stated that as a result of MacDonald’s direction to the scientists not to include “uninhabited streams” in the CHD, many areas identified by the biologists as critical habitat were left out of the rule. Berg said he believed this ultimately resulted in significant gaps in the necessary critical habitat for the bull trout, and consequently, he did not feel the final rule represented the best available science.

Berg went on by saying that because the final rule did not represent “our best work,” he thought FWS needed to redo the rule; however, he also stated that he was aware that CHD rules were subject to policy interpretations. When asked if he, as the project leader for the field office responsible for a large area of the CHD identified in the rule, could defend the rule in court if he

was asked by a judge to do so, Berg replied that he personally believed the rule defied logic and he would not be able to make an argument defending the rule as it was currently written.

The FWS Region 1 Special Projects Coordinator stated that he participated in the region-wide team that was created to review the science behind the designations set forth in the initial final rule for the bull trout CHD, which was later voluntarily remanded by FWS in April 2005 in response to litigation. He also stated that he was personally responsible for compiling the administrative record for the rule's preparation.

Regarding the exclusions to the bull trout CHD, the Special Projects Coordinator stated that MacDonald directed FWS to exclude all lands that had any "plan" governing land use. He explained that this seemed inappropriate to her because several of the "plans" that were used to justify exclusions were not habitat conservation plans, which were developed specifically to provide a certain level of protection for a specific species. He stated that, in fact, several of the "plans" were not developed to protect the bull trout, and therefore he personally questioned why FWS would exclude certain areas from CHD simply due to the existence of a land use plan that provided no protection to the specific species.

As an example, the Special Projects Coordinator stated that certain plans called "sub-basin plans" were developed by local groups to provide benefits to various priority species (e.g. salmon), yet these plans were voluntary and there were no mandates in place requiring the plan to be followed. Accordingly, he explained that there were no assurances that the plans would be implemented, much less whether the plans would actually benefit the bull trout, unlike habitat conservation plans, which were developed to benefit a specific species, such as the bull trout.

The Special Projects Coordinator stated that he personally believed the existence of such plans was not an appropriate rationale for excluding lands from the CHD, yet "huge" areas were excluded under this approach. He also pointed out that all federal lands were excluded from the bull trout CHD under this approach based on the justification that the USFS and BLM had land-use plans in place. Due to his belief that the USFS and BLM plans were not habitat conservation plans that provided ample protection specifically for the bull trout, he stated that these exclusions resulted in the final rule not providing enough critical habitat needed to conserve the bull trout and lead to its recovery.

Barbara Behan is a fish biologist for FWS Region 1. Behan stated that she supported the CHD project coordinator by organizing the material being produced by the field biologists in preparation for rule writing. Behan also helped establish the database of public comments to the proposed rule.

According to Behan, the rule drafted by the field biologists represented the views and recommendations of the biologists, and as the rule for the CHD traveled through the region, fairly few edits were made to the recommendations of the biologists. However, once the rule was forwarded to Washington, D.C., Behan said the rule underwent significant editing.

Behan stated that MacDonald contacted her twice in regard to the bull trout CHD rule. According to Behan, in both instances, MacDonald had called Behan requesting that she copy

and fax multiple references that were cited in the rule to MacDonald. Behan said she was still working on the CHD rule when MacDonald started directing FWS to exclude certain areas from the CHD, such as reservoirs. However, Behan stated that she had been transferred to other duties prior to MacDonald traveling to the regional office for a 2-week stint in which MacDonald worked with Rabot in identifying exclusions to the CHD.

Behan stated that in her professional opinion, MacDonald's level of interference with the creation of the CHD rule was improper. According to Behan, MacDonald defied the scientific determinations made by the biologists as to what should be included in the CHD. Behan said she had never before witnessed such a level of "top-down management" from Washington, D.C.; however, Behan also stated that she was told that this level of hands-on direction was within the discretion of ASFWP.

Behan also stated that she believed the "benefit of the doubt" needed to be given to the protection of the species in listing and CHD decisions; however, this was not being done. She further stated that she believed the lack of clear policy guidance in making these types of decisions allowed too much personal interpretation by political appointees versus following the science.

Ren Lohofener became the FWS Region 1 Regional Director in September 2006 and just prior to that was the Assistant Director for Endangered Species in the FWS Washington Office from September 2005 to September 2006. Lohofener stated that he served as the FWS State Supervisor for Texas (Region 2) from 2002 through 2005.

According to Lohofener, MacDonald was heavily involved with the bull trout CHD. Lohofener stated that he remembered an issue regarding the decision involving the identification of primary constituent elements for the designation. According to Lohofener, MacDonald liked to "go shopping for opinions" and she found a U.S. Geological Service biologist who identified a certain primary constituent element water depth that was different than the water depth identified by FWS biologists. He stated that there was no "right or wrong" depth, so a compromise was ultimately reached. Lohofener stated that he did not believe the CHD was affected by anything "improper."

Chris Nolin stated that the main issue with the bull trout CHD was the amount of exclusions pursued by ASFWP, specifically MacDonald. According to Nolin, MacDonald was very much involved in the bull trout CHD and she "definitely pushed the limits" on ASFWP's ability to exclude areas from a CHD. Nolin opined that it was unwise for the department to "push the limits" as far as MacDonald did in the bull trout CHD decision because a court could find such exclusions unsupportable.

We asked Nolin about MacDonald's direction to Region 1 not to include any unoccupied streams in its original bull trout CHD. Specifically, we asked Nolin if it was a nationwide policy not to include unoccupied areas in CHDs. Nolin responded by stating that there was not a nationwide policy prohibiting the inclusion of unoccupied areas in CHDs. In fact, she stated that the ESA specifically allowed for such designations; however, ASFWP had directed that the standard needed to make such designations was very high.

Nolin stated that she would not be surprised if several regional directors had directed their staff simply not to include unoccupied areas in their CHDs because they felt such a designation would never pass muster when being reviewed by ASFWP.

*Agent's Note: Regarding Region 1's decision not to recommend the bull trout CHD as a decision that warranted reconsideration under FWS Director Hall's memorandum, we found that Region 1 initially did, in fact, recommend the bull trout CHD. However, after further discussion about the criteria outlined in FWS Director Hall's memorandum, Region 1 decided to rescind its submission of the bull trout CHD for reconsideration. In a July 19, 2007 memorandum to FWS Director Hall, Region 1 Regional Director Lohofener stated that the decision "should not have been included in the Pacific Region's [Region 1's] recommendations" because the decision did not involve "the inappropriate use of science," but rather involved a "policy decision" within the discretion of ASFWP; the memo did not discuss how far the reaches of the "policy decisions" went.*

The final bull trout CHD rule was published in the *Federal Register* on September 26, 2005 (70 FR 56212). FWS Region 1's response to the OIG's request for information stated the following:

The rule contained a number of exclusions, most of which were based on the decisions made by DAS [Deputy Assistant Secretary] MacDonald that specific areas did not meet the definition of critical habitat (Section 3(5)(A) of the Act) or that the benefits of excluding lands from critical habitat designation outweighed the benefits of including them (Section 4(B)(2) of the Act).

Plaintiffs filed suit over the exclusions contained in the final rule; oral argument was completed in the District Court of Oregon in April 2007 and a ruling is still pending.

As of November 13, 2008, the U.S. District Court for the District Oregon had not yet made a ruling regarding the lawsuit.

### **3. Northern Spotted Owl Recovery Plan (Region 1)**

#### *Summary:*

We determined that MacDonald was heavily involved in trying to contract out the development of the Northern Spotted Owl Recovery Plan (NSORP), including personally reviewing the Statement of Work (SOW) and Request for Proposal (RFP) related to the potential contract. After FWS Director Hall decided that FWS would develop the plan in-house rather than contract it out, MacDonald continued her involvement with the development of the NSORP by dictating the make-up of the recovery team that was formed to develop the plan. The draft NSORP was eventually criticized heavily during the peer review process and as a result was later modified by FWS.

*Details:*

FWS Region 1's response to the OIG's request for information stated the following:

The Service's records reflect substantial involvement by DAS [Deputy Assistant Secretary] MacDonald in the very early phases of the Recovery Plan process. Specifically, DAS MacDonald was heavily involved in the early decision to contract the Recovery Plan to an outside party, the proposed RFP itself, and in the makeup of the Recovery Team .... Once a decision was reached that the Service would prepare the Recovery Plan, to our knowledge DAS MacDonald's involvement essentially stopped.

Michelle Zwartjes is a Biologist in the Listing Division for FWS Region 1. She has been in her current position since November 2006, and prior to this she was a biologist in the Recovery Planning Division. According to Zwartjes, as a biologist in the Recovery Planning Division, she reviewed the science and policy of various recovery plans, including the NSORP.

Zwartjes stated that she initially worked on developing the SOW for a projected contract to create the recovery plan until it was decided that the plan would be completed in-house by FWS. Zwartjes explained that a recovery plan of this nature would typically always be completed in-house, yet she understood that MacDonald was pushing to have it contracted out. Zwartjes said that MacDonald was very active in the creation of the SOW.

Zwartjes provided a draft SOW Region 1 prepared that was forwarded to MacDonald prior to the decision to have the plan developed in-house by FWS. The SOW was dated September 29, 2005, and MacDonald returned the draft with her comments to Region 1 on October 17, 2005. Contained in the draft SOW was a recovery plan checklist that was to be provided to a potential contractor identifying sections that were required to be included in the recovery plan. The checklist required the contractor to include a "recovery" section to the recovery plan that contained a "Narrative Outline of Recovery Actions" that might include the following:

- Limiting take
- Habitat protect/restoration
- Research
- Control of threats
- Monitoring/adaptive management
- Population augmentation
- Outreach

On the draft SOW, Zwartjes pointed out that MacDonald crossed out "habitat protect/restoration" from the list, indicating she did not want the contractor to discuss habitat protection/restoration as a potential "recovery action" for the owl.

Zwartjes said that after FWS (Hall) decided to create the plan in-house, region and Washington, D.C., officials exchanged ideas on this issue until MacDonald ultimately dictated who would be on the recovery team that would be drafting the plan. According to Zwartjes, a typical recovery

team consisted of experts in the particular species; however, in the case of the NSORP, MacDonald ultimately dictated who would be on the recovery team, which did not contain any scientists who were “owl experts.” *Agent’s Note: FWS does not have a formalized policy dictating who will be on a recovery team.*

Zwartjes said she believed that any recovery team should have included species experts; otherwise, the recovery team might have a difficult time understanding the requisite science. In the case of the NSORP recovery team, Zwartjes stated that she believed the team lacked scientific owl experts and the appropriate balance between the state/agency/timber industry/environmental group representatives and scientists. Zwartjes explained that a combination of such representation and owl experts would have been the optimal balance for this recovery team.

In addition to preventing any “owl expert scientists” from participating on the recovery team, Zwartjes stated that MacDonald refused to allow any direct Native American representation by claiming the Bureau of Indian Affairs would adequately represent the interest of the tribes affected by the NSORP. Zwartjes said the Regional Director disagreed with MacDonald on the issue and argued strongly in favor of allowing Native American representation on the recovery team – all to no avail. Zwartjes stated that she believed this decision was an example of “extremely poor relations” because such an action was analogous to “cutting out” those local tribes who would be affected by the NSORP.

Zwartjes said she felt the decisions being made by FWS were not being driven by the best science but rather other interests. She stated that she had often witnessed “the best science being shelved” in the decision-making process in order to have a predetermined outcome reached, which she believed was often transparent to the public and the courts. Accordingly, she said FWS was often litigated against and forced to redo many decisions, all at the taxpayers’ expense, simply because the best science was ignored in lieu of a predetermined outcome. In sum, she stated that she was very frustrated with the current state of affairs within FWS and DOI.

*Agent’s Note: According to FWS Region 1’s response to the OIG’s request for information, “on March 27, 2006, FWS Director Hall decided for fiscal reasons that the Service would not use a contractor to develop the NSORP,” but rather Region 1 would “lead development of the Plan.”*

Patrick Sousa is the Program Manager (Chief) for the Endangered Species Program for FWS Region 1. According to Sousa, as a Chief for the Endangered Species Program, he was initially involved with the creation of the NSORP. Sousa stated that he initially worked on developing the RFP for the potential contract to create the recovery plan until it was decided that the plan would be completed in-house by FWS. After the decision was made to create the plan in-house, Sousa participated in group decisions concerning the make-up of the recovery team.

Sousa stated that MacDonald was very active in the creation of the recovery team and in dictating the make-up of the team. He confirmed Zwartjes’ statement that MacDonald refused to allow any direct Native American representation by claiming the Bureau of Indian Affairs would adequately represent the interest of the tribes affected by the NSORP. According to Sousa, he personally prepared a two-page briefing paper arguing the benefits of tribal representation on the recovery team, yet MacDonald ultimately denied their representation.

Sousa stated that he remembered there were group discussions about the potential creation of two recovery teams – one being made up of various state and agency representatives and the second team being made up of owl expert scientists. However, he recalled that the science advisory team was not created and MacDonald dictated that the one recovery team would consist of representatives from California, Oregon, Washington State, FWS, the Bureau of Indian Affairs, BLM, USFS, and the National Park Service, along with two private timber representatives and two environmental representatives. Sousa stated that he was uncertain if MacDonald picked the actual individuals for the team because once the logistics of the recovery team were established, the NSORP process for creating the plan left his domain.

Theresa Rabot stated that MacDonald desired to have the task of creating the NSORP to be put out for contract and be led by a political team in Washington, D.C., and Rabot performed a significant amount of work preparing an RFP for such a contract, at MacDonald’s direction. According to Rabot, after FWS decided to complete the NSORP in-house and the recovery team was created and assigned the task of creating the recovery plan, she personally had very little interaction in the process. Rabot said she believed MacDonald’s involvement with the creation of the NSORP ended after the creation of the recovery team.

Dave Wesley is the Deputy Regional Director for FWS Region 1. Wesley stated that he has been in his current position for the past 5 years, and prior to that, he was the Assistant Regional Director for Migratory Birds in State Programs.

Wesley stated that he was appointed as the NSORP recovery team leader by former Region 1 Regional Director Dave Allen. Wesley stated that a multi-group/state/agency approach was taken in forming the recovery team. Specifically, Wesley said the following persons were on the recovery team:

- Cal Joyner U.S. Forest Service
- Mike Haske Bureau of Land Management
- Scott Grimel National Park Service
- David Wooten Bureau of Indian Affairs
- Lenny Young Washington State
- Mike Cafferetta Oregon State
- John Sipirek California State
- Lowell Diller Timber Industry
- Ed Murphy Timber Industry
- Tim Cullinham Environmental Group
- Dominick DellaSala Environmental Group

Wesley stated that the recovery team was supported by an interagency support team that performed the day-to-day organization of the project by setting meetings, compiling references, etc. According to Wesley, Paul Phifer, an FWS employee of Region 1, chaired the interagency support team, and Zwartjes also served on the team.

According to Wesley, the first step taken by the recovery team was to perform a five-factor analysis examining the threats to the northern spotted owl. Wesley stated that there was a “huge” volume of information that had been gathered over the past 10 years related to the species, including an FWS 5-year review and a 10-year review of the Northwest Forest Plan. Additionally, a panel of owl experts, including owl expert scientists from the USFS, was convened to discuss the threats to the species. Wesley stated that the recovery team eventually held several workshops to identify the threats and develop criteria that would help form the recovery plan.

Wesley said the recovery team had been given a target date for the development of the NSORP of September 30, 2006. According to Wesley, this target date provided the recovery team with only 6 months to complete the project, whereas he stated that normally a project of this magnitude would take 1 year.

Wesley stated that the recovery team ultimately developed a plan in which all members of the team reached a consensus on its criteria, threats, and goals. According to Wesley, the main issue the recovery plan addressed was the loss of habitat for the northern spotted owl, which was generally made up of older, larger trees (old growth). Wesley stated that the recovery team adopted a concept of managed reserve area networks in the plan, and these habitat conservation areas were termed as Managed Owl Conservation Areas. In creating these Managed Owl Conservation Areas, Wesley stated that the recovery team used the most recent scientific data in order to determine the size and disbursement of the reserve networks, while attempting to avoid as much private land as possible. Ultimately, he stated that the plan recommended one option where a series of larger and smaller networks of Managed Owl Conservation Areas would be established, along with recommendations for dealing with other threats, such as barred owls.

Wesley stated that the recovery team presented the plan to the Regional Director on September 29, 2006, which was then forwarded to Washington, D.C. Wesley said he personally presented the draft plan in Washington, D.C., to the Washington Oversight Committee that was made up of political appointees in October 2006. According to Wesley, the following individuals comprising the Washington Oversight Committee were present at the October 2006 briefing: DOI Deputy Secretary Lynn Scarlett, DOI Associate Deputy Secretary Jim Cason, DOI Acting Assistant Secretary for Fish, Wildlife and Parks David Verhey, DOI Solicitor David Bernhardt, BLM Director Kathleen Clarke, DOI Deputy Assistant Secretary for Lands and Minerals Julie Jacobson, a BLM headquarters staff member, Undersecretary of Agriculture Mark Rey, Deputy Secretary of Agriculture Dave Tenney, USFS Associate Deputy Chief Fred Norburry, and FWS Director Dale Hall (via telephone). Wesley stated that MacDonald also attended the briefing but did not ask any questions or make any comments. *Agent's Note: According to FWS Region 1's response to the OIG's request for information, "MacDonald was present at the briefing but gave no comments or direction".*

Wesley stated that the Washington Oversight Committee asked many questions about the plan and DOI Deputy Secretary Scarlett was complimentary of the work the recovery team had done in developing the plan. Ultimately, however, the Washington Oversight Committee asked Wesley to consider other options under the plan. Specifically, regarding the format of the plan, the Washington Oversight Committee suggested to Wesley that the recovery team place the

conclusions of the plan at the beginning of the plan, rather than discussing the biology prior to stating the conclusions. Secondly, rather than mandating the creation of delineated reserves (Managed Owl Conservation Areas), the Washington Oversight Committee asked if the recovery plan could simply identify habitat areas, along with a set of rules and guidance for local conservation efforts in those areas. According to Wesley, the Washington Oversight Committee based this suggestion on the idea that the local land managers could take the necessary measures to protect the species without placing on them the burden of mandated reserve networks. Lastly, Wesley stated that the Washington Oversight Committee suggested that the plan place more emphasis on dealing with the threat of the barred owl, rather than focusing mostly on the loss of habitat.

Wesley stated that he brought the Washington Oversight Committee's suggestions back to the recovery team members for consideration. He said some team members felt that a plan that did not mandate specific network reserves, but rather was composed of only rules and guidance for local managers (states, counties, agencies, etc.) to follow, at their own discretion, was unacceptable. Specifically, Wesley stated that those members believed the recovery plan needed to "lock down" certain areas (reserve networks) that would be protected, rather than trusting local managers to exercise their discretion to do the right thing by following the plan's rules and guidance. Wesley stated that it was his personal opinion that such an approach could work, as long as the appropriate rules, guidance, and oversight were provided to the local land managers because he believed that most managers "try to do the right thing" for the species. He pointed out that, in fact, the original plan allowed for local land managers to make minor adjustments to the reserve networks depending on local conditions and needs.

Based on the guidance issued by the Washington Oversight Committee, Wesley stated that the recovery team then started to develop a set of rules and guidance for local land managers to follow. According to Wesley, they approached this task by asking themselves two things: "What rules and guidance are needed to provide protection for the species?" and "What rules and guidance should be established that would prevent a rogue land manager intent on 'not doing the right' [thing] from being able to find loopholes in the guidance and not take the necessary protective measures for the species?" Wesley stated that the recovery team went through a series of exercises where it created various hypothetical situations that tested the rules and guidance with regard to these two concerns, and, according to Wesley, the rules and guidance the team created "stood up well" to those tests.

After publishing the draft recovery plan in April 2007 that no longer included a mandated network of reserve lands (Managed Owl Conservation Areas), but rather contained an option based on the rule/guidance approach – as per the guidance of the Washington Oversight Committee – all members of the recovery team agreed that the document should be peer reviewed to ensure the science was sound. The Society for Conservation Biology and the American Ornithologists' Union conducted a joint, independent peer review of the draft recovery plan, and the Wildlife Society conducted a second review. Additionally, the three owl expert scientists whose work was referenced in the plan by the recovery team were asked to review the plan to ensure their research was correctly referenced. According to Wesley, both peer reviews indicated that FWS "missed the boat on the science," and all three owl expert scientists stated that the plan misrepresented their research.

Zwartjes stated that she believed the recovery team's initial plan was the best they could do considering the lack of sufficient time they were given to complete the plan, along with the lack of scientific owl experts' presence. She stated that the team basically "regurgitated" the 1992 NSORP, which was an excellent plan created by owl experts yet was never signed or finalized. Zwartjes explained that the recovery plan created by the recovery team essentially modified the habitat reserve approach created in the 1992 NSORP. She also pointed out that all of the representatives on the recovery team reached a consensus on the initial plan.

However, after the initial recovery plan was forwarded to Washington, D.C., for review, Zwartjes stated that the Washington Oversight Committee dictated that an "option" without demarcating fixed reserve lands be created. According to Zwartjes, this option would provide a broad description of habitat areas while not mandating the creation of a network of reserves with defined boundaries but rather would allow local land managers the discretion to identify protected areas and adjust such areas as they saw fit. Zwartjes stated that she was uncertain who "would oversee" such a process in order to ensure local land managers were taking the correct steps in protecting the species.

Zwartjes stated that she believed this option was "driven by the revision of the BLM's Western Oregon Plan," which affected BLM's approach in timber harvesting of late-successional reserves (old growth forests). Zwartjes said she believed the Western Oregon Plan placed the conservation and recovery of the northern spotted owl secondary to timber harvesting. She explained that when she attended meetings involving the Western Oregon Plan, the most important question was, "What do we want to harvest?" versus, "What is best for the northern spotted owl?"

Upon receiving direction from the Washington Oversight Committee to create an option where a network of reserves would not be mandated, Zwartjes stated that the recovery team could no longer reach a consensus as to what the plan should contain. Zwartjes stated that this was the case because the environmental representatives on the team had concerns about the lack of oversight over the local land managers under the option suggested by the Washington Oversight Committee. She said the environmental representatives argued that there needed to be a fixed system of reserves; otherwise, the government would be forced "to trust" the local land managers to take all necessary actions to protect the species.

Zwartjes confirmed that after the recovery team published the draft recovery plan that incorporated the suggestion of the Washington Oversight Committee in April 2007, FWS requested peer reviews from several professional organizations that contained experts in owl conservation, along with requesting the review of the three main owl expert scientists whose research was relied on to produce the plan. According to Zwartjes, all of the peer reviews were critical of the plan.

Paul Phifer is a Project Manager for FWS Region 1 and was the manager for the interagency support team that handled the day-to-day management issues related to the creation of the NSORP. When interviewed on this matter, he stated that the interagency support team was

created simultaneously with the recovery team in April/May 2006 to organize meetings, gather scientific data, and provide logistical support to the project.

According to Phifer, after the initial draft NSORP was presented to the Washington Oversight Committee, the committee suggested that rather than mandating the creation of delineated reserves, the recovery plan could identify habitat areas, along with a set of rules and guidance for local conservation efforts in those areas. Phifer stated that the Washington Oversight Committee also suggested the plan place more emphasis on dealing with the threat of the barred owl, rather than focusing mostly on the loss of habitat.

Phifer opined that the Washington Oversight Committee did not “get much into the weeds” with the development of the plan but rather only made policy suggestions. Regarding the negative peer reviews of the draft recovery plan published in April 2007, Phifer stated that he believed the criticism was based on a mix of science and biases of the reviewers. He stated that the peer review critiques made some valid scientific criticisms, yet he believed some of the criticisms were based solely on mistrust of the current Administration to do the right thing. Phifer admitted that the April 2007 draft recovery plan probably “over extrapolated the science,” but FWS did feel it was getting things right. He summed it up by stating that he felt FWS was trying to be “cutting edge” with its understanding of the science, yet it “got slapped for it.”

Phifer stated that the effects the NSORP might have on the timber industry were certainly considered in creating the plan; however, he said the plan was developed in a “framework” of attempting to provide flexibility to USFS regarding timber yield, while simultaneously leading to the recovery of the species. He stated that he believed the compromise between these two goals reached in the plan did not represent “improper political influence,” but rather it simply reflected the “high level of risk tolerance” accepted by the current Administration.

Phifer explained that he viewed this type of policy call to be representative of the level of “risk tolerance” adopted by a sitting administration. Phifer explained that if an administration had a high risk tolerance level, it would make policy calls that were not as conservative in the effort to recover a species (i.e., decreasing the levels of protection to a species leading to its recovery); whereas, if a sitting administration had a lower risk tolerance, it would make policy calls that were more conservative (i.e., increasing the levels of protection to a species leading to its recovery).

Phifer stated that the strongest language he heard suggesting “political influence” was during a teleconference where a female political appointee/attorney from BLM’s Washington Office stated that the NSORP plan must “not be tiered to the Northwest Forest Plan” because that plan was a “Clinton plan” rather than a “Bush plan.” Phifer stated that he was uncertain which political appointee made the comment because it was made during a teleconference and Phifer was not aware of all the individuals from Washington, D.C., who were participating in the call.

As a result of the negative scientific peer reviews, Wesley told the OIG that FWS held public meetings and extended the comment period for the final rule twice, through October 2007. According to Wesley, once the comment period ended, he worked with the interagency support team to ensure that every comment was considered, and after such review, FWS determined that

there were approximately 10 to 15 issues of concern with the plan expressed by scientists and the public.

At this point, according to Wesley, FWS decided to contract with Sustainable Ecosystems, Inc., a nonprofit private contractor, to have the plan analyzed in order to determine how it could be modified to reflect the peer reviews and scientists' comments. *Agent's Note: Sustainable Ecosystems, Inc. released a draft report to FWS in early 2008 and issued its final report in April 2008.* In sum, Wesley stated that the Sustainable Ecosystems, Inc. report recommended that the NSORP provide an option that established a group of mandated network reserves for the "west side" of the Cascade Mountain Range, whereas a group of such reserves was not recommended for the "east side" of the Cascade Mountain Range due to the threat of fire.

According to Phifer, he managed the contracting work performed by Sustainable Ecosystems, Inc.. He said FWS created three separate panels (after FWS received the draft report) to consider issues identified by the company: loss of habitat, fire, and the barred owl. Phifer stated that after the panels reviewed these issues, the obligation of drafting a revised plan fell squarely onto the interagency support team because the recovery team had been disbanded in November 2007. Phifer stated that he supervised the interagency support team in revising the plan and he submitted a revised plan to Region 1 Regional Director Ren Lohofener on April 4, 2008. In sum, Phifer stated that in response to the contractor's report and the workgroup panels, the interagency support team proposed that all "high-quality" habitat, and occupied habitat areas, be left "untouched" in the NSORP.

When interviewed about the Washington Oversight Committee, Lohofener stated that certain persons on the committee desired to be involved in forming the details of the plan. He stated that DOI fielded interest from other agency officials, including Mark Rey, Under Secretary of the Department of Agriculture. However, ultimately, the Washington Oversight Committee was not involved in developing the specifics of the NSORP, he said. Lohofener stated that he did not believe there was any "improper" political influence that affected the creation of the plan.

When asked if the management plans of BLM or USFS heavily influenced the creation of the NSORP, Lohofener stated that the NSORP was guidance, not regulation. Therefore, he explained, people had to want to follow the plan; otherwise, it would "just sit on a shelf." Accordingly, he stated that FWS needed to work closely with BLM and USFS in creating the plan so that those agencies could become vested in the plan.

Lohofener stated that he believed the NSORP was "more than fair" for the spotted owl. He stated that in creating the plan, FWS was able to have BLM and USFS agree to "do something they had never done before." According to Lohofener, under the plan, no old growth forests would be harvested over the next 10 years. Lohofener stated that he believed this was "huge" for the owl.

Lohofener stated that he was "amazed" that the NSORP was finalized due to the prodigious amount of biases, opinions, and political interests surrounding its development. Regarding his interactions with the private contractor, Sustainable Ecosystems, Inc., which reviewed the use of the science in the April 2007 draft recovery plan, Lohofener stated that he needed to ask the

company to remove some “opinions” from its report. However, notwithstanding the “opinions” in the report, Lohofener stated that there would not be a finalized NSORP if it were not for the Sustainable Ecosystems, Inc. report.

Lohofener signed the final plan on May 13, 2008. According to Lohofener, FWS was working very closely with BLM and USFS in preparation for implementing the plan. Indeed, Lohofener stated that FWS had actually asked BLM and USFS to take a lead in the implementation process because most of the habitat discussed in the NSORP was on land managed by those two agencies.

Phifer prepared the following comparison between the initial NSORP drafted by the recovery team in September 2006, the draft recovery plan published in April 2007 (after input and direction by the Washington Oversight Committee), and the final NSORP signed in May 2008:

The Final Northern Spotted Owl Recovery Plan was the culmination of several previous versions. Each version identified the top three threats facing the northern spotted owl (NSO) as past and current loss of habitat from harvest and catastrophic fire, and competition from barred owls. There were many revisions across the iterations of the plan.

September, 2006

- Managed Owl Conservation Areas (MOCAs) identified across the range
- Suitable habitat targets for each MOCA based on the habitat fitness theory
- Recovery actions described to reduce risk from fire
- Manage to minimize negative effects of barred owls on spotted owls

April, 2007

- Emphasized barred owls are the most pressing threat facing the NSO
- Two possible options to address threat from habitat loss
  - o Option 1 – MOCAs identified across the range
  - o Option 2 – rule set described for land management agencies to delineate conservation areas. No conservation areas for the northern spotted owl were mapped
  - o For each option - Suitable habitat targets for each MOCA based on the habitat fitness theory
- Recovery actions to reduce risk from fire
- Appendix added with draft experimental control of barred owls

May, 2008

- Top three threats (habitat loss due to harvest and catastrophic wildfire) identified as equally important
- 2 options and habitat fitness targets eliminated
- On the west side of the Cascade Mountains, MOCAs identified
- On the east side of the Cascade Mountains, a landscape approach described for managing all of the Federal lands to support the building blocks of NSO habitat and aggressive risk (e.g., fire and insects) reduction

- Barred owl appendix eliminated and replaced with a call for large scale barred owl control in key NSO areas
- Call to maintain substantially all of the older, complex forests on Federal lands west of the Cascade Mountains, outside of MOCAs, as we learn to address the threat from barred owls

*Agent's Note: In FWS Region 1's response to the OIG's request for information, FWS Region 1's records did not indicate instances where MacDonald "influenced or changed the science used in the draft recovery plan." Accordingly, FWS Region 1 stated that it "did not submit this action for review because it did not meet the criteria identified in Director Hall's memorandum."*

#### **4. Marbled Murrelet 5-Year Review (Region 1)**

##### *Summary:*

FWS Region 1 conducted a 5-year review of the marbled murrelet beginning in 2003 and 2004. The task of conducting the status review of the species was contracted out, and based on the review, according to FWS Region 1's response to the OIG's request for information, Region 1 made a finding that the murrelet did represent a distinct population segment, and the finding was forwarded to ASFWP. Region 1's response also stated, "On August 30, 2004 (one day prior to the completion of the 5-year review), the Service was provided new text from [Deputy Assistant Secretary] MacDonald and [Assistant Secretary] Manson for insertion into the 5-year review," and "the new text concluded that the lower-48 population of the murrelet did not differ from the Canadian population in conservation status, management or regulatory mechanisms and, therefore, did not meet the DPS [distinct population segment] policy's discreteness tests."

While MacDonald and Manson changed the text of the final review the day before it was completed, the 5-year review did not change the listing status of the murrelet. Thus, DOI decided not to pursue its delisting through the internal candidate process. However, based on its finding of a non-distinct population segment, FWS received a petition to delist the species. In response to the petition to delist, FWS conducted a 90-day review and subsequently issued a Proposed Rule to delist the marbled murrelet in the *Federal Register* on October 2, 2008 (73 FR 57314). Of note, however, in the Proposed Rule to delist the species, FWS stated that "[t]he service now believes that the discreteness analysis in the 5-year review was flawed, because it compared current levels of legal protection across the international border, rather than levels of protection that would exist if the marbled murrelet were not listed in the United States" (73 FR 57317).

##### *Details:*

FWS Region 1's response to OIG's request for information stated the following:

A 5-year review of the marbled murrelet (MAMU) was conducted in 2003 and 2004 (published in the *Federal Register* August 31, 2004). This review was one of the first such reviews conducted by the Service nationally, and occurred

concurrently with the development of national guidance for such reviews. Therefore, it is difficult to say what was considered standard 5-year review practice at that time, although the personal involvement of Department level officials in rewriting a finding would be considered unusual in most situations.

Paul Phifer stated that he played essentially the same role as a project manager of the marbled murrelet 5-year review as he did with the development of the NSORP. According to Phifer, after FWS decided to contract out the task of performing the 5-year review, he was responsible for preparing the RFP that identified the parameters of the review for the contractor. Additionally, after EDAW, Inc. was awarded the contract, Phifer stated that he managed how the contractor performed the review.

Theresa Rabot, Assistant Regional Director for Ecological Services, FWS Region 1, played a supervisory role in all species decisions emanating from Region 1 (reviewing lower level staff's work products, etc.), including this decision. Rabot said MacDonald was very engaged in the project and made many comments to the RFP regarding its requirements and ultimate final product.

According to both Rabot and Phifer, one of the main issues covered in the 5-year review concerned whether or not the murrelet met the 1996 policy guidelines for establishing a distinct population segment. After the review was completed, Rabot and Phifer stated that the regional office engaged in a structured decision-making process that included the Regional Director and several other managers in Region 1. After this process was completed, Rabot said, the region determined that, based on the review produced by the contractor, the murrelet did meet the standard of a distinct population segment. According to Phifer, he personally facilitated this process as the project manager and wrote the 5-year review report that was then forwarded to ASFWP, through the FWS Washington Office.

Phifer stated that the ASFWP political appointees involved in the 5-year review decision were Manson and MacDonald. He said Manson and MacDonald reviewed the materials and asked several questions, and he also conducted a face-to-face briefing for them. As noted above, the region conducted a structured decision-making process, including several managers in Region 1, and the region determined that the murrelet represented a distinct population segment. However, ASFWP determined "at the eleventh hour," that the murrelet was not a distinct population segment because it was not "discrete," he said. Phifer stated that Manson and MacDonald also raised questions about the objectivity of the contractor's report because some of the individuals who worked on the report for EDAW, Inc. had been outspoken advocates for the murrelet in the past.

According to Phifer, the main issue in determining whether the murrelet population was a distinct population segment (i.e., did it meet the discreteness test) was based on the differences between the protection measure for the species between the United States and Canada. Whereas, in its structured decision-making process, Region 1 determined that there were differences between the protections offered by the two nations, Phifer stated that Manson and MacDonald determined that there were no differences. Therefore, Manson and MacDonald stated that since Canada amply protected the species under its Species at Risk Act (SARA), such protection was

adequate enough not to warrant a separate distinct population segment finding for the murrelet located in the United States (i.e., the United States population was not “discrete” from Canada’s population). As a result of their determination, Phifer stated that Manson and MacDonald simply e-mailed Region 1 the new language they directed to be inserted in the 5-year review report, changing its finding of a distinct population segment to a finding of a non-distinct population segment. Rabot also confirmed to us this scenario of events.

Sarah Hall is the Recovery Coordinator, Chief of Recovery Program, for FWS Region 1. Hall stated that she has been in her current position since 1998, and in this position, she provides program oversight on all recovery plans and status reviews completed by the region. Hall confirmed the scenario of events as outlined by both Phifer and Rabot regarding the region’s structured decision-making process, their positive finding of a distinct population segment, and Manson and MacDonald’s subsequent changing of the positive finding of a distinct population segment to a negative finding.

According to Hall, ASFWP determined that the murrelet was not a distinct population segment because it was not distinct from the population in Canada, and since Canada protected the species under SARA, such protection was adequate enough not to warrant a separate distinct population segment finding for the murrelet located in the United States. Hall stated that she believed Manson and MacDonald’s reasoning was flawed because SARA was a relatively new law and its effectiveness was wholly untested.

[Exemption 5] The SOL Regional Attorney explained in his legal memorandum:

After delisting, there will be substantially less legal protection for the species in the U.S. than in Canada, and the population will therefore be discrete under the DPS [distinct population segment] policy. The rational way to conduct a 5-year review is to assess the species definition and listing factors in the same manner as for an unlisted species, i.e. without ESA protection ....

The purpose of a five-year status review under ESA Section 4(c)(2) is to determine whether a listed species should remain listed. The logical way to approach such a review is to apply the listing criteria to the species in the same manner as the Service does when it makes an initial listing determination. At the time of an initial listing determination, a species does not yet enjoy ESA’s protection, so an analysis for ‘discreteness’ based on an international border would compare any regulatory mechanisms on the foreign side of the border with any *non-ESA* regulatory mechanisms that exist in the United States. I believe there is no rational basis for conducting a five-year review of a listed species in a different manner.

When Phifer was asked if he believed the determination made by ASFWP regarding the murrelet’s distinct population segment status represented “improper political influence,” he stated that Congress, in the congressional record, had directed that findings of distinct population segment should be made sparingly. Therefore, Phifer stated that he believed the type of determination made by Manson and MacDonald represented a policy call and, in his mind, did

not need to be based on science. According to Phifer, he viewed this decision by Manson and MacDonald to once again represent the high level of risk tolerance adopted by the current Administration.

We asked Rabot what the ultimate outcome of the finding meant to the species and she responded by stating that the finding of no distinct population segment had led to several groups reaching out to FWS requesting the murrelet to be delisted. Rabot pointed out, however, that FWS had not made any internal attempts to delist the species, so, in essence, the finding had not yet altered the murrelet's listing status. Conversely, groups that supported the continued listing of the murrelet requested that FWS change its finding back to the determination that the murrelet represented a distinct population segment.

Douglas Krofta is the current FWS Chief of the Branch of Listing at the FWS Washington Office. Krofta has been in his current position for the past 2 years and was a staff member of the Listing Program prior to his appointment as Chief. As a staff member for the Listing Program, he reported directly to Chris Nolin, former Chief of FWS' Conservation and Classification for the Endangered Species Program.

According to Krofta, he had very little involvement in the 5-year review of the murrelet; however, he stated that there was a clear interest in ASFWP to have the species delisted. According to Krofta, he believed ASFWP's goal to delist the species influenced its decision to make a negative distinct population segment finding.

Lohofener stated that he had some involvement in how the 5-year review was viewed by the department after its completion. He confirmed that the decision that the murrelet was not a distinct population segment was made by Manson as a policy call based on the Canadian equivalent to the ESA. [Exemption 5]

Lohofener stated that he recently put together a panel that reviewed the entire range of the murrelet, and the panel determined that the species was declining range-wide. Based on this finding, Lohofener stated that he was able to persuade DOI Deputy Secretary Scarlett that FWS should not pursue Manson's desire to delist the murrelet under FWS' internal candidate process.

Lohofener stated that FWS did, however, receive a petition to delist the murrelet in June 2008 and he believed there was enough information to support a positive 90-day finding, including the 5-year review's negative finding of a distinct population segment.

FWS Region 1's response to the OIG's request for information stated the following:

On July 12, 2006, Chris Nolin (chief of listing at the WO [Washington Office]) relayed the following message to Regional Office listing contacts throughout the country: 'Because the creation of a DPS [distinct population segment], although informed by science, is largely a policy decision, we need to be aware of the Department's preferences with respect to interpreting the policy. The Department is generally not using the international border to define discreteness, believing

that management differences between the US and its neighbors are not that great.’  
[Exemption 5]

During his interview on that subject, Manson stated that species listed as potential candidates were to be reviewed every 5 years pursuant to the ESA. FWS Region 1 in Portland conducted the marbled murrelet review and determined that it should remain listed. However, Manson said, FWS Region 1 did not consider the status of the bird in Canada, which had passed a new endangered species law. Manson told Region 1 that pursuant to the ESA, the region was required to consider the Canadian statute and international boundaries. Manson said these issues made the bird “not validly listed as a DPS [distinct population segment].” Manson said some people accused him of doing this in an attempt to try to delist the marbled murrelet; however, he said this delisting action was never taken and that the only insistence he made was that the law be appropriately applied.

Regarding Region 1’s decision not to recommend the marbled murrelet 5-year review as a decision that warranted reconsideration under FWS Director Hall’s memorandum, Region 1 initially did recommend the murrelet 5-year review. However, after further discussion about the criteria outlined in FWS Director Hall’s memorandum, Region 1 decided to rescind its submission of the murrelet 5-year review for reconsideration. In a July 19, 2007 memorandum to FWS Director Hall, Region 1 Director Lohofener stated that the decision “should not have been included in the Pacific Region’s [Region 1’s] recommendations” because the decision did not involve “the inappropriate use of science” but rather involved a policy decision within the discretion of ASFWP.

In response to the June 2008 petition to delist, FWS conducted a 90-day review and subsequently issued a Proposed Rule to delist the marbled murrelet in the *Federal Register* on October 2, 2008 (73 FR 57314). Of note, however, in the Proposed Rule to delist the species, FWS stated the following (See 73 FR 57317):

The Service now believes that the discreteness analysis in the 5-year review was flawed, because it compared current levels of legal protection across the international border, rather than levels of protection that would exist if the marbled murrelet were not listed in the United States. The Service believes that the latter approach is more rational in the context of a 5-year review, because it analyzes discreteness in the same manner as the Service would in an initial listing determination. Nonetheless, because the 2004 5-year review did conclude that the population was not a valid DPS [distinct population segment], and because the Service has not formally revisited that conclusion since then, a reasonable person could conclude that the petitioned action may be warranted.

With this substantial 90-day finding we are initiating a rangewide status review of the species, and, once it is completed, we will make a finding on whether delisting the California, Oregon, and Washington population of the marbled murrelet is warranted. Our status review will also consider whether alternative DPS configurations are warranted or whether any additional changes to the status of the species throughout its range or within significant portions of the species'

range are warranted. Because our next 5-year status review will be due around the time our 12-month finding is due, and because the 12-month finding and 5-year status review serve a similar purpose (i.e., to determine the appropriate classification of a species under the Act), the results of our 12-month finding will be adopted for our 5-year status review.

## **5. Western Gray Squirrel Listing (Region 1)**

### *Summary:*

In April 2003, FWS Region 1's Field Office in Lacey, Washington, submitted to the regional office a "warranted but precluded" finding for the potential listing of the western gray squirrel. After a review by regional managers, the region decided to change the finding to a "not warranted" finding because the regional managers believed the western gray squirrel in Washington State did not represent a distinct population segment. All FWS staff involved in the decision stated that there was no involvement with the decision whatsoever by any political appointee, including MacDonald; but rather the decision was made by career FWS staff based on the best available science.

### *Details:*

FWS Region 1's response to the OIG's request for information stated the following:

- The Service was petitioned in January 2001 to list the western gray squirrel in the State of Washington under the Act.
- The Service published a 90-day finding on October 29, 2002, that listing the squirrel under the Act 'may be warranted.' This action triggered a species assessment leading to a 12-month finding.
- The Western Washington Fish and Wildlife Office submitted a proposed 12-month finding in April 2003 that listing the gray squirrel in Washington was 'warranted but precluded by higher priority listing decisions.'
- The Regional Director concluded that the assessment did not make a compelling case to support listing as a Distinct Population Segment. The published finding articulated that the western gray squirrel met the discreteness criterion of the DPS [distinct population segment] Policy, but that it was not 'significant to the remainder of the taxon,' thus failing to meet the significance criterion of the DPS [distinct population segment] Policy.
- The Administrative Record contains documents from the Regional Director and Assistant Director-Endangered Species explaining the rationale behind the 'not warranted' decision.

Ted Thomas is a Senior Ecologist for the Division of Listing and Recovery for FWS Region 1, and he has been in his current position since 2004 in the Lacey, Washington State Field Office. Thomas stated that he was the manager of the listing and recovery branch at the time the listing decision for the western gray squirrel was processed. He stated that he reviewed the package and surnamed the package prior to it being forwarded to Field Office Supervisor Berg.

According to Thomas, the Washington State Department of Wildlife had placed the western gray squirrel on its endangered species list in the 1990s and FWS received a petition for its listing under the ESA in 2000, yet the funding was not available for FWS to pursue the petition at that time. Thomas stated that eventually the Lacey, Washington Field Office was “given the go-ahead” on reviewing the 90-day petition, and the office made a positive finding, which triggered the 12-month review of the petition.

According to Thomas, the field office eventually recommended a positive “warranted but precluded” finding to the regional office. A briefing was provided to Regional Director Dave Allen about the positive finding; however, the field office learned the next day that the Regional Director decided the finding should be “not warranted.” Thomas stated that he understood the Regional Director’s reasoning for a negative finding to be the fact that the species was plentiful in Oregon and California and was even hunted in California. Thomas said the field office argued that the western gray squirrel in Washington State was a distinct population segment from the species in Oregon and California, yet the region determined that the Washington State population was “not significant to the population as a whole.” Based on his personal role in the listing process for the western gray squirrel, Thomas stated that he was unaware of any political involvement in the region’s decision not to list the species.

Washington Field Office Supervisor Berg also stated that he was unaware of any political involvement in the region’s decision not to list the species. He stated that he personally recommended that the western gray squirrel be listed; however, the region felt otherwise. FWS ultimately published a “not warranted” finding in the *Federal Register* on June 10, 2003 (68 FR 34628). Berg further stated that FWS explained its reasons for not listing the western gray squirrel in a memorandum to file. Additionally, Berg stated that FWS was successful in defending its decision in both the Federal District Court and the Ninth Circuit Court of Appeals (See U.S. District Court – Oregon Case#: CV 03-1505-PA, dated August 2, 2004, and Ninth Circuit Court of Appeals Docket No. 04-35860, dated February 2, 2007).

*Agent’s Note: A review of the courts’ decisions indicated that the courts found the FWS’ 1996 distinct population segment policy, including the “significance” requirement, was a reasonable construction of “distinct population segment,” and the region applied the requirement regarding its decision not to list the western gray squirrel in a manner that was not “arbitrary and capricious.”*

Scott McCarthy, former Chief of Classification for FWS Region 1, stated that he was at the FWS Washington Office at the time the 90-day finding of “not-substantial” was sent to Washington, D.C., from the regional office regarding the western gray squirrel. McCarthy stated that after he reviewed the package, he personally encouraged the field office to make a substantial finding and proceed with a 12-month review of the listing, which FWS ultimately did do. After the 12-month review, the field office made a finding that the listing of the species was warranted and forwarded the finding to the regional office. McCarthy stated that he was back in the regional office at that time and he reviewed the 12-month finding. After reviewing the package, McCarthy stated that he personally felt the field office’s argument for a separate taxon of the

species was not supported; therefore, he recommended a finding of not warranted, which was the finding that was ultimately made by the Regional Director.

McCarthy explained to us that the decision was a “tough biological question” regarding the “distinctness of the species” of the Washington State western gray squirrel from its counterparts in Oregon and California. As noted above, McCarthy, along with others in the region, made the call on deciding that the species should not be listed, and the Regional Director signed the finding. Similar to Berg, McCarthy pointed out that FWS was sued over the decision but that FWS had prevailed in both the Federal District Court and the Ninth Circuit Court of Appeals in the matter.

Based on his personal role in the listing process for the western gray squirrel, McCarthy stated that he was certain the decision not to list the western gray squirrel was made within the region without any undue political influence, and the decision was based on good science.

Chris Nolin stated that she was involved with the decision not to list the western gray squirrel at the FWS Washington Office and she confirmed the decision did not have any political influence whatsoever.

Douglas Krofta stated that he was also involved with the decision not to list the western gray squirrel at the FWS Washington Office, and the decision did not have any departmental involvement.

## **6. Northern Mexican Gartersnake Listing (Region 2)**

### *Summary:*

We determined that MacDonald was specifically involved with the northern Mexican gartersnake decision, along with Bowman. However, the final decision to change the field and region’s 12-month positive finding for the listing of the northern Mexican gartersnake to a negative finding was apparently made within the FWS Washington Office by career FWS staff. Additionally, we determined that after being sued concerning the negative 12-month finding, FWS entered into a settlement agreement to conduct a new 12-month status review for the northern Mexican gartersnake, and on November 25, 2008, FWS published in the *Federal Register* a finding that the species was warranted but precluded.

### *Details:*

We interviewed Jeffrey Servoss, who is a Fish and Wildlife Biologist in FWS Region 2. He stated that FWS received a petition to list the northern Mexican gartersnake in December 2003. FWS was not able to complete its review in the required time frame, but after the petitioner filed a Notice of Intent to sue, FWS agreed to develop a timeline for a decision. According to Servoss, a positive 90-day finding for the northern Mexican gartersnake was published in the *Federal Register* in January 2006, and FWS then began to work on the 12-month review of the northern Mexican gartersnake for potential listing. Servoss stated that the draft 12-month finding went to the FWS regional office on June 15, 2006, as “warranted but precluded.” Servoss

explained that this meant the field office believed the northern Mexican gartersnake should be listed, but efforts to carry out the listing were precluded by higher priorities. Servoss said he chose to address the northern Mexican gartersnake as a range-wide finding because Mexico had already listed it as threatened. Servoss said he believed this approach would make it easier for bi-national conservation efforts in the future.

Region 2 sent the warranted but precluded finding to the FWS Washington Office on August 1, 2006, he said. Servoss stated that the draft finding was provided to Acting Assistant Director for Endangered Species Brian Arroyo on August 29, 2006, and, after approval by Arroyo, the draft was sent to MacDonald on August 31, 2006. Within approximately 1 week, Servoss said, MacDonald requested copies of the public comments for the northern Mexican gartersnake listing proposal.

Servoss stated that the proposed warranted finding was reversed and changed to an unwarranted finding on September 7, 2006. Servoss presumed that MacDonald had reversed the finding because she had been working on it.

Servoss explained that his office received copies of 10 excerpted pages (page 8 and pages 14 through 22) from the approximately 160-page draft finding. Servoss said each of the excerpted pages contained MacDonald's handwritten comments. He said MacDonald had not written comments on any other pages of the draft listing proposal. Servoss said MacDonald's comments revealed that she did not believe FWS had enough information about the northern Mexican gartersnake in Mexico to be able to proceed with a warranted finding. Servoss stated that MacDonald had made no comments after page 22 of the draft finding, even though the bulk of the discussion about the northern Mexican gartersnake in Mexico occurred after page 22. Servoss questioned whether MacDonald had read any of the draft finding after page 22.

Servoss said he had to change the proposed positive finding to a negative finding. He told his supervisors in an e-mail that he would make the changes required by MacDonald's edits but he would not delete anything from the finding that was supported by literature and that he would not make any changes to the finding that would be contrary to the literature. Thus, Servoss said, there was no alteration of the science in the published finding. According to Servoss, an SOL Attorney advised that the negative finding would not be legally defensible.

Servoss said the negative 12-month finding for the northern Mexican gartersnake was published in the *Federal Register* on September 26, 2006. Servoss added that he disagreed with the decision because he believed there was a strong case for listing the northern Mexican gartersnake using the best available scientific information. Servoss stated that a lawsuit was filed against FWS in response to the decision.

During his interview, the SOL Attorney stated that he first worked on the northern Mexican gartersnake decision when it was a positive 90-day finding, and it again came to him for review as a positive 12-month finding. He said the finding was then submitted to the FWS Washington Office and was returned as a negative 12-month finding. The SOL Attorney stated that Susan Jacobsen, Region 2's Division Chief for Threatened and Endangered Species, told him that Lohofener felt FWS did not have enough information on northern Mexican gartersnake-related

activities in Mexico in order for a positive finding to be made. According to the SOL Attorney, the regional and field offices were therefore directed to rewrite the finding to be negative. He said he refused to sign and approve this document because he felt the litigation risk was too high. He explained that the record contained too much information indicating that the finding should have been positive, and FWS did not adequately explain why it was putting forth a negative finding.

The SOL Attorney said the administrative record in the case showed that the positive finding was provided to MacDonald, and it then came back from her as a negative finding. He said this suggested that MacDonald was involved in the decision. However, he noted that he later learned that Lohofener stepped forward and claimed responsibility for the change from positive to negative. As a result, the SOL Attorney said, it was not clear to him how the final decision transpired.

Sarah Quamme is a Listing Biologist in FWS Region 2. She confirmed the timeline of events as described by Jeffrey Servoss in her interview. Quamme stated that Lohofener approved the positive 90-day finding but expressed concerns about the data from Mexico. During a July 28, 2006 conference call concerning the northern Mexican gartersnake, Lohofener told Region 2 personnel that the information about threats to the northern Mexican gartersnake in Mexico needed to be equivalent to the threat information about the northern Mexican gartersnake in the United States. According to Quamme, Lohofener's direction was a policy shift because FWS never knew as much about what was happening in Mexico as it knew about what was occurring in the United States. She stated that more information was provided to Lohofener, but he was not persuaded.

Quamme confirmed Servoss' statements relative to the reversal of the positive finding. Specifically, Quamme recalled that Douglas Krofta at the FWS Washington Office sent an e-mail on September 8, 2006, stating that the northern Mexican gartersnake decision had been reversed and changed to unwarranted. Quamme said the e-mail provided no explanation about why the finding was changed.

Steve Spangle, FWS Region 2 Field Supervisor, stated that he reviewed the 90-day initial positive finding and the subsequent 12-month positive finding for the northern Mexican gartersnake. Spangle stated that after Region 2 forwarded the 12-month finding to the FWS Washington Office, he learned that FWS Washington Office personnel felt the data presented by the field resulted in too much uncertainty concerning a large portion of the northern Mexican gartersnake's range. Spangle said he thought Lohofener was the individual who had these concerns.

Spangle stated that he did not agree with the FWS Washington Office's position on the matter; however, he did not believe there was any political influence that prompted the FWS Washington Office's stance. Spangle explained that he simply disagreed with the decision; however, he said he understood Lohofener's reasoning for not believing the finding should have been positive.

Chris Nolin told us that she thought Lohofener made the decision that the northern Mexican gartersnake did not warrant listing. She said she did not know whether Lohofener discussed the decision with MacDonald or whether he made the decision on his own.

Krofta stated that Lohofener approved the positive 90-day finding for the species but questioned the taxonomy of the species. The region then made a positive 12-month finding and forwarded its recommendation to the FWS Washington Office. Krofta said he felt the package submitted by Region 2 was a “strong package” regarding the taxonomy of the species, but the information concerning the status of the species in Mexico was very limited. According to Krofta, after discussing the matter with the region, the region strengthened its proposal by obtaining more firm data regarding the status of the species in Mexico. The region then resubmitted the package to the FWS Washington Office.

Krofta explained that by the time the package was resubmitted, Lohofener had left the FWS Washington Office and was replaced by Arroyo. According to Krofta, Arroyo supported the resubmitted package and forwarded it on to MacDonald, who, Krofta believed, changed the positive finding to a negative finding. Krofta stated that he was informed that MacDonald allegedly based the change on the fact that Lohofener had told her prior to his departure that he believed the finding should be negative.

Arroyo stated in his interview that he was the Deputy Assistant Director for Endangered Species for FWS between 2005 and 2007. Arroyo recalled that Lohofener indicated that he would not support a positive listing for the northern Mexican gartersnake, whereas Arroyo believed the listing was warranted. Arroyo stated that he believed Lohofener passed his opinion on to MacDonald prior to leaving the FWS Washington Office. As a result, he said MacDonald changed the northern Mexican gartersnake positive finding to a negative finding.

During his interview, Lohofener stated that after reviewing the original listing package as the FWS Washington Office’s Assistant Director for Endangered Species, he sent it back to the region because it did not contain enough accurate data from Mexico. Lohofener stated that he might have passed his opinion to ASFWP that the package should have been a negative finding prior to leaving the FWS Washington Office. However, Lohofener stated that he never learned that the package was allegedly strengthened by Region 2 and then resubmitted to the FWS Washington Office.

When interviewed on this subject, FWS Director Hall stated that during his conference call with all FWS regional directors concerning his request to the regions to compile a list of decisions that might have been improperly influenced by MacDonald, Region 2 Regional Director Benjamin Tuggle initially identified the northern Mexican gartersnake listing decision as a decision his region felt warranted review. However, according to Hall, during the conference call, Lohofener informed Tuggle that he was the Assistant Director for Endangered Species in the FWS Washington Office at the time the northern Mexican gartersnake package was sent to Washington, and he was the person who decided the package was inadequate, not MacDonald. Hall stated that based on Lohofener’s statement, Tuggle withdrew the northern Mexican gartersnake decision from Region 2’s list of decisions recommended for review.

Bowman stated in his interview that when the northern Mexican gartersnake listing package initially arrived at the FWS Washington Office, Lohofener informed Bowman and MacDonald that it was his opinion that the listing was not warranted. According to Bowman, immediately after Lohofener left the FWS Washington Office, a revised northern Mexican gartersnake package arrived at the FWS Washington Office. Bowman stated that the timing of this submittal created the appearance to ASFWP that someone from FWS was trying to take advantage of Lohofener's absence by waiting until he had left before resubmitting the package because they knew he would deny it.

During our investigation, we identified an e-mail string dated September 7, 2006, through October 23, 2006, between Bowman, MacDonald, former FWS Deputy Director Marshall Jones, and former Acting Assistant Secretary for Fish, Wildlife and Parks David Verhey. After reviewing the e-mail string, Bowman stated that he remembered ASFWP was "prepared to change" the northern Mexican gartersnake positive finding to a negative finding based on the direction/opinion previously received from Lohofener. He stated that based on his office's skepticism of the package, his office asked FWS some "pointed questions" about the finding, which apparently influenced FWS to decide to change the finding themselves.

The e-mail string reviewed by Bowman contained statements from MacDonald, Bowman, and Jones summarizing the circumstances surrounding the decision's ultimate outcome.

The first e-mail, dated September 7, 2006, from Marshall Jones to David Verhey, with the gartersnake listed as the subject heading, stated the following:

Last week I surmised and sent forward to your office a proposed 'warranted but precluded' finding on this species. I did this with some significant reservations, but with Ren, Bryan Arroyo, and Ben Tuggle all unavailable and the two-week deadline to your office looming (I had only one day to review the package) I moved it forward despite my nagging feeling that this was not ready for prime time. This week I was finally able to track Ren down in Honolulu and then Ben here in town where he's on annual leave preparing for his move to Albuquerque. This discussion revealed that the package sent forward was not what Ben had expected it to be, and he concurred that the package should be withdrawn from your office to be revised. At that point I considered my surname no longer appropriate or valid -- thus Bryan Arroyo came over this afternoon to retrieve it. Ben understands the urgency of getting the package revised and back to you as early as possible next week if we are to meet the September 15 due date.

An extension of time is very unlikely from [sic] the plaintiffs but Bryan will discuss this with Solicitors tomorrow. I'll be out of town Friday through Tuesday -- Ken Stansell will be acting and I'll be available by cell phone or blackberry if necessary.

Jones then sent the following e-mail, dated September 13, 2006, at 3:23 p.m., to MacDonald, copying Verhey, Bowman, and Arroyo:

I have surnamed and Bryan Arroyo is bringing over to you a revised finding on the Mexican Garter Snake prepared by Albuquerque RO [regional office], replacing the version which I had withdrawn from consideration on 9/7/06 after discussion with former AD-ES Ren Lohofener and Acting Albuquerque RD [Regional Director] Ben Tuggle. The revised finding is that listing 'not warranted', based on further analysis by the Regional Office which shows that the U.S. population does not qualify as a DPS [Distinct Populations Segment], and that we have no information to indicate that the Mexican government's legal designation of the species in [sic] inadequate to provide for its conservation. I know that this gives your office little time to review the finding, but we would appreciate your assistance in getting this package approved for signature so that it can be delivered to Brian Waidmann for final clearance by tomorrow (Thursday, September 14) since it's due to the Federal Register by COB Friday September 15.

Bowman sent the following e-mail, dated September 13, 2006, at 3:41 p.m., to Jones, copying Arroyo, Verhey, and MacDonald:

I want to add as a follow-up to your prior note on this package that the questions raised by Julie and myself on the initial version we received were aimed solely at determining why it was changed from the finding shown in the briefing paper the Service had proved earlier, which was 'not warranted'. When I talked with Bryan, I asked only that he check into why the finding had changed since that time without anyone saying anything to us, not that it be reversed. Similarly, Julie's earlier email request for background information was aimed at allowing her to look at the same question. Neither of us at any point asked the Service to change the finding, but asked only that the difference between this and the outline be looked into and explained.

On October 23, 2006, MacDonald sent the following e-mail to DOI Public Affairs Spokesperson Hugh Vickery, also forwarding the previous e-mail chain:

My understanding is that Renne [sic] did not agree with the field in their initial assessment and they changed it to be 'not warranted', we were then briefed on the package. Subsequently, Renne [sic] went to Portland to act as RD, and the field apparently made another change without notifying anyone.

Thus this long string of emails.

FWS Region 2's response to the OIG's request for information stated the following regarding its decision not to recommend review of the northern Mexican gartersnake decision in response to Director Hall's request for decisions improperly affected by MacDonald:

In response to Director Hall's request for all regions to evaluate past decisions for instances where Julie MacDonald may have improperly influenced the decision

process, we did not include the not-warranted 12-month finding on the northern Mexican gartersnake because we had already agreed to a remand and to redo the finding based on: 1) the fact that the record did not adequately reflect the U.S. Fish and Wildlife Service's reasoning for the change in the draft finding from a 'warranted but precluded' to a 'not warranted' finding; and 2) new guidance had been received on the interpretation of 'significant portion of its range' from the head Solicitor, after the 12-month finding had been published in the Federal Register.

FWS was sued on its negative finding and a settlement agreement was reached where FWS agreed to conduct a new 12-month status review of the northern Mexican gartersnake. On November 25, 2008, FWS published a finding in the *Federal Register* that the listing of the species throughout its range in the United States and Mexico, based on its range-wide status, was warranted; however, its listing is currently precluded by higher priority actions (73 FR 71788).

## **7. Southwestern Bald Eagle Listing (Region 2)**

### *Summary:*

We determined that MacDonald played no apparent role in FWS' August 2006 negative 90-day finding for the southwestern bald eagle. Instead, we found that there was considerable and well-documented disagreement between FWS Region 2 and then-Assistant Director for Endangered Species Lohofener about the status of the southwestern bald eagle. As a result of the disagreement, FWS Region 2 personnel declined to author the 90-day finding, and it was instead prepared by the FWS Washington Office. This disagreement within FWS contributed to a March 2008 ruling by a federal judge in the U.S. District Court for the District of Arizona that the FWS 90-day negative finding on the southwestern bald eagle was "arbitrary and capricious." In its ruling, the court directed that FWS conduct a 12-month status review for the southwestern bald eagle and issue a finding by December 2008.

### *Details:*

According to a "Notice of 90-day petition finding" published in the *Federal Register* by FWS on August 30, 2006, in October 2004, FWS received a petition from several organizations requesting that the bald eagle population found in the Sonoran Desert area (southwestern bald eagle) be classified as a distinct population segment and that this distinct population segment be reclassified as an endangered species (71 FR 51549). In March 2005, the petition was clarified as it related to geographical boundaries. Subsequently, FWS determined that action on the petition was precluded by higher listing priorities. In January 2006, one of the petitioners advised FWS that they intended to sue based on FWS' failure to act on the petition, and in March 2006, another petitioner filed suit for this same reason. The parties reached a settlement and FWS agreed to complete its review of the petition and issue a finding by August 2006.

Listing Biologist Sarah Quamme confirmed during her interview that FWS received a petition to identify the southwestern bald eagle as a distinct population segment and to up-list it from threatened to endangered status. According to Quamme, the petition came to Region 2 at about

the same time FWS was working on a nationwide delisting rule for the entire bald eagle population. Quamme said Region 2 personnel knew it was unlikely that they would obtain approval to up-list the southwestern bald eagle to endangered status because of FWS' effort to delist the bald eagle nationwide. In addition, she said the southwestern bald eagle matter was complex because FWS had to meet specific criteria in order to make a positive finding to identify the southwestern bald eagle as a distinct population segment, while at the same time addressing whether or not it should be moved from threatened to endangered status.

Based on FWS' 1996 distinct population segment policy, Quamme said that in order for FWS to make a positive 90-day finding for the southwestern bald eagle, it had to find that the petition provided substantial information indicating that the southwestern bald eagle populations (1) were discrete from other eagle populations, (2) were significant to the species overall, and (3) warranted endangered status.

Quamme stated that FWS' 1996 distinct population segment policy required that discreteness, significance, and threats be considered in that order. However, she said Region 2 believed it would not be possible to conclude that the threats to the southwestern bald eagle warranted listing it as endangered. Region 2 therefore decided upon a strategy to address only the threat prong of the distinct population segment criteria for the 90-day finding. The region felt that because all three distinct population segment criteria had to be met for a positive finding, there was no reason to address discreteness or significance given that the threat finding would be negative. When asked, Quamme said Region 2 consulted with, and received approval from, the SOL to use this approach.

According to Quamme, Region 2 followed the aforementioned strategy and its proposed unwarranted 90-day finding was approved at the regional level and forwarded to the FWS Washington Office. However, Quamme said Lohofener did not agree with the strategy, and he directed the region to address the other two distinct population segment prongs. Region 2 then revisited the decision and concluded that there was substantial information to indicate that the southwestern bald eagle was discrete, but there was not substantial information to indicate that the southwestern bald eagle was significant or threatened.

An SOL Attorney confirmed that Region 2 personnel contacted him and asked him if FWS could legally make a negative 90-day finding based solely on the conservation status (threats) of the southwestern bald eagle, without making findings related to the other distinct population segment prongs. In response, the SOL Attorney advised FWS that it could make such a determination.

Susan Jacobsen, Region 2's Division Chief for Threatened and Endangered Species, reiterated the statements made by Quamme concerning the approach that Region 2 took when evaluating the southwestern bald eagle petition. Jacobsen confirmed that there was much discussion among the Region 2 scientists about whether the southwestern bald eagle population was discrete, significant, and threatened, and that the SOL approved the approach that only the threat criterion needed to be addressed. Jacobsen said this strategy was proposed because Region 2 personnel could not reach consensus on discreteness and significance for the southwestern bald eagle. Similar to Quamme, Jacobsen stated that Region 2 recognized that FWS was working on a

nationwide effort to delist the entire bald eagle population so it knew it would be very difficult to get a warranted finding for the southwestern bald eagle. Jacobsen also confirmed that Lohofener directed Region 2 to redo the southwestern bald eagle 90-day finding so that it would include discussion of the discreteness and significance criteria.

Both Jacobsen and Quamme said there was a belief within FWS that MacDonald did not like the use of distinct population segments and that unless there was good genetic information, a distinct population segment could not be sent forward to the FWS Washington Office for consideration.

Steve Spangle stated during his interview that he reviewed the 90-day finding for the southwestern bald eagle that was prepared by his office. Similar to Quamme and Jacobsen, Spangle stated that Region 2 was initially told that it only needed to consider threats to the southwestern bald eagle, and Region 2 then made a negative finding on that prong.

Spangle said the region was later directed to complete an analysis of discreteness and significance. After receiving this direction, Spangle said he informed Lohofener that the region would most likely return positive findings on both of those criteria, but since the threat finding would remain negative, the overall finding would still remain negative. Spangle said Lohofener responded by telling Spangle that the package “Better not come in from the region that way.” Spangle said he felt Lohofener’s statement was inappropriate because he was telling Spangle what the outcome was to be.

Mary Richardson, Region 2 Supervisory Fish and Wildlife Biologist, stated during her interview that FWS Region 2 officials agreed that the southwestern bald eagle petition did not provide any new information about threats to the species. As a result, “threatened” seemed to remain an appropriate status for the southwestern bald eagle and an up-listing to “endangered” did not appear warranted, she said. According to Richardson, the question then became whether the other two prongs of distinct population segment, significance and discreteness, needed to be addressed. She stated that after a series of telephone calls with the regional office, Region 2 agreed that these prongs did not need to be addressed.

On July 18, 2006, Richardson participated in a teleconference concerning the southwestern bald eagle with Nolin and Krofta from the FWS Washington Office. Richardson stated that during the call, Nolin and Krofta discussed a negative finding on the discreteness prong, yet Richardson and other field personnel suggested that the finding could instead possibly be positive. Richardson said that when significance was discussed, Krofta and Nolin stated that Lohofener wanted to apply an evolutionary standard to the significance prong. Richardson objected, stating that this standard was not a part of the FWS distinct population segment policy. When she asked them to identify an instance when this standard had been used in the past, Krofta and Nolin responded by stating that this was the first time it had ever been applied. In response to her inquiries, Richardson said, Krofta stated, “We’ve got the answer; we just need the analysis to support it.” Richardson said that immediately after Krofta said this, someone in her office pressed the mute button on the telephone and said, “Did he just say that?” Richardson said that everyone on the call was “shocked” by Krofta’s statement. She also stated that it was clear based on what she saw and heard that Lohofener was the one who provided the answer to Krofta.

Richardson said the Krofta quote, which was later documented in a U.S. District Court decision concerning the southwestern bald eagle, was taken directly from notes she took during the July 18, 2006 telephone meeting. Richardson stated that during the call, FWS field personnel kept insisting that they would need to examine the significance issue in detail before reaching any conclusion, and the FWS Washington Office personnel clearly wanted a negative conclusion on significance, regardless of the analysis. Richardson said Region 2 eventually agreed that the field personnel would document the information they had relative to the petition and the specifics of the significance issue, and they would then provide it to the FWS Washington Office, which would write the final analysis. Richardson stated that there was clearly a push, mostly by Nolin, to write a negative significance finding. Richardson said the final finding was, in fact, written by the FWS Washington Office (and not Region 2 personnel).

A Region 2 Wildlife Biologist, also participated in the conference call with the FWS Washington Office in July 2006. The Biologist recalled that during the call, Nolin raised questions about the banding of eagles in the southwest and asked whether or not 100 percent of the bird population there had been banded. In response, he told Nolin that every single bird had not been banded. He stated that he thought it was unreasonable to expect that every bird would be banded. He said that during these same discussions, FWS Washington Office personnel raised questions concerning the evolutionary differences between the southwestern bald eagle and other eagles. He said he and others asked for an example of this theory, but FWS Washington Office personnel could not provide one.

The Biologist recalled that during the call, Krofta said something like, “We’ve been given an answer. We need to find an analysis that fits. It’s not significant.” He said he was shocked to hear Krofta make this statement because to him it “didn’t seem right.” He said the “answer” that Krofta was referring to was that the southwestern bald eagle was not a distinct population segment and therefore would not be up-listed. The Biologist recalled that after Krofta said this, he pressed the mute button on the phone and asked the others in the room, including Richardson, if they had heard what he did. Krofta did not say who had “given” the answer to him, but the Biologist had heard that this directive came from Lohofener. The Biologist said Spangle later told him that prior to this conference call, when Spangle had told Lohofener that it looked like the field office would find the southwest population to be both discrete and significant, Lohofener said something like, “It better not come out of the regional office that way.”

The Biologist said both he and Richardson disagreed with the FWS Washington Office’s notion that the southwestern bald eagle was not significant. As a result, they declined to write a 90-day finding that stated as much; therefore, FWS Washington Office personnel prepared it.

Nolin, who was the Chief of FWS’ Conservation and Classification for the Endangered Species Program in the FWS Washington Office at the time the southwestern bald eagle decision was made, stated that she did not believe there was any political influence related to the southwestern bald eagle decision.

According to Krofta, he was involved with the southwestern bald eagle listing decision at the FWS Washington Office. He stated that FWS conducted an analysis of whether the southwestern bald eagle population was a distinct population segment. Krofta explained that the

proper method for analyzing whether a certain species population represented a distinct population segment was to first determine if the population was both “discrete” and “significant.” If the population was determined to meet both of these definitions, it could then be referred to as a “listable entity,” at which point a threat analysis would be performed by FWS. According to Krofta, if the threat analysis was found to be positive, then the population met the standard needed to be labeled a distinct population segment.

Krofta stated that in furtherance of the distinct population segment analysis for the southwestern bald eagle, Region 2 initially attempted to prepare a threat analysis of the population without first finding that the population was discrete and significant. According to Krofta, the FWS Washington Office disagreed with this approach because, as described above, the first step in any distinct population segment analysis required that a population be a “listable entity.” As a result, the FWS Washington Office directed the region to conduct an analysis regarding the population’s discreteness and significance.

Krofta stated that subsequently, in furtherance of conducting an analysis regarding the population’s discreteness and significance, the FWS Arizona Field Office determined that the southwestern bald eagle population was discrete and significant, whereas the regional office did not agree with this determination. According to Krofta, there were many discussions about this issue between the field office, regional office, and, ultimately, the FWS Washington Office.

We informed Krofta that during one of the teleconference discussions between the field office, the regional office, and the FWS Washington Office, field office personnel claimed that Krofta said the decision regarding significance had “already been decided” to be negative and the field office needed to produce data supporting that finding. In response, Krofta said the field office, regional office, and FWS Washington Office had participated in several in-depth discussions about the science and standards surrounding the southwestern bald eagle distinct population segment analysis.

According to Krofta, after these many discussions and his personal consideration/analysis of the issue, he concluded, along with others in the FWS Washington Office (including then-Assistant Director for Endangered Species Lohofener), that the southwestern bald eagle population did not meet the significance criteria. He stated that the field office continued to feel otherwise, and the FWS Washington Office provided the field office several opportunities to convince the FWS Washington Office that the population was significant. Krofta stated, however, that he and others in the FWS Washington Office ultimately remained unconvinced and overruled the field office by making the final decision that the population did not meet the significance test. During one of the last conference calls about the issue, Krofta stated that he did indeed tell the field office that the decision regarding significance had been decided to be negative; however, he pointed out that he and other career FWS employees within the FWS Washington Office made the decision, not a political appointee.

Krofta stated that during the conference call, he also informed the field office that the finding had to be drafted to correspond with the negative finding. He said that, in response, the field office refused to draft the negative finding and the FWS Washington Office took on the responsibility of doing so.

Krofta said his personal issue with the field office's finding that the population was both discrete and significant was that, in 1995, in its proposed delisting rule for the entire bald eagle population, FWS had determined that the southwestern bald eagle population was not discrete and significant; therefore, he believed that FWS needed to address this previous finding adequately in order to arrive at a different conclusion in its current decision. Krofta said the field office did not meet this burden.

According to Krofta, ultimately, FWS issued a finding that the population was not significant and therefore did not meet the criteria to be labeled a distinct population segment. Regarding potential political influence in the listing process, Krofta stated that during all of the many discussions between the field office, the regional office, and the FWS Washington Office, he was completely unaware of any input being made by ASFWP. Accordingly, he stated that he did not believe MacDonald or any other political appointee influenced FWS' ultimate decision finding that the southwestern bald eagle population was not a distinct population segment, but rather the decision was made in-house by FWS career personnel.

Lohofener stated that he personally determined that the southwestern bald eagle 90-day finding should have been negative, and thus the decision never reached MacDonald. He stated that he believed the discreteness analysis was "questionable" and the significance analysis "utterly failed." Lohofener stated that all three distinct population segment prongs needed to be addressed, explaining that threats could not be determined until there was a "listable entity," and in order to determine whether there was a "listable entity," the species must have been deemed discrete and significant. Accordingly, under the ESA, a threat analysis could not be performed until an analysis was performed regarding the species' discreteness and significance, he said. Regarding the suggestion that headquarters directed the region to perform an evolutionary analysis, Lohofener stated that he had no knowledge of this issue. However, Lohofener stated that if such an analysis was performed, it would have actually been easier to pass the discreteness test. In sum, Lohofener stated that he felt the package submitted by the region was "sloppy."

During his interview, Benjamin Tuggle, Region 2's Regional Director, substantiated the statements made by others. According to Tuggle, after Region 2 received the original listing petition, the region recognized that there would be "consternation" regarding the discreteness and significance issues, and the region therefore skipped to the third distinct population segment prong – threat analysis. Tuggle said the decision was then sent to the FWS Washington Office, which directed that the discreteness and significance matters be addressed as well. Region 2 resisted this decision because there was a great deal of disagreement on these two issues, and after Region 2 declined to draft the decision, the FWS Washington Office agreed to write it. According to Tuggle, this decision was further complicated by the fact that FWS was delisting the bald eagle on a nationwide basis, which would have clearly conflicted with any decision to up-list the southwestern bald eagle.

Tuggle noted that the final negative decision reached by FWS was the same as the decision originally reached by Region 2. Tuggle stated that process in this case, and not the biology, was what led to the controversy and lawsuit.

With respect to the statement about already having a predetermined “answer,” Tuggle stated that he remembered the answer had to do with the need to address significance and discreteness, not that the southwestern bald eagle 90-day finding would be not warranted. Tuggle stated that Region 2 did not want to address discreteness or significance, but the policy call was that they needed to. Tuggle said the statement about already having a predetermined “answer” had been misinterpreted to mean that Lohofener made a policy call on the decision in the case, rather than on the process in the case.

As noted above, on August 30, 2006, FWS published its “Notice of 90-day petition finding” in the *Federal Register*. In the notice, FWS determined that the southwestern bald eagle petition did “not provide substantial scientific or commercial information indicating that the petitioned action may be warranted” (See 71 FR 51549).

In response to the OIG’s request for information, FWS Region 2 stated the following regarding its decision not to recommend review of the southwestern bald eagle decision (in response to Director Hall’s request):

The Regional Office did not recommend review of the bald eagle 90-day finding in our response to the Director’s request, since that request was to include decisions that were influenced by the DAS [Deputy Assistant Secretary MacDonald] in terms of interfering with the science of the decision. We have no information in the administrative record that would show that the DAS directly influenced this decision. The recommendation of the Region to the Washington Office was to make a not substantial finding with or without an analysis of the DPS [distinct population segment] portion of the petitioners’ request. The decision to add a DPS analysis was a policy decision made by the Washington Office that did not change the not substantial recommendation of the Region on the finding.

In March 2008, Judge Mary H. Murguia in the U.S. District Court for the District of Arizona ruled that FWS’ decision regarding the southwestern bald eagle was “arbitrary and capricious” (See U.S. District Court – Arizona Case#: CV-07-00038-PHX-MHM, dated March 6, 2008). The court found that the administrative record clearly showed that a number of FWS scientists believed there was substantial information to suggest that listing the southwestern bald eagle might be warranted. Further, the court found that the statements made by Nolin and Krofta “appear to exemplify an arbitrary and capricious agency action.” The court also noted that when there was disagreement among FWS scientists, the “may be warranted” standard for the 90-day finding had been met. The court therefore directed FWS to complete a 12-month status review for the southwestern bald eagle by December 2008.

As of November 13, 2008, per the direction of the March 2008 court order, the southwestern bald eagle remains listed as threatened and FWS is working on the new 12-month status review of the southwestern bald eagle population and determination.

## **8. & 9. Spikedace and Loach Minnow Critical Habitat Designations (2 separate decisions) (Region 2)**

### *Summary:*

We determined that MacDonald selected one of several potential CHDs for the spikedace and loach minnow (SDLM). The option selected by MacDonald limited the amount of critical habitat that would be designated, and it was consistent with the established practices of ASFWP at that time. The FWS personnel interviewed agreed that MacDonald's selection, although not preferable, was acceptable.

### *Details:*

According to FWS Region 2's response to the OIG's request for information, during the time period in which the SDLM matter was being addressed, a "concept paper" was prepared by the regional office and submitted to the FWS Washington Office. The concept paper provided an overview of the approach being considered by the region for the CHD. The approach would then be approved or disapproved by the FWS Washington Office and ASFWP.

Mary Richardson stated in her interview that eight versions of the SDLM CHD concept paper were prepared over a multi-month period. By April or May 2005, Richardson said, four possible SDLM CHD areas were identified in the concept paper.

Richardson said Jacobsen and Quamme were concerned about how the FWS Washington Office and MacDonald would view the region's preferred alternative, which included an entire section of the Verde River in Arizona. According to Richardson, the regional office (Jacobsen and Quamme) felt that if the entire river was included in the CHD, it would be rejected by Washington, D.C.; but if only part of the river was included, it would be a way to show that the field office had made an attempt to be "reasonable." Richardson stated that "[i]t was a strategy." She noted that she disagreed with this strategy because she believed Region 2's proposal should be based solely on the biology of the SDLM. In fact, Richardson said she voiced her disagreement about the "strategy" to the regional office. According to Richardson, however, Jacobsen and others in the regional office stated that based on their experience with previous CHD decisions, they felt the strategized approach was needed. She said the regional office's explanation for the need of the strategized approach was that they had been "raked over the coals" with two previous CHD decisions and they did not want to relive those experiences.

Spangle stated that current FWS Director Hall was Region 2's Regional Director at the time the SDLM CHD was being prepared. According to Spangle, Hall felt that many of the unoccupied streams should have been included in the SDLM CHD due to their "connectivity" with the occupied streams, and thus Hall selected Alternative 3, which included these areas.

A review of e-mails obtained from FWS identified a September 9, 2005 e-mail from Bowman to an FWS employee. In this e-mail, titled, "Comments on spikedace and loach minnow concept paper," Bowman wrote the following:

These reflect Julie's comments: 1) paper is far too long, and so field staff spent too much time on it; 2) She wants alternative 2, not the preferred alternative 3) Table 1 is good, but she wants only areas where we know the species were present, nothing based on 'presumptions' as shown in the footnote; 4) within the areas shown in Table 1, she would – now I guess I would – like justification for including the following areas (if they survive the change to use of Alternative 2), where the chart indicates either no records of the species or no records for a very long time .... Otherwise the proposal is OK.

The e-mail was forwarded to Jacobsen, who then sent it on to Quamme, Richardson, Spangle, and others.

In his September 12, 2005 e-mail response to Jacobsen, Spangle wrote that Hall had selected Alternative 3, and thus MacDonald's decision to instead use Alternative 2 had to be reconciled with Hall.

According to Sarah Quamme, MacDonald's philosophy was that FWS should do the minimum possible to meet the requirements of the ESA. Quamme explained that under MacDonald's policies, FWS was to choose the minimum or average dispersal of a species and was not to consider a maximum dispersal scenario. Quamme also said MacDonald liked to exercise her authority under the ESA to make economic exclusions to remove proposed critical habitat from the rule. Quamme said the purpose of the economic exclusion authority was to be able to exclude areas that would have a high economic impact on landowners, such as areas with high potential of housing development.

Quamme stated that the Region 2 personnel who worked on the SDLM CHD proposal knew MacDonald liked to use economic exclusions, so they strategized about how to minimize the impact of these exclusions on the proposed SDLM CHD. Quamme said that in their concept paper, Region 2 identified an area of the proposed CHD that was a good candidate for economic exclusion in the hope that MacDonald would accept the identified area without excluding additional area from the proposed CHD. Quamme said Region 2 took this approach in an attempt to retain areas that had important biological reasons for being included.

Quamme said each of the options that were submitted to MacDonald were acceptable to Region 2 personnel. According to Quamme, MacDonald selected an option that was not the preferred option of the field office personnel but was acceptable to regional personnel. She noted that MacDonald made no changes to the option that was presented to her. Quamme said the field office personnel had a preference for another option because they would be able to update an earlier CHD proposal. She opined that MacDonald selected a different option because the option preferred by the field office personnel did not have a "clean" methodology that adhered to specific criteria. Quamme then opined that MacDonald selected an approach for the critical habitat proposal that made more sense.

According to Quamme, the ESA stated that "critical habitat" was habitat that was known to be occupied at the time of the species listing and had the appropriate habitat features for the species. Quamme said MacDonald interpreted this strictly and would not allow Region 2 to propose

critical habitat areas unless there was documentation to verify that the area was occupied at the time of listing. According to Quamme, MacDonald would not even accept a proposal that *currently occupied* areas be included as critical habitat if there was no documentation or proof that the area was occupied at the time the species was listed under the ESA. Quamme stated that this was another mechanism that MacDonald used to minimize compliance with the ESA. According to Quamme, unoccupied habitat could be considered in a CHD proposal if there was data to show the benefit to the species. However, Quamme believed that MacDonald would never have allowed unoccupied habitat to be included in a CHD rule.

Quamme said that because of MacDonald's policies, Region 2 did not consider adding previously occupied, but currently unoccupied, habitat to the SDLM CHD concept paper because it believed MacDonald would not allow it to be considered. According to Quamme, MacDonald's philosophy meant that consideration of unoccupied habitat was not an option. Quamme stated that the inclusion of unoccupied habitat was very important to the protection and viability of the SDLM because both species were doing poorly and their habitats were "blinking out." Quamme said she did not believe anyone attempted to talk with MacDonald about concerns for SDLM because of a belief that arguments that were not in conformance with MacDonald's philosophy would not be considered. She added that FWS personnel had been "beat up" so much in the past that they had resigned themselves to just surviving through MacDonald's tenure.

Mary Richardson, Region 2 Supervisory Fish and Wildlife Biologist, substantiated Quamme's statements, opining that there were no real significant differences between the four options, although she thought some were better suited toward conservation of the species than others. MacDonald selected what Richardson felt was the most minimal option.

Susan Jacobsen, Region 2's Division Chief for Threatened and Endangered Species, stated in her interview that there was substantial discussion between the field office in Arizona and the regional office about the approach that the region would take for making the SDLM CHD rule. Jacobsen recalled that these discussions concerned habitat that was considered to be occupied, habitat that was unoccupied, and whether some of the unoccupied habitat should be included in the proposal. Jacobsen said Hall participated in some of the discussions. Jacobsen explained that Region 2 personnel knew it would be difficult to get approval to include unoccupied habitat as a part of the CHD, and thus they merely focused on occupied habitat.

An SOL Attorney stated that his review of the administrative record clearly showed that MacDonald weighed in on how big the defined SDLM CHD should be. In addition, the SOL Attorney recalled that Jacobsen told him FWS felt there were certain parameters on what kinds of areas it could include in its final decision and that it could only designate areas that were occupied.

According to Chris Nolin, MacDonald was heavily involved in the decision-making process for the SDLM CHD. Nolin believed MacDonald desired to make the CHD as small as possible through the use of exclusions.

Bowman stated that he did not have any personal involvement with directing FWS not to include any unoccupied streams in the designation. However, he stated that MacDonald was hostile to the idea of including unoccupied habitat, and Manson was skeptical. According to Bowman, Manson made it clear that he preferred not to include unoccupied habitat. In fact, Bowman stated that it was the unwritten policy of ASFWP under Manson to exclude as many areas as “practicable” from CHDs.

According to Richardson, multiple drafts of the SDLM CHD *Federal Register* Notice were prepared and rewritten by the regional office, and the decision was ultimately published on March 21, 2007 (72 FR 13356). Subsequently, three separate lawsuits were filed against FWS.

## **10. Gulf Sturgeon Critical Habitat Designation (Region 4)**

### *Summary:*

Our investigation revealed that MacDonald was significantly involved in the gulf sturgeon CHD. MacDonald recommended numerous edits to the gulf sturgeon rule that were different than what FWS recommended. More significantly, however, MacDonald directed FWS to remove shipping channels from the CHD despite concerns expressed by region biologists and solicitors that the record did not support exclusion of the channels.

### *Details:*

In response to the OIG’s request for information, Region 4 provided a written summary of the gulf sturgeon CHD process. Along with other relevant details, Region 4 noted that FWS and the National Oceanic and Atmospheric Administration (NOAA) worked collectively on the preparation and development of the gulf sturgeon rule from the initiation of the 1998 lawsuit through publication of the final rule. Region 4 stated that the CHD for the gulf sturgeon resulted from a court order following a Sierra Club challenge to an FWS and NOAA determination that critical habitat would not be designated. The Sierra Club challenge to the decision not to designate critical habitat resulted in a District Court order to FWS to publish, by specified dates, proposed and final decisions regarding the critical habitat of the Gulf Sturgeon.

The proposed rule succeeded through the review and approval process at the following levels: regional office, regional solicitor’s office, NOAA, ASFWP, and the Office of Management and Budget. It was then published in the *Federal Register* on May 24, 2002. The draft economic analysis was published and announced in the *Federal Register* in August 2002.

ASFWP reviewed the draft final rule. Based on information in the economic analysis, MacDonald recommended several editorial changes; she also suggested exclusion of the shipping channels based on economic impact. The shipping channels were removed from the final designation. The final rule was published in the *Federal Register* on March 19, 2003.

An FWS Region 4 Biologist was the lead biologist for the gulf sturgeon critical habitat rule. He stated that from the beginning of the process to develop the proposed rule until about 1 month before publication, minor clarifying and mapping changes had been made from what the field

office had proposed; no significant alterations had been made, he said. According to the Biologist, about 1 month before the rule was published, MacDonald began talking about excluding shipping channels from three separate units based on Section 4(b)(2) economic exclusion rules under the Act.

The Biologist said the gulf sturgeon team was concerned with inconsistency in the rule because MacDonald's exclusions were based on economic reasons that were not explained in the economic analysis of the rule itself.

He stated that ultimately there was no impact to the gulf sturgeon as a result of MacDonald's exclusion of the shipping channels. He explained that the reason the gulf sturgeon team had not excluded the shipping channels from the CHD initially was because the critical habitat areas FWS had mapped out for the gulf sturgeon were general, large areas that the sturgeon used. He said that in designating critical habitat, the scientists were trying to be as specific as possible, while providing protection to the species.

The Biologist noted that the exclusions created inconsistencies in the rule in that there were other areas proposed for designation that had low primary constituent elements and high economic impacts similar to the excluded shipping channels; nevertheless, those areas were not excluded. He said the FWS field office and regional office took the position that the exclusions made by MacDonald were "not worth falling on our sword over because they do not really impact the species." He noted that their acquiescence to the exclusions apparently was well-reasoned because there had been no legal challenges to the rule since it was published in 2003.

He said the current status of the gulf sturgeon was that the species was stable. He said he did not think the rule needed to be redone because the sturgeon was afforded a level of protection similar to the CHD as a result of Section 7 consultations, and also because the species did not appear to have been affected by the exclusions.

Gail Carmody, FWS Field Supervisor for the Panama City Field Office, said that following development of a draft critical habitat rule and receipt of public comments for the gulf sturgeon, the economic analysis to be used in consideration of the exclusions for the final critical habitat rule was published. Carmody said she briefed Manson on the content of the draft proposed rule.

Carmody said she explained to Manson why the field office had designated the critical habitat that was in the draft rule and the science supporting their decisions. She said Manson did not make any changes to the designation at that time.

Carmody said that after Manson approved the proposed rule, the rule underwent processing as a draft final rule. At that point, Carmody said, the CHD was greatly scrutinized by ASFWP and by MacDonald, in particular.

Carmody recalled that MacDonald wanted to edit parts of the critical habitat rule by excluding three particular shipping channels. Carmody said this prompted FWS to re-inspect its biological and regulatory reasons for including the shipping channels in the designation and re-examine such considerations as the amount of shipping activity, scouring, and dredging frequency.

Carmody noted that FWS had originally considered the shipping channels as a food resource for the gulf sturgeon. Upon closer examination of the proposed critical habitat area, the field office found that the three shipping channels identified by MacDonald could be excluded from the critical habitat with minimal impact to the gulf sturgeon. Accordingly, the exclusions were made.

Carmody said the current status of the sturgeon was similar to its status prior to the CHD; the species was not declining. Carmody said she saw no reason to redo the gulf sturgeon decision now.

Gloria Bell, Region 4's Chief of the Division of Species and Habitat Assessment, stated that the gulf sturgeon critical habitat action underwent the same process as other CHDs. Bell explained that typically when it became necessary to designate critical habitat, the field office looked at available information, then prepared a strategy for designation. Following preparation of a strategy, the field office prepared a briefing statement with which to inform the regional office of what the field office was planning to propose in terms of a CHD.

Bell said once a strategy was in place, the field office worked on the rulemaking. When complete, the field office sent the package to the regional office, where Bell reviewed it to ensure the conclusions drawn in the designation were supported by facts and the biology met proper standards. Bell said the regional solicitor then reviewed the package for legal sufficiency. After review for legal sufficiency, the package was signed by the Regional Director and then sent to the FWS Washington Office for a review process similar to that which occurred at the field office/regional office levels.

Bell noted that once the package went to the FWS Washington Office, there was usually an "easy-going back and forth" between the region and the FWS Washington Office. In other words, if the FWS Washington Office had any questions, it had exchanges with the regional office and field office until addressed, she said. Once the FWS Washington Office approved the package, it then went to the listing branch for review. Bell said ASFWP reviewed CHD packages last.

Bell noted that during the process for this proposed rule, the gulf sturgeon CHD package initially went through ASFWP without any changes. Bell said the critical habitat package then had to undergo a second round of review and approval for the final rule. She explained that the second round was essentially the same as the first, except that economic analysis was introduced into the process for consideration. Bell explained that the economic analysis was ultimately the basis for ASFWP's changes to the rule during the second round.

Bell said MacDonald requested exclusions of major shipping channels in three units, based on economics. According to Bell, there were numerous conversations between the field office, the regional office, and the FWS Washington Office. Bell said the regional office tried to explain that the conclusions drawn by MacDonald based on the economic analysis were baseless. In particular, Bell said dredging windows would not have an impact on the Army Corps of Engineers, as MacDonald believed would happen. Bell said that despite efforts by the field office and regional office, MacDonald still excluded the major shipping channels.

Bell said the exclusion of the shipping areas resulted in no impact to the gulf sturgeon because the exclusions did not diminish the primary constituent elements that were available to the gulf sturgeon and that were required to be present in order to designate critical habitat. Bell explained that the reason FWS had not excluded the shipping areas from the start was because it did not see the economic impact and did not regard the dredging windows the same way MacDonald did.

Bell acknowledged that MacDonald's decision to exclude the shipping channels caused some discomfort because people did not like seeing their rule changed. Bell stated that despite its discomfort, the region understood that ASFWP possessed delegated authority to make such exclusions. Bell did not believe there were any other factors operating aside from the economic impacts articulated by MacDonald.

Noreen Walsh, Region 4's Assistant Regional Director for Ecological Services, was Chief of the Endangered Species Program for Region 4 during the time of the gulf sturgeon CHD. Walsh explained that for the gulf sturgeon, MacDonald revised the rule between the approval stages for the proposed and final rules. Walsh said MacDonald requested FWS to exclude major shipping channels and three critical habitat units from the designation. She said MacDonald believed there was a significant economic impact from designating those areas and that the economic impact outweighed the "small benefit" to the gulf sturgeon.

Walsh said that under Section 4(b)(2) of the ESA, FWS and DOI could make exclusions from the final designation if the benefits of exclusion outweighed the benefits of inclusion and if the species would not be rendered extinct based on the exclusions. Walsh explained that FWS had not proposed to exclude the shipping channels and the three critical habitat units based on economic impacts because it had not occurred to FWS to do so. Walsh said there were three primary reasons why FWS had not considered the exclusions.

First, Walsh said, when conducting a CHD, a tension existed between the degrees of detail available to designate, map, and draft legal descriptions for the critical habitat area and the amount of time available to do the rule; the court-ordered deadline limited the amount of time and detail the field office could dedicate to the CHD. Second, Walsh said, MacDonald argued that if the areas were, in fact, included in the CHD, there would be a significant economic impact imposed on the Army Corps of Engineers by virtue of its requirement to adhere to dredging windows. Third, the units that MacDonald had proposed for dredging windows were under the joint jurisdiction of DOI and NOAA Fisheries; MacDonald was proposing to exclude areas over which DOI did not have jurisdiction.

Walsh stated that Region 4 detailed its reasons why it had not excluded the shipping channels, but MacDonald was not persuaded by Region 4's arguments. Walsh conceded that under Section 4(b)(2) of the ESA, MacDonald had the authority to make exclusions. Walsh said MacDonald believed the costs for including the shipping channels in the CHD were high, while benefits to the gulf sturgeon were low; therefore, exclusion of the areas from the CHD was warranted. Walsh said she had no knowledge of whether other factors or motivations were influencing MacDonald's authorized discretion to exclude the shipping areas.

Walsh said the gulf sturgeon team believed the costs (impacts) that MacDonald believed were imminent likely would not happen at all, and, if they did, the costs would have arisen whether or not critical habitat had been designated. Walsh made it clear that there was never concern by the gulf sturgeon team that the exclusions would have had a significant harmful effect to the conservation of the species; but rather, the team was frustrated with having to redo the rule at the last minute.

Walsh said the rule was signed, published, and implemented with the shipping channels excluded. However, Walsh said, there would be no material benefit afforded to the gulf sturgeon by redoing the rule.

An SOL Attorney stated that he provides legal advice to FWS regional offices and regional directors. He said he had been working primarily on ESA issues since 1999 and was the sole attorney in the regional solicitor's office working on Section 4 listings.

He said the gulf sturgeon was under jurisdiction of both DOI and the National Marine Fisheries Service (within NOAA), thus the critical habitat rule was jointly prepared by both. He said he reviewed the proposed rule of the gulf sturgeon on April 30, 2002, and found it to be legally acceptable. The SOL Attorney said that from April 30, 2002, until January 9, 2003, the proposed rule underwent review and edits by the regional office, the National Marine Fisheries Service, ASFWP, and others. He said that in January 2003, he was given the final rule to review. He said he edited the rule and sent it to the regional solicitor to be reviewed.

At some point after his review of the gulf sturgeon rule, the SOL Attorney said, MacDonald wanted to remove the navigational shipping channels from the critical habitat based on the economic analysis. He said MacDonald concluded that dredging windows were the probable costs of designation.

The SOL Attorney said that on February 26, 2003, FWS made a decision to exclude Units (or areas) 2, 8, and 9 from the CHD based on the existence of shipping channels.

[Exemption 5] The final rule was published in the *Federal Register* on March 19, 2003, with the shipping channels excluded. The SOL Attorney noted that there had not been any legal challenges to the final rule since it was published in 2003.

## **11. Virginia Northern Flying Squirrel Delisting (Region 5)**

### *Summary:*

FWS Region 5 performed a 5-year review of the ESA listing status of the Virginia northern flying squirrel (VNFS). During the 5-year review, FWS received data from USFS, various states, and other entities indicating that the VNFS was present in many more areas than originally noted when the VNFS became listed under the ESA. Based on this data, FWS determined that all of the specific goals listed in the VNFS' 1990 recovery plan did not need to be met prior to concluding that the species no longer met the criteria needed to consider it

threatened or endangered under the ESA. As a result, under FWS' internal candidate process, Region 5 proposed to delist the species.

In its response to the OIG's request for information, Region 5 stated that MacDonald had no involvement whatsoever with the delisting decision. Through our investigation, we confirmed that no evidence indicated that MacDonald, or any other political appointee, influenced the decision. Rather, the decision to propose the delisting of the VNFS was made entirely within FWS ranks, based on the staff's evaluation of the science.

*Details:*

FWS Region 5's response to the OIG's request for information stated the following:

In the case of the [VNFS], we learned new information on the subspecies that was not known at the time the recovery plan and the amendment to the recovery plan were finalized (1990 and 2001 respectively). This new information changes the extent to which two of the four criteria need to be met for recognizing recovery of the subspecies. However, though the goals from the 1990 recovery plan have changed, we believe that the intent of the original recovery plan goals has been met.

...We conducted a formal 5-year review of the VNFS. In July 2005 we published a notice in the Federal Register announcing our review of the subspecies and soliciting any new information on the squirrel or its habitat. After reviewing all the information submitted during the comment period and engaging in robust internal agency discussions, the Region completed its review in 2006, using the 5-factor analysis, and concluded that the threats to the [VNFS] have either been eliminated or largely abated, and that the status of the subspecies no longer met the definition of endangered or threatened. Therefore, the Service's final recommendation on the status of the [VNFS] was to delist.

Glenn Smith is the Assistant Coordinator of Endangered Species for FWS Region 5. According to Smith, the proposal to delist the VNFS was internally generated within FWS in response to a 5-year review of the species' listing status under the ESA and was not the result of a petition to delist. Smith stated that he was personally involved in pursuing the potential delisting because, based on his review of all of the recent scientific data assessing the threats to the VNFS, the species no longer met the criteria needed to consider it threatened or endangered under the ESA.

According to Smith, several years ago, FWS received funding to analyze the status of the VNFS, and a graduate student performed an assessment. The assessment listed several prevailing threats to the species; however, according to Smith, once he analyzed those threats under the standards outlined in the ESA, Smith concluded that the threats were not at a level that warranted the species' continued listing under the ESA. At that point, FWS initiated a full 5-year review to determine the status of the VNFS.

According to Smith, in furtherance of the 5-year review, FWS received data from USFS, various states, and other entities indicating that the VNFS was established in many more areas than originally noted when the VNFS became listed under the ESA. Smith stated that this data was the “new information” FWS relied on in determining that all of the specific goals listed in the 1990 recovery plan did not need to be met prior to the delisting of the VNFS. In fact, Smith stated that the 1990 recovery plan was “not so much threat based” versus a plan that was compiled to “do good things.” Smith explained that all of the goals in the 1990 recovery plan were not needed to be met in order to remove the threats to the species to the level where it was no longer threatened or endangered.

Thomas Chapman is the Field Supervisor for the West Virginia Field Office in FWS Region 5. Chapman has been the Field Supervisor since May 2003, and in this position, he oversees the Endangered Species Program. Chapman explained that a 5-year review had been initiated to assess the status of the VNFS – to determine whether the population count had increased and the threats to the species had lessened. Chapman stated that while conducting the status review of the squirrel, staff began to believe that the VNFS population had increased substantially and that threats to the species had diminished, so delisting was warranted.

When asked if the recommendation to delist the VNFS was in compliance with the 1990 recovery plan, Chapman stated that the recovery plan was only guidance. Chapman explained that FWS relied on known habitat and threats to the population to list the VNFS as endangered. But, since the time of listing, more scientific information had been made available regarding the known occurrences of the squirrel, as well as showing that the flying squirrel was secure in its known habitat, Chapman said. Further, FWS had established a memorandum of agreement with local entities to preserve private lands that were abundant with spruce fir ecosystem in which the VNFS resided. Consequently, Chapman said, his office felt the threats to the VNFS had been removed and the species had recovered enough to warrant its removal from the list of endangered species.

Michael Thabault is the Assistant Regional Director for Ecological Services for FWS Region 5, a position he has held since late 2004. Thabault stated that he directed every listing decision emanating from Region 5, and with respect to the VNFS decision, he directed the commencement of the 5-year review. He further directed Region 5 staff to move forward with the delisting rule after reviewing the conclusions of the 5-year review. In sum, Thabault stated that he provided guidance and oversight to the entire process at the regional level.

Thabault confirmed that the proposal to delist the VNFS was internally generated within FWS in response to a 5-year review of the species’ listing status under the ESA and was not the result of a petition to delist. He also confirmed that, in furtherance of the 5-year review, FWS received data from various agencies and states that led FWS to determine that all of the specific goals listed in the 1990 recovery plan did not need to be met prior to the delisting of the VNFS. In fact, Thabault stated that the 1990 recovery plan, similar to many other older recovery plans, was “less than stellar” in adequately identifying whether a species was still threatened or endangered under the ESA.

FWS Region 5’s response to the OIG’s request for information stated the following:

During this 5-Year Review process, there was no discussion between Regional and Field Office staff or management with Washington Office Endangered Species Management, the Director's Office, Julie MacDonald, or anyone else in the Secretary's office regarding the status of the species, or the review process. There were communications between Regional Office Endangered Species staff and Washington Office Endangered Species staff on procedural and policy issues, however, there were no directives given, or known to be given by Julie MacDonald or any other political appointee. The Region engaged in what it believes were the typical coordination between the Regional Office and its Washington Office counterparts.

Wendi Weber is the Deputy Director for FWS Region 5. Weber has been employed by FWS since 1998 and was the Assistant Regional Director for Ecological Services in FWS Region 3 from 2004 through 2007, prior to becoming the Deputy Regional Director for FWS Region 5 in late 2007. Weber was the acting Regional Director for FWS Region 5 from November 2007 through March 3, 2008.

In response to the allegation that improper political influence may have driven FWS' proposal to delist the VNFS, Weber stated that she was unaware of any such influence occurring. Both Weber and Thabault stated that the decision to propose the delisting was generated from within the FWS field office and supported by the FWS regional office after FWS completed its 5-year review of the species status. As far as Weber knew, no political appointee in Washington, D.C. even knew of the proposal until it was already being pursued by the regional and field offices. Both Weber and Thabault further stated that they considered the proposal to delist the VNFS as a true success story for the ESA.

Regarding involvement specifically from ASFWP, Thabault stated that he believed Bowman made some perfunctory comments/edits on the proposed delisting, yet nothing of substance. Thabault explained that if Bowman had made substantive comments, Thabault would have been the person responsible for reviewing such comments and making any necessary changes based on those comments.

Bowman, when interviewed, said he only made perfunctory comments to the delisting proposal. Specifically, Bowman stated that he reviewed the proposal to delist the VNFS and made only one suggestion to reword the proposal. According to Bowman, FWS had stated in the proposal that the recovery plan had "secured critical habitat," whereas Bowman pointed out to FWS that this statement was technically incorrect because a recovery plan had no force of law and could not create or secure critical habitat but merely recommend such habitat.

FWS Region 5 stated the following regarding its decision not to recommend the proposal to delist the VNFS as a decision that warranted reconsideration:

The only explanation that we can give in response to the above question is a simple one. There was no political interference by Julie MacDonald, or any other political appointee during this entire process. The Service knows exactly which

listing, critical habitat, delisting packages and consultations received attention from Julie MacDonald and this was not one of them. We are not aware of anyone in the agency that believes differently. Therefore, we did not see any need to submit this decision for further review. We have responded to several Congressional inquiries and have provided direct responses along with nearly all the records in our files at the time. We cannot provide any form of evidence to further prove there was no political influence in the decision. We stand by our delisting process – it was untainted and science based.

FWS published a final rule delisting the VNFS in the *Federal Register* on August 26, 2008 (73 FR 50226).

## **12. Greater Sage Grouse Listing (Region 6)**

### *Summary:*

Our investigation determined that MacDonald had significant involvement throughout the FWS 12-month review of the greater sage grouse. We found that MacDonald personally questioned and challenged field biologists, attempted to influence source data used by FWS, attempted to influence the composition of an expert panel, significantly edited an FWS document that was being prepared for use by the expert panel, attempted to influence and edit the final greater sage grouse finding, and maintained a relationship with an SOL attorney assigned to the greater sage grouse decision to keep her apprised of FWS actions and assist with her efforts to influence the decision. Despite these facts, the FWS managers involved in the greater sage grouse decision continue to maintain that the final finding was not influenced by MacDonald's efforts.

### *Details:*

FWS published an announcement in the *Federal Register* on April 21, 2004, that it had made a positive 90-day finding that the greater sage grouse might be warranted for listing under the ESA (69 FR 21484). FWS then conducted a 12-month review of the greater sage grouse and concluded that a listing of the greater sage grouse was not warranted under the ESA. FWS published this decision in the *Federal Register* on January 12, 2005 (70 FR 2244).

According to a Fish and Wildlife Biologist in the Wyoming Field Office, FWS received seven petitions to list the greater sage grouse between approximately 1999 and December 2003. He added that FWS decided to address the petitions in one review of the greater sage grouse and later published a positive 90-day finding for the greater sage grouse.

The Biologist said FWS decided to use a structured analysis process for the 12-month review of the greater sage grouse because the greater sage grouse had populations in 11 states and two countries (United States and Canada). According to the Biologist, FWS created a seven-member panel composed of experts on sage grouse, sage brush, and range ecology as part of the structured decision-making process. He identified the members of the expert panel as Cary Reese, University of Idaho; Mike Schroeder, Washington Department of Fish and Wildlife; Steve Kanick, U.S. Geological Survey; Ann Hild, University of Wyoming; Chad Boyd, U.S.

Department of Agriculture; Neil West, Utah State University; and Jim Young, University of Nevada (retired).

The Biologist stated that the expert panel met for 2 days in November 2004 in Denver, CO, to discuss the greater sage grouse. FWS gave a presentation to the panelists to inform them of what FWS knew about the greater sage grouse before the panel began its deliberations. According to the Biologist, the expert panel ranked the threats to the greater sage grouse and estimated when it might go extinct.

The Biologist said an FWS status review team, composed of FWS personnel, met for 1 day after the expert panel had concluded its work. He identified the members of the team as Region 1 Director Dave Allen, Region 8 Deputy Director Paul Henson, Region 1 Assistant Director for Endangered Species Terry Rabot, Region 8 Director Steve Thompson, Region 6 Director Ralph Morgenweck, Region 6 Assistant Director for Endangered Species Mary Henry, and FWS Field Supervisor Brian Kelly, Cheyenne, Wyoming Field Office.

According to the Biologist, the FWS status review team made a not warranted finding for the greater sage grouse. He opined that the status review team had concerns about the greater sage grouse but it did not believe that the greater sage grouse met the definition of threatened under the ESA. He said the not warranted finding was accepted by then-FWS Director Steve Williams.

The Biologist stated that the not warranted finding was publicly released within a week of the decision by then-Secretary of the Interior Gale Norton at a livestock producers' conference in Arizona. He opined that Norton was sharing the "good news" of the not warranted finding with the conference attendees. According to the Biologist, it was not typical to publicly release a decision before publication of the finding. He added that it took FWS about a month after the decision to actually write the finding for publication.

According to the Biologist, MacDonald was a constant presence during the greater sage grouse review. He said MacDonald contacted him directly on two or three occasions during May/June 2004 to request information and to ask very detailed questions. He recalled that MacDonald questioned the scientific content of literature that he collected, wanted to know why he was using certain literature, and asked him to consider other literature. He described the other literature suggested by MacDonald as opinion papers rather than legitimate scientific literature.

The Biologist recalled that MacDonald called him on one occasion and asked him to photocopy an out-of-print book of approximately 400 pages. He said he refused to photocopy the entire book because he did not have copyright privileges for it.

The Biologist said Mary Henry, former Region 6 Assistant Director for Endangered Species, and Casey Stemler, then-Special Assistant to the FWS Director, were tasked to be MacDonald's points of contact in an effort to redirect MacDonald's inquiries away from FWS field biologists. He said the joke at FWS was that the biologists were put inside a little circle of musk ox to protect them from MacDonald's badgering and efforts to distract the scientists from doing their work.

According to the Biologist, MacDonald wanted to see the resumes of the individuals nominated for the expert panel. He said he believed FWS provided the resumes to MacDonald with the understanding that they would not be released publicly.

The Biologist said MacDonald wanted FWS to remove Kanick from the panel and replace him with Mark Boyce, University of Alberta. He speculated that MacDonald did not want Kanick on the panel because he had published a paper about the human effects on greater sage grouse that suggested it was going extinct.

The Biologist opined that MacDonald wanted Boyce on the expert panel because he had written a scathing critique of the greater sage grouse listing petitions. He explained that when Boyce was hired by a consultant for the petroleum industry to critique the listing petitions, he was asked to critique them as if he was reviewing a scientific paper. He said Boyce was not provided the context of a petition (i.e., its intended purpose) before being asked to critique the petitions.

The Biologist said Region 6 prepared a synthesis document to compile information about the greater sage grouse for use by the expert panel and FWS decision makers. He recalled that MacDonald kept trying to edit the synthesis document as it was being prepared because MacDonald thought FWS was attempting to influence the expert panel. When asked for an example, the Biologist said MacDonald objected to the use of a phrase such as “a scientific review of the greater sage grouse” because MacDonald thought the phrase would bias the panel.

According to the Biologist, MacDonald significantly edited the first 19 pages of the approximately 65-page synthesis document using the track changes function of the word processor. He recalled that because some of MacDonald’s edits changed basic scientific information, they were not incorporated into the FWS version of the synthesis document. For example, he said, MacDonald challenged a statement that the greater sage grouse was dependent on sage brush because it also ate alfalfa. He said MacDonald’s assertion was only partly true because greater sage grouse consumption of alfalfa was only a seasonal shift in diet. The Biologist added that the greater sage grouse did not survive the year if they did not have sage brush.

The Biologist also said MacDonald called FWS’ documentation on the greater sage grouse a “fairy tale” because MacDonald was aware of a document that contradicted an FWS conclusion about the greater sage grouse. He agreed that the document referenced by MacDonald contradicted the FWS conclusion but noted that the document MacDonald was using could not be legitimately considered for the decision. He explained that the document was an unpublished “opinion paper” that had not gone through peer review.

The Biologist said MacDonald continued to badger FWS even after the decision was made to have a not warranted finding for the greater sage grouse. He said MacDonald continued to attempt to “tweak” and soften the written finding. He offered one example in which MacDonald did not want FWS to include a precautionary note in the written greater sage grouse finding that said FWS remained concerned about the species and encouraged conservation efforts even though the greater sage grouse did not meet the criteria for listing.

The Biologist asserted that the greater sage grouse decision was based upon the science and was made independent of MacDonald's attempts to influence the decision. He opined that MacDonald's attempted influence did not affect the process used for the decision.

When asked, the Biologist opined that MacDonald's interest in the greater sage grouse decision was due to a desire by MacDonald to protect the interests of those who would be affected by a warranted finding. He said he believed MacDonald was trying to protect interests of the livestock industry and the oil and gas industry who would be affected if the greater sage grouse was listed under the ESA.

Brian Kelly, FWS Field Supervisor of the Ecological Services Branch in the Wyoming Field Office, recalled that when he arrived at the Wyoming Field Office in late June 2003, he was briefed on the status of the greater sage grouse by his staff. He said that by the summer of 2003, FWS had received between seven and nine petitions to list the greater sage grouse. Kelly said that in late 2003, FWS prepared a positive 90-day finding and added that the FWS Washington Office was briefed on the finding in December 2003. He said that in approximately April 2004, FWS began to work on the 12-month finding, the next step after a positive 90-day finding.

Kelly said he attended a briefing in early 2004 in which Gary Frazer, FWS' then-Assistant Director for Endangered Species in the FWS Washington Office, confirmed that a "structured decision making" process along with an expert panel would be used to assist in the 12-month finding process. According to Kelly, the seven-member expert panel consisted of persons with various areas of expertise involving the greater sage grouse, its habitat, and related topics. Kelly said that in connection with this process, FWS prepared a "synthesis document," which was a compilation and summary of all of the available literature and data on the greater sage grouse. This document was provided to the expert panel.

According to Kelly, the panel met for about one and a half days (November 2004) and discussed the synthesis document and heard presentations from FWS biologists and others. Kelly said the panel accomplished three tasks: it identified and prioritized the threats to the greater sage grouse, it determined the greater sage grouse's risk of extinction, and it discussed FWS' policy for the evaluation of conservation activities related to the greater sage grouse. Kelly opined that the expert panel process was very worthwhile and valuable.

Kelly said the FWS managers then split from the panel and discussed the greater sage grouse and whether or not the 12-month finding should be positive. After approximately 1 day of deliberations on Election Day in November 2004, the FWS managers ultimately concluded that the greater sage grouse would not be warranted for listing.

Kelly told us that MacDonald telephoned him either once or twice at his office in 2004. Kelly said he told MacDonald that it was not appropriate for him to discuss the greater sage grouse matter with her because the process was ongoing. He noted that at no time did MacDonald ever directly instruct him that he should make a negative finding on the greater sage grouse. Rather, he said she communicated her intentions in subtle ways.

Kelly stated that FWS had gone to great lengths to ensure that the panel members were well qualified and from various backgrounds. According to Kelly, MacDonald made a “clear” but completely unsuccessful attempt to influence and manipulate the panel selection process through then-FWS Director Williams and then-Special Assistant Stemler. Specifically, Kelly said, MacDonald wanted certain persons on the panel and did not want others on it. For example, MacDonald felt that panel member Kanick was predisposed to support the greater sage grouse, so she did not want him on the panel.

Kelly said MacDonald obtained a copy of the synthesis document and rewrote it. According to Kelly, “it got really ugly after a while.” Kelly explained that Mary Henry determined that FWS was not going to address any of MacDonald’s comments on the synthesis document, and she decided to provide the edited but not finalized document, which included MacDonald’s comments, directly to the panel members. According to Kelly, most of the panel members thought MacDonald’s comments were “a joke” and irrelevant. Kelly noted that to the best of his knowledge, Henry was not directed to provide MacDonald’s comments to the panel, and in fact Henry was later reprimanded by then-FWS Director Williams for doing so.

Kelly said it would not have been possible to just ignore MacDonald’s comments because the “mood” at the time was that no one could get away with doing so. In fact, Kelly said, the mood was so prevalent that “it became a verb for us – getting MacDonaldded.”

Kelly said the Petroleum Association of Wyoming (PAW) was a trade group in Wyoming, and almost all oil and gas operators, producers, processors, and marketers in Wyoming were members of PAW. He said Drew Bower was the Vice President of the PAW during the 2004 time period and was in charge of the public lands regulatory arm. Kelly said Bower and MacDonald communicated “all the time.” For example, Kelly recalled that at one point he and Bower were at a meeting together, and he (Kelly) went outside for a phone call. He said Bower tracked him down while he was walking outside and told him, “Julie called me and told me it’s not going good,” meaning that FWS was leaning toward listing the greater sage grouse. Kelly said Bower then asked him, “Is that true?” In response, Kelly said he told Bower that even if it was true, he was not in a position to provide that information to her, and secondly it was improper for her to tamper with the process. “There’s no doubt in my mind that [MacDonald] was talking to industry and trying to get the decision they would want,” Kelly said. According to Kelly, he was not aware of any specific connections between MacDonald and grazing and livestock organizations.

When asked why he thought MacDonald attempted to influence the process even through the drafting of the final decision, Kelly opined that MacDonald knew that the matter would eventually be litigated, and she wanted to have her viewpoint articulated in the document to the maximum extent possible. As a result, he said she attempted to change and manipulate the data such that it would substantiate the negative finding in any future lawsuit. Kelly said this was consistent with the “subtle yet consistent sense of pressure in the Department that they wanted a certain answer on this.”

Kelly concluded by stating that even though MacDonald “manipulated the crap out of” the greater sage grouse process, it was ultimately a fair and impartial process that he and others

believe resulted in the correct conclusion.

Julie Lyke, Region 6 Deputy Assistant Regional Director for Fisheries and Ecological Services, confirmed that an expert panel was convened to provide input on the topic, and a group of FWS managers, including Ralph Morgenweck, Brian Kelly, Mary Henry, and others, after considering the views of the expert panel, ultimately decided that a not warranted finding should be issued. The management team made this recommendation to then-FWS Director Steve Williams, who concurred with the finding.

Lyke said the expert panel procedure was used in an attempt to superimpose a structure that would help insulate FWS from litigation resulting from any process that was perceived as biased. According to Lyke, the experts (members of the expert panel) were precluded by law from making the final decision.

Lyke also confirmed that MacDonald was “very involved” in the greater sage grouse process by asking many questions during several conference calls and editing the synthesis document that was provided to the expert panel. Lyke said MacDonald provided her synthesis document comments, some of which Lyke described as “snide,” to FWS staff. One of the comments MacDonald wrote was that the greater sage grouse was not a sage brush obligate because it sometimes ate other types of food. MacDonald also wrote that the synthesis document looked like “a treatise on why roads are bad.”

*Agent’s Note: According to FWS, the biological definition of a species that is an obligate is that it is “bound to a restrictive environment” (Steen Dictionary of Biology); therefore, with respect to sage grouse and sage brush, sage grouse are bound to sage brush for their survival and thus cannot sustain themselves in its absence.*

According to Lyke, then-FWS Director Williams directed Mary Henry to retrieve the original version of the synthesis document from the expert panel and replace it with the one edited by MacDonald. Lyke said Henry told her she was not going to do this, and as a result the panel ended up with both versions of the document.

Lyke said MacDonald attempted to influence the process through this synthesis document before she knew what the outcome would be. Lyke also said MacDonald was clearly attempting to “shape” the process such that a not warranted finding would be reached. Had MacDonald not done so, Lyke said, the end result would have been the one that MacDonald wanted, but without the taint of her attempted influence.

On December 4, 2007, the U.S. District Court for the District of Idaho ruled that the greater sage grouse 12-month finding made by FWS was “arbitrary and capricious under the [Administrative Procedures Act]” and remanded the case back to the FWS for further consideration (U.S. District Court for the District of Idaho – Memorandum Decision, Case CV-06-277-E-BLW, dated December 12, 2007).

Lyke stated that the court’s decision to remand the not warranted finding back to FWS was especially ironic given that FWS went to great lengths to ensure that the greater sage grouse

review process was fair and unbiased. In addition, Lyke said MacDonald's attempted influence had no effect on the outcome. Lyke opined that FWS managers were not influenced by the climate that MacDonald had created and instead concluded that the greater sage grouse was not threatened or endangered because it was such a wide-ranging species.

Ralph Morgenweck, Senior Science Advisor and former Region 6 Regional Director, recalled that FWS was petitioned to list the greater sage grouse. He said the petition went through the process and FWS began to work on a 12-month finding. Morgenweck stated that FWS knew the greater sage grouse review was going to be very controversial because its habitat was located in the same areas that were of interest to energy development operations. According to Morgenweck, Region 6 decided to use a structured decision-making process as a means to deal with the anticipated controversy about the greater sage grouse review.

As part of the structured decision-making process, Region 6 decided to create a panel of experts on range management, sage grouse biology, and sage brush ecosystems, he said. Morgenweck said Region 6 provided the expert panel with information and data about the greater sage grouse to use during its meeting.

Morgenweck said FWS asked the expert panel, as its consultants, to review the information about the greater sage grouse and to provide an analysis of the extinction risks based upon the habitat as FWS understood it – development pressures on the greater sage grouse and assessment of the greater sage grouse against the listing criteria. Morgenweck stated that the expert panel was not asked to make a recommendation for listing or not listing the greater sage grouse.

When asked, Morgenweck said the creation of the expert panel helped to insulate FWS field biologists from the anticipated controversy over the greater sage grouse review. Morgenweck added that the structured decision-making process also helped to minimize political influence because it created a much stronger record than the traditional way of doing a 12-month review.

According to Morgenweck, Region 6 also created a panel of FWS managers to meet after the conclusion of the expert panel meeting. He said the managers on the panel were tasked to make the decision for the greater sage grouse finding, and the panel decided that the greater sage grouse did not meet the criteria for listing under the ESA. However, Morgenweck added that the FWS managers also concluded that if the oil and gas industry expanded its encroachment on the greater sage grouse habitat, the greater sage grouse would likely warrant listing in the future.

When asked, Morgenweck said Mary Henry, Region 6 Assistant Regional Director for Endangered Species, and Casey Stemler, then Special Assistant to the FWS Director, were both given the task of interacting with MacDonald and told to serve as a "buffer" so that MacDonald would not be contacting field biologists.

Morgenweck stated that Region 6 had been required to provide MacDonald with a copy of the synthesis document. He speculated that MacDonald attempted to downplay the threats to the greater sage grouse by editing the document. He also opined that she was attempting to create scientific uncertainty about the status of the greater sage grouse.

According to Morgenweck, Region 6 was directed to give MacDonald's edited version of the synthesis document to the expert panel even though the panel had already been given the original version. Morgenweck did not recall who provided the direction to give MacDonald's version to the panel.

Morgenweck said that although FWS delivered "good news" (the negative finding) to MacDonald, it was not good enough. He explained that MacDonald kept trying to find ways to undermine the identification of threats to the greater sage grouse. He opined that she wanted the published finding to downplay existing threats to the species.

Morgenweck reiterated that the greater sage grouse negative finding was made by FWS based upon the information gathered for the 12-month finding. He said MacDonald's involvement and efforts to influence the decision made it look like MacDonald had forced FWS to make the negative finding. Morgenweck insisted that the decision was not influenced by MacDonald or anyone else.

Mary Henry also confirmed that FWS decided to use a structured decision-making process for the greater sage grouse finding because it was such a large task. She added that FWS believed the structured decision-making process would give it a more robust and neutral review of the greater sage grouse.

Henry confirmed that MacDonald's frequent requests for information during the greater sage grouse review were detrimental to getting the work done. She explained that MacDonald's requests diverted FWS biologists from doing their jobs to collecting literature/data for her. Henry recalled one instance in which MacDonald asked for 1,001 primary literature citations in their original form.

According to Henry, MacDonald obtained a copy of the synthesis document that had been prepared by a Biologist in the Wyoming Field Office. Henry opined that MacDonald obtained the summary document through her "spy network."

Henry stated that MacDonald directed her to withhold the synthesis document from the expert panel and instead provide the expert panel with a version of the document that had been edited by MacDonald. According to Henry, MacDonald's version contained false biological information and deleted important information from the original document. When asked for an example, Henry said MacDonald deleted a phrase that said the greater sage grouse was an obligate sage occupant.

Henry said she disobeyed MacDonald and gave both versions to the expert panel. She noted that she gave the track changes version of MacDonald's edited document to the expert panel so they would know what had been changed. Henry described the original summary document as a scientific document and described MacDonald's version as a politically edited document.

Henry opined that FWS concluded that the greater sage grouse was not in jeopardy but the species needed to be watched carefully. She said FWS decided to make a negative finding based

on the information available at the time. According to Henry, the decision was based on biology and not upon any influence by MacDonald.

According to Chris Nolin, FWS created a structured decision-making process in which a document (synthesis document) identifying the science related to the decision was presented to an objective panel. Nolin stated that MacDonald attempted to have a version of the document that she (MacDonald) personally edited be presented to the panel in substitution of the document created by FWS. However, Nolin said FWS ensured that the panel received both copies of the document and were made aware which document was created solely by FWS and which document was edited by MacDonald.

Casey Stemler, Region 6 Chief for Bird Habitat Conservation and former Special Assistant to the FWS Director, stated that as the process of gathering and assembling data for the greater sage grouse decision moved along, MacDonald's office became "very involved" and began to request large amounts of information. Stemler said his role was to keep the Region 6 personnel from having to take time to respond to all of these requests, adding that he was the "in-between guy," or "blocker," and "shield" between field personnel and MacDonald's office.

Stemler stated that MacDonald was contacting field personnel and "constantly" asking for updates on the process and copies of the many documents used in the analysis. He said MacDonald wanted a copy of every single paper or document that FWS was using to make its determination on the greater sage grouse. He explained that this was a significant amount of information and MacDonald's requests took time away from the work that needed to be done. Someone had to write these updates and someone had to copy these documents, Stemler said, and this took time and effort that otherwise could be directed toward the actual process. In addition to dealing with MacDonald, Stemler said he also dealt with Manson, who was MacDonald's supervisor. Stemler said Manson resolved disputes that developed between FWS and MacDonald.

According to Stemler, if MacDonald looked at 12 papers on the greater sage grouse, and 11 of the 12 indicated that the greater sage grouse was endangered, MacDonald would insist on using and relying on the one paper that stated otherwise. Stemler said that while it was common practice for there to be some disagreement among scientists on any issue, MacDonald always seemed to rely on the "outlier" or the statistical anomaly, or the one scientist who was not close to agreeing with all the others.

Stemler said he did not recall whether MacDonald had asked for or had been given the resumes of the prospective expert panel members. However, Stemler recalled that MacDonald was concerned about who was going to be on the expert panel and added that it was true that MacDonald attempted to influence the composition of the expert panel. According to Stemler, MacDonald wanted FWS to remove Kanick from the panel. Stemler opined that MacDonald did not want Kanick on the panel because she had heard him provide a briefing to DOI officials and concluded that Kanick was biased.

Stemler also said MacDonald wanted FWS to replace Kanick with Boyce. Stemler opined that MacDonald liked Boyce because Boyce had stated information about the greater sage grouse

with which the FWS community disagreed. Stemler said Kanick's qualifications to be a member of the expert panel were good so FWS "pushed back" against MacDonald and retained Kanick as a member of the expert panel. Boyce did not participate in the expert panel, Stemler said.

Stemler said that prior to the time the panel convened (in November 2004), MacDonald asked him for copies of all of the information that was going to be provided to the panel. Included in this information was the synthesis document that summarized the status of the greater sage grouse. Stemler said MacDonald "took it upon herself" to edit the synthesis document, and she then gave it back to him and directed him to incorporate the changes she had made into the version of the document that was going to be provided to the panel. In response, Stemler told MacDonald that it was too late in the process to do this and that the changes would not be made, but she insisted that it be done.

Stemler said that in order to resolve their disagreement, a meeting was held with Williams, Stemler, MacDonald, and Manson. After the meeting, they agreed that MacDonald's version of the document would be provided to the panel along with the unedited version. Stemler said both documents were provided, as agreed. He recalled that during the panel meeting and while the MacDonald version was being distributed, one of the panelists briefly looked at the document, then "flipped it in the air" and stated that he would not be intimidated by political appointees or political pressure. Stemler could not recall the name of this panelist.

Stemler stated that the "irony" of MacDonald's insertion of herself into this and other issues was that some of her comments were insightful and useful. He noted that one did not need to be a biologist to point out obvious errors or problems with a document. "There were times when she made some legitimate suggestions and comments," Stemler said. However, he said, there were other comments that "make you scratch your head" because they were so "outlandish" and not based on any facts. For example, Stemler said, MacDonald wrote that the greater sage grouse did not need sage brush to survive. Comments like these had no factual basis or credibility whatsoever, Stemler said.

Stemler stated that MacDonald's "constant barrage" continued even while the final decision on the greater sage grouse was being written. He explained that he and a FWS Staff Biologist wrote the decision and "fought" the insertion of "unnecessary" language into it by MacDonald. Stemler said he was not able to recall any specific examples of this unnecessary language. Although Stemler said MacDonald never told him why she wanted particular language in the decision, he speculated that she wanted to ensure that it was legally defensible. Stemler rejected many of MacDonald's changes, telling her that it would keep them from meeting a deadline set by the Secretary of the Interior.

Subsequent to his interview, Stemler provided OIG investigators with a copy of an e-mail, dated November 2, 2004, from MacDonald to Henry on which Stemler was copied. In the e-mail, MacDonald directed Henry to provide both versions of the synthesis document to the panel. MacDonald described the original synthesis document as "Synthesis Document prepared by the Service," and her own, edited version of it as "Annotated Synthesis Document (DOI comments/questions presented anonymously)."

Finally, Stemler opined that the not warranted decision was an appropriate decision given the facts and circumstances of the case. He described the decision and the process that led to it as both “sound” and “transparent,” and said he was “one hundred percent comfortable with it.”

When interviewed about this specific ESA decision, Manson explained that FWS Region 6’s office in Denver was “obstructing” the greater sage grouse listing evaluation process and had already made their minds up about what the outcome should be. Manson recalled several “uncomfortable” conversations he had with Region 6 Director Morgenweck about this process. Manson stated that it was Stemler’s role to convince Region 6 personnel to objectively move forward with the planned evaluation process.

With respect to the greater sage grouse “synthesis document,” Manson said MacDonald approached him with concerns she had about it. For example, the document reported on the number of greater sage grouse that existed in pre-Columbian times, he said. Manson said MacDonald felt, and he agreed, that it was impossible to know this number.

Manson said he knew MacDonald was doing something with the synthesis document to address her concerns, but he did not recall exactly what it was. He said he was not concerned about MacDonald’s involvement with this document because he knew she had to rework other FWS documents in the past. He said he may have reviewed edits to the document that MacDonald made, but he did not think he went through and made his own edits. He said he only occasionally reviewed MacDonald’s edits to documents.

Manson did not recall any meetings that took place between him, Williams, Stemler, and MacDonald relative to which version of the synthesis document would ultimately be used in the process, although he said it would not have been unlike him to hold such a meeting. He did remember that ultimately both versions were used.

When interviewed, Thomas Graf, an SOL Attorney, confirmed that FWS decided to convene an expert science panel, which he attended, that would review a report from FWS on the state of the greater sage grouse, ask questions about the species, and then submit an informal recommendation about the threat of extinction of the greater sage grouse in the future. Graf said the panel was not asked to make a decision on listing because the panel was not composed of FWS employees; rather, FWS selected university researchers and state wildlife agency personnel to serve as expert panel members. Graf claimed that he did not know who made the decision to create the expert science panel or what criteria FWS used for picking the panel members.

Graf opined that FWS decided to use an expert panel to add another layer of objective analysis to the greater sage grouse decision. Graf believed FWS anticipated that the greater sage grouse decision would be controversial because, according to Graf, the species had been called the spotted owl of the Great Plains.

Graf said FWS held a management meeting after the conclusion of the expert panel meeting (November 2004). He said the participants of the FWS management meeting discussed the ESA and then voted on whether the greater sage grouse was or was not threatened. Graf recalled that one or two participants voted that the greater sage grouse was threatened and that the other

participants voted that the greater sage grouse was not threatened. According to Graf, following the vote, Morgenweck stated that he was going to recommend a not warranted finding to the FWS Director.

### *SOL Attorney Graf's Conduct Questioned*

According to Brian Kelly, SOL Attorney Thomas Graf attended the expert panel meeting. Kelly stated that he believed Graf was constantly on the telephone, both in the meeting and when stepping out of the meeting, speaking to MacDonald and updating her on the status of the discussions. Kelly stressed that he did not know for certain that Graf was speaking to MacDonald, but everyone at the meeting opined that it was MacDonald.

About 1 week before the expert panel was to convene, Graf attempted to contact state wildlife officials in all of the states occupied by the greater sage grouse to conduct his own research on the issue, Kelly said. He said this was done without the knowledge of anyone at FWS. One of the state wildlife officials was suspicious of the call, Kelly said, and created a transcript of the message that Graf left for him; he then notified FWS.

Subsequent to his interview, Kelly provided OIG investigators with a memorandum from Tom Christiansen of the Wyoming Game and Fish Department with the Subject line, "Voice-mail message claiming to be from the Dept. of Interior Solicitor's Office." In that memorandum, Christiansen wrote that the following was recorded on his office voice-mail:

Hi Tom. This is Tom Glass (?) from the Department of the Interior also the solicitor; I got your name and number from [Exemptions 6 & 7C]. Tom, what we're doing here at the department is putting together a comprehensive report that will illustrate what's going on at the state level for sage grouse. This will help inform the people at department level in Washington in whatever decisions are made regarding the 12 month planning for the sage grouse. I would like to talk to you a little bit about what programs and stuff you have going on. I know a lot of what you have going on through [Exemptions 6 & 7C] but just wanted to also kinda confirm what I received from him, with you, and also was wondering if I could use your rolodex to kinda get your counterpart person in other states across the 11 states of the sage grouse so that we have someone to go to in the next week to pull information from those states. My number in Denver is [Exemption 2]. I look forward to talking to you. Bye. And, I would appreciate if you could just kinda keep this as a closed effort between you and I for now. The department does not want to be seen as doing anything counter to what the fish and wildlife service is doing. We think we are just providing a benefit to the analysis and something that I really don't think the service biologists have time to compile so we've kinda been tasked with compiling... (end of time allowed for message). [Emphasis added]

***Agent's Note:*** *The telephone number provided in the voice-mail message described above is Graf's office telephone number.*

Brian Kelly also provided an e-mail from a Wyoming Game and Fish Department Staff Biologist, dated November 1, 2004, with the subject line, "RE: guidance on request for information from DOI." The e-mail stated the following, in part:

The WAFWA [Western Association of Fish and Wildlife Agencies] Sage-grouse Team discussed this situation....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.

A Biologist from the Wyoming Field Office recalled that during the expert panel deliberations, Graf made a telephone call to someone named Julie. He said he assumed Graf was talking to MacDonald because Julie Lyke was at the meeting. The Biologist said he observed Graf making calls on a cellular phone and on a pay phone during the 2 days of the expert panel meeting.

Ralph Morgenweck opined that Graf was "anti-listing" and speculated that Graf was communicating with MacDonald about the greater sage grouse decision. Morgenweck said he discussed his concerns about Graf with Regional Solicitor Bob Comer, Rocky Mountain Region. According to Morgenweck, Comer was somewhat sympathetic to Morgenweck's concerns. However, Morgenweck learned that Comer's office had a very heavy workload and not enough attorneys to do the work, so he and Comer agreed that Graf would continue to be the attorney assigned to the greater sage grouse.

Morgenweck recalled that Graf contacted biologists in Wyoming (state biologists) to discuss the greater sage grouse and told the biologists that FWS did not need to know that he (Graf) had contacted them. Morgenweck said the biologists later informed FWS about Graf's contact.

According to Casey Stemler, FWS was informed that Graf would be attending the expert panel meeting, although he was not invited by FWS personnel to attend. Stemler said he did not know who informed FWS that Graf would be attending. Stemler stated that it was "no secret" that there was a "strong connection" between Graf and MacDonald and that the two were communicating often. Stemler said Graf was frequently on the phone during the meetings, but Stemler did not know who Graf was talking to. Stemler said Graf and MacDonald each had information on the process that they could not have obtained from any source other than each other.

Stemler also said he was aware that Graf had attempted to gather information on the greater sage grouse on his own, without the knowledge of FWS. He said he thought this was "kind of odd" and "inappropriate."

Mary Henry stated that Graf was not invited to the expert panel meeting held as part of the structured decision-making process. Henry said Graf just showed up and attended the meeting. She recalled that during the meeting, Graf took notes, intermittently left to make telephone calls, and provided no legal advice to FWS.

Henry said she believed Graf had been co-opted by MacDonald to spy on FWS. She opined that Graf was never working for the interests of FWS but rather MacDonald wanted Graf to spy on FWS so that she could use the deliberative information obtained by Graf to pre-empt FWS and influence its decision for the greater sage grouse.

When interviewed, SOL Attorney Thomas Graf stated that the expert science panel was convened in Denver, CO, and met for 2 days in about October/November 2004. Graf said then-DOI Solicitor Sue Ellen Wooldridge asked him to attend the expert panel meeting. He said Wooldridge's request was communicated to him through his supervisor, Regional Solicitor Comer.

When asked why Wooldridge would have an interest in the science panel for the greater sage grouse, Graf said FWS had previously convened an expert science panel for the slick spot peppergrass that had not gone well. Graf also speculated that Wooldridge wanted an SOL attorney to attend the meeting to observe the processes because of an expectation that FWS would be sued no matter what decision was made about the greater sage grouse. Graf said he did not know how Wooldridge became aware of the expert science panel meeting.

Graf said his attendance at the expert panel meeting upset some FWS personnel because they thought he was there to spy on them. He explained that the meeting was not open to the public and was intended to be an FWS function. Graf opined that some FWS personnel did not believe an attorney was needed for a science meeting and that they viewed him as an intruder.

We informed Graf that one witness claimed to have overheard him talking to someone named "Julie" during the expert panel meeting in November 2004. Graf opined that he might have mentioned MacDonald to someone during a telephone conversation but denied that he had been talking to MacDonald. However, Graf responded, "I don't know," when asked if his cellular phone records would reflect his assertion that he did not call MacDonald. Graf then clarified his response by stating that he meant that he did not recall if he was using a cellular phone or a landline. Graf then stated that he did not remember calling MacDonald, that he may have called Comer who told him to call MacDonald, and that he did not remember talking to MacDonald during the expert panel meeting.

Regarding his actions before the meeting, Graf stated that in about September/October 2004, MacDonald directed his supervisor, Comer, to task him (Graf) and another SOL Attorney, to call around to the various states to discuss their conservation efforts and regulatory mechanisms for the greater sage grouse. Graf said the task made sense to him because regulatory mechanisms under the ESA were not a biological issue but rather fell within the realm of policy, legal, or governmental decisions.

Graf said some states were very cooperative with them and other states were concerned that the SOL was "stepping on the toes" of FWS. Graf recalled that the states were told that the SOL was conducting its project independent of what FWS was doing on the greater sage grouse. According to Graf, FWS found out about the project and complained to Manson and then-FWS Director Williams. Graf said he was subsequently told to discontinue the project.

Graf speculated that FWS was so focused on the biological matters that it did not adequately address the issue of regulatory mechanisms. He added that perhaps MacDonald enlisted the services of the SOL because she did not believe FWS had the time, inclination, or expertise to provide her with the information. Graf opined that MacDonald's request was made to fill an information gap and that it was not an attempt to influence or improperly interfere with the decision.

Graf volunteered that MacDonald sent her edited version of the FWS synthesis document to him. He opined that MacDonald wanted him to see her comments in case FWS did not provide her version of the synthesis document to the expert panel.

*Agent's Note: A review of MacDonald's e-mail by OIG investigators disclosed that Graf and MacDonald had exchanged e-mails pertaining to endangered species decisions. Graf used a BLM e-mail account and a hotmail e-mail account to exchange messages with MacDonald. BLM originally provided Graf with the BLM e-mail account for the sole purpose of working on water rights issues. The use restriction was made to ensure compliance with court direction in the Cobell v. Norton litigation.*

Graf sent an e-mail to MacDonald on March 8, 2005, stating the following:

Considering what we know about the greater sage grouse and the sage brush habitat, there may be a good chance the Service can do a negative 90-day finding on the petition to list the pygmy rabbit. I'm sure that petition is loaded with the same misinformation and allegations that were debunked regarding sage grouse.

The e-mail signature block included Graf's title as a Special Assistant U.S. Attorney.

Graf told us that he sent the e-mail to provide some "FYI" to MacDonald. He claimed that he was just offering assistance on what he had learned about the pygmy rabbit because he and MacDonald had similar philosophies on the uses and abuses of the ESA. Graf said his comment about debunked misinformation and allegations was referring to information in the petition rather than FWS information.

Graf told MacDonald the following in another e-mail that he sent on November 7, 2004:

I was an investigative reporter before going to law school...and the disinformation /misinformation and dirty deeds done on the behalf of this sage grouse by FWS folks and some state buddies are worse than any of the business or government shenanigans I used to expose.

Graf told us that he did not recall specifics about the e-mail and opined that he was referring to some instance in which he believed FWS was not being totally honest and he wanted to let MacDonald know about it.

When we asked Graf what other communications he had with MacDonald, he responded, "E-mails like these" (the e-mails discussed during this interview) and telephone calls. Graf said the

Secretary of the Interior was his client, and through the e-mails, he was pointing out issues to MacDonald, who had expressed an interest in his opinion. Graf asserted that he had done nothing improper because MacDonald and Manson had asked for his expertise and he was providing it.

Graf said all of his comments and actions were based on his legal interpretation. Graf added that if his interpretation coincided with MacDonald's policy position, it was mere coincidence rather than at MacDonald's direction. *Agent's Note: Subsequent to the interview with Graf, our investigation determined that in an e-mail written on June 27, 2005, to MacDonald, Graf wrote, "I could be your eyes and ears on meetings and drafting so you can concentrate on other matters."*

Graf, when asked whether he had desired to work with MacDonald to prevent positive findings, responded, "That wasn't my intention. That wasn't what I signed up for." Graf again denied that he wanted to prevent listings and said he wanted to work with MacDonald because he believed there were a lot of actions that they could take to fix FWS and the listing process. *Agent's Note: Subsequent to the interview with Graf, our investigation determined that in the June 27, 2005 e-mail to MacDonald mentioned above, Graf wrote, "We could kill three listings (two potential and one current) with one rule if we can pull this off, and I believe we can."*

Graf said he last had contact with MacDonald when she contacted him by telephone in about August 2007 or September 2007 to provide him with her e-mail address and telephone number. According to Graf, MacDonald wanted to let him know "what she was doing and where she was." Graf did not recall whether MacDonald called him at the office or on his cellular phone.

At the conclusion of his interview with the OIG, we asked Graf to provide copies of any other e-mails that he had exchanged with MacDonald that were on his BLM computer. On May 14, 2008, Graf sent a fax to the OIG. The fax cover sheet stated, "Here is the only e-mail I had left from Julie [MacDonald] in my BLM computer." The e-mail string provided by Graf was dated May 1, 2007. In the e-mail string, MacDonald told Graf that she was resigning her position. MacDonald also told Graf that he should not hesitate to call her if he thought she could assist him and provided her home telephone number. Graf responded that he was saddened to see MacDonald leave. Graf redacted MacDonald's home telephone number from the copy of the e-mail that he provided to the OIG.

When asked about Graf's role, Manson recalled "hearing" that Graf had made an effort to obtain his own scientific data from state agencies during the greater sage grouse process, but Manson said he knew nothing else about this. Manson stated that he did not direct Graf to collect this data, and he did not know if MacDonald directed Graf to do so.

John Kunz is the Assistant Solicitor, Branch of Federal and Indian Royalties, and was Graf's direct supervisor. Kunz recalled that Graf was the lead SOL attorney working on the endangered species decision for the greater sage grouse. Although Kunz was Graf's supervisor, Kunz stated that Graf worked directly with Comer on the greater sage grouse decision because Kunz did not know much about endangered species decisions. Kunz added that Graf was very familiar with endangered species decisions.

In approximately October/November 2004, Kunz said, Comer and/or Graf contacted him about a task to review state conservation measures for the greater sage grouse and to contact state fish and game departments about the greater sage grouse. Kunz said he did not know the origin of the assignment. He opined that the task did not originate from FWS because he believed by that point in time, FWS was done with its review of the greater sage grouse. When asked, Kunz said the task seemed to be relevant to the work that Graf was doing in support of the greater sage grouse endangered species decision.

Kunz recalled that there was a “time crunch” for the greater sage grouse assignment and that Graf needed assistance to complete the task. According to Kunz, Comer suggested that Kunz assign another SOL Attorney to assist Graf in completing the research of state laws and regulations. Subsequently, Kunz said he asked this SOL Attorney to help Graf.

Kunz recalled that someone got upset about the assignment and that the project was not completed. He said he could not recall who was upset with the project and he did not remember any details about what occurred or how it happened.

According to Kunz, Graf had an established relationship with MacDonald and Graf sometimes talked to MacDonald on the telephone. He said he did not know how or when Graf established the relationship with MacDonald.

Kunz said that at some point before or after Graf began working on the greater sage grouse decision, Graf may have been considered for a detail assignment to Washington, D.C. He opined that perhaps Graf established his relationship with MacDonald when the detail assignment was being considered.

When interviewed, an SOL Attorney stated that on October 28, 2004, Kunz, then-Assistant Regional Solicitor for Resources, asked the SOL Attorney to meet with him because he had a new assignment for him. The SOL Attorney said he later reported to Kunz’s office, where he found that Graf was already present.

The SOL Attorney said Kunz told him that Graf needed assistance to complete a project. The SOL Attorney said Kunz told him the project would require collecting information and creating summary documents about the greater sage grouse from various state fish and game departments. Specifically, the SOL Attorney said, he was asked to research state hunting regulations and state conservation measures pertaining to the greater sage grouse. The SOL Attorney recalled that he was told to just gather facts and not perform an assessment of the laws or programs. He described his role as a “support person” for Graf.

The SOL Attorney said he did not think that the task was unusual and felt “honored” to be asked to work on what he understood was an important project. He said that although he was never told the purpose of the assignment, he deduced that the work would help the SOL determine how effective state programs were for protection of the greater sage grouse.

The SOL Attorney recalled a discussion about him and Graf making telephone calls to the states. However, he said, it was later decided that he would not be contacting state offices.

Accordingly, the SOL Attorney never telephoned any of the state fish and game departments. He said he completed his assignment by conducting Internet research from home. He said he researched regulations and laws of California, Idaho, Montana, Nevada, Oregon, and Washington State that pertained to the greater sage grouse.

The SOL Attorney opined that the intent to make telephone contact with the states changed because Graf may have telephoned one of the states and learned that they were uncomfortable answering questions. He said he was not aware of any controversy or complaints from the states or FWS about the assignment.

The SOL Attorney did not recall periodic meetings with Graf about the assignment. Rather, he said he and Graf exchanged a few e-mails about the progress that was being made on the assignment.

The SOL Attorney, who maintained a daily work log, said his last entry for work on the assignment was January 3, 2005. The log entry stated, "Organized my materials on state summaries and set them aside." He said nobody ever asked for or looked at his work. When asked, he recalled hearing that the information was no longer needed, yet he did not recall why this decision was made.

The SOL Attorney said he did not know whom the work was being completed for and suggested that Graf would be able to provide details about the task. He opined that the greater sage grouse assignment was not something that FWS would typically ask of the SOL and said his "gut feeling" was that the assignment originated from somewhere in Washington, D.C.

The SOL Attorney said he did not believe that it was Kunz's idea to ask him to assist Graf. He speculated that his assignment to the task originated with Comer after Graf asked for assistance.

The SOL Attorney said he assumed that Graf was participating in meetings with whoever wanted the SOL to conduct the research. He said he did not participate in meetings regarding the greater sage grouse and said that the research task was his only involvement with the greater sage grouse endangered species decision.

The SOL Attorney stated that he did not recall any mention of MacDonald or Wooldridge being associated with the greater sage grouse assignment. He said he vaguely recalled the mention of Manson while he was working on the greater sage grouse assignment, but he did not recall the circumstances in which Manson's name came up.

The SOL Attorney recalled hearing that Graf was being considered for a detail assignment to Washington, D.C. However, according to the SOL Attorney, the detail assignment never happened.

When interviewed, Comer stated that Graf was the SOL attorney assigned to assist FWS in its preparation of the listing decision for the greater sage grouse. Comer stated that Graf's duties related to the greater sage grouse decision were "typical duties" of an SOL attorney assigned to a project. Specifically, Comer stated that Graf was assigned to provide legal advice to FWS.

Additionally, he said Graf's duties included keeping him (Comer), along with any interested parties from ASFWP, informed of "anything special" going on with the decision. Comer stated that the greater sage grouse decision was a "high-profile" decision.

Comer stated that he did not know how often Graf spoke directly with MacDonald related to the greater sage grouse decision. Comer also stated that he did not know whether Graf received direction from MacDonald related to his work regarding the decision. He speculated that MacDonald may have sought out Graf's expertise of the ESA because Graf was such a legal expert of the ESA.

Comer stated that he was unaware of how many e-mails Graf and MacDonald exchanged related to the greater sage grouse decision, beyond those e-mails in which Comer was a recipient. Comer further stated that he was not aware of all of the work Graf performed related to the greater sage grouse decision, but Comer was "generally aware" of what Graf was doing.

According to Comer, Graf had informed him that he (Graf) felt that FWS was doing a poor job in completing the greater sage grouse decision. Comer stated that he personally reviewed the final decision prepared by FWS not to list the greater sage grouse and he felt it was the "poorest written product" he had ever seen come from a federal official.

Regarding the expert panel meetings compiled by FWS to review the greater sage grouse data, Comer stated that Morgenweck controlled the logistics of the meetings. In response to Graf's claim that former Solicitor Wooldridge asked Comer to direct Graf to attend the expert panel meetings, Comer said he did not recall doing so and he did not recall Wooldridge's involvement in the greater sage grouse decision.

Comer stated that he did not recall whether Graf called him during the deliberations of the expert panel in order to apprise him of the status of the deliberations. Further, he stated that he did not recall whether he directed Graf to call MacDonald to inform her of the status of the meetings.

Comer stated that Morgenweck contacted Comer and complained about Graf's conduct in the meetings, and in response, according to Comer, he spoke to Graf about his conduct. Comer stated that he did not recall Morgenweck specifically asking him to remove Graf as the SOL attorney assigned to assist FWS with the greater sage grouse decision.

Comer stated that Graf was "a favorite subject" for FWS because Comer believed that Graf was "doing his job" with respect to the legal advice he dispensed regarding ESA decisions, and Graf put pressure on FWS to "do their job" regarding the preparation of ESA decisions; as a result, FWS retaliated against Graf by misrepresenting his actions in order to discredit him.

Comer stated that he remembered that Graf performed work on a project to research various state game departments' conservation measures regarding the greater sage grouse. When Comer was told that Graf stated to the OIG that MacDonald had asked him (Comer) to direct Graf to perform such an assignment, Comer stated that he did not recall assigning Graf to perform this task; however, if he did do so, the direction could have come from either the Washington SOL or ASFWP (MacDonald).

Comer stated that Graf was interested in trying to get a detail to work directly for MacDonald in Washington, D.C. He stated that he was certain that Wooldridge, MacDonald, and Manson discussed the potential detail.

We provided Comer with an e-mail written by Graf to MacDonald on June 27, 2005, which stated the following:

I really believe that we might miss opportunities to make meaningful impacts if my detail to your office is delayed further. I think it is important for me to at least 'start' my detail before the new associate for FW@P gets started in late July. That way my DC role will be part of the status quo, and not something that he might try to stop out of fear of the future or fear of change. I am very excited about working with you and Judge Manson and your folks, and I believe the sooner that happens, the better for the department and for all of us and what we are trying to accomplish. This Rio Grande Cut issues is a great example of the short and long term impact I could make in this detail. Short-term, I could be there to make sure our reasoning on SPOTR [Significant Portion of the Range] and language consistent with regulation/policy reform is incorporated into DOJ brief. *I could be your eyes and ears on meetings and drafting so you can concentrate on other matters. Long-term, we can make modifications in our definition of range and other reg./policy reform proposals based in part on the input/comments we get regarding this brief. And, I would prepare a legally sufficient delisting proposal (for Greenback) based on genetic studies that show Rio Grande , Colorado and Greenback are not separate sub-species. (We could kill three listings (two potential and one current) with one rule if we can pull this off, and I believe we can.)* Lastly, I want to take advantage of the remaining few years of this Administration to do great things for the country and my career, and I believe this detail is a great way to start doing that. I know working with you on reg. reform will be a big part of my detail, but I really think I should get started before that whole effort gets the green light. You said yourself it was 'nuts' there. I would fit right in! [Emphasis added]

After reviewing the e-mail, Comer stated that he had never previously seen the e-mail. Regarding its content, he said Graf obviously had "his view" on listing decisions; however, Comer stated that he did not believe that Graf allowed this view to bias his SOL legal work for FWS. Comer stated that if he felt that Graf was skewing his legal work toward this view, he would have talked to Graf about the matter in order to ensure it did not continue.

Comer said he did not recall whether MacDonald sent him her personal phone number when she resigned, as she did with Graf. When informed that MacDonald sent Graf her personal phone number, Comer stated that he believed MacDonald learned a lot from Graf.

Comer said he did not believe MacDonald improperly influenced any ESA decisions. He opined that MacDonald asked many legitimate, needed questions that were directed to "drive the process" more so than "drive a conclusion."

Regarding potential bias surrounding the greater sage grouse decision, Comer stated that during a recent meeting (August/September 2008) held by FWS regarding its new decision-making process for the greater sage grouse, he heard two FWS biologists responsible for leading the decision-making process state outright that they were biased toward listing the greater sage grouse. According to Comer, a biologist from the Wyoming Field Office and Brian Kelly both began their PowerPoint presentations by stating, "I am biased in favor of listing the greater sage grouse."

*Agent's Note: We asked two high-level FWS officials, Jay Slack and Ren Lohofener, who were present at the meeting if they similarly heard the Biologist from the Wyoming Field Office and Kelly state that they were biased toward listing the greater sage grouse. Slack stated that he remembered Kelly remarking that he was biased toward listing the greater sage grouse; however, he stated that Kelly followed the remark by stating that the science did not support listing the greater sage grouse. Slack stated that he attributed the statement to Kelly's discomfort about having to present an unpopular message to the audience and Slack did not think much about the statement because, in his opinion, Kelly had too much integrity to allow a personal preference to interfere with the science or influence a listing decision. Lohofener stated that he would have taken notice if an FWS employee stated he or she was biased in a decision-making process, and he did not hear the Biologist or Kelly make any such statements. Both the Biologist and Kelly denied stating that they were biased toward listing the greater sage grouse at the meeting. Additionally, Kelly pointed out that he was not the decision maker regarding the listing status of the greater sage grouse, but rather his work was forwarded on to the actual decision makers.*

On January 12, 2005, the not warranted 12-month finding for the greater sage grouse was published (70 FR 2244). A lawsuit was filed against the FWS to challenge the decision in early 2007.

As stated previously, on December 4, 2007, the U.S. District Court for the District of Idaho ruled that the greater sage grouse 12-month finding made by FWS was "arbitrary and capricious under the [Administrative Procedures Act]" and remanded the case back to the FWS for further consideration. In its ruling, the court stated the following:

MacDonald's principal tactic is to steer the 'best science' to a pre-ordained outcome. That may explain why so much of the 'best science' in this case was verbally communicated and never reduced to writing in any analytical or rigorous manner. This process allows the ultimate decision-makers to subjectively bend the 'best science' to their own ends, while obscuring any inconsistencies. In other words, MacDonald's principal tactic dovetails precisely with the principal weakness in this case. For that reason, MacDonald's extensive involvement in the sage-grouse listing decision is an independent reason for the Court's finding that the Director's 12-Month Finding is arbitrary and capricious under the APA [Administrative Procedures Act].

In its response to a request for information from the OIG, Region 6 reported that the reason it did not recommend review of the greater sage grouse decision in response to Director Hall's request

was because “we experienced a significant level of involvement from Ms. MacDonald in this finding, including attempts to influence the outcome of the finding; however, we ultimately concluded that the species did not warrant listing.”

Based on the District Court for Idaho’s remand of the greater sage grouse decision, FWS published a notice in the *Federal Register* on February 26, 2008, initiating a new status review of the species (73 FR 10218). As of November 13, 2008, FWS is currently conducting the status review, and it is expected to be completed in early 2009.

### **13. Gunnison’s Sage Grouse Listing (Region 6)**

#### *Summary:*

Our investigation determined that MacDonald was involved in the Gunnison’s sage grouse listing decision process. We found that she questioned the taxonomy of the species, requested information about Gunnison’s sage grouse, and made edits to the final not warranted finding for the species. However, we also determined that the decision to withdraw the proposal to list Gunnison’s sage grouse was ultimately made by FWS Region 6’s career staff without direct or specific influence from MacDonald or any other political appointee.

#### *Details:*

Al Pfister, FWS Supervisor of the Western Colorado Sub-Office, stated that FWS initiated the internal candidate process to list Gunnison’s sage grouse under the ESA after it was designated as a separate species in 2000. Pfister added that FWS received a petition to list Gunnison’s sage grouse a short time thereafter.

Pfister stated that Chris Nolin told the Western Colorado Sub-Office and Region 6 that their Gunnison’s sage grouse listing proposal would not make it past MacDonald during several discussions about the threats to the species. He said the explanation provided to them was that the Western Colorado Sub-Office was improperly using a “shotgun approach” for the six Gunnison’s sage grouse populations because the populations each had different threats and no one threat applied range-wide to the species.

Pfister stated that he generally agreed with the critique but noted that the outcome for each of the threats was the permanent loss of habitat for a Gunnison’s sage grouse population. Pfister opined that the Western Colorado Sub-Office’s proposal to list Gunnison’s sage grouse did not have the “silver bullet” or the one thing that stood out to say that the species should be listed under the ESA.

Pfister said that on December 1, 2005, Julie Lyke informed the Western Colorado Sub-Office during a conference call that the Gunnison’s sage grouse finding was to be changed from a positive finding to a negative finding. He said Lyke said the decision was based upon the results of a November 2005 report on Gunnison’s sage grouse population trends that was written by Professor Edward “Oz” Garton, University of Idaho. Pfister recalled that the Western Colorado Sub-Office personnel were also informed that they did not have a strong enough argument to

warrant listing Gunnison's sage grouse. Pfister said he did not know if the decision to change the positive finding to a negative finding had been made by Region 6 or by the FWS Washington Office.

When asked, Pfister said he did not believe the Garton report supported changing the positive finding to a negative finding. He explained that the Garton report concluded that because there had not been a statistical difference in Gunnison's sage grouse population trends, the same trends would continue into the future. Pfister said the statement expected the habitat to stay the same. He said he believed the field office had strong information to indicate that the habitat conditions were not going to remain the same.

Pfister said he believed the Western Colorado Sub-Office had strong enough scientific inference from other studies to support a warranted finding for Gunnison's sage grouse. He explained that some management decisions had to be based upon scientific inference. As an example, Pfister said that until 2000, Gunnison's sage grouse was considered the same species as the greater sage grouse and that he believed it would be an appropriate scientific inference to use studies of the greater sage grouse in the Gunnison's sage grouse proposed rule. Pfister added that it would be a rare situation to have all of the specific studies to support a conclusion.

Pfister stated that while he did not have any personal knowledge that MacDonald or anyone else attempted to improperly influence the Gunnison's sage grouse decision, he believed that MacDonald was attempting to influence the decision because the field office had to go to the extra effort to explain the taxonomy to MacDonald. Pfister added that MacDonald hired Rob Ramey, then Curator of Zoology, Denver Museum of Nature and Science, to write a report to document why he (Ramey) did not believe Gunnison's sage grouse was a separate species. Pfister recalled that MacDonald had commented on a document pertaining to Gunnison's sage grouse at some point in the process, which led him to speculate that the FWS Washington Office was influenced by MacDonald.

A Fish and Wildlife Biologist from the Western Colorado Field Office, explained that in 2000, FWS placed Gunnison's sage grouse on the "candidate list" pursuant to the ESA. He said he was the one who prepared the candidate assessment document that resulted in this placement. In approximately 2005, a lawsuit was filed against FWS seeking to have FWS make a determination on the status of Gunnison's sage grouse. Subsequently, in approximately March 2005, the Biologist said he began writing the listing decision package, and he completed a rough draft a few months later. Over the next few months, he said, several FWS supervisors reviewed the package. In approximately September 2005, the Biologist said, discussions between himself and FWS supervisors in Region 6 began to occur relative to the draft listing decision package. He said these discussions centered on the conclusions he reached in his listing package. He described these discussions and this process as being "normal."

The Biologist recalled that at one point during a conference call, Nolin told him the positive finding on Gunnison's sage grouse "would not pass through Julie MacDonald." He said he was never told specifically why the proposed finding would not be approved by MacDonald or what, if anything, he could do to change it. He said the implication, though, was that the argument for a positive finding was not strong enough.

The Biologist stated that in approximately October 2005, FWS contracted with Professor Garton to perform a population trend report on Gunnison's sage grouse. He said Garton issued his report approximately 1 month later, and it indicated that the Gunnison's sage grouse population trend was "pretty much flat," meaning it was not increasing or decreasing. He said the decision to contract with Garton was made by both the Western Colorado Sub-Office and Region 6 during this process. According to the Biologist, Garton was not brought in by the FWS Washington Office in an attempt to undermine the findings of the regional office.

The Biologist said MacDonald questioned the taxonomy of Gunnison's sage grouse during the listing process and questioned whether it was a separate species. He noted that Gunnison's sage grouse was not classified as a separate species until 2000; previously, it was included with the greater sage grouse. He noted that MacDonald was the only person who questioned this distinction. However, according to the Biologist, MacDonald's concerns about the uniqueness of Gunnison's sage grouse played no role in the decision to issue a not warranted finding.

In its response to a request from the OIG, Region 6 reported that the Western Colorado Sub-Office was working on an endangered species listing package for Gunnison's sage grouse throughout 2005. Region 6 provided the following response, that in about November 2005:

[S]everal factors converged: 1) we received unpublished trend analysis (Garton 2005) that was contrary to our conclusions, and 2) the Regional Office found that data was not strong enough to indicate that the species was warranted for listing, and 3) the Washington Office began to feel that the proposed rule would not meet the expectations of Ms. MacDonald. Therefore, after a December 1, 2005 conference call, the typical process diverged into a preparation of a 'not warranted for listing' 12-month finding.

Region 6's response to the OIG further identified MacDonald's involvement in the Gunnison's sage grouse decision in the following chronology:

- 07/19/05 – Julie MacDonald asked for information about a USGS geneticist.
- 10/05/05 – Region 2 Genetics Expert, bio prepared for Julie MacDonald.
- 11/03/05 – Conference call notes mention taxonomy discussion with Julie MacDonald.
- 11/10/05 – E-mail from Chris Nolin on proposed rule outline; mention of Julie MacDonald asking for outline.
- 03/28/06 – E-mail from Jean Cochran on determination schedule; meeting with Julie MacDonald.

- 04/05/06 – Region 6 responds to comments by Tom Graf and MacDonald.
- 04/10/06 – E-mail pertaining to MacDonald’s “request of Determination of her editing.”
- 04/12/06 – E-mail pertaining to the final Gunnison’s sage grouse determination package and final edits between Hall and MacDonald.

Julie Lyke stated that it was “clear that Julie MacDonald was very hostile” toward conservation measures for Gunnison’s sage grouse. Specifically, she said MacDonald questioned the taxonomy of the species as well as other facts that she (Lyke) felt had been clearly established. However, Lyke said she, not MacDonald, was the one who made the ultimate decision not to move forward with the listing package. “I decided we were not going to put forth a positive finding,” Lyke said.

Lyke said her decision was influenced by pleas from the FWS Washington Office personnel who did not want to “go in front of [MacDonald] with a half-baked package” because it was a “fairly painful experience.” However, and more importantly, Lyke said, the listing package was poorly written and did not fully articulate the reasons for the positive finding. Lyke said the “climate” in the FWS Washington Office created by MacDonald, as well as the shortcoming of the package itself, caused her, in consultation with Chris Nolin, to decide not to move forward with the listing package. Lyke stated that MacDonald had no direct or specific influence on the decision.

Bridget Fahey, FWS Region 6 Chief of Endangered Species, said she believed that in the case of Gunnison’s sage grouse, the entire population decline occurred a long time ago while current populations had been stable for about 40 years. She noted that there was still discussion about whether FWS should be looking at where a species “used to be” or just where “it is now.” She said the current policy was to make listing decisions based upon current populations rather than go back in time. Fahey said Region 6 staff believed the field office had not made a case that the current Gunnison’s sage grouse populations were threatened or endangered.

Fahey recalled that MacDonald made several edits to the Gunnison’s sage grouse finding but added that MacDonald’s edits did not change the decision, which was that Gunnison’s sage grouse was not warranted for listing. Fahey expressed a belief that Region 6 had established that Gunnison’s sage grouse was a separate species and opined that its conclusion was accepted in the scientific community. She said MacDonald questioned the science on the taxonomy. According to Fahey, MacDonald disagreed with the conclusion and added a sentence to the decision package that said there was continuing debate over whether Gunnison’s sage grouse was a separate species. Fahey opined that MacDonald’s policy that raised the bar for making a positive listing decision may have influenced the original Region 6 decision that Gunnison’s sage grouse was not warranted for listing.

During her interview, Chris Nolin stated that she believed the Gunnison’s sage grouse listing decision was a product of internal FWS discussions rather than being influenced by MacDonald. Nolin also said she believed the Region 6 Director simply disagreed with the Western Colorado Sub-Office recommendation and that there was no political influence involved in the decision.

SOL Attorney Graf recalled that FWS hired a biologist from Idaho (Garton) to do a population viability analysis for Gunnison's sage grouse. Graf said the population viability analysis was peer reviewed and included in the final FWS finding. According to Graf, the analysis indicated a stable to slightly increasing Gunnison's sage grouse population. Graf said that at some point in the listing process, Region 6 or the FWS Washington Office had some concerns about the listing and decided to do a withdrawal. Graf opined that it was a poorly written withdrawal but he eventually surmised it. Graf claimed that he was not aware of any improper political influence or involvement in the Gunnison's sage grouse listing decision.

In a June 21, 2007 memorandum to the Region 6 Director, James "Mike" Stempl, Region 6 Assistant Regional Director for Fisheries and Ecological Services, reported the following:

The increased level of scrutiny on Service listing packages by Ms. MacDonald may have influenced the final decision [for Gunnison's sage grouse] by the Regional Office. However, our determination also was significantly influenced by the inability of the Field Office [Western Colorado Sub-Office] to draft a cogent argument for listing based on known threats to the species.

In its response to the OIG, Region 6 reported that it did not recommend review of this decision in response to Director Hall's request because "we considered a warranted finding to be unsupported by data."

The negative finding for Gunnison's sage grouse was published in the *Federal Register* on April 18, 2006 (71 FR 19954). Subsequent to publication of the decision, a lawsuit was filed to challenge the decision. As of November 13, 2008, the decision remains in litigation.

#### **14. Gunnison's Prairie Dog Listing (Region 6)**

##### *Summary:*

Our investigation determined that FWS Region 6 submitted a positive 90-day finding for Gunnison's prairie dog to the FWS Washington Office, where it was changed to a negative finding. We determined that on January 19, 2006, Chris Nolin, then-Chief, FWS Conservation and Classification Program, informed Region 6 and the FWS field office in Pierre, SD, in an e-mail that the positive finding to list Gunnison's prairie dog was being changed to a negative finding "per Julie's [MacDonald's] instructions." However, our interviews with FWS personnel concerning the Gunnison's prairie dog decision revealed, in contrast, that during a conference call in July 2007, Lohofener, then-FWS Assistant Director for Endangered Species, and FWS Director Hall asserted that they had made the decision to change the positive finding to a negative finding, not MacDonald.

##### *Details:*

According to FWS Region 6's response to the OIG, FWS received a petition to list Gunnison's prairie dog on February 23, 2004, and assigned the task of completing the 90-day finding to the

South Dakota Field Office on July 8, 2005. A draft positive 90-day finding was submitted to the FWS Washington Office by Region 6 on December 5, 2005.

Region 6 reported that MacDonald was actively involved in the process to change the Gunnison's prairie dog finding from positive to negative. Noteworthy dates of MacDonald's involvement were provided by Region 6 in the following chronology:

- 12/06/2005 – MacDonald requests and receives copies of 7 citations from the 90-day finding from the Washington Office.
- 01/19/2006 – Nolin e-mails the regional office to change the conclusion of the 90-day finding to negative, stating, "Per Julie please make the pd [prairie dog] finding 'negative.'" However, later it was clarified that Lohofener and Hall made the decision.
- 01/22/2006 – MacDonald requests a copy of the negative 90-day finding from the regional office.
- 01/25/2006 – MacDonald provides comments/questions on the negative 90-day finding to the Washington Office.
- 01/26/2006 – MacDonald provides further changes for the negative 90-day finding to the Washington Office.
- 01/27/2006 – MacDonald and Lohofener finalize the negative 90-day finding.

According to Donald R. "Pete" Gober, the South Dakota Field Office's Supervisor for Ecological Services, and a Biologist from the South Dakota Field Office received the assignment to begin work on a 90-day finding for Gunnison's prairie dog in July 2005. Pete Gober said the South Dakota Field Office discussed the progress and findings for the Gunnison's prairie dog listing decision with Julie Lyke, who had a number of questions about their work. Gober explained that Lyke told them the finding had to make sense to her in order to make sense to the rest of the world.

Pete Gober said the South Dakota Field Office documented that there was substantial information to make a positive finding that Gunnison's prairie dog might warrant listing and that it should progress to the 12-month review stage. He said the states involved in a Gunnison's prairie dog working group (Colorado, Utah, New Mexico, and Arizona) wrote a letter stating that they supported a 12-month review for listing the species under the ESA.

Gober said the South Dakota Field Office's proposed finding was sent to Region 6 for review and approval before Region 6 sent it to the FWS Washington Office (December 5, 2005). When asked, Gober said Region 6 concurred with their positive 90-day finding for Gunnison's prairie dog and forwarded it to the FWS Washington Office as a positive finding.

Gober recalled that an FWS Staff Biologist at the Washington Office had sent an e-mail to Region 6 indicating that he concurred with their positive 90-day finding. After referring to a chronology for Gunnison's prairie dog actions, Gober said that on January 13, 2006, the Staff Biologist sent an e-mail that said the FWS Washington Office submitted draft number 7, a positive 90-day finding, to Ren Lohofener, then-Assistant Director for Endangered Species at the FWS Washington Office.

According to Gober, there may have been some miscommunication between the Staff Biologist, FWS Director Hall, and Lohofener because Hall and Lohofener decided that the Gunnison's prairie dog 90-day finding would be negative.

Gober recalled that Hall said he made the decision to change the Gunnison's prairie dog finding to negative during a conference call between the South Dakota Field Office, Region 6, and the FWS Washington Office. Gober said the final decision on the finding was not his to make and he speculated that the decision might have been made because of resource limitations, particularly if there was a belief that the 12-month review would likely result in a negative finding.

Gober opined that the final negative finding added statements that were not well substantiated and deleted information that might have supported a negative finding. Gober attributed the sloppy work by the FWS Washington Office to pressure to have the finding completed quickly and to a lack of knowledge of the material.

Regarding his knowledge of any direct involvement by MacDonald with the decision, Gober stated that MacDonald and Lohofener telephoned him in approximately January 2006 while he was home at lunch and asked questions about the draft proposal. Gober said MacDonald and Lohofener asked questions about general population measures in different parts of the range and what he thought about the strength of the data. When asked, Gober said the telephone call lasted about 15 to 20 minutes.

A Biologist from the South Dakota Field Office recalled that he drafted a 90-day finding for Gunnison's prairie dog and submitted it to Region 6 for comments. He said the document went back and forth "about three times" between the field and regional offices and was eventually submitted to the FWS Washington Office. He said this was a "positive" finding, which stated that the species "may warrant" listing under the ESA. He explained that the positive finding was primarily the result of the danger that plague, a bacteria transmitted by fleas, posed to Gunnison's prairie dog.

The Biologist from the South Dakota Field Office recalled seeing an e-mail from a woman (Nolin) at the FWS Washington Office that was forwarded to a Staff Biologist at the Washington Office and then to the South Dakota Field Office through Region 6, which stated, "Per Julie, please make the pd [prairie dog] finding negative". The Biologist from the South Dakota Field Office said he was "disappointed" that this change was made but recognized that the decision was "out of our hands."

The Biologist from the South Dakota Field Office said the Staff Biologist at the Washington Office rewrote the Gunnison's prairie dog finding such that it had a negative conclusion. He said the facts did not change, and the finding was simply changed from positive to negative. He said this document was then provided to MacDonald, who made "quite a few changes" to it. Specifically, he said, some information was deleted from tables that he had prepared, and changes were made to the way in which numbers were tallied. In addition, some text was deleted and some was added, he said. For example, the Biologist said, although information concerning historical population reports for Gunnison's prairie dog was left in the text of the finding, it was deleted from the tables, thereby making the population trend numbers in the tables much less dramatic.

The Biologist from the South Dakota Field Office also said the original document had question marks next to all of the trend numbers, indicating that the information was not completely substantiated. On the version he received back from MacDonald, the question marks remained on the decreasing trends but had been deleted from the increasing trends. He described this as an "eye roller." He said that while the changed document was not false, it was "tweaked" in "a lot of little" ways.

As an example of how language was added to the document, the Biologist said the revised version included language stating that "most" of the involved states had implemented prairie dog shooting restrictions. In fact, the Biologist said, two of the four states had done so, which would appear to qualify as half the states, not "most" of them. He again noted that he did not know for sure who made these changes and did not know how many were made by MacDonald and how many were made by the FWS Washington Office or others. In at least one instance, the Biologist said, information was deleted that supported the negative finding, and he found this change to be "odd."

The Biologist said that during this process, he responded to MacDonald's draft (January 2006), preparing several pages worth of comments and submitting them to Region 6. He said MacDonald then prepared a second draft, but this was not reviewed by the Biologist because the deadline for completion was nearing.

Julie Lyke confirmed that the Biologist at the South Dakota Field Office was the biologist who prepared the original positive 90-day finding. Lyke stated that she agreed with the conclusions reached by this biologist, and the draft finding worked its way through Region 6 on to the FWS Washington Office, where it was reviewed by a Staff Biologist, who also concurred with the finding.

*Agent's Note: In its response to a request from the OIG, Region 6 reported that on January 19, 2006, it received an e-mail from Nolin stating, "Per Julie please make the pd [prairie dog] finding negative". Region 6 added, however, that Lohofener and FWS Director Hall later informed the region that they had made the decision to change the finding to negative because they did not feel the information in the finding supported a positive conclusion.*

Lyke said an e-mail from Nolin was circulated indicating that MacDonald reversed the decision. According to Lyke, the actual 90-day finding document then remained in Washington, D.C.,

where Lyke understood that MacDonald and the Staff Biologist at the Washington Office revised it to report a negative finding.

Lyke stated that in approximately July 2007, she participated in a conference call with the various FWS regions concerning listing decisions affected by MacDonald. She said the call was organized by FWS Director Hall. She said that during the call, Lohofener publicly stated that he was the person who reversed the Gunnison's prairie dog finding from positive to negative. Lyke had no recollection of Hall either confirming or denying the statement by Lohofener. Lyke said that at one time, she heard from an FWS staff member that Lohofener and Hall felt that the Gunnison's prairie dog listing package did not contain enough information to substantiate a positive finding.

Bridget Fahey said Region 6 worked under the assumption that the Gunnison's prairie dog finding would be positive. According to Fahey, a decision was made to change the finding to not substantial at a level beyond Region 6. Fahey said Nolin sent an e-mail in which Nolin said MacDonald had made the decision to change the finding. However, Fahey stated that Lohofener said he had made the decision to change the positive finding to a negative finding. Fahey did not recall if Lohofener explained why he made the decision. Fahey said Lohofener had a lot of integrity so she believed him when he took responsibility for the decision. She opined that Nolin's e-mail might have been the result of a miscommunication.

Fahey said the FWS Washington Office was tasked to rewrite the Gunnison's prairie dog positive finding to make it a negative finding. Fahey said she believed the FWS Washington Office just inserted "not" in front of substantial on the proposed listing decision but did not change the biology.

Lohofener stated that he had no personal knowledge of MacDonald's involvement in the final rule. He stated that he remembered being totally unconvinced with the region's threat analysis. He further stated that he found it "hard to believe" that the FWS Washington Office wrote the negative finding because the region refused to do so, and he had no memory of such an event occurring. He also stated that he did not remember calling Peter Gober to discuss Gunnison's prairie dog; he said he remembered calling Peter Gober, but he thought it was regarding a different issue.

Regarding the e-mail she sent to Region 6 on January 19, 2006, that stated, "Per Julie please make the pd [prairie dog] finding negative," Nolin stated that she remembered sending the e-mail just after leaving a meeting with MacDonald. According to Nolin, she did not remember MacDonald specifically directing her to change the finding to negative, but rather she believed MacDonald must have made it clear by her statements during the meeting that she was not going to approve a positive finding.

Manson stated that he had no specific recollection concerning actions involving Gunnison's prairie dog, noting that by late 2005, he was preparing to leave DOI. He had no recollection of any editing that MacDonald might have done to the 90-day finding in this case.

In its response to the OIG, Region 6 reported that it did not recommend a review of the decision in response to Director Hall's request because "we were informed that the 'not substantive' 90-day finding determination came from within the Service."

The Gunnison's prairie dog 90-day negative finding was published in the *Federal Register* on February 7, 2006 (71 FR 6241). FWS subsequently received a Notice of Intent to sue to challenge the decision on August 17, 2006, and a complaint was filed in the U.S. District Court for the District of Columbia (Case 1:06-cv-02115-GK) on December 13, 2006. Subsequently, FWS agreed to conduct a 12-month review of Gunnison's prairie dog for listing status as part of a settlement, and on February 5, 2008, FWS published a warranted but precluded finding for a portion of the Gunnison's prairie dog populations determined to be a distinct population segment (73 FR 6660).

## **15. Montana Fluvial Arctic Grayling Listing (Region 6)**

### *Summary:*

Our investigation found that in July 2004, MacDonald participated in a teleconference briefing given by FWS personnel from the FWS' Field Office located in Helena, MT. During that briefing, MacDonald said she did not believe the Montana fluvial arctic grayling (MFAG) was a distinct population segment and stated that she would write a white paper about the MFAG. However, we determined that MacDonald never provided a white paper to Montana Field Office or Region 6 personnel and that she had no other involvement in the MFAG listing decision. Our investigation revealed that the decision to publish a negative finding for the MFAG was made by FWS Region 6 career staff in June 2006 without further pressure or influence from MacDonald, or any other political appointee.

### *Details:*

In its response to a request from the OIG, FWS Region 6 reported that the MFAG was placed on the endangered species candidate list in 1994 subsequent to a "warranted but precluded" 12-month finding in 1994. According to the Region 6 response, the MFAG languished on the endangered species candidate list for many years due to a lack of funding for listing and other factors. Region 6 reported that in 2004, FWS staff briefed MacDonald about the MFAG because a drought and irrigation use had affected MFAG habitat.

Region 6 reported that in about September 2005, the Montana Field Office began to work on a proposed rule for listing the MFAG in response to litigation. The Montana Field Office submitted a proposed rule to the regional office on January 31, 2006, that said the MFAG met both the discreteness and significance criteria of the distinct population segment policy. On February 16, 2006, Region 6 informed the Montana Field Office that then-Region 6 Director Mitch King (retired) wanted the Montana Field Office to "look at whether conservation measures exist that could preclude the need to list," and on March 31, 2006, King sent a briefing to the FWS Washington Office that "expressed intent to preclude the need to list of [sic] grayling by implementing conservation measures." Region 6 informed the Montana Field Office on June 14, 2006, that it had decided not to list the MFAG because it did not qualify as a distinct population

segment. The negative 12-month finding for the MFAG was published in the *Federal Register* on April 24, 2007.

Doug Peterson, Fishery Biologist, Helena, Montana Field Office, stated that the MFAG had been a potential candidate for listing under the ESA since well before June 2004, when he began working at the Montana Field Office. In fact, he said, there had been concerns about the MFAG population, which was related to trout and salmon, since the 1980s. In 1991, FWS was petitioned to list the MFAG, which Peterson said could migrate hundreds of miles during a single year between its spawning and wintering habitats. In 1994, FWS issued a warranted but precluded 12-month finding, and the MFAG was placed on the candidate list at that time.

According to Peterson, MacDonald was briefed about the MFAG in July 2004 by telephone. He said FWS personnel from both the Montana Field Office and Region 6's regional office participated in the call. Peterson recalled that the briefing began by discussing the status of the MFAG. However, he said MacDonald quickly changed the focus of the discussion to distinct population segment issues. Peterson said he handled this portion of the briefing, and after he concluded, MacDonald stated that she did not think the MFAG qualified as a distinct population segment. Peterson said that because he was new to FWS and did not know any better, he asked MacDonald why she felt this way, but she failed to respond to his question. Peterson said he was not surprised by MacDonald's reaction because he had been warned prior to the briefing that she usually rejected any conclusions made by biologists.

According to Peterson, MacDonald then requested that all of the information used by Peterson to reach his conclusion that the MFAG was a distinct population segment be provided to her so that she could conduct her own evaluation of the distinct population segment issue. The information was provided, but he never saw anything to suggest the MacDonald prepared such an evaluation, he said.

Peterson noted that MacDonald's statements on the distinct population segment issue were important to the MFAG discussion. He explained that if the MFAG was not qualified as a distinct population segment, it could not be considered a species and therefore could not obtain threatened or endangered status under the ESA. Without distinct population segment status, no additional action could be taken. "The process stops" without distinct population segment, Peterson said.

Peterson stated that in late December 2005 and early January 2006, he prepared a proposed rule that sought to list the MFAG as endangered. He said he sent the draft of this proposed rule to Region 6. In early 2006, Peterson said, Mitch King reported as the new Regional Director in Region 6 and was briefed on the proposed course of action. Peterson said that during the briefing, King made it clear that although he was not objecting to the distinct population segment conclusion that he (Peterson) had reached, he did not want to move forward with the listing action as proposed by Peterson. Rather, King stated that he wanted FWS to focus more on conservation measures and efforts with ranchers and land owners that would preclude the need to list.

