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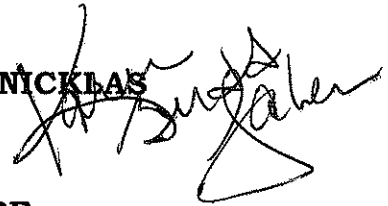
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MEMORANDUM

**TO: BOWMAN-SLOPE SOIL AND WATER CONSERVATION
DISTRICT LAND USE PLAN STEERING COMMITTEE**

VIA: EMAIL
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**FROM: KAREN BUDD-FALEN & CONNER NICKLAS
BUDD-FALEN LAW OFFICES, LLC**



**THROUGH: BRENDA YOUNKIN & ABBY MOORE
Y-2 CONSULTANTS**

DATE: SEPTEMBER 12, 2017

RE: SPECIES OF CONCERN AUTHORITY AND CRITERIA

I. BACKGROUND

A. Endangered Species Act

Under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*, candidate species are "any species being considered ... for listing as an endangered or threatened species, but not yet the subject of a proposed rule." 50 C.F.R. § 424.02(b). In 1992, the U.S. Fish and Wildlife Service ("FWS") published a policy to place candidate species into one of three categories according to the information on the species available at the time that it is listed in the FWS's notice of review of species considered for listing. Endangered and Threatened Species; Policy on Candidate Categories Relative to Petition Findings, 58 Fed. Reg. 28,034 (May 12, 1993). Category 2 candidates comprised "species of concern," that is, species for which the FWS did not have sufficient information then available to determine whether the species should

or should not be listed, but for which there was enough information available to suggest that the continued existence of the species was threatened.¹

In 1996, the FWS revised its policy and discontinued use of the Category 2 “species of concern” classification. Endangered and Threatened Wildlife and Plants; Notice of Final Decision on Identification of Candidates for Listing as Endangered or Threatened, 61 Fed. Reg. 64,481 (December 5, 1996) (“Using the old category-2 list as a ‘species of concern’ list was inappropriate.”). In its final decision on the policy, the FWS reasoned that duplicative efforts in listing these “species of concern”, which were also tracked by other federal agencies, professional societies, and conservation organizations, relieved the FWS of using its scarce resources on the project. *See id.* (discontinuing designation of Category 2 species candidates). In its initial indication of the change in policy, however, the FWS indicated that the change was due to confusion regarding the three classes:

The designation of Category 2 species as candidates resulted in confusion about the conservation status of these taxa. To reduce that confusion, and to clarify that the Service does not regard these species as candidates for listing, the Service is discontinuing the designation of Category 2 species as candidates in this notice.

Review of Plan and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 Fed. Reg. 7596-01 (February 28, 1996).

Today, the term “category 2 candidate species” is no longer used. However, while not legally defined or mentioned in the ESA or its implementing regulations, “species of concern” is defined in the ESA glossary as:

An informal term referring to a species that might be in need of conservation action. This may range from a need for periodic monitoring of populations and threats to the species and its habitat, to the necessity for listing as threatened or endangered. Such species receive no legal protection and use of the term does not necessarily imply that a species

¹ Francesca Ortiz, *Candidate Conservation Agreements as a Devolutionary Response to Extinction*, 33 Ga. L. Rev. 413, 455 (1999) *citing* Policy on Candidate Categories Relative to Petition Findings, 58 Fed. Reg. 28,035.

will eventually be proposed for listing. A similar term is “species at risk,” which is a general term for listed species as well as unlisted ones that are declining in population.

FWS, *Endangered Species Glossary*, 10 (revised May 2015), <http://www.fws.gov/endangered/about/glossary.html>.²

The term “species of concern” is also mentioned in regard to Candidate Conservation Agreements, which are defined in the glossary as “voluntary agreements between FWS and landowners who agrees to manage lands or waters to remove threats to candidate or proposed species, or other ‘species of concern.’” *Id.*

According to the National Marine Fisheries Service(NMFS), which, like FWS, maintains a list of “species of concern” for which more information is needed before they can be proposed for listing:

Species of Concern are those species about which we have some concerns regarding status and threats, but for which insufficient information is available to indicate a need to list the species under the [ESA]. We wish to draw proactive attention and conservation action to these species. “Species of concern” status does not carry any procedural or substantive protections under the ESA.

National Marine Fisheries Service, *Proactive Conservation Program: Species of Concern*, <http://www.nmfs.noaa.gov/pr/species/concern/> (last updated Feb. 23, 2017).

B. Bureau of Land Management

Similarly, the Bureau of Land Management (“BLM”) uses the term “special-status species” which includes species federally listed or proposed for listing as threatened or endangered under the ESA, candidate species, state protected and sensitive species and other special-status species other than state or federal status as threatened, endangered or candidates, which includes

² This glossary is intended to give the meaning of key words but does not necessarily provide a legal definition.

federal and state “species of concern” (former C2 candidates). See <https://www.blm.gov/programs/fish-and-wildlife/threatened-and-endangered/state-te-data/utah>. The BLM designates “species of concern” where there is credible scientific evidence to substantiate a threat to continued viability of populations of such species. The BLM’s policy for managing special status species is set forth in BLM Manual 6840.³ It is the BLM’s intention that wildlife “species of concern” designations will identify species for which conservation actions are needed, and that timely and appropriate conservation actions implemented on their behalf will preclude the need to list these species under the provisions of the ESA. See <https://www.blm.gov/programs/fish-and-wildlife/threatened-and-endangered/state-te-data/utah>. The BLM also acknowledges state-listed “species of concern” when considering management and conservation practices. *Id.* BLM may designate a species as a sensitive species if either: (1) there is information that a species has recently undergone, is undergoing, or is predicted to undergo a downward trend such that the viability of the species or a distinct population segment of the species is at risk across all or a significant portion of the species range, or (2) the species depends on ecological refugia or specialized or unique habitats on BLM administered lands, and there