October 9, 2014

Mr. Douglas Krofta
U.S. Fish and Wildlife Service
Division of Conservation and Classification
4401 N Fairfax Drive, Suite 420
Arlington, VA 22203

Dear Mr. Krofta:

Western Governors respectfully submit to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the “Services”) the following comments on the draft Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act [79 FR 36330, June 26, 2014 and 79 FR 27052, May 12, 2014]. Thank you for extending the public comment period to provide states a reasonable period of time in which to respond to the proposed draft.

Western Governors want to see this draft policy updated such that a single set of criteria are utilized for discretionary exclusion analysis, holding all parties to the same standards and evaluations.

**Stated Purpose of the Draft Policy:**

Section 4 of the Endangered Species Act (ESA) outlines the framework for designation of critical habitat. The Act provides that “[t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned” [Section 4(b)(2)].

The Services have put forward this draft policy to clarify their position on how they consider partnerships and conservation plans in the exclusion process.

**Western Governors’ Analysis and Recommendations:**

- **Criteria for Exclusions**

  Western Governors agree with the Services that it is desirable to have greater predictability and transparency regarding how exclusions from critical
habitat are determined. However, we have concerns about how the Services propose to evaluate state conservation plans under this draft policy.

As noted in the Federal Register (79 FR 27052), the Services sometimes exclude specific areas from critical habitat designations if there is a private or other non-federal conservation plan, or a plan developed in partnership with the Services such as a habitat conservation plan (HCP), safe harbor agreement (SHA), or candidate conservation agreement with assurances (CCAA).

In the draft policy on exclusions from critical habitat, the Services have outlined different conditions for exclusion for HCPs, SHAs and CCAAs versus all other conservation plans (including state plans). The former must only meet three conditions, while the latter are evaluated based on eight factors. Justification is not provided for why two different sets of criteria are being proposed. We note, for example, that HCP/SHA/CCAA plans need only be “properly implemented” while other conservation plans must show not only implementation but also “success of the chosen mechanism.” No explanation for this difference is provided.

Western Governors oppose the application of two different sets of criteria for the discretionary exclusion analysis. All plans should be held to the same threshold for exclusion consideration. States spend enormous amounts of time to craft species conservation plans. Those plans are developed and implemented based on extensive scientific expertise housed in state wildlife agencies. They are crafted to meet state and federal laws, rules and regulations applicable to the protection of wildlife.

Congress, in its FY 2014 Committee on Appropriations report on the Department of the Interior’s budget, directed the Department of the Interior cooperatively engage with state wildlife agencies and use state fish and wildlife data and analyses as principal sources to inform land use, land planning and related natural resource decisions. Clearly, state plans should be considered for evaluation under the same standard for exclusion from critical habitat as HCPs, SHAs, and CCAAs where a state plan has been developed to address equivalent interests for the listed species.

- **Prioritization of Federal Lands for Species Recovery**

We are encouraged to see that, under the draft policy, lands owned by the federal government will be prioritized over state and private lands as sources of support for species recovery for the designation of critical habitat, where such a designation is determined to be the most effective tool. We applaud this commitment to species recovery by prioritizing conservation efforts on federal lands as called for in Western

- **Consideration of Economic Impacts**

ESA listing decisions have real economic impacts for state and local governments, through restriction on rangeland grazing, hunting, tourism and development of resources on public and private lands. As WGA Policy Resolution 2014-11 underscores, the negative impacts of federal ESA decisions fall squarely on states, local communities, businesses, jobs and private property owners.

We agree with your assessment that economic impacts can play an important role not only in designation of critical habitat writ large, but also in the discretionary exclusion analysis under Section 4(b)(2). It may well be the case that the economic benefits of exclusion outweigh the conservation benefits of inclusion. Such situations should be recognized by the Services and granted exclusion in order to provide maximum flexibility for a balanced mix of conservation and economic activities.

**Conclusion:**

In summary, Western Governors find it arbitrary to have two different sets of criteria for discretionary exclusion analysis. We believe the Policy could be greatly improved by applying the same criteria to all conservation plans. Those criteria should be based on what information is truly needed to weigh the benefits of exclusion and inclusion as critical habitat.

We are pleased to see that federal agencies will prioritize critical habitat on federal lands, leaving greater management flexibility on state and private lands. It is essential that economic impacts continue to be considered as critical habitat decisions are made by the Services as such decisions have real effects on states and our citizens.