In June 2006, Peterson said, Mark Wilson, Field Supervisor for Ecological Services, Helena, Montana Field Office, officially advised him that the decision had been made to make his 12-month finding a negative one. He said that during a staff meeting the very next day, James “Mike” Stempl, Region 6 Assistant Regional Director for Fisheries and Ecological Services, personally advised him of the decision.

Peterson described MacDonald as the “800 pound gorilla.” He explained that FWS employees in Washington and elsewhere had been “pounded on” for trying to get other species listed, and they had no desire to continue that process with other species, including the MFAG. Peterson said it was clear that MacDonald did not want listings to move forward, and it was equally clear that FWS personnel were either afraid to move listings forward or were simply told not to do so.

According to Wilson, MacDonald and Region 6 personnel participated in a teleconference about the MFAG in 2004. Wilson said MacDonald was polite but “seemed difficult to convince” and seemed like she was “suspicious of” and did not trust FWS personnel. “[MacDonald] never, ever learned to trust the things that we were doing,” Wilson said. Wilson said he got the impression that MacDonald felt FWS personnel were agenda-driven and wanted to list every species with which they had contact, and it was going to be her mission to put a stop to that, he said. He said MacDonald did not think the MFAG met the significance prong of the distinct population segment requirements. Wilson said that during the call, it was clear that FWS was moving toward a policy whereby if there was a large population of the species in some other location, then it would not be listed. Had this policy always been in effect, Peterson said, FWS would have never listed wolves or grizzly bears or certain other species because they, like the grayling, existed outside the United States.

Wilson said that at the conclusion of the call, MacDonald requested that the information that had been gathered on the MFAG be forwarded to her so she could write a white paper that would address whether or not the MFAG should be listed as threatened or endangered. Wilson said he never saw or heard of this white paper again. This was the last direct contact the Montana Field Office had with MacDonald, he said.

According to Wilson, the MFAG was on FWS’ proposed candidate list for approximately 15 or 20 years. He said that in May 2003, two environmental organizations filed a lawsuit over the MFAG’s continued placement on this candidate list. He said that in August 2005, FWS reached a settlement with the plaintiffs where the agency agreed to submit a final listing determination for the MFAG to the *Federal Register* no later than April 16, 2007.

Wilson said the 90-day finding was positive, and as a result, the 12-month finding process was initiated. He said that during the course of this process, a phone conference was held with Peterson, Wilson, and King, the new Director of Region 6. Wilson added that Lyke may have also participated in the call. Wilson stated that at the end of the call, King made it clear that he did not want the finding to be positive. Wilson said that although King never directly came out and said he did not want the fish listed, King was “indirectly hinting” that he did not want it to be listed. He said King suggested that other actions, including conservation methods, be given more time and money.

Wilson said Peterson completed a 12-month positive finding, approved by Wilson, and forwarded it to Region 6. He stated that he was “absolutely” comfortable that the proper conclusion had been reached. According to Wilson, the positive finding was reviewed by Mike Stempl, Region 6 Assistant Regional Director for Fisheries and Ecological Services, who did not think the MFAG was significant.

Wilson stated that he saw no evidence that MacDonald had any direct influence over the MFAG decision but opined that she had a large amount of indirect influence in that no one wanted to provide her with a written product that she would not be happy about. Wilson also said MacDonald’s participation in the briefing suggested that she was making an effort to influence the process.

Fahey said she first became involved with the MFAG during a briefing for MacDonald in 2004. Fahey said that during the briefing, there was discussion about whether the MFAG should be emergency listed. Fahey explained that an environmental group had asked FWS to consider emergency listing because the MFAG had been on the candidate list for listing under the ESA for a long time.

According to Fahey, MacDonald said she did not believe the MFAG qualified as a distinct population segment after the field office presented its distinct population segment justification for the MFAG. Fahey did not recall whether MacDonald provided her rationale or evidence to support her belief that the MFAG was not a distinct population segment. Fahey recalled that MacDonald said she would write an analysis to show why the MFAG was not a distinct population segment. Fahey noted that Region 6 never received an analysis or report from MacDonald.

Mary Henry recalled that Region 6 provided a briefing to MacDonald about the MFAG in about 2004. According to Henry, MacDonald disagreed with the scientific analysis for the MFAG. Henry said Nolin served as the “referee” between the FWS field staff and MacDonald, and Nolin had more empathy for the Region 6 position.

OIG investigators told Henry that they were informed by other sources that during the 2004 briefing, MacDonald said she did not believe the MFAG was a distinct population segment, requested copies of the grayling data, and said she would write a white paper on the species. Henry confirmed that the information was correct. She did not recall if MacDonald ever wrote the white paper.

According to an SOL Attorney-Advisor, the MFAG had been a candidate for listing since approximately 1994. He said that because FWS made no progress on listing this and other species over a number of years, a lawsuit was brought against FWS. He said that as a result of the settlement agreement reached in that case, FWS agreed to produce a finding for the MFAG, which ultimately was a negative one.

Prior to the issuance of the final decision, the SOL Attorney-Advisor said he had telephone discussions in early March 2007 with FWS personnel both in the Montana Field Office and Region 6 concerning the proposed negative finding. He said he was concerned because since

1994, FWS had taken the view that the MFAG was a distinct population segment, but in the proposed finding, “all of a sudden it magically wasn’t.” [Exemption 5]

After reviewing notes in his possession, the SOL Attorney-Advisor stated that in late March 2007, he did not sign or approve the negative finding. [Exemption 5] He said he also wanted the revised draft to be provided to him, but this never occurred due to the pending court-imposed deadline. As a result, he never saw the draft that went to the FWS Washington Office.

The SOL Attorney-Advisor said that based upon his participation in the MFAG decision process, he believed Stempl was responsible for making the decision that the finding for the MFAG would not be warranted. According to the Attorney-Advisor, Stempl was “a true believer in this finding,” and he opined that Stempl was not influenced by anyone in making the decision. He also opined that the decision was made at Region 6 without influence from MacDonald or others.

According to Region 6 Assistant Regional Director for Fisheries and Ecological Services Mike Stempl, the MFAG had been a candidate for listing for 13 or 14 years. He said it had been languishing on the candidate list as warranted for listing but precluded by higher priorities. Stempl said FWS made annual determinations to keep the MFAG on the candidate list throughout the years.

Stempl stated that FWS was able to continue to keep the MFAG on the candidate list as warranted but precluded because the MFAG were being propagated at an FWS hatchery in Bozeman, MT. However, Stempl said he was concerned that keeping the MFAG on the candidate list implied that FWS believed it had a reason to keep the MFAG as warranted but precluded. According to Stempl, he also feared that problems would arise if FWS decided to remove the MFAG from the candidate list because it had remained on the list for many years. Stempl said he and Region 6 did not act on the concerns and kept “kicking it [the MFAG] down the road” so that they could worry about making decisions at a later time.

Stempl confirmed that Region 6 was eventually petitioned to list the MFAG, and in response, Region 6 went through the 12-month review process. He said this review included assessing the threat factors to determine if the factors warranted listing and looking at the status of the species to determine if it was declining, stable, trending downward, or heading for extinction.

Stempl stated that the Montana Field Office and Region 6 were trying to determine if the MFAG qualified as a distinct population segment because the species ranged into Canada and Alaska. According to Stempl, the MFAG was not a separate species or a separate subspecies so they had to determine if it was a distinct population segment in order to be able to find the MFAG warranted for listing.

Stempl said the Montana Field Office was responsible for doing all of the biology, genetics, research, and application of the distinct population segment threat factors. He stated that Region 6 was responsible for review of the Montana Field Office’s work and assessment of how it complied with FWS policies. Stempl added that the regional review focused on how well the field office’s product complied with the distinct population segment policy. He said the Region 6 review did not focus on the biology presented by the Montana Field Office.

Stempl stated that he made the decision that the MFAG did not warrant placement on the endangered species list because he did not believe the MFAG was significant to the entire (worldwide) grayling population. Stempl stated that MacDonald showed no interest in the MFAG while he was working on the decision and added that nobody attempted to improperly influence his decision. Stempl said he had no contact with MacDonald about the MFAG.

According to Stempl, the distinct population segment determination was subjective because he had to consider the importance of the very small MFAG population when compared to the large number of other grayling populations. Stempl concluded that the MFAG was distinct and discrete because it was separated from the nearest grayling population in Canada by about 700 or 800 miles; however, he noted that the second criterion of the distinct population segment policy was the significance of the species. According to Stempl, he was responsible for making the correct policy decision pertaining to significance and he did not believe the MFAG rose to the level of significance because the MFAG population was not significant to the entire grayling population.

Stempl recognized that the decision was subjective and said someone had to decide where to draw the line and make the decision whether it was, or was not, significant. Stempl opined that there would be no need for a distinct population segment policy if every population were deemed significant. To illustrate the rationale behind his decision, Stempl said FWS would not list a gray squirrel in Central Park, NY. He explained that the gray squirrel would be discrete because it was surrounded by buildings and cut off from other squirrel populations, but the Central Park squirrel population could not be considered significant to the remainder of the gray squirrel populations. He said the same held true for the MFAG because it was only one of many populations. Stempl added that the distinct population segment policy directed that a species could not be listed unless the species was discrete *and* significant.

Stempl recalled that Region 6 informed the FWS Washington Office in early briefing papers that it was considering a warranted but precluded finding, but after further review, he decided that listing was not warranted. Stempl said the final decision package was sent to the FWS Washington Office as a not-warranted finding in about September or October 2006.

Jay Slack, Region 6's Deputy Regional Director, said he and then-Region 6 Director King concurred with Stempl's conclusion that the MFAG did not meet the significance criteria under FWS' distinct population segment policy. Accordingly, he stated that he and King both agreed with Stempl's decision to change the Montana Field Office's positive finding to a negative finding. Slack stated that the data did not provide evidence to support a conclusion that the MFAG was biologically unique.

According to Slack, millions of stocked or hatchery grayling had been placed in the streams and lakes with native MFAG populations for many years, which raised concern about whether the native MFAG population remained genetically distinct after having so many other grayling placed in the habitat. Slack said it would be difficult to argue that the MFAG was genetically distinct after having hatchery grayling placed in the habitat for many years.

Slack said Stempl argued that he did not know what the FWS would be saving if it used the border as a non-biological reason to list the Montana grayling (due to overstocking of hatchery grayling in MFAG habitat). Slack said this was the “lynch pin” for why Region 6 chose not to use the border as a non-biological reason for listing the Montana grayling.

When asked, Slack said it was acceptable to consider grayling populations in other countries when making the decision for the MFAG in the United States. Slack explained that the distinct population segment policy allowed for use of an international border as an artificial non-biological basis to keep a species persistent in the United States. However, Slack said, the policy also required that an international border be used sparingly when making listing decisions.

We asked Slack whether King had ever told the Montana Field Office or anyone else that he did not want the MFAG listed. In response, Slack said King might have said something like that about a lot of issues. Slack explained that King liked to develop partnerships and solve problems through cooperation and did not believe that listing a species was always the best answer to a problem. Slack said King had formerly been part of the FWS Partners Program and supported the philosophy of working with others in the hope that recovery efforts would be successful rather than jumping right to listing a species.

According to Slack, there was no influence from MacDonald or anyone else. He explained that the discussions and decisions that resulted in the negative finding for the MFAG occurred at Region 6 without pressure or influence. However, Slack acknowledged that his concurrence with Stempl’s decision was influenced by the climate at the time. He explained that the negative finding was made with the knowledge that the data was not conclusive enough to overcome scrutiny from the FWS Washington Office or DOI.

Nolin stated that MacDonald had expressed her view that she did not believe the MFAG represented a distinct population segment; however, Nolin believed the final decision was made at the regional level.

Henry, Lyke, and Fahey all stated that they were not aware of any influence by MacDonald or other political appointees in the MFAG decision.

In its response to the OIG, Region 6 reported that it did not recommend review of this decision in response to Director Hall’s request because of the following:

[T]he initial decision to not list, based on conservations [sic] measures being implemented, was made by Region 6 RD [Regional Director] Mitch King. Subsequent conclusions regarding whether the Arctic grayling met the DPS [distinct population segment] Policy were made by Region 6. Therefore, this decision was not influenced by Ms. MacDonald.

FWS announced that it was withdrawing the MFAG from consideration for listing under the ESA on April 24, 2007. The withdrawal was challenged in a lawsuit filed in November 2007 in the U.S. District Court, Billings, MT. As of November 13, 2008, the matter remains in litigation.

## 16. Peirson's Milk Vetch Delisting (Region 8)

### *Summary:*

On two different occasions, in 2001 and 2005, the American Sand Association (ASA) petitioned to delist the Peirson's milk vetch, potentially simultaneously removing it from the endangered species list and removing its status as "threatened." Bowman was significantly involved in this matter, and MacDonald had direct and regular involvement with the petitioners in advancing the ASA's delisting petitions for the Peirson's milk vetch. Despite MacDonald's interaction with the ASA and advocacy on its behalf, FWS allegedly relied on the best available science in evaluating the petitions to delist and twice found the delisting petitions to be "not warranted."

### *Details:*

In response to the OIG's request for information, Region 8 stated the following:

- "The Service received a petition to delist PMV [Peirson's milk vetch] on October 25, 2001, from the American Sand Association (ASA) and two other parties."
- A finding of "not substantial" was surmised by the Washington Office in June 2003, after FWS was sued by ASA for failure to issue a prompt 90-day finding for its 2001 petition. It was sent back by Special Assistant Randy Bowman, ASFWP, to be re-examined to determine if the appropriate standard had been applied.
- In August 2003, the Washington Office "submitted a draft 'not substantial' finding to [AS]FWP for review. After [AS]FWP review, the 'not substantial' finding was revised in Washington to a 'substantial' finding on August 28, 2003. A positive 90-day delisting petition finding was published in the Federal Register on September 5, 2003, initiating a status review to determine if the petitioned action was warranted."
- On June 4, 2004, Region 8 published a 12-month finding determining that, "based on the best available science the petitioned action to delist the species was 'not warranted' at that time."
- "On October 18, 2004, the ASA and two other parties filed suit challenging the 12-month finding." This litigation was dismissed on September 6, 2005, following discussions between ASFWP and ASA.
- "The Service briefed DAS [Deputy Assistant Secretary] MacDonald on July 28, 2005, on the progress of the 90-day finding. She requested an outline of the updated petition, specifically noting new information presented in the second petition as compared to information to which we previously responded in our previous 12-month finding. CFWO [Carlsbad Fish and Wildlife Office] provided a table to Region 8 for transmittal to DAS MacDonald on September 7, 2005."
- "The Service published a 90-day finding in which we determined that the updated petition contained substantial information indicating that the petitioned delisting action may be warranted on November 30, 2005."

Gary Wallace, Biologist in the Carlsbad Field Office, said he worked primarily on the first petition to delist the Peirson's milk vetch, which was filed in 2001 by the ASA. Wallace said

that upon receiving the petition from the ASA, he determined that there was not substantial information contained in the petition to warrant a 12-month review.

*Agent's Note:* According to its Web site, ASA "is dedicated to preserving the Right to Ride while preserving the Environment." ASA seeks to inform sand enthusiasts, according to the site, using the best information available on sand-related issues: environmental, political, social, or otherwise. ASA asserted, in both its 2001 and 2005 petitions to delist the Peirson's milk vetch, that the Peirson's milk vetch population and reproductive capacity were stable and strong, warranting delisting.

Wallace said his written finding proceeded from the field office to the regional office, then to the FWS Washington Office, and then to ASFWP as "not substantial." He said his finding was inexplicably changed to "substantial." Wallace said he did not know who changed the finding from "not substantial" to "substantial." He said he was told that the 90-day finding was made "substantial" because of the petitioner's assertion that they had evidence of Peirson's milk vetch seed banks. According to Wallace, there was no mention of the seed bank in the rule.

*Agent's Note:* Wallace explained that the information relating to the seed bank could have been potentially significant because desert plants emit seeds, but all the seeds do not germinate the next year. So, when the plant dies, some seeds survive and germinate in later years. This re-germination contributes to the survival of the species of plant. Wallace stated that even though ASA asserted that there were seed banks for the Peirson's milk vetch, the seed banks were not enough, in and of themselves, to make the case for a delisting of the Peirson's milk vetch.

According to Wallace, since the 90-day finding was changed to "substantial," FWS proceeded to the 12-month status review to determine if the species warranted delisting as petitioned. Wallace said he worked on the 12-month determination and looked at information relating to the Peirson's milk vetch in greater detail. He said he and others on the team looked at the information included with the petition and also reports that had been submitted to FWS. Wallace said they provided the reports and materials that had been submitted by the petitioner to peer reviewers. Wallace said the peer reviewers "did not think very highly" of the information submitted in support of the petition. Wallace elaborated that the materials relied on much information provided by the ASA's expert Biologist.

Wallace said he found that, as a result of the 12-month status review, the petitioned action was "not warranted." He explained that the ASA relied upon a lot of "anecdotal observations" that it asserted as science; and the ASA made a lot of assumptions. He said the rule was published as "not warranted."

Wallace said the ASA sued FWS on its 12-month finding, arguing that FWS did not adequately consider the "science" put forth by the ASA expert Biologist. Wallace said FWS received an updated petition in 2005, and there was not much difference between the updated petition and the 2001 petition. Wallace concluded that the outcome of the second 90-day finding must have been substantial because FWS was currently working on a 12-month finding.

Wallace admitted that the 90-day review he conducted on the 2001 petition was more extensive than what should have been done for a 90-day review, but rather it was more like a 12-month review. Wallace explained that his review was more in-depth because the initial petition had been worded like a lawsuit and was very detailed. Consequently, he felt his response necessitated a much more detailed response than typical. Wallace said he had to “answer detail with detail.”

Wallace said he did not rely solely upon what was written in the petition to make the 90-day finding. According to Wallace, he generally relied on what was readily available to him, but he elaborated that the definition of “readily available information” was different for him than it would be for another person. Wallace said that as a botanist with over 30 years of field experience, he had “readily available” access to any library in the country from which he could request a document and receive it within an hour.

Wallace specified that in conducting his analysis for the 90-day petition to delist the Peirson's milk vetch, in addition to FWS files, he accessed the library at Ranch Santa Ana Botanic Gardens, called colleagues, accessed the Internet, and used references from his home library collection. He said these were the typical sources that he accessed to conduct a 90-day review. Wallace distinguished his level of effort for the 90-day from the 12-month review. He said his 12-month review was a little more in depth.

Wallace said that during his work on the Peirson's milk vetch, he did not have any interaction with MacDonald. He said he did not know if she or any other political official had influence on the process. Wallace recalled, however, that MacDonald traveled to the dunes to see the milk vetch. Wallace pointed out that MacDonald went on a tour of the dunes in ASA off-road vehicles that were driven by ASA members.

*Agent's Note: ASA issued a newsletter in June 2005 describing MacDonald's off-road-vehicle tour of the dunes. In the newsletter, ASA stated, “MacDonald loved the ride with ASA President Grant George as was evidenced by her huge smile and her enthusiastic recap of it. She commented that it reminded her of her days in high school when she would go to carnivals and ride all the fast rides. At one point there was at least 3 feet of air below the Funco.” The newsletter further stated that “[the ASA expert Biologist] made an excellent presentation at a large PMV [Peirson's milk vetch] site he monitors. All points in favor of our case were made .... In the end, we all feel confident that our major points were made.” Pictures from the newsletter show MacDonald standing in a “sea” of Peirson's Milk Vetch.*

Wallace said that about that time, an Associate Professor of Botany at Claremont Graduate University, had inadvertently received an e-mail on August 2, 2005, that showed that MacDonald was urging the ASA to file its petition to delist the species. Wallace said the professor sent the missent e-mail to him on August 26, 2005. Wallace said the original e-mail was sent to David Hubbard, Counsel for the ASA, from Vince Brunasso, Vice Chair of the Executive Committee of the ASA. Wallace said Hubbard was listed on the first petition to delist the Peirson's milk vetch and probably had a role in the updated/second ASA petition to delist the species. Wallace said the e-mail had no effect on the way he reviewed the second petition.

Field Supervisor Jim Bartel said Wallace reviewed the 2001 petition filed by the ASA to delist the Peirson's milk vetch and Wallace determined that the information presented in the petition was "not substantial." Bartel said that when the finding went forward, Special Assistant Randal Bowman questioned whether Wallace had gone beyond the limits/threshold necessary for a 90-day review. Bartel admitted that Wallace might have gone too far in that he had called colleagues and requested information that was outside of FWS files.

Bartel stated that when conducting the 90-day petition review, the biologists had a tendency to make calls to colleagues, conduct some research online, and more. He said that when the biologists did this, the review became more like a 12-month status review. He noted that there was no clear guidance on how much review was sufficient for a 90-day review. He said he advised his employees that if it took more than a day to make a determination, then the review was likely going too far. Bartel said there was a perception that the bar was low for delisting actions but high for listings, resulting in handicapping efforts to list and making it easier to delist.

Bartel said the field office re-conducted that 90-day review and again found that the information presented in the petition was "not substantial." He said that when ASFWP reviewed the finding, it was changed to "substantial." This change to "substantial" initiated a 12-month status review to determine if the petitioned delisting was warranted, he said.

According to FWS Region 8's response to the OIG's request for information, on June 4, 2004, FWS published a 12-month finding that determined, based on the best available science, the petitioned action to delist the species was "not warranted" at that time. Four months later, on October 18, 2004, the ASA and two other parties filed suit challenging the 12-month finding.

In its response, FWS Region 8 further asserted that on April 1, 2005, MacDonald forwarded e-mails to Region 8 from the ASA referencing a previous meeting with her and requested that Region 8 set up a site visit for her to meet with ASA's botanical consultant and observe Peirson's milk vetch plants in the field. According to Region 8's response, MacDonald visited FWS Region 8's Carlsbad Field Office on April 20, 2005, and was briefed on recent Peirson's milk vetch research. In addition, on April 21, 2005, MacDonald conducted a site visit to the dunes and met with ASA representatives there; Region 8 and Carlsbad Field Office staffs were also present.

FWS Region 8's response also stated that during a June 6, 2005 briefing with MacDonald on Peirson's milk vetch critical habitat, she mentioned that the ASA would likely submit a second petition to delist the Peirson's milk vetch prior to an upcoming court date related to the October 18, 2004 litigation.

FWS Region 8's response further stated that the ASA submitted an updated petition to delist the Peirson's milk vetch to MacDonald, dated June 30, 2005. On July 13, 2005, FWS received direction from MacDonald and Bowman, via e-mail from FWS Assistant Director of External Affairs Elizabeth Stevens, to acknowledge the new petition and that the petitioners would drop the lawsuit on the 12-month finding.

Additionally, FWS Region 8's response stated that on July 28, 2005, FWS briefed MacDonald on the progress of the 90-day finding, and MacDonald requested an outline of the updated petition, specifically noting new information presented in the second petition as compared to information to which FWS previously responded in its 12-month finding. The same day, July 28, 2005, FWS wrote a letter to the ASA formally acknowledging receipt of the petition to delist Peirson's milk vetch.

According to FWS Region 8's response, FWS received a copy of an internal ASA e-mail, dated August 2, 2005, indicating that the ASA was working on an addendum at MacDonald's urging. Subsequently, the October 18, 2004 litigation was dismissed on September 6, 2005, and FWS received a supplement to the petition on September 8, 2005. Shortly thereafter, FWS published a 90-day finding on November 30, 2005, in which it determined that the updated petition contained substantial information indicating that the petitioned delisting action might be warranted.

Bartel stated that he took issue with MacDonald's involvement with the second petition filed by the ASA to delist the Peirson's milk vetch. Bartel said MacDonald encouraged the ASA to submit a second petition and MacDonald provided the ASA advice on how to amend its petition. Bartel said Peirson's milk vetch was a plant in direct conflict with a multimillion-dollar recreational industry. He explained that Peirson's milk vetch germinated at the same time the Algodones dunes became most popular for off-highway vehicle activity in that same area. Bartel said the Algodones dunes were the most popular dunes area in the United States.

Bartel also stated that MacDonald was "very sympathetic to industry" and that Peirson's milk vetch was "her baby." Bartel said MacDonald made it clear that she thought the ASA cause was correct. But, when asked if there was improper political influence in the Peirson's milk vetch matter, Bartel said that it was a matter of opinion as to whether MacDonald was improperly involved. He said, however, that there were appearances of improper involvement.

For example, Bartel said, he briefed MacDonald on the dunes in April 2005. Bartel then provided a picture of MacDonald with the ASA expert Biologist at the Algodones dunes in April 2005. Bartel said MacDonald had been transported there by ASA members in ASA off-highway vehicles. Two months later, he said, in June 2005, ASA filed an updated petition to delist. Bartel suggested that the timing of the briefing to MacDonald, the meeting with the ASA at the Algodones dunes, then the detailed revisions of the petition were enough to lead to the appearance of improper involvement.

Bartel said it was unclear where policy blended into science, thus it was unclear whether exclusions by Manson or MacDonald were inappropriate or not. Bartel opined that when he dealt with MacDonald, it always felt like he was "dealing with someone from the other side [an opponent]." Bartel said MacDonald was so outspoken and determined that it led to a culture where employees just gave in to her. According to Bartel, FWS employees adopted an attitude that management should simply tell them what they wanted, and the employees would do it.

Bowman stated that he performed a substantial amount of work on the Peirson's milk vetch delisting petition and that MacDonald was also very much involved. According to Bowman, FWS recommended a negative finding on the 90-day petition based on an in-depth review of

FWS files. Bowman stated that he directed FWS to allow the petition to go forward for a 12-month review prior to using all of the information in FWS' files. Bowman stated that he provided this direction under his philosophy that a 90-day review should not be as in-depth as a 12-month full status review, and therefore FWS should not be denying petitions by performing a 12-month level of review at the 90-day petition stage.

Bowman stated that he participated in a few meetings that MacDonald had with the petitioners, the ASA, yet he did not "coach" the ASA in its endeavor to delist the Peirson's milk vetch. Bowman said he did not believe it was inappropriate to provide a "generic explanation" of the actions to the public; however, he stated that he personally felt uncomfortable participating in such meetings since they were dealing with a regulatory process.

Region 8 Director Steve Thompson said he had completed several field trips to the region where the Peirson's milk vetch was at issue, one of which was on a dune buggy to look at the sand and to see where the plants were. Thompson said he had meetings with an ASA representative and ASA expert Biologist regarding the milk vetch. Thompson additionally stated that he had met with BLM to determine what the impact of critical habitat was on BLM projects and to understand its planning process.

Thompson recalled that MacDonald visited the site of the Peirson's milk vetch, along with Bartel. He said there was a lot of discussion with the ASA and review of information. In the end, he said, Region 8 determined that the petition to delist was not substantial, despite "lots of contacts, lots of visits, and lots of e-mails" by MacDonald.

FWS Region 8 stated that it did not recommend review of this decision in response to Director Hall's request because no final FWS decision had been reached on this latest iteration of the action; therefore, it was not a final decision that was ripe for reconsideration. Subsequent to its response to the OIG's request for information, however, on July 17, 2008, FWS published in the *Federal Register* its 12-month finding that the delisting petition was not warranted (73 FR 41007).

## **17. Vernal Pool Species Critical Habitat Designation (Region 8)**

### *Summary:*

There are 15 vernal pool species consisting of 4 crustaceans and 11 plant species in California and southern Oregon. Since 2003, FWS has had to redo the critical habitat rule for the vernal pool species three times due to litigation and court-ordered remands. The remands were a result of economic and other policy positions undertaken by Manson and MacDonald. As a result of their involvement, significant amounts of critical habitat of the vernal pool species were excluded.

However, Region 8 stated that despite significant involvement by Manson and MacDonald, their involvement was apparently within their scope of authority delegated from the Secretary of the Interior. According to FWS Region 8, unless DOI revises its policies concerning economic or other critical habitat exclusions and provides updated policy guidance to FWS, redoing the rule

will lead to the same result. Further, FWS Region 8 personnel stated, to revisit this and other critical habitat rules without clear policy and legal guidance from the Department would not be prudent and could be a tremendous waste of agency resources.

*Details:*

Regarding the Vernal pool species CHD, in its response to the OIG request for information, FWS Region 8 stated the following:

In sum, the critical habitat rule for vernal pool species was redone or formally revised three times over four years ... [during which] the designation of critical habitat acreage was reduced significantly. The vast majority of these revisions were due primarily to policy decisions from the Department based on the application of Secretarial discretion under Section 4(b)(2) of the Endangered Species Act. These reductions included economic exclusions and exclusions of lands under various ownerships that already had adequate management plans, such as military installations, tribal lands, state and federal wildlife areas, national monuments, lands contained in habitat conservation plans, and tribal lands. Application of this particular policy has been a source of tremendous confusion and controversy, as well as an active area of litigation. However, it is important to note that exclusion of those lands with management plans from a critical habitat designation does not mean they are lost to conservation, or that they are unimportant for the conservation of vernal pool species. The service expects these lands to continue contributing to the conservation of these species even though they met the Section 4(b)(2) policy criteria for exclusion from critical habitat.

Arnold Roessler is the Listing Branch Chief at FWS' Sacramento Fish and Wildlife Office. He explained that the vernal pool species were found from San Diego County, CA, up to Oregon. Roessler explained that not all of the species occurred in each vernal pool. Roessler said FWS was sued because of exclusions implemented by MacDonald and Manson.

Roessler explained that FWS was sued on the 2003 rule because MacDonald attempted her own economic impact analysis relating to the vernal pool critical habitat. Roessler said MacDonald made "math errors" of "an order of magnitude" that led to the exclusion of critical habitat based on the erroneous calculations that resulted in highly inflated economic costs for five counties. According to Roessler, four of five of those counties were "the best vernal pool habitat" available. Roessler said the court rejected the rule and remanded it back to FWS.

Roessler said FWS redid the CHD in 2005 and was sued again. This time, Roessler said, when doing the critical habitat exclusions, MacDonald wanted to make exclusions at the census tract level. Further, Roessler said, MacDonald directed FWS to reduce 80 percent of the costs, with no consideration to the species affected or where the habitat was located. He said that as a result, the top-20 census tracts were excluded. Roessler admitted that doing the exclusions on a census tract level was better (more precise) than doing it on a county level but argued that there was no science behind how the exclusions were done on a census tract level, nor was there any analysis by FWS on how the exclusions would impact the species.

*Agent's note: According to Roessler, MacDonald wanted to make exclusions at the census tract level (as opposed to calculating by counties as FWS historically did).*

Roessler said the impact on the CHD resulted in a series of “piecemeal little fragments” remaining after removal of “weird-shaped,” “cookie cutter”-like census tracts. Roessler said some of those excluded areas contained vernal pool critical habitat that had no economic impact. He said the CHD was redone in May 2007.

Roessler opined that FWS should not redo the vernal pool critical habitat rule because the development community understands that they should consult with FWS when they encounter vernal pools on their lands. Thus, these lands are treated the same as if the CHD had included them, he said. Roessler noted that the Army Corps of Engineers motivated the developers to comply because it policed the activity of developers and could issue or withhold permits based on the developers’ compliance.

FWS Sacramento Fish and Wildlife Office Field Supervisor Susan Moore described the CHD effort for the vernal pool species as “a long and difficult process.” She noted that the rule had to be redone several times. She said that previously, in FWS’ efforts to designate critical habitat, the Sacramento Fish and Wildlife Office would send a draft rule up to the FWS Washington Office and ASFWP, but it would come back without guidance and with the comment that the designated critical habitat area was “too big.”

Moore credited the Administration with urging FWS to look more closely at the science and on how FWS used science. Moore said that in following their direction, FWS had narrowed the critical habitat down and came up with something that, in her opinion, was biologically sound. She said that with the vernal pool CHD, as with most of the critical habitat, challenges arose regarding the exclusions, whether for special management practices or economics. Moore admitted that, at one point, MacDonald attempted to make broad exclusions of lands including those lands that only had a “hint” of a habitat conservation plan (as opposed to an actual habitat conservation plan in place).

Moore explained that habitat conservation plans were management plans that benefited the species, but unless the plans were actually in place or very close to implementation, then they would not provide any protection to the species. Moore said FWS successfully argued with MacDonald to ensure that only those lands with complete or near-complete habitat conservation plans in place could be excluded.

Moore stated that MacDonald also excluded whole counties from the vernal pool CHD based on information MacDonald had received from the local small business bureau. Moore said MacDonald calculated the economic impact of the vernal pool CHD on the counties, but in calculating the economic impact, MacDonald had put the decimal point in the wrong place. Moore said FWS was sued for excluding “huge chunks of critical habitat” stemming from MacDonald’s erroneous calculations. Moore said FWS had to redo the critical habitat. She said MacDonald required them to contract with David Sunding, Associate Professor, Department of Agricultural and Resource Economics, University of California, Berkeley, whom MacDonald

had selected to do the economic analysis. Moore said FWS ended up excluding the top-20 census tracts.

Moore was reluctant to offer an opinion about whether the top-20 census tract exclusion made sense. But, she stated, “I’m not an economist....It seemed arbitrary to me, but what do I know?” Moore conceded that the authority to make exclusions to critical habitat based on economics had been delegated to ASFWP by the Secretary of the Interior; therefore, MacDonald had the authority to make such exclusions. Moore said she did not know the reason why MacDonald decided to exclude the top-20 but speculated that it was likely based on economics.

Moore distinguished the vernal pool critical habitat exclusions from past practices. She said that prior to the Bush Administration, she did not recall FWS excluding any critical habitat based on economics. Moore said there had been exclusions based on special management practices but none based on economic exclusions – until MacDonald came to DOI.

Moore said that formerly, FWS performed economic analysis based solely on the economic impacts of the CHD, rather than economic impacts related to the listing activity. According to Moore, when the new Administration came in, the policy was changed to exclude based on the economic impacts of both listing and the designation itself. From that point on, Moore said, the impacts “rose tremendously.”

Moore said she did not know if FWS was still making exclusions to CHDs based on the top-20 census tracts but stated that the Sacramento Fish and Wildlife Office recently completed the Alameda whipsnake and the checkerspot butterfly in which FWS did not make exclusions based on the top-20 census tracts. She stated that FWS successfully argued that the exclusions would have been very detrimental to the species. She added that the policy might still be floating around, although it was not being applied.

Moore said MacDonald had a resonating impact, even where there was no written or other specific evidence establishing her involvement. She explained, “The more we started to work with MacDonald, the more we tried to take the next rule and learn from what she had done and try to learn and apply to make the next rule successful .... It is what we referred to it [sic] as the cloud of Julie MacDonald. We looked at how we did the next rule based on what she did to you in the previous rule .... It is there. It was real.” Moore said an example of how MacDonald’s involvement had residual effects was shown by discussions FWS employees had about inflating the critical habitat by 20 percent so that when MacDonald made the exclusions, then the critical habitat would end up where it should have been in the first place. Moore emphasized that no one actually undertook such inflationary practices, but the idea of it did surface in discussions. Moore said the employees in her office were waiting for a new Administration to bring changes.

Steve Thompson, FWS Region 8 Regional Director, recalled that the vernal pool species CHD was one of the largest packages that Region 8 had completed. Thompson noted that the species encompassed about 6 million acres in California. Thompson said there was a lot of concern from homebuilders, and people were very concerned about private property rights, all of whom were concerned about how the vernal pool CHD would affect their property and their community.

Thompson said MacDonald had policy authority to make exclusions to a CHD under Section 4(b)(2) of the ESA. Thompson noted that MacDonald made lots of editorial changes; Thompson directed staff to make those changes as appropriate. But, where MacDonald tried to make changes to the science, Thompson said, the staff did a good job of defending their scientific positions. Thompson said FWS' tenacity resulted in few changes to the science being made by MacDonald.

Gary Frazer, Assistant Director for Fisheries and Habitat Conservation, was the Assistant Director for Endangered Species at the FWS Washington Office during the time of the CHD for the vernal pool species. Frazer said Manson and MacDonald were very involved in the vernal pool CHD and were highly focused on all CHDs in California. Frazer said the vernal pools designation was large, involving several hundred thousand acres and 26 different species. Frazer said MacDonald's and Manson's involvement related to the economic analysis for the designation.

Frazer said that as FWS approached the deadline for designating critical habitat for the vernal pools, MacDonald went on a Web site for the California Economic Development Authority to find what she thought was the revenue generated by individual counties. Frazer said MacDonald compared the economic costs of the CHD that had been determined by the FWS economic analysts to the gross domestic product from each county. According to Frazer, MacDonald was attempting to put the CHD into context by showing that the costs of designating those counties were significant in comparison to the economies of those counties. Frazer said MacDonald used her analysis as the basis for excluding those counties from the CHD.

Frazer noted that FWS normally procured outside entities to conduct the economic analysis. In this case, according to Frazer, the economic analysis for the vernal pool CHD did not provide the specific data that MacDonald thought was appropriate, so she "went out and found the information that she thought she needed to do that." Frazer stated that MacDonald unfortunately misinterpreted the information that she found on the Web site. Frazer said MacDonald underreported the economy of the counties by "three orders of magnitude," thus leading to wrong conclusions.

Frazer stated that MacDonald's errors were discovered *before* the rule went to the *Federal Register*. Frazer said he reported the errors to Manson and asked if he wanted "to revisit the exclusions or stay the course." Frazer said Manson sent him an e-mail directing him to stay the course. Frazer said the result was that the erroneous data was published in the *Federal Register*. Frazer said FWS got sued on the vernal pool rule based on the economics methodology; however, he said it was not limited to MacDonald's errors.

Frazer said the vernal pool CHD was one package in which he thought ASFWP's involvement led to a flaw in the finding. Frazer said, "But, it was a critical habitat designation. The Assistant Secretary was the responsible official. I reported to him that there was an error in his analysis that affected the finding. He very explicitly concluded that he wanted to stay the course."

Frazer said there was no recourse when a senior policy official had made or appeared to make a flawed decision in this or other ESA matters. Frazer explained that DOI was at risk of being

sued and usually was; FWS then had to redo the decision, pay the attorney's fees, and use \$300,000 to \$400,000 of FWS' limited species budget to redo the decision. The consequences all fell on FWS, Frazer said.

Frazer said every ESA decision that occurred when MacDonald, Bowman, and Manson were at the Department was characterized by their detailed and specific involvement. He added that there was never a clear case in which their involvement was "inappropriate" in everyone's eyes. Frazer said some people would view their involvement as a highly-appropriate exercise of oversight over FWS program activities. Frazer elaborated that all political appointees had oversight as part of their responsibilities; how that oversight was conducted was the crux of the matter.

Douglas Krofta, FWS Chief of the Branch of Listing at the FWS Washington Office, stated that MacDonald cost FWS \$100,000 by forcing FWS to revise the published vernal pool CHD decision based on her "miscalculation" of a statistical number that she derived from the Internet. Krofta stated that FWS was sued on its decision and lost, forcing FWS to redo the decision. According to Krofta, MacDonald strongly influenced the large number of exclusions to the vernal pool CHD.

Regarding the vernal pool CHD, Nolin said MacDonald caused an "incredible" waste of time and money. According to Nolin, MacDonald based several exclusions on a faulty number that she derived from the Internet (by misreading the location of a decimal point). Nolin stated that it was her belief that MacDonald desired to exclude everything possible from the designation and she "pushed the limits" on rational arguments for such exclusions under Section 4(b)(2) of the ESA.

When he was interviewed on this matter, Manson recalled that the vernal pool species involved critical habitat. He also recalled that he and MacDonald looked at the information provided by the field offices on the vernal pool CHD and concluded that they would exercise their authority under Section 4(b)(2) of the ESA. He stated that under this section, the Secretary of the Interior had the authority to consider economics when making CHDs and exclude certain areas from a CHD if the benefits of excluding them outweighed the benefits of including them.

Manson said he and his staff had made the decision early on during his tenure that this exclusion authority had not been used enough by their predecessors, and they were going to make an effort to use it more frequently. It was Manson's view that the CHDs added very little to the conservation of the species but added tremendous economic and either real or perceived social impacts. He and his staff therefore looked at the vernal pool CHD from this point of view.

Manson said MacDonald developed a formula that documented the economic impact that a potential vernal pool CHD decision would have in California. Although he was not certain, Manson thought this formula might have concerned sales or sales tax revenues. He said that according to MacDonald's calculations, a number of counties would be more heavily affected than others by a vernal pool CHD, so the decision was made by MacDonald, with his (Manson's) concurrence, to exclude these counties from the designation. Manson said that at some point, MacDonald realized she had made a mistake by a factor of 10 that caused a significant error in

the calculations she did. As a result, he said this caused a mistake in the number of counties that were excluded from the CHD.

Manson said he had no recollection of Frazer or anyone else approaching him to discuss the calculation error made by MacDonald. He said this may have occurred, but he could not recall it happening. Manson similarly had no recollection of anyone other than MacDonald ever approaching him about this error. Manson did not know if the incorrect numbers or any decisions made as a result of the incorrect numbers were published in the *Federal Register*, and he could not recall if MacDonald approached him before or after the *Federal Register* publication.

FWS Region 8 did not recommend that the critical habitat package for the vernal pool species be redone because, as noted above, despite significant involvement by Manson and MacDonald, their involvement related to critical habitat exclusions that were within their scope of authority delegated to ASFWP from the Secretary of the Interior.

## **18. California Tiger Salamander Listing (Region 8)**

### *Summary:*

Two of three distinct population segments of the California tiger salamander – the Sonoma and Santa Barbara populations – had previously been listed as “endangered” on the endangered species list; the remaining population, referred to as “Central,” had not yet been listed but appeared to warrant a listing as “threatened.” In the fall of 2003, FWS Region 8 Director Thompson convened a team of FWS endangered species experts to consider the idea of a consolidated, range-wide listing of the California tiger salamander as “threatened.” This would mean that the Sonoma and Santa Barbara populations would be down-listed from “endangered” to “threatened,” while the Central population would be newly placed on the endangered species list as “threatened.” The final rule to consolidate and list the California tiger salamander range-wide as “threatened” was published in August 2004.

Manson and MacDonald were substantially involved in this decision. Because of their involvement at several stages, the California tiger salamander populations were consolidated and listed as one entity range-wide. However, based on litigation, in August 2005, the Northern California District Court restored the “endangered” status to the Sonoma and Santa Barbara populations, while leaving the Central population listed as “threatened.” Because the court addressed the statuses of the three distinct population segments, which conformed to where FWS officials believed the listing status of the distinct population segments should have been, FWS Region 8 officials did not believe it was necessary to redo the California tiger salamander decision.

### *Details:*

In response to the OIG’s request for information, Region 8 detailed the process relating to the California tiger salamander beginning after the publication of the proposed rule in the *Federal Register* on May 23, 2003.

Records relating to the process leading up to development of the proposed rule indicate that Manson and MacDonald were significantly involved in shaping the direction of the proposed rule, which, in turn, paved the direction of the final rule. Information provided by Region 8 in its response to the OIG's request for information revealed the following:

The California tiger salamander was listed in three separate actions as three separate distinct population segments (DPSs). The three DPSs are the Santa Barbara population; [emergency listed as endangered on January 19, 2000]; the Sonoma County population [finalized as endangered on March 19, 2003]; and the Central population.

*Agent's Note: This information was pulled verbatim from Region 8's response.*

In the rule for the Sonoma population, FWS noted that it was required to make a final listing determination on the Central population by May 15, 2003. FWS also announced its intent to "review all then-current information regarding both the Sonoma County and Santa Barbara County populations, including whether they constitute valid distinct population segments, and render a final determination on the California tiger salamander accordingly."

Due to a complaint filed by the Center for Biological Diversity on February 17, 2002, FWS entered into settlement negotiations with the plaintiff. The parties reached a settlement agreement wherein FWS committed to submitting "a proposed rule to list the California tiger salamander range wide by May 15, 2003, and to make a final listing determination ... by May 15, 2004" (68 FR 13498, 13502).

On April 30, 2003, MacDonald inquired by e-mail about the status of the Central California tiger salamander proposed rule that was due to the *Federal Register* on May 15, 2003. By May 2, 2003, MacDonald had not received a response from FWS regarding her inquiry about the status of the California tiger salamander rule. To expedite a response, MacDonald sent an e-mail to FWS stating, "The silence is deafening .... could you help me get this rule asap. Thanks ... it's going to be very controversial so i need as much time as possible for review." Later that day, FWS e-mailed what it titled as the "Central CTS DPS PR 4-30-03 v2.wpd" proposed rule to MacDonald.

This version of the rule proposed threatened status for the Central California tiger salamander distinct population segment. It indicated that the Santa Barbara and Sonoma County populations were listed as endangered but proposed no action to be taken on either of them. The draft proposed rule also stated that a special rule was being proposed to exempt "existing routine ranching activities" because they had neutral or beneficial effects on the Central distinct population segment. Lastly, the proposed rule stated that, if made final, the rule would extend federal protection and recovery provisions to the Central distinct population segment.

A short time after e-mailing the "v2" version of the proposed rule, at 4:04 p.m. that same day, FWS sent MacDonald another version, "v3," which incorporated recent edits from the California Nevada Office (name later changed to "Region 8"). The edits primarily focused on a discussion of whether the Central California tiger salamander population was a valid distinct population

segment. In turn, MacDonald forwarded the document to Manson on May 5, 2003. In the e-mail, she wrote, "Per our conversation." On May 14, 2003 Manson e-mailed edits directly to FWS, stating the following:

Here are two documents: the edited rule and a redline version showing changes. On the early pages some things were simply moved around. I don't think there is any need to add in any thing [sic] on the Santa Barbara or Sonoma rules, since the edited version 'incorporates by reference' (See attached file: Central CTS DPS PR 4-30-03 5-14wp7.wpd) (See attached file: compare CTS docs.wpd).

In the text of the edited version returned by Manson, following the paragraph that stated, "The Santa Barbara and Sonoma County DPSs [distinct population segments] are listed as endangered," a line was inserted that stated, "We propose reclassifying these populations as threatened." This was the first overt indication of ASFWP's attempt to down-list the Santa Barbara and Sonoma populations from endangered to threatened. FWS then began to incorporate Manson's changes to the draft proposed rule for the Central California tiger salamander distinct population segment.

After this point, FWS convened a structured decision team to consider the merits of a range-wide, consolidated listing of the California tiger salamander. FWS Region 8's response to the OIG's request for information stated the following:

In June of 2003, Region 8 began discussing use of a structured decision team approach to handle the recommendation on whether to finalize the listing of CTS (Central DPS [distinct population segment]/Rangewide). Dr. Diane Elam, a Region 8 staff scientist assumed the lead for this effort and worked closely with Sacramento Fish and Wildlife Office (SFWO) staff....

Region 8 staff and a team member and Service genetics expert from Region 2 briefed AS [Assistant Secretary] Manson and DAS [Deputy Assistant Secretary] MacDonald on Region 8's recommendation to list the Central DPS on January 16, 2004. Region 8 presented several options to Assistant Secretary Manson. Steve Thompson's preferred option was to proceed with a rangewide listing as threatened (i.e., consolidate the Santa Barbara and Sonoma DPSs with the Central DPS, and list them all as threatened). Assistant Secretary Manson and DAS MacDonald visited Region 8 and had an additional discussion on CTS [California tiger salamander] in late January. Assistant Secretary Manson eventually supported the recommendation to proceed with a rangewide listing of CTS as threatened.

During fall and winter of 2003-2004 and spring of 2004, DAS MacDonald made numerous requests for information on CTS, including requests for the raw genetics data used by [a scientist from UC Davis] in his research on CTS, information on contract or cooperative agreements the Service had regarding CTS, all documents that the CTS team received, information on the status of publication of CTS genetics data, the literature cited list for the listing rule, and specific references cited in the rule.

FWS Region 8's response also stated that in February 2004, it developed a "robust administrative procedure" for a "consolidated range-wide listing of CTS as threatened," adding the following:

This proposed procedure included publication of a Federal Register notice describing an explicit 5-factor analysis for the Santa Barbara County and Sonoma County DPSs, something that was lacking in the proposed rule and that we felt was necessary for a robust and legally defensible rangewide final listing. The approach was approved by AS Manson (per March 1, 2004, e-mail from Service Assistant Director Gary Frazer).

On May 5, 2004, FWS sent MacDonald the "CTS most recent version" via e-mail, in response to recent inquiries from her. That version of the draft final rule concluded, "Because the population segment meets both the discreteness and significance criteria of our DPS policy, we conclude that the Central California tiger salamander constitutes a DPS that qualifies for listing." The proposed down-listing and/or consolidation of the Sonoma and Santa Barbara population with the Central distinct population segment was not mentioned. On May 7, 2004, FWS sent MacDonald a briefing paper regarding the status of the work on the California tiger salamander listing. The briefing paper did, in fact, mention the Sonoma and Santa Barbara populations. It explicitly stated that FWS was planning to reopen the comment period on the proposed down-listing of the Santa Barbara and Sonoma distinct population segment for an additional 60 days.

In an e-mail to FWS, MacDonald questioned the proposed reopening of the comment period. In response, FWS reminded MacDonald that its plan to reopen the comment period had been discussed with Manson in February of that year and that he had supported the action. FWS elaborated that in the discussion with Manson, FWS stated that it would include a five-factor analysis for down-listing the Santa Barbara and Sonoma populations in the notice of the reopening of the comment period. *Agent's Note: The five-factor analysis provided the scientific information to be used in consideration of whether down-listing was or was not prudent.*

MacDonald responded by stating that FWS' summary of the February 2004 discussion with Manson and its subsequent actions was "completely inconsistent with our earlier understanding, the direction from the Judge [Manson], and the information that has been provided to this office for months." FWS clarified that it had explicitly informed MacDonald of its understanding that, based on the advice of the regional and Washington Office solicitors, the down-listing proposal should be reopened for comment, in order to add additional information supporting the down-listing. Further, FWS explained that part of the rationale for reopening for public comment was to more explicitly set the stage for removing the distinct population segment designations.

On May 11, 2004, MacDonald sent an e-mail to FWS stating that Manson wanted to proceed with a listing document to down-list the Santa Barbara and Sonoma populations to threatened and consolidate those populations into one, along with the Central population. This meant foregoing the reopening of the comment period. MacDonald's communication to FWS sparked numerous communications among senior attorneys in SOL. [Exemption 5]

At about 6 p.m., MacDonald sent Manson an e-mail regarding the “CTS Listing Extension,” on which she stated, “Per our discussion.” Attached to this e-mail was a memo titled, “CTS Extension.doc.” The attached correspondence was addressed to Manson from MacDonald, regarding the California tiger salamander listing. On the four-page document, MacDonald recommended and discussed, in detail, that DOI should seek a 6-month extension of the review period for listing the Central California tiger salamander. MacDonald stated that “it appears clear there is substantial disagreement regarding the sufficiency and accuracy of the data used to make the listing determination.”

Specifically, MacDonald enumerated the following reasons she advocated for an extension:

1. Significance of the Sonoma and Santa Barbara distinct populations;
2. Whether the genetic separation among the three species is sufficient to meet the requirements of the DPS policy;
3. Level of threat due to inadequacy of the existing regulatory structure;
4. Projected future habitat losses;
5. Extent of population losses and extent of existing populations;
6. Adequacy of the basis for the listing, which is based entirely on unpublished work done by a scientist from UC Davis.

[Exemption 5]

On May 13, 2004, Manson sent an e-mail to MacDonald, to which he attached a “Finding of the Assistant Secretary” that was to serve as the basis for a declaration to accompany the Assistant Secretary’s request for a 6-month extension. The “Finding” reiterated four of the five points that MacDonald made in her May 11, 2004 memo to Manson.

At 8:11 p.m. that evening, an SOL Attorney e-mailed a draft declaration of ASFWP’s request for an extension to Raynor, Roth, Young, another SOL Attorney, and Assistant Regional Solicitor Jim Monroe (Pacific Southwest Region, Sacramento, CA). After delineating the steps necessary to get the declaration from draft to an approved, final, and surnamed version, he wrote, “For the record, I am not myself certifying to the facts in the declaration, or the sufficiency of the determination that triggering the 6-month extension is appropriate.”

At about 10 p.m. that evening, the SOL Attorney e-mailed the draft declaration of ASFWP’s request for an extension to various DOI, DOJ, and FWS officials. The draft declaration included three of the five points listed in MacDonald’s memo. Manson approved the draft at 11:17 p.m. that evening, which enabled the declaration to be filed with the court. Manson executed the declaration on May 14, 2004, for DOJ to file with the court.

The court granted the extension on June 14, 2004, but only gave DOI an additional 6 weeks, not 6 months as requested (No. C02-00558 WHA, June 14, 2004 Order at 1). The final CTS rule was due on July 23, 2004. The court “extended the deadline six weeks to resolve the purported factual issue of whether there was a fourteen percent decrease in grazing versus a one percent increase in grazing land regarding the Central California tiger salamander.”

On June 15, 2004, Region 8 Assistant Regional Director for Ecological Services Paul Henson sent an e-mail to MacDonald asking her to confirm that FWS was directed to proceed with the final consolidated rule for the California tiger salamander and not to finalize the Central-only rule. MacDonald confirmed that FWS was to proceed with a consolidated listing, but she added that she wanted to provide FWS with her edits “so you can see what we are doing.” On June 15, 2004, FWS circulated a task sheet that had been approved by Manson and MacDonald for submittal to the court as an attachment to the stipulated extension/consent decree for the California tiger salamander, entitled, “Investigating Scientific Disagreement Over Rate of Habitat Loss for the California tiger salamander.”

On June 17, 2004, MacDonald talked with an SOL Attorney regarding whether it was necessary to reopen the comment period to consolidate the listing of the California tiger salamander.

[Exemption 5]

MacDonald sent an e-mail to FWS stating that she asked the California Nevada Office (now Region 8) to proceed with writing the final rule for the California tiger salamander. MacDonald stated, “There will be no new comment period. This decision was made by Judge Manson based on the advice of the Solicitor,” and, “Per Judge Manson’s instruction, the Central California Tiger Salamander will be listed as threatened and the entire range of the California Tiger Salamander will be listed as threatened.”

*Agent’s Note: According to FWS, when proposing a species for listing or down-listing, it is necessary to do a five-factor analysis that articulates the scientific basis for listing or delisting. The five-factor analysis for the California tiger salamander was to be published along with notification to the public about the comment period for the down-listing of the California tiger salamander. Moreover, the comment period was to serve as the opportunity for the public to respond to the five-factor analysis rationale underpinning the proposal to down-list. Consequently, when MacDonald and Manson eliminated the comment period, they eliminated the five-factor analysis at the same time.*

On July 15, 2004, an SOL Attorney wrote a note on behalf of Raynor to send to MacDonald.  
[Exemption 5]

On July 22, 2004, SOL Attorney Jim Monroe reviewed the draft “Final rule listing the California tiger salamander (*Ambystoma californiense*) as threatened, and associated 4(d) rule” produced by Region 8. [Exemption 5]

The final listing rule was published on August 4, 2004, listing the California tiger salamander as threatened range-wide. The rule also finalized the 4(d) rule for the species range-wide, which exempts existing routine ranching activities (69 FR 47212).

FWS Region 8 stated the following in its response to the OIG:

FWS was challenged ... on the final rule. Plaintiffs specifically objected to the consolidation of the endangered Santa Barbara and Sonoma DPSs [distinct population segments] with the threatened Central DPS.

In August of 2005, Judge Alsup found that the downlistings of the Santa Barbara and Sonoma County DPSs were arbitrary and capricious and vacated that portion of the final rule, returning the two DPSs to endangered status. He upheld the listing of the Central DPS and the associated 4(d) rule.

The vacature of the two downlistings was based on procedural irregularities promoted by DAS [Deputy Assistant Secretary] McDonald [sic], which the FWS attempted to avoid by proposing to issue a Federal Register notice articulating a 5-factor analysis for these DPSs (as noted above). This notice was ultimately not approved by the Department of Interior and was never published.

On August 19, 2005, Judge Alsup issued an opinion regarding the California tiger salamander in response to a motion brought by the plaintiff, the Center for Biological Diversity. In the opinion, the court specifically admonished MacDonald, stating that she did the following:

[C]learly set forth a directive that had little to do with analyzing the factual discrepancies and analysis of the data in front of the agency; rather, upon being granted an extension, the Assistant Deputy Secretary of the Interior immediately gave a directive to the scientific review team to draft a rule that down-listed all three populations to ‘threatened’ ‘per [Assistant Secretary Craig] Manson’s previous instruction.’

The final rule reclassified the Santa Barbara and Sonoma salamanders from ‘endangered’ to ‘threatened,’ eliminated their separate listings as DPSs, and listed the California tiger salamander range-wide as ‘threatened.’ Pursuant to Section 4(d), which allows such relaxed provisions for a ‘threatened’ status, the rule also exempted routine ranching activities from the ‘take’ prohibitions under Section 9.

***Agent’s Note:*** To “take” a species means to kill and/or remove the species from its habitat. If a species is listed as endangered, then all “take” is prohibited; that is, there could be no killing of the species, incidental or otherwise. However, if a species is listed as threatened, landowners may be exempted from the “take” prohibitions.

Ultimately, the court ruled the following:

The 2004 rule should be vacated .... Finally, the irregular way in which the down-listing occurred counsels in favor of vacatur. It would be unseemly for a court to leave in place a rule that was so riddled with error. Also, for these reasons (and that the agency had ample time to properly evaluate its listing decision), it would be unseemly to allow a voluntary remand as requested by the agency.

[Further,] the 2004 rule, including the Section 4(d) relief, is sustained as to all but the Sonoma and Santa Barbara DPSs. This part of the rule remains effective .... As to the Santa Barbara and Sonoma DPSs, the 2004 rule is vacated without

prejudice to any new rule-making concerning them. In the meantime, the prior 'endangered' listing of the Santa Barbara and Sonoma DPSs shall apply.

FWS witnesses provided additional information relating to the listing efforts for the California tiger salamander, as follows.

Susan Moore, FWS Sacramento Fish and Wildlife Office Field Supervisor, said the California tiger salamander matter involved a policy call as to whether one of the California tiger salamander entities was a distinct population segment or whether all of the entities could be considered as one. Moore explained that the Sonoma and Santa Barbara California tiger salamander populations had previously been emergency listed as endangered. FWS was attempting to list the Central population as threatened, she said. Moore said that while attempting to newly-list the Central population, Thompson asked the region to consider whether the California tiger salamander should be listed as a whole. Moore did not know if Thompson had been in contact with MacDonald at that time but described it as "a suggestion from outside of our office."

Moore said the team working on the California tiger salamander rule had already completed a significant amount of work on the rule for listing the Central distinct population segment, so when the idea of a range-wide listing came up, they had to shift gears and develop a strategy for addressing the California tiger salamander as a range-wide listing. Moore speculated that the shift in direction was likely due to a disagreement from DOI about what should be a distinct population segment. Moore said that reference to DOI usually meant Manson or MacDonald. She explained that MacDonald and Manson were very concerned about FWS' distinct population segment policy.

Moore stated that the shift could also be due to the exemptions permitted under the 4(d) rule, which allowed exemptions for lands that were under a special management process that provided protection to the species. She explained that 4(d) rule exemptions could apply to species listed as threatened, such as was proposed for the Central population of the California tiger salamander. However, with species listed as endangered, like the Santa Barbara and Sonoma distinct population segments, 4(d) rule exemptions could not be applied, she said. So, if the species was listed as threatened range-wide, then all three distinct population segments could be subject to 4(d) rule exemptions, she said.

Despite the potential benefits offered by application of the 4(d) rule if a species were listed as threatened, Moore stated that neither the Santa Barbara nor the Sonoma distinct population segments would have benefitted from application of the rule. Moore said that if the effort to list the California tiger salamander range-wide had been successful, it would not have made a difference to the species; it would not have been a benefit and it would not have been a detriment, she said.

Moore averred that she did not believe the suggestion to list the California tiger salamander range-wide was an attempt to manipulate science. Instead, she said she believed that "the Department had problems with the distinct population segment aspect of the endangered species

.... It's a statement." Moore said critical habitat had become "quite a challenge for us over the last several years."

Moore opined that the current status of each of the distinct population segments was appropriate and did not warrant being redone. She stated that the Santa Barbara population was not within her jurisdiction, so she could not directly speak to that population, but she felt the Sonoma should be listed as endangered and the Central should be listed as threatened.

Moore described the way in which the California tiger salamander population got to its current status as "a little gut-wrenching" and fraught with "turmoil and angst amongst all of us in the field." Moore explained that the California tiger salamander team made a "strategic," calculated decision to support the range-wide listing, under the belief that the downgrading of the Sonoma and Santa Barbara populations would have no measurable impact on those species. But, she said, the range-wide listing would add the Central population to the endangered species list as threatened, which was the goal of the California tiger salamander team. Moore added, "We figured that it would be litigated."

Moore discussed the five-factor analysis that had been omitted from the California tiger salamander rule, which was the primary reason it was challenged in court. Moore said that because FWS was pursuing a range-wide listing that required down-listing of the Santa Barbara and Sonoma populations, a five-factor analysis should have been done that addressed each of the factors that were used to list the populations as endangered in the first place.

Moore said the FWS Sacramento Fish and Wildlife Office worked with regional SOL Attorney Monroe to write up the five-factor analysis. Moore said the analysis was never published to allow for public comment. She did not know why the decision to exclude the five-factor analysis was made or who made the decision. Moore speculated that the decision to exclude the analysis resulted after discussions between the regional office and ASFWP.

Moore said MacDonald's level of involvement in the endangered species matters was extensive and unusual; the California tiger salamander was not the first battle that she had to fight with MacDonald, she said. She said the Sacramento Fish and Wildlife Office no longer had to fight those "battles" because since MacDonald left DOI, there was a "huge shift" in how the office worked with the FWS Washington Office and ASFWP.

Arnold Roessler said that at the time of the California tiger salamander Central distinct population segment listing petition process, he oversaw the biologist who worked on the package. Roessler said ASFWP decided to pursue a range-wide listing of the California tiger salamander. During the process, Roessler said, MacDonald usually contacted regional office staff, and then they would pull him in on briefings, phone calls, and conversations with MacDonald regarding the status of the California tiger salamander rule. Roessler said MacDonald provided comments that revealed her perspective about the status of the California tiger salamander.

Roessler said that despite opposition from [Exemption 5] and the biologists, ASFWP still wanted to pursue a range-wide listing. Roessler speculated that ASFWP wanted to list all three species

as threatened because there were some advantages to listing a species as threatened. Roessler said that with a threatened species, FWS could develop 4(d) rules that allowed landowners to be excepted from “take” prohibitions.

For example, Roessler said, for the Central population, there was currently a special 4(d) rule that allowed for routine cattle grazing on lands where there were also ponds for the Central population of the California tiger salamander. Roessler said FWS believed the grazing was beneficial to the species, so the grazing was allowed as a result of the 4(d) rule. Roessler elaborated that a 4(d) rule allowed more “take” flexibility with those species listed as threatened. Such flexibilities were not permitted for species that were endangered because there was a need to be more protective of them as they were already in jeopardy.

Roessler said that even if ASFWP had expressly communicated that it wanted to list the California tiger salamander range-wide in order to take advantage of the 4(d) rule flexibilities, the field office still would not have supported it because of the Sonoma population. According to Roessler, the area where the Sonoma population occurred did not have a lot a grazing activity that would benefit the California tiger salamander based on the 4(d) rules. Instead, Roessler added, the area only had “vineyards and houses ... for people who have their horses on their five-acre lot,” thus suggesting that any benefit from the 4(d) rule would have been to profit builders and non-agricultural homeowners, not farmers.

Roessler said the rule was ultimately published as a range-wide listing, with all populations of the California tiger salamander published as threatened. Roessler said FWS was sued and the court threw out the final rule that combined the species but maintained the listing of the Central distinct population segment as threatened. The court also restored the Santa Barbara and Sonoma populations as endangered.

Roessler explained that a five-factor analysis was done for every species that was proposed for listing. Roessler said that when doing the range-wide listing for the CTS, FWS did not do a five-factor analysis for the range-wide listing. Roessler was not sure who made the decision to exclude this analysis from the rule. He opined that he was glad that the analysis was not done because the workload was already overwhelming and this meant one less thing to do. Also, Roessler added, because the analysis was left out, the court invalidated it and the species ended up where FWS wanted it in the first place.

Roessler said it was not unusual to have this much involvement by MacDonald. He said she was very involved in all of the rules in Region 8 until FWS Director Hall became Director of FWS. Since then, Roessler said, the field office rarely heard directly from ASFWP. Roessler contrasted the current contacts to previously when FWS Director Hall was not yet Director. Roessler said MacDonald would be in their offices on a regular basis, asking about all of the packages – that she wanted to see the references and made judgment calls on the scientists from which FWS had solicited information. Roessler noted that MacDonald particularly disliked a “premiere CTS [California tiger salamander] scientist from UC Davis,” whom FWS consulted on California tiger salamander matters.

In reference to MacDonald's motivation and involvement in the California tiger salamander rule, Roessler opined, "A different philosophy .... There are people that believe in protecting the species and people that don't ...." He said it did not seem that MacDonald provided the "benefit of the doubt" to the species as was the disposition of the scientists. Roessler said, "She tended to side more on the side of developers and how it was going to affect businesses, rather than how it's going to affect the species." Roessler said MacDonald always sided with landowners over protecting the species.

Diane Elam is the Deputy Division Chief for Listing Recovery and Conservation Planning for Region 8. Elam stated that she was involved only with the listing of the Central population of the California tiger salamander and the fall 2003 effort to propose a range-wide listing of the species. Elam explained that she was involved in the listing because she was a geneticist. She added that when a distinct population segment was designated, it had to be determined to be discrete and significant and that genetics played a role in making that determination. Elam said ASFWP was not convinced that the Central distinct population segment was genetically different enough to be a distinct population segment.

Elam said that about the time the listing effort for the Central distinct population segment came about, Thompson raised questions about listing the California tiger salamander range-wide. Elam said she suggested to Thompson that the questions be approached through a structured decision-making process and a team. Elam said Manson supported the team structured decision-making approach. She speculated that headquarters was involved because MacDonald had a lot of interest in the California tiger salamander issues. She conceded that she did not know if MacDonald and Manson held similar interest in species of other regions; she could only attest to their interest "in a lot of things out here [California] ... this was one that piqued their interest."

Elam opined that although Manson had the authority to make decisions relating to the FWS approach, she believed MacDonald was advising him and giving her opinion of what should be done. She said her impression was formed from MacDonald's actions.

Elam said MacDonald seemed to be more interested in California tiger salamander issues than Manson. She speculated that MacDonald was interested because "it was her home state." Elam said, "... [S]he knows people that might be interested in the decision. She had a particular political bend .... All I know is that she was really, really interested, throughout the process .... She requested lots of information throughout the process."

Elam said that because all of the ESA activities and decisions fell under the Secretary of the Interior, and since the Secretary of the Interior delegated that authority to ASFWP, MacDonald was provided the authority to act. Elam said the FWS Director had been delegated authority to sign the rule and since the FWS Director was subordinate to ASFWP, again ASFWP had the authority.

Elam said the California tiger salamander structured decision-making team never came to an actual consensus, but most of the team members supported the option to keep the Santa Barbara and Sonoma distinct population segments listed as endangered, while the Central distinct population segment should have been proposed for listing as threatened. Elam conceded that the

decision was up to Thompson, who ultimately decided to pursue a range-wide listing of the species.

Elam said she did not know why Thompson decided to pursue the range-wide alternative, as opposed to following the recommendation of the team. She speculated that Thompson might have found the opportunity to invoke the 4(d) rule in relation to a range-wide listing of the California tiger salamander “attractive.” Elam explained that the 4(d) rule could only be applied to a “threatened” species, not for “endangered” species – that a 4(d) rule allowed tailoring or “crafting” of the ESA restrictions to permit specific activities to occur that might not otherwise be allowed if the species were listed as endangered.

Elam provided an example relating to the California tiger salamander: She said that normally, if a species was listed as endangered, then all “take” was prohibited. That is, there could be no killing of the species, incidental or otherwise. With listing the complete range of the California tiger salamander, including the Central population as “threatened,” however, normal ranching practices could go on without regulation of the ESA because FWS did not think the routine ranching practices were harmful to the salamander. Elam said this allowed the ranching community to proceed with its activities without being required to come to FWS for a take permit. Elam said that if the complete range of the California tiger salamander was listed as threatened, then this “benefit” would apply to the entire range, including Sonoma and Santa Barbara.

Elam said she felt that even if the Sonoma and Santa Barbara populations had been downgraded and listed as threatened, with a 4(d) rule applied, the impact to the two distinct population segments would not have significantly changed. Elam elaborated that in Sonoma, there was not much ranching activity and therefore the amount of incidental takings under the 4(d) rule versus the no-take restrictions of being listed as endangered would have been minimal. Elam said this “effectively makes endangered and threatened” the same under the 4(d) rule. Elam said she “did not have a ton of heartburn” about the recommendation to list the species range-wide.

Elam stated that ultimately the decision got reversed by the court on a procedural error, so the status for the Santa Barbara and Sonoma populations remained the same as they had been. Elam said the procedural error stemmed from the failure of FWS to complete a five-factor analysis for the Sonoma and Santa Barbara population segments of the California tiger salamander. Elam elaborated that when a species was evaluated for listing, a five-factor analysis was conducted; the analysis was also completed for down-listings or delistings.

Elam said her team had proposed and drafted the notice to publish a supplemental *Federal Register* Notice that articulated the five-factor analysis for Sonoma and Santa Barbara, supporting the move from endangered to threatened. Elam said ASFWP decided to publish the final rule without the benefit of the five-factor analysis. Elam said she thought the decision was an error. She added that FWS had not presented all of the information to the public that it needed to have in order to evaluate FWS’ decision to do a range-wide listing that included down-listing the Sonoma and Santa Barbara populations. After the final rule came out, FWS was challenged and defeated in court because of the lack of the five-factor analysis, she said. Elam

opined that the loss might have been avoided if the five-factor analysis had been included as planned.

Elam pointed out that aside from MacDonald's extensive involvement, she recalled that Manson was originally involved in the process for the California tiger salamander decision by approving the team used for the structured decision team approach. Additionally, Manson also approved the final rule. Elam did not know if Manson was involved in the decision not to publish the supplemental *Federal Register* Notice that had the five-factor analysis.

Elam said that while working on the California tiger salamander rule, MacDonald showed "surprising involvement and interest ... in the day-to-day process of our business and our science ... and questioning of where our science took us." Elam said that normally, the questioning would be done by the field office and regional office, prior to being presented to the FWS Washington Office and ASFWP. Instead, with the California tiger salamander, there was "almost day-to-day involvement, frequent involvement and questioning" by MacDonald, Elam said.

Elam said MacDonald also requested the raw genetics and DNA sequence data that had been used by a professor from the University of California at Davis whose research had been the crux of the information relied upon for the rule. Elam said MacDonald wanted the raw data to be included in the rule.

Elam stated that MacDonald's involvement affected the decision about whether to publish the five-factor analysis notice, but the decision to pursue a range-wide listing of the California tiger salamander was Thompson's. Stated another way, she said, Thompson's involvement influenced the scope of the listing, but MacDonald's involvement influenced the success of it. Elam averred that Thompson did not explain why he made the decision to go range-wide. She said Thompson characteristically thought outside the box and did not just give into processes because it conformed to the way things had always been.

Elam said that in her opinion, she believed the California tiger salamander distinct population segments were now appropriately listed, as ordered by the court; the Santa Barbara and Sonoma distinct population segments' endangered listing status was reinstated, and the Central distinct population segment was listed as threatened, she said. Elam said she did not feel that there was a need to re-evaluate the decisions.

Steve Thompson said the California tiger salamander was one of the "most complicated [rules]." Thompson explained that it involved "the leading edge of genetic debate" about what defined a distinct population segment. Thompson said there were a lot of briefings to MacDonald and, on at least one occasion, Manson. Thompson said he decided to proceed with a range-wide listing of the California tiger salamander as "threatened." Thompson said the team working on the California tiger salamander had varying opinions about whether to pursue a range-wide listing of the salamander and did not achieve 100 percent consensus. However, Thompson said, the team ultimately concluded that a range-wide listing was the best approach and made such a recommendation to Thompson.

Thompson explained that the benefit of listing the California tiger salamander as threatened versus endangered enabled FWS to use 4(d) rules to work with landowners. Thompson said landowners were more receptive to working with FWS to protect the species when 4(d) rules were in effect because it allowed FWS the flexibility to take into consideration the best management practices employed by the landowners. According to Thompson, “It allowed [landowners] to work with us, instead of against us.”

Thompson explained that 4(d) rules allowed some activities that might affect the species but resulted in an overall good impact. Thompson said that if a species was endangered, then likely no impact would be allowed. When a species was listed as threatened, under the 4(d) rules, restrictions were applied flexibly, depending on the specific needs of the species and the landowner. When listed as endangered, there was no flexibility. Thompson stated that the rationale for the FWS to use the 4(d) rule was that it was sometimes more beneficial to the species because it encouraged landowners to help rather than forcing them to do something that they usually did not do. Thompson said that he considered what factors were the best measures for conservation of the species. Thompson did not recall why a five-factor analysis was not included in this rule.

Jim Monroe is the Assistant Regional Solicitor for the SOL in Sacramento, CA. Monroe said that when the Central population of the California tiger salamander was being petitioned for listing, MacDonald told the court that FWS needed more time to process information relating to the listing of the Central distinct population segment. Accordingly, the court granted the extension. In fact, Monroe said, MacDonald used the time to develop a special 4(d) rule that would form the basis for listing the California tiger salamander as a consolidated, range-wide listing. This same listing effort would down-list the Sonoma and Santa Barbara California tiger salamander populations from endangered to threatened.

Monroe said the court learned that MacDonald’s request for an extension was deceptive and determined that she had acted in bad faith. As a result, Monroe said, Manson had to respond to the court via examination on the stand. According to Monroe, the court rendered a “scathing” opinion regarding MacDonald’s deliberate misrepresentation of the reason for requesting an extension. Further, the court vacated the rule relating to the range-wide listing; it restored the Sonoma and Santa Barbara populations to endangered and designated the Central distinct population segment as threatened.

Monroe stated that he had a few brief conversations with MacDonald on a few occasions concerning the genetics of the California tiger salamander. He said his conversations with MacDonald were brief because it was apparent by that time (of the California tiger salamander decision process) that the regional solicitors were marginalized and their opinions were not being regarded by ASFWP. Monroe said that once ASFWP made a political decision regarding a particular issue, that decision would shape the direction, regardless of the solicitor’s opinion. Monroe said the regional solicitors would have input into the rule(s), but the input “would be confined to the department.”

[Exemption 5]

Monroe explained that typically he received a draft of a rule; he then reviewed it, would or would not sign the surname form, and then sent the package forward for further review and approval. Monroe added that he usually sent the package back to the field office so it could “fix” any deficiencies that he noted and he also sent it to the SOL in Washington, D.C., to give the office a heads up regarding his review of the package. He said he did not see the package anymore after this review.

Monroe said that when he identified technical problems with a package that could be fixed, he spoke directly to the Sacramento Fish and Wildlife Office. However, Monroe said, if the fix required a policy call, he then wrote his feedback on the surname form and sent it to FWS Region 8, to SOL Attorneys Mike Young and Barry Roth in Washington, D.C., and ASFWP.

Monroe referred to a copy of the surname sheet he provided for the “Final rule listing the California tiger salamander (*Ambystoma californiense*) as threatened, and associated 4(d) rule.” As noted above, Monroe signed the surname sheet on July 22, 2004. [Exemption 5]

In addition, Monroe said, draft CHD rules for the California tiger salamander, dated May 9, 2005, and November 28, 2005, were also examples of where he did not sign the surname sheet because, in his opinion, the packages were legally insufficient. Monroe elaborated that the November 2005 Sonoma California tiger salamander CHD rule resulted in no critical habitat being designated because there was no conservation strategy in place. Monroe explained that the November rule posed “a merits challenge” because it relied on a special management plan that did not exist at the time the rule was being proposed. Monroe said the rule specifically noted that there was no currently existing special management but that it was “going to have” special management. Monroe said this “flies in the face of logic” because the regulations required existing management, not proposed management. Monroe pointed out, “At the moment, we could still get merits challenged on this and we’d lose in a heartbeat.”

Monroe said the employees in the FWS regional office did not consult with him or the regional solicitor’s office, and they did not view the regional solicitor’s office as advisors. Monroe stated that the regional office personnel viewed him (and other solicitors) as the “harbingers of bad news” who were “inflicting pain” by not signing off on the “indefensible rules.” Monroe speculated that this communication and relationship disconnect stemmed from the fact that the regional office was “caught in the middle ... [of] the person signing their performance appraisal [and] the attorneys who say, ‘That’s not lawful. You can’t do that.’”

Monroe pointed out that a conflict was presented when “the person at the top of the totem pole says, ‘This is the outcome we want to have: We’d rather not see critical habitat designated without regard to what the law says.’ And, then a solicitor ... show[s] [up and says,] ‘Guys, this isn’t gonna work. I can’t sign off on this.’” Monroe said this created a relationship that was not adversarial but was uncomfortable. After a while, Monroe said, the review of the solicitor became “pro forma.”

Gary Frazer was the FWS Washington Office’s Assistant Director for Endangered Species at the time of the California tiger salamander listing process. He recalled that MacDonald and Manson were significantly involved in both the listing and the CHD of the California tiger salamander.

Frazer explained that the California tiger salamander involved a complex issue dealing with multiple distinct population segment determinations that involved genetics and evaluations of discreteness. Frazer said MacDonald was “very engaged in the genetics discussions.”

Frazer said the California tiger salamander was an area where previously ASFWP would have relied upon the expert judgment and recommendations of conservation geneticists who were trained and qualified in this highly complex field. Frazer said, “Julie just waded right into the middle of it.” He said MacDonald would challenge every assumption and fundamental premise for FWS’ use of genetics as a factor in discreteness and significance. Frazer said it never got to the point where MacDonald directed anyone to go a different route than what FWS believed was the appropriate course of action, based on science. Frazer said that from MacDonald’s perspective, she was trying to ensure that the analysis was thorough and objective and within her scope of responsibility and authority. He said MacDonald’s involvement was not helpful, but former FWS Director Williams did nothing to stop her.

Douglas Krofta stated that MacDonald’s ultimate goal in the California tiger salamander decision was to have all three populations be listed together as threatened, whereas two of the segments were already listed as endangered. According to Krofta, he believed MacDonald was intent on down-listing the species to threatened (versus endangered) because industry and agricultural businesses could then request exceptions to the CHD under Section 4(d) of the Act.

When interviewed on the subject, Manson recalled that the California tiger salamander was “strangely” broken up into three separate distinct population segments. Manson thought it made sense to combine these three populations into one, given that the three distinct population segments did not appear to be significantly geographically separated. Manson said it was his decision to combine the populations. Manson thought this issue had not been resolved before he left DOI.

## **19. Delta Smelt Biological Opinion (Region 8)**

### *Summary:*

The delta smelt biological opinion involves the distribution of water throughout the state of California, including water on federal and state lands. Based on statements of FWS employees working on the delta smelt biological opinion, neither MacDonald nor any other departmental policy officials were involved in the development or approval of the biological opinion to any extent.

The 2005 biological opinion was invalidated by U.S. District Court for the Eastern District of California on May 25, 2007, and the court directed FWS to complete a new biological opinion by September 15, 2008. The biological opinion was already under reconsideration by FWS due to the court action. According to FWS, this litigation result, plus the confirmation that MacDonald was not involved in this opinion, made additional review by FWS unnecessary.

*Details:*

Regarding the delta smelt biological opinion, in response to the OIG's request for information, Region 8 stated that the Sacramento Fish and Wildlife Office was the lead for developing the Delta smelt biological opinion and had issued numerous biological opinions on the Delta smelt. The response also stated the following:

The most comprehensive and controversial of those opinions is the 2005 'no jeopardy' biological [opinion] on the operation criteria and plan for the Central Valley Project (OCAP).

The OCAP opinion was developed following the standard section 7 process described above, but the SFWO [Sacramento Fish and Wildlife Office] coordinated closely with the Bureau of Reclamation, National Marine Fisheries Service, and California Department of Fish and Game.

DAS [Deputy Assistant Secretary] MacDonald or other Departmental personnel were not involved in the development or approval of this biological opinion to any extent.

Cay Goude is the Assistant Field Supervisor in FWS' Sacramento Fish and Wildlife Office. She stated that the delta smelt biological opinion was also referred to as the Operation Criteria and Plan (OCAP) for the Central Valley Project. Goude said OCAP was an important topic in Region 8 because the project involved the distribution of water throughout the state of California, including water on federal and state lands. She said that although the project had the potential for monumental impact, there was no involvement by MacDonald or any other high-ranking official.

Goude said that once MacDonald began working at DOI, the environment changed significantly. Goude said scientists were concerned that they would be subject to MacDonald's verbal assaults and potential personnel actions. Consequently, the concern caused them to take into consideration how to produce a product that would please MacDonald, instead of focusing on the science.

Steve Thompson said the delta smelt biological opinion affected 25 million people in Southern California; therefore, it was a "hot issue for everybody above me from the day I started here." Consequently, Thompson explained, the biological assessments produced by the agencies were controversial. Thompson stated that the science that went into the biological assessments were always challenged and debated. According to Thompson, FWS, along with NOAA Fisheries, California Fish and Game, and other agencies, reviewed the science and issued a biological opinion. Thompson stated that he did not recall any involvement by MacDonald or any other political appointees in the delta smelt biological opinion.

According to FWS Region 8's response to the OIG's request for information, the biological opinion was invalidated by the Eastern California District on May 25, 2007, and based on this

litigation result, plus the confirmation that MacDonald was not involved in this opinion, FWS did not recommend review of the decision to FWS Director Hall.

## **20. Sacramento Splittail Critical Habitat Designation (Region 8)**

According to FWS Region 8's response to the OIG's request for information, the Sacramento splittail was first listed under the ESA on February 8, 1999, and FWS determined that designation of critical habitat was not prudent at that time and did not propose or designate critical habitat (64 FR 5963). The response further pointed out that this decision was made during the previous Administration and did not involve MacDonald. Based on our verification of these facts, no investigation was warranted.

### Other Issues

During our investigation, we acquired a considerable amount of information and useful insights in understanding the endangered species process, as practiced by this Administration. This significant information can be found in portions of interviews with key players. It is unrelated to any specific species decision discussed above but warrants further discussion below – beginning with documents referred to as “Lessons Learned.”

#### **“Lessons Learned” Document**

Witnesses from five of the six regions we interviewed, as well as the FWS Washington Office, acknowledged the existence of “Lessons Learned” documents, citing them as the “policy du jour.” The witnesses commonly explained that the “Lessons Learned” documents contained policies made up on a day-by-day or – as time wore on – a package-by-package basis.

More specifically, the documents, officially titled, “Lessons Learned in Recent CH Rules and Other Miscellaneous Information,” later shortened to “Lessons Learned in Recent CH Rules,” served as a mechanism for communicating information about what a field or regional office learned in its efforts to process an endangered species package through ASFWP's review and approval chain to publication in the *Federal Register*. The “Lessons Learned” documents were reportedly borne from efforts by FWS employees to respond to the ever-changing demands of ASFWP. Consequently, because the guidance was directly in response to trying to satisfy ASFWP, the “Lessons Learned” documents were regarded by FWS employees as much more than guidance, but rather as policy.

As described by the FWS Assistant Director of External Affairs, Elizabeth Stevens, “[T]his document tries to help provide a ‘blue print’ for the Regions when preparing proposed [critical habitat] ... it reflects those instructions/directions from the ASFWP office ... it was not intended to be a policy document.”

The earliest version of the “Lessons Learned” documents obtained by the OIG was October 2003. Its introductory paragraph stated the following:

Please note the Department is developing guidance on the critical habitat designation process. The following notes reflect changes made in recent rules, in of themselves, they do [not] necessarily reflect any ‘official guidance’ to date (i.e., things will continue to change). However, to facilitate and expedite the review process, each proposed and final critical habitat rule should reflect the following changes. In parentheses, we include the source behind the requested change.

The core of this paragraph served as the introduction to every version of the “Lessons Learned” documents spanning from October 2003 to January 2006; it stressed that the Department was developing guidance on the CHD process, and until the guidance was finalized, the “Lessons Learned” documents should be used to guide development of ESA documents.

An e-mail from MacDonald exemplifies her view of the importance of the “Lessons Learned” documents. She sent a version of the “Lessons Learned” documents, dated January 9, 2006, to Gregory T. Schildwachter, Associate Director for the White House Council on Environmental Quality, stating, “These are our comments to a FWS draft document that will eventually become the critical habitat designation guidance.” *Agent’s Note: The White House Council on Environmental Quality coordinates federal environmental efforts and works closely with agencies and other White House offices in the development of environmental policies and initiatives.*

The “Lessons Learned” document that MacDonald had forwarded to the environmental policy advisor to the White House had been repeatedly updated from October 2003 through January 2006, based directly on edits made by MacDonald and others in response to informal policies implemented by MacDonald. The OIG ultimately obtained more than 14 distinct versions of the “Lessons Learned” documents that had been generated during the period previously noted.

Despite the constant changes, we found some consistencies in the “Lessons Learned” documents relating to discussion of such topics as exclusions, advanced concept papers, special management, required determinations, and more. Parts of the documents were proscriptive and required that certain specific actions be undertaken by FWS employees to achieve a general programmatic goal. This was seen in such sections, including advanced concept papers, and the Department’s position on critical habitat and economic analysis. Other parts of the “Lessons Learned” documents were “guidance” and delineated generally autonomous, discretionary processes for how to complete a specific task or action.

Based on discussions with the DOI Program Manager for Departmental Directives, Hazel Wilson, there is no clear, unequivocal definition of “policy” in the department manual. However, Wilson said, policy tended to pose requirements and was usually less discretionary. Wilson said policy generally stemmed from statutes and legislation and laid framework for navigating the organization to its goals. By contrast, Wilson noted, guidance allowed more discretion in terms of using or implementing policy and usually laid out specific procedures, processes, methods, and standards undertaken to work toward policy-driven organizational goals.

Wilson reviewed a copy of the January 9, 2006 version of the “Lessons Learned” documents and stated that it was a mixture of policy and guidance. She pointed out an example of a policy statement, referring to a section of the document, stating, “For all proposed critical habitat designations, the preparation of an advanced concept paper is required.” Wilson said the statement clearly indicated that the policy was to have a concept paper developed for each CHD. On the other hand, she said, the use of boilerplate templates was an example of guidance; it was a “go by,” not a must do, she said. Wilson observed, “It’s not enforceable. Someone can view it as guidance and dismiss it.”

Former Region 8 Assistant Director for Ecological Services Paul Henson said policy promulgation and changes affecting FWS ran along a continuum of sources with verbal and e-mail policy direction to the local policy memoranda to national policy memoranda and finally to formal promulgation of policy through *Federal Register* notification and publication. Henson said that also along that continuum were the “Lessons Learned” documents. According to Henson, the “Lessons Learned” documents contained written, informal policies that were neither on letterhead nor on any sort of formal approval/surname pathway. Henson said the documents were an attempt to aggregate a lot of informal policies into a document that FWS employees could refer to for guidance and direction about the current thinking in the Department.

Henson opined that over the past 5 years or so, there was “way too much informal policy.” He elaborated, saying that as an administrator, it was a struggle to give people clear and consistent direction. Henson said he would wake in the morning and ask, “Okay, what’s the Agency doing today?” This, he concluded, was “a problem.”

Arnold Roessler, Listing Branch Chief of FWS’ Sacramento Fish and Wildlife Office, said that when MacDonald was involved with ESA matters, FWS would document any issues that MacDonald had with various packages. That documentation would be disseminated throughout FWS as “Lessons Learned,” that is, actions to avoid when working on a package. Roessler said the “Lessons Learned” became policy, but policy guidance that changed from package to package, which led to inconsistency from one package to the next. In addition, FWS employees never knew what the measure of success or the goal was, he said. Roessler said the “guidance” tended to filter down from the FWS Washington Office after MacDonald “had a fit about something.”

An SOL Attorney-Advisor stated that the lack of clear and consistent policies kept FWS employees asking, “What’s the policy of the day on X?”. He said that because FWS did not have good and consistent policies, courts took it upon themselves to interpret them.

## **Significant Interviews**

*Nolin*

During Nolin’s interview, she stated the following:

[MacDonald] was an odd choice for that position [Deputy Assistant Secretary] because she had no interest in species conservation. She [said] she didn’t like the outdoors; she never went outdoors. She never went to a national park or wildlife

refuge and she never intended to ... [MacDonald believed] there were other more important goals, like making sure people got water and electricity and developers had the opportunity to make profits.

According to Nolin, MacDonald was personally responsible for reassigning FWS career staff who regularly disagreed with her, which, in turn, engendered a culture of fear within FWS ranks. Nolin stated that MacDonald personally orchestrated the reassignment of former FWS Assistant Director for Endangered Species Frazer and the retirement of former Region 1 Regional Director Allen because they disagreed with MacDonald. *Agent's Note: In his interview, Bowman confirmed that MacDonald had Frazer reassigned because he would not conform to the unwritten policies of ASFWP.* Nolin further stated that MacDonald attempted to have Nolin herself fired because she disagreed with MacDonald on several occasions.

*Agent's Note: Frazer told the OIG that he concluded that he was moved out of his position because ASFWP wanted someone that had a different approach to management than Frazer had. During a previous interview relating to a different OIG investigation, Frazer had told us he was removed from his position based on his opposition to this Administration's policies.*

*Bowman*

Bowman's duties under Manson included reviewing ESA packages forwarded to ASFWP from FWS. Bowman said that in his review of the ESA packages, he primarily edited them for content and reviewed CHDs with the goal of identifying potential exclusions to the designation under Section 4(b)(2) of the ESA. According to Bowman, it was the Administration's policy to exclude as many areas from potential CHDs as "practicable."

In providing historical background information related to CHDs, Bowman claimed that former FWS Director Jamie Clark had placed the creation of CHDs very low on FWS' priority list. In turn, the Center for Biological Diversity began filing lawsuits against DOI for not establishing CHDs, and DOJ informed DOI that it needed to start creating CHDs because there was a statutory obligation to do so, he said. Accordingly, Bowman stated that the workload related to CHDs began to "pile up" and DOI was producing five to seven CHD packages per week. At this time, he said, Manson was congressionally confirmed and was given the challenge of keeping up the CHD workload, with little financial resources to do so. According to Bowman, Congress appropriated money specifically for the CHD effort and prohibited the courts from being able to direct FWS to use money appropriated otherwise for the CHD effort, and the lawsuits "kept coming."

Bowman stated that it was the unwritten policy of ASFWP under Manson to exclude as many areas as "practicable" from CHDs. He further stated that he and MacDonald understood this policy "through discussions" because, according to Bowman, there was never any thought of establishing this policy in writing. Based on this policy, ASFWP informed FWS that ASFWP would be making the exclusions to CHDs, and eventually FWS started making its own exclusions, he said.

According to Bowman, Manson attempted to memorialize many policies in a written format; however, they were never completed and formalized. Bowman opined that the decision not to formalize these unwritten policies into a written format “came down” from the Secretary’s Office, rather than from ASFWP. When asked, Bowman agreed that the Department’s unwillingness to formalize policies in writing created an appearance that the Department intentionally decided not to do so in order to retain the maximum amount of flexibility in making future decisions.

### *Lohofener*

Lohofener stated that the complexity and ambiguity of the ESA naturally led to the potential for political influence. Accordingly, he opined that FWS needed to institute formal policies and regulations that would clarify the procedures and processes to be followed when dealing with the ESA in order to limit such influence.

According to Lohofener, MacDonald brought a critical review to the process, which he believed was beneficial. Lohofener stated that he personally was “extremely critical” of listings because there were currently 1,350 species listed, yet none were being adequately recovered. He stated that he believed there were many “ill informed” listings that occurred over the past years due to the lack of tough, critical reviews of the packages when they were being processed. He said he believed FWS needed “to clean up its act” in order to have the ESA work the way it was supposed to work. In fact, he stated that he believed FWS was still listing species for “non-biological reasons.” In sum, Lohofener stated that he did not agree with MacDonald’s approach; however, he believed she raised FWS’ awareness for the need to strengthen its ESA packages in order to make them “biologically defensible.”

According to Lohofener, the regions needed to take more “management ownership” of the ESA packages coming from their regions in order to ensure they were biologically defensible. He stated that currently, the regions relied too heavily on the staff in the FWS Washington Office to shepherd packages through the review process. Lohofener acknowledged that this was not an easy feat to achieve due to the “breadth and complexity” of the ESA; however, he felt the regions were far better equipped to manage their own packages, ensuring they were accurate and supported by the science, than a few “front people” at headquarters.

Lohofener concluded his interview by stating that it was important to remember that Manson “empowered MacDonald” and she could not have had such influence without his approval.

### *Tuggle*

Benjamin Tuggle, Region 2 Regional Director, stated that, while assigned to the FWS Washington Office, most of the issues in which he interacted with MacDonald concerned Federal Energy Regulatory Commission issues related to the re-licensing of hydroelectric power plants. These interactions involved fish passages and economic impacts, he said. According to Tuggle, during one of these discussions, MacDonald told Tuggle that her job was to represent industry. Tuggle said with sarcasm that MacDonald was “not conflicted” because she very clearly represented industry. In fact, Tuggle recalled instances where he would walk to MacDonald’s

office to visit her on a hydroelectric power issue and see industry representatives leaving her office.

Tuggle said MacDonald did a “skillful” and “effective” job of finding a way to implement the Administration’s policy and advance very conservative positions when it came to interpretations by FWS field personnel. Tuggle said he believed her activities were generally “very much within the realm of policy.” However, in some instances, MacDonald did “refute” and “argue” the biology, an activity with which Tuggle was uncomfortable. Tuggle also stated that he thought it was improper for MacDonald to have implemented policies that restricted the ability of FWS to find the answers to pertinent questions.

### *Arroyo*

Brian Arroyo is FWS’ current Assistant Director for Endangered Species and he has been in the position for the past year. Prior to that, he was the Deputy Assistant Director for Endangered Species from 2005 through 2007. Arroyo has been working for FWS for 17 years and started his career with FWS as a staff biologist.

Arroyo said clear policy guidance as to what processes FWS needed to follow in making various ESA decisions/rules needed to be developed and published, and such policy guidance needed to be transparent so that all FWS staff and the public understood how FWS arrived at a particular decision. He explained that such policy guidance needed to clearly define what criteria would be evaluated in making the decisions, and, as long as the guidance was followed by FWS, such guidance would enable FWS to more readily defend its decisions in court when challenged. To this end, Arroyo stated that his office was currently working toward finalizing several different policies/guidelines. Arroyo provided a list of these policies and projected dates of completion to the OIG.

### *Hall*

FWS Director Hall was sworn in as the Director of FWS in October 2005. According to Hall, after getting “settled in” for 3 months, he noticed how MacDonald was interfering with FWS’ decision packages. Hall stated that it became obvious that MacDonald was “digging beyond where she should be digging.” According to Hall, a Deputy Assistant Secretary had no line authority over any FWS employee and therefore she should not have been directly contacting GS-12 scientists to discuss their findings; he stated that this was “just wrong.”

Accordingly, in early 2006, Director Hall stated that he held a meeting with the Secretary’s Office staff, including Matt Hogan, David Smith, Paul Hoffman, and MacDonald, and informed them that he would not allow MacDonald’s direct communications with lower level FWS employees to continue. He said Hogan, Smith, and Hoffman all agreed with him. Specifically, they agreed that the only time ASFWP should receive an FWS package was after Director Hall’s office had reviewed the final package and forwarded it to ASFWP as the official position of FWS. Hall sent the participants of this discussion an e-mail on February 7, 2006, confirming this agreement.

Hall said he believed he was the only bureau director within DOI who needed credential requirements in order to serve as a director, specifically, that he was a scientist with FWS management experience. Hall stated that he believed he was responsible, as the FWS Director, to make any and all final reviews of the science, and after he confirmed that the science was valid, there was no more questioning of the science – from a Deputy Assistant Secretary or anyone else. He stated that he saw himself as the “end of the scientific discussion and the beginning of the political discussion.” Hall issued a memorandum to all FWS employees on February 3, 2006, describing this philosophy.

Regarding FWS’ current efforts to implement policies concerning its ESA decision process, FWS Director Hall provided the following statement:

I will cross the 30 year period with the Fish and Wildlife Service in September, so I had some objectives developed through experience that I wanted to accomplish as Director. High on that list was more clear policy and better consistency in the implementation of the ESA. We began to develop a list of subject areas under the ESA that we, our career leadership and I, believed were important to clarify. Within six months, discussions with Secretary Norton and others raised the question ‘why not revise the regulations?’ The implementing regulations for the ESA were last revised in 1986 and there has been a considerable increase in our working knowledge of the law since then. I agreed that was the most holistic way to approach multiple necessary changes to the policy and legal directions given to the field, so we began building a regulations package that encompassed all the subjects on our list of potential policy changes. Deputy Assistant Secretary Julie MacDonald quickly requested that the Department allow her to lead this effort for the Department and work with the Service. During that process, we had several disagreements with Ms. MacDonald on what the regulations should say on a given subject. Those disagreements culminated in there being two different drafts of the regulations; one with Ms. MacDonald’s language and one that we were willing to live with. It was at that point that Secretary Kempthorne came on board and all efforts at regulatory change were placed on hold pending our ability to bring him up to speed on what was occurring and why.

I had a one on one discussion with Secretary Kempthorne and encouraged him to support these badly needed regulatory changes. During that discussion, I informed him that the law requires Congress to reauthorize or discontinue the Endangered Species Act every 5 years, but the last time that had occurred was 1988. When the law expired in 1993, it was not reauthorized through the normal Congressional Authorization Committees, but rather has been extended for 12 months at a time through the Appropriations process. As such, while our experience in implementing the ESA has substantially passed the thinking of 1988, we had not received any new guidance from Congress since that time. Since most of the court actions, which have been overwhelming, revolve around the regulations for implementing the act, and since we cannot change the law, our only recourse is to modify regulations that are in the sole propriety of the Executive Branch of government.

However, during that discussion, I told him that I could only support that effort if he allowed me to bring in our career professionals who are charged with implementing the law on a daily basis to draft the changes that would both benefit the species and habitats they depend upon, and also update the regulations to reflect their experience over the last 20 years. In addition, I asked that Julie MacDonald not be allowed to have any involvement whatsoever in the process. I assured him if he allowed me to draft new regulations in that fashion, we would have a sound package that would be supported by our field leadership. In addition, I knew that our professionals were frustrated with work that was required under the regulations, but not beneficial to the species; procedures that made work but not results. He agreed to this approach and we began the process. I had each Assistant Regional Director for Ecological Services (which includes endangered species) and several of the career leadership staff here in Washington form a team to develop new regulations. That work was completed in March of 2007 and we passed them forward for Departmental review, and later for Interagency review through CEQ [White House Council on Environmental Quality]. Greg Schildwachter at CEQ was the lead for coordination of interagency review. We also held a series of briefings for members of Congress (staff for more than 25 members were briefed) in April, 2007, on our efforts.

There was a noticeable resistance from some members of Congress to have the rule changes go forward. My perception was that they trusted the Fish and Wildlife Service and our staff, but were concerned about unwanted changes that might be made during the Administration review process. We also learned that there was a threat (non-attributed) that a rider would be placed on our appropriations bill to prevent any appropriated funds being spent to modify or propose regulatory changes. There was considerable concern within the Administration about that possibility. Also, comments from EPA (pesticide section) and USDA about some of the changes created lengthy delay to allow for inter-Departmental discussions. As a result, we reached the point where we would not have enough time to propose and finalize the regulations before a change in Administration and, due to the normal delay of 6-8 months in a new Administration before regulatory decisions are made, the regulatory package was placed on hold. We have been looking at a much smaller proposal to help clarify Section 7 consultation requirements, but no decision has been made on that question.

We have once again gone back to the policy list we originally had to see if there are individual policies that could be done in short order. I don't know what the outcome of that review by our Endangered Species staff will reveal.

Hall said he was unaware of any other political appointee beyond MacDonald who may have tried to improperly influence FWS decision packages. He did, however, state that he believed former Assistant Secretary for Fish, Wildlife and Parks Craig Manson tacitly approved of what MacDonald did, yet he had no proof supporting such a belief.

## *Manson*

During his interview, Manson stated that he and former FWS Director Steve Williams went through their Senate confirmation hearing together. During this process, according to Manson, Williams told Manson that he had no interest in ESA matters. Manson said it became a “well known” joke that Williams was not interested in the ESA. Given Williams’ disinterest in ESA issues, “There was a vacuum to fill and I filled it,” Manson said. Manson confirmed that during the first staff meeting he held at DOI, he told his staff that he was not a potted plant and that this would be a good way to describe his role in ESA issues. *Agent’s Note: Williams served as FWS Director from January 2002 until March 2005.*

Accordingly, Manson said the ESA was the one single issue that consumed much of his time as the Assistant Secretary for Fish, Wildlife and Parks. Manson said he reviewed documents, held meetings, and briefed the Secretary’s office on ESA issues. He also wrote and reviewed policies, testified before Congress, and received and responded to concerns raised by citizens. Manson claimed that he spent a large amount of time on ESA issues because he understood and enjoyed them.

Manson told us that MacDonald had served as the Deputy Secretary for Legislation at the California Resources Agency, an entity of the State of California, while he served as General Counsel at the California Department of Fish and Game, which was an agency within the California Resources Agency in the mid-1990s. Manson explained that the California Resources Agency was the parent agency for the Department of Fish and Game, the Department of Water Resources, the Department of Forestry and Fire Protection, and other resource organizations. Manson said that given their respective positions, he and MacDonald worked together on a variety of issues. They were both gubernatorial appointees, and the Governor of California had them working on various legislative issues affecting the Department of Fish and Game.

According to Manson, he hired MacDonald as a special assistant in his office in July 2002. He said it was his decision to hire MacDonald. As a special assistant, he said MacDonald was responsible for “a wide variety of things,” but she focused her work on ESA issues because she had a background in this area. Specifically, Manson said, MacDonald was responsible for reviewing ESA documents that were submitted for Manson’s signature and ensuring that they met his standards and were consistent with his policies. When questioned, Manson explained that MacDonald gained this ESA familiarity through her legislative work at the California Resources Agency. For example, MacDonald worked on a 4-year project completed in 1997 to reform the California ESA. Through this work, she became knowledgeable of the federal ESA. Manson said that at a later date, MacDonald was promoted to the position of Deputy Assistant Secretary for ASFWP.

Manson stated that MacDonald’s duties regarding ESA issues were to ensure that “the documents were in good shape.” According to Manson, this meant that the science and policies were correct and the document was well written. Manson said he and MacDonald talked frequently about her work on ESA issues, and he would then “send her forth to get them done.” However, Manson said, he was not aware of, and did not look into, the methods through which

MacDonald was accomplishing these duties – although he had “no problem” with letting her take action. Manson said he had “total confidence” in her abilities to accomplish tasks and therefore did not keep a “tight leash” on her.

Manson stated that MacDonald regularly edited FWS findings/decision documents for two primary reasons. First, he said, FWS was overworked, “or said they were,” and thus MacDonald assisted them in completing projects in a timely manner, sometimes under court-ordered deadlines. Second, Manson said, it was important for MacDonald to do this because there were some instances when FWS made unsupportable statements in its written findings. He said it was MacDonald’s job to ensure that everything in the written document was supportable and attributable. Manson said that to the best of his knowledge, MacDonald never took a scientific concept and completely reversed it. Instead, what she did was ensure that the facts stated in the document matched the conclusion FWS reached. Manson said that unfortunately, there were a number of instances where FWS submitted poorly written or poorly researched documents.

Manson stated that upon reflection of his time at DOI, he stood by all of the ESA decisions that he made. He also stated that he could not recall any instances when he admonished MacDonald for some particular action she took, and he could similarly recall no instances where MacDonald took an action that he later had to correct or overturn. There were some instances when she approached him with an idea or an approach that he rejected, but these were all prior to action taking place. Manson said he and MacDonald had communicated on a daily basis.

We showed Manson a portion of his congressional testimony from April 10, 2003, regarding CHDs, where he stated the following:

In previous testimony before the Committee, then-Director Jamie Clark noted that in 25 years of implementing the ESA, [FWS] had found that the designation of statutory critical habitat provided little additional protection to most listed species, while consuming significant amounts of scarce conservation resources.

After reviewing this, Manson recalled making these statements to Congress. He went on to say that while there were approximately 1,300 listed species, FWS had designated critical habitat for less than 400 of these species, even though the statute required that it be designated. When Manson asked FWS officials why this was the case, he said they told him that they felt CHDs should be a low priority. Manson said that if Congress could do something to remove the CHD requirement of the ESA, FWS’ workload would be reduced. In addition, he said there were potential real and perceived social and economic effects of CHDs.

Manson stated that it was “explicit” that since FWS felt that CHDs “didn’t add much, why worry about it?” Manson said he felt that the more CHDs could be limited, the better off FWS and the public would be, and the affected species would not be hurt. Manson said he did not develop this theory and instead adopted it from former FWS Director Clark. Manson said language to this effect was intentionally inserted into formal rules and documents issued by FWS in an attempt to build a record with the courts. Manson said this was his idea. When questioned, Manson said he did insist that this language be included.

In summary, Manson stated, “When a Presidential appointee exercises discretion delegated to him under the law, that is not improper political influence.” He also stated that no one ever told him, and he was not aware, of any situation where MacDonald or anyone else changed the scientific findings of FWS scientists. He also stated that the ESA was very controversial and political, but “that’s why we have elections.” Manson said the actions that he and those working for him, including MacDonald, took were no different from those done by his predecessors from various administrations ever since the ESA was enacted.

*Agent’s Note: We interviewed former FWS Director Jamie Clark so she could respond to Manson’s remarks concerning her stance on CHDs. Clark stated that prior to her appointment as the FWS Director, FWS had inherited a significant backlog of potential species listings from the George H.W. Bush Administration, along with CHDs. As a result, she said, due to the scarcity of resources afforded FWS to manage the ESA, she did indeed decide to place a higher priority on dealing with the potential listings versus CHDs. She said she believed that placing species on the endangered list – thus affording the species some immediate federal protection – was paramount to protecting the species. According to Clark, this prioritization in no way meant that she believed CHDs “didn’t add much” to the conservation of the species and that FWS and the public would be better off if they were limited. In fact, she stated that she believed habitat was extremely important to the conservation of a species. Accordingly, Clark stated that Manson mischaracterized her priority-setting efforts in an attempt to suggest that she would have supported his actions.*

#### *MacDonald*

MacDonald refused to be interviewed regarding this investigation despite multiple attempts to arrange an interview. In a June 30, 2008 letter to Inspector General Devaney, MacDonald stated, “Given the breathtaking arrogance with which you have conducted previous so-called investigations of me, I have no interest in any further discussions with your office.”

## ADDENDUM

#	Region	Species	ES Action	MacDonald Involvement?	Raised in Previous Investigation?	Was the Integrity of the Process Potentially Jeopardized by MacDonald or any other DOI Employee?
1	1	Tabernaemontana Rotensis	Listing	No	No	Yes
2	1	Bull Trout	Critical Habitat Designation	Yes	Yes	Yes
3	1	Northern Spotted Owl	Recovery Plan	Yes	No	Yes
4	1	Marbled Murrelet	5-Year Review	Yes	No	Yes
5	1	Western Gray Squirrel	Listing	No	No	No
6	2	Northern Mexican Gartersnake	Listing	Yes	No	Yes
7	2	Southwestern Bald Eagle	Listing	No	No	Yes
8 & 9	2	Spikedace and Loach Minnow	Critical Habitat Designations	Yes	No	Yes
10	4	Gulf Sturgeon	Critical Habitat Designation	Yes	No	Yes
11	5	Virginia Northern Flying Squirrel	Delisting	No	No	No
12	6	Greater Sage Grouse	Listing	Yes	Yes	Yes
13	6	Gunnison's Sage Grouse	Listing	Yes	No	Yes
14	6	Gunnison's Prairie Dog	Listing	Yes	No	Yes
15	6	Montana Fluvial Arctic Grayling	Listing	No	No	No
16	8	Peirson's Milk Vetch	Delisting	Yes	No	Yes
17	8	Vernal Pool Species	Critical Habitat Designation	Yes	Yes	Yes
18	8	California Tiger Salamander	Listing	Yes	Yes	Yes
19	8	Delta Smelt	Biological Opinion	No	Yes (recovery only)	No
20	8	Sacramento Splittail	Critical Habitat Designation	No	Yes (withdrawal only)	N/A

## ACRONYMS

<b>ASA</b>	American Sand Association
<b>ASFWP</b>	Assistant Secretary's Office, Fish, Wildlife and Parks
<b>BLM</b>	Bureau of Land Management
<b>CEQ</b>	White House Council on Environmental Quality
<b>CHD</b>	Critical Habitat Designation
<b>DOI</b>	U.S. Department of the Interior
<b>DOJ</b>	U.S. Department of Justice
<b>ESA</b>	Endangered Species Act
<b>FR</b>	Federal Register
<b>FWS</b>	U.S. Fish and Wildlife Service
<b>MFAG</b>	Montana Fluvial Arctic Grayling
<b>MOCAs</b>	Managed Owl Conservation Areas
<b>NOAA</b>	National Oceanic and Atmospheric Administration
<b>NSORP</b>	Northern Spotted Owl Recovery Plan
<b>OCAP</b>	Operation Criteria and Plan
<b>OIG</b>	Office of Inspector General
<b>PAW</b>	Petroleum Association of Wyoming
<b>SARA</b>	Canadian Species at Risk Act
<b>SDLM</b>	Spike Dace and Loach Minnow
<b>SFWO</b>	FWS' Sacramento Fish and Wildlife Office
<b>SOL</b>	Office of the Solicitor
<b>USFS</b>	U.S. Forest Service
<b>VNFS</b>	Virginia Northern Flying Squirrel