United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:

FWS/R6
FR-ES

MAILING ADDRESS:
P.O. Box 25486, DFC
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Boulevard
Lakewood, Colorado 80228-1807

JUN 21 2007

Memorandum

To: Director

From: Regional Director, Region 6

Subject: Region 6 Decisions Influenced by Julie MacDonald

In response to your request for a review of all decisions that may have been affected by former Deputy Assistant Secretary Julie MacDonald, I have consulted with our field and regional staff to develop the following assessment for Region 6:

WHITE-TAILED PRAIRIE DOG; 90-DAY FINDING, NOT SUBSTANTIAL (NOVEMBER 2004)

Field Office Input - The Utah Field Office drafted a 90-day finding on this petition that concluded that the information presented by the petitioners was substantial and warranted further review of the species' status. On October 26, 2004, the Field Office received comments and questions on the finding from Ms. MacDonald (via Washington Office and Regional Office email). We responded to comments from Ms. MacDonald by email and conference call on October 29, 2004. In that conference call, the Utah Field Office responded to a series of specific questions from Ms. MacDonald and defended the positive finding of substantial information. During the course of that call the Field Office did not suggest or support modification of the finding to "not substantial." Subsequently, we received an email from the Regional Office dated November 1, 2004, advising the Field Office that Ms. MacDonald and the Department wanted to go with a not substantial 90-day finding. Ms. MacDonald "suggested" we go with her version of the document sent to us the previous week. In accordance with Department direction, the Washington Office revised the final draft document and finalized it for *Federal Register* publication, incorporating Ms. MacDonald's edits.

Regional Office Input - The finding was surnamed as "substantial" by the Field Office, Regional Office, and Washington Office. The change to not substantial only occurred at Ms. MacDonald's direction.

Recommended Corrective Action - A Notice of Intent to sue on the "not substantial" 90-day finding has been filed. We recommend settling to do a 12-month finding.

LYNX; FINAL CRITICAL HABITAT DESIGNATION (NOVEMBER 2005)

Field Office Input - Despite early briefings and approval of our intended approach for proposing critical habitat for the lynx, 4 days before the court-ordered deadline (November 1, 2005) for the proposed critical habitat designation for the lynx, Ms. MacDonald ordered all U.S. Forest Service lands to be removed from the proposed designation. This significant change substantially reduced the size of the areas proposed for designation. As a result, the proposed rule contained errors that were published in the *Federal Register* because we did not have time to make all the necessary corrections to conform to Ms. MacDonald's direction before the court deadline.

In 2006, while we were developing the final critical habitat rule for the lynx, Ms. MacDonald met with representatives of Plum Creek Timber Company, the Maine Forest Products Council, and members of Maine's congressional delegation regarding the designation. Plum Creek and the Maine Forest Products Council were opposed to any designation on their properties. Presumably anticipating that Ms. MacDonald would not want Plum Creek lands designated as critical habitat, the Washington Office verbally directed that critical habitat would not to be designated on Plum Creek properties. Because of the inequity that would result if the only private commercial forest land excluded from the designation was Plum Creek property, we determined that all private commercial forest lands should be excluded thereby maintaining cooperative working relationships with landowners.

Additionally, the GIS Specialist in our North Dakota Field Office provided mapping support for lynx critical habitat. The Specialist participated in a conference call with the team and Ms. MacDonald at the proposal stage of the process, and after maps had been prepared. On a pre-call, the team discussed their anxiety that Ms. MacDonald would not be happy with the large area being proposed. This employee's perception was that the project team felt that to continue to move the package forward and meet court ordered deadlines, that Ms. MacDonald would want to hear that areas of habitat mapped and proposed as critical could be removed later if suitable lynx management plans were developed, and this is what she was told during the call.

As this package was being developed, large tracts of critical habitat were removed from what was initially mapped. Although there were legitimate reasons for some modifications, the North Dakota Field Office employee had the impression that if a large landowner (whether private or governmental) felt that Canada lynx critical habitat designation would adversely impact their current land use, a verbal promise to manage for Canada lynx was enough to have their land removed from designation and mapping.

Regional Office Input - We concur with the Field Office's characterization. The Department of the Interior has wide latitude under section 4(b)(2) of the Act to exclude areas from critical habitat if the costs outweigh the benefits, provided the exclusion would not result in extinction. However, the majority of acres (Forest Service and BLM lands) were excluded under 3(5)(A) of the Act with little justification (i.e., did not show that special management was supported by existing finalized plans) and thus did not conform to the statutory definition of critical habitat.