Sincerely,

Brian Sandoval
Governor, State of Nevada
Chairman, WGA

John Kitzhaber
Governor, State of Oregon
Vice Chairman, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior
Honorable Penny Pritzker, Secretary, U.S. Department of Commerce
Dan Ashe, Director, U.S. Fish and Wildlife Service
Eileen Sobeck, Assistant Administrator for Fisheries, National Marine Fisheries Service
A. **BACKGROUND**

1. States possess broad trustee responsibilities, police powers and primacy over management of the majority of fish and wildlife within their borders, and state wildlife managers have on-the-ground expertise in managing species.

2. Western states are proactively engaged in species conservation, including development of state and/or multi-state conservation plans to manage species as an alternative to federal Endangered Species Act (ESA) regulation.

   a. All 11 states with greater sage-grouse have developed state conservation plans or other authorities for conservation.

   b. The five states with lesser prairie-chicken collaborated with the Western Association of Fish and Wildlife Agencies to develop the Lesser Prairie-Chicken Range-wide Conservation Plan. The Plan was endorsed by the U.S. Fish and Wildlife Service (FWS).

3. Western Governors applaud federal incentive-based conservation efforts such as the Sage-Grouse Initiative (SGI) and the Lesser Prairie-Chicken Initiative of the Natural Resources Conservation Service. These initiatives have successfully assisted landowners in conserving habitat for those species on a voluntary basis. ESA listings dramatically alter the ability of states and federal agencies to seek incentive-based, collaborative solutions to difficult conservation questions by causing citizens to avoid cooperative agreements.

4. ESA listing decisions have real economic impacts for state and local governments through restriction on rangeland grazing, hunting, tourism and development of resources on public and private lands. The negative economic impacts of federal ESA decisions fall solely on states, local communities, businesses, jobs, and private property owners.
B. GOVERNORS’ POLICY STATEMENT

1. Western Governors support all reasonable management efforts to conserve species and preclude the need to list species under the ESA.

2. Western Governors believe that state and multi-state conservation plans, upon review, consultation and endorsement by the U.S. Fish and Wildlife Service or National Marine Fisheries Service (NMFS), should give rise to a regulatory presumption by federal agencies that an ESA listing is not warranted. To that end:
   
a. States need clear, concrete guidance from FWS and NMFS about the requirements of state and multi-state conservation plans in meeting minimum conservation goals and objectives that would lead to stable or increasing populations, eliminate perceived threats to the species, and eliminate the need for listing.

b. FWS and NMFS should acknowledge that variability in state approaches for conservation of species, particularly for species with a wide geographic range such as the greater sage-grouse, can be valid so long as conservation goals and objectives are met.

3. States should be included as partners in ESA listing determinations, particularly in the case of listings that could have significant impact on state economies. Partnerships must include:
   
a. Cooperative engagement of federal agencies with state fish and wildlife agencies to ensure that state fish and wildlife data, analyses and management recommendations are used as a principal source to inform listing determinations.

b. Avoiding duplicate analysis by federal agencies of raw data previously prepared by the states.

c. Giving full consideration to state conservation plans as a means for species management and using such plans to the greatest extent practicable.

d. Private landowners are central to voluntary conservation efforts. Concerns about public release of data make private landowners reluctant
to engage in these valuable voluntary conservation efforts. Efforts should be made to publicly release data at an appropriate scale which acknowledges and addresses such concerns.

4. In considering whether to list a species under the ESA, the FWS should give full recognition to voluntary conservation efforts conducted by landowners, states, non-profit organizations, and other stakeholders, whether independently conducted or in partnership with federal programs like the Sage Grouse Initiative (SGI).

5. When issuing a proposed rule for a candidate species, the FWS should define what thresholds of geographic, temporal or other conditions are necessary to preclude the need to list a species.

6. Conservation efforts by both federal and state governments should prioritize time and funding for primary challenges facing a particular species, rather than less-significant concerns or those easiest to mitigate.

7. Federal agencies, as partners, should do their share to conserve species and be consistent and coordinated in their efforts to conserve species.

   a. Federal agencies need to demonstrate their commitment to species conservation by prioritizing such efforts on their own lands, in cooperation with the overarching goals of state conservation plans.

   b. Adequate funding must be budgeted by the federal agencies for conservation efforts on federal lands.

   c. The proportion of a species’ habitat that occurs on federal land should inform the federal agencies’ level of commitment to conservation of that species. States and local governments cannot bear a disproportional burden for species conservation when federal management practices are a dominating factor in the likelihood of a species’ success.

8. Federal funding for state conservation of species including State and Tribal Wildlife Grants and Section 6 funds must remain robust. States rely on these grants to support and leverage state management of non-game species.
9. Governors support legislative initiatives, court rulings, petitions or regulatory measures which allow local, state, federal and private conservation efforts adequate time to be implemented and demonstrate their efficacy.

C. GOVERNORS’ MANAGEMENT DIRECTIVE

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.

2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.