Recommended Corrective Action - A complaint on the critical habitat designation has been added to existing lynx litigation in Judge Kessler's court. We may want to consider remanding the critical habitat designation.

LYNX CONSERVATION AGREEMENT BETWEEN FISH AND WILDLIFE SERVICE AND FOREST SERVICE

Field Office Input - In 2005, Ms. MacDonald and her counterpart in the Department of Agriculture, Mr. Dave Tenney, became interested in the Lynx Conservation Agreement, which provided guidance on where the Forest Service would apply the Lynx Conservation Assessment and Strategy (LCAS). Ms. MacDonald and Mr. Tenney wanted to ensure that the LCAS was only applied on National Forest lands that had strong evidence of being "occupied" by lynx. On conference calls, Ms. MacDonald first stated that a team of biologists would be allowed to define what occupied habitat meant for lynx, the team was not allowed to finalize the definition until it was narrowed substantially. The narrow definition of "occupied" substantially reduced the amount of National Forest lands on which the LCAS would be applied by considering some areas to be unoccupied when thorough surveys had not been conducted or a long time had intervened since surveys were last conducted. Because lynx can move large distances, expand into new suitable habitat, and can be difficult to detect, the narrow definition may result in adverse effects or take of lynx occurring in lands no longer considered to be occupied.

Regional Office Input - Concur with Field Office characterization.

Recommended Corrective Action - We recommend working with the Forest Service to revisit the definition of occupied lynx habitat.

PREBLE'S MEADOW JUMPING MOUSE; 12-MONTH FINDING, RESULTING IN PROPOSAL TO DELIST (FEBRUARY 2005)

Field Office Input - Ms. MacDonald was involved in the decision to move forward with a proposal to delist the Preble's meadow jumping mouse based on a preliminary genetics report from Dr. Rob Ramey. At the time of the proposal, the report had not been accepted for publication and peer-reviews had identified major issues with the report. This led Region 6 to commission an independent genetics study by Dr. Tim King. Dr. King's results proved contrary to Dr. Ramey's and were subsequently upheld by an expert panel.

Regional Office Input - Concur with Field Office characterization.

Recommended Corrective Action - We have proposed settlement dates to Wyoming to either re-propose delisting or withdraw the proposed delisting based on the outcome of our threats assessment and significant portion of the range analysis by fall 2007. This process should allow for a scientifically based assessment of the status of the mouse.

PREBLE'S MEADOW JUMPING MOUSE; FINAL CRITICAL HABITAT DESIGNATION (JUNE 2003)

Field Office Input - Days before the final rule was due at the *Federal Register*, Ms. MacDonald and Judge Manson reviewed the rule and directed the Washington Office to remove all critical habitat from three Counties in Colorado (with the exception of Federal lands in Douglas County within the South Platte critical habitat unit) that were in the process of developing Habitat Conservation Plans (HCPs). Due to the lateness of the timing, the final rule contained many inconsistencies regarding critical habitat in Boulder, El Paso, and Douglas Counties. In the 4 years since the critical habitat rule was published, only Douglas County has completed an HCP, and their final HCP does not cover any private party actions.

Regional Office Input - The Department of the Interior has wide latitude under section 4(b)(2) of the Act to exclude areas from critical habitat if the costs outweigh the benefits, provided the exclusion would not result in extinction. However, several counties were also excluded under 3(5)(A) of the Act because they were planning on developing County-wide HCPs. The fact that these HCPs have not been developed four years later shows that the exclusions had little justification (i.e., did not show that special management was supported by existing finalized plans) and thus did not conform to the statutory definition of critical habitat.

Recommended Corrective Action - None required, pending the outcome of our threats assessment. If our threats assessment determines that the mouse should remain listed, we should revisit our critical habitat designation at that time.

OTHER DECISIONS REVIEWED

In addition to the above, I reviewed the following decisions that Ms. MacDonald was involved in or was alleged to be involved in, and determined that despite her input, the final decision was made by the Service. We have documented these projects in more detail in a memorandum to the file, which is available at your request.

Involved, Did Not Affect Outcome:
Gunnison Prairie-Dog 90-day "not substantial" finding
Salt Creek tiger beetle proposed critical habitat
Arctic grayling distinct population segment determination
Greater sage-grouse 12-month not warranted finding
Black-tailed prairie dog candidate removal
Gunnison sage-grouse 12-month not warranted finding

No Involvement:
Topeka shiner critical habitat designation
Boreal toad withdrawal from candidate list
Wolverine "not substantial" 90-day finding
Mountain plover withdrawal from candidate list

The Washington Office Endangered Species Division also may add some valuable insights to this report. Please do not hesitate to contact me with any questions you may have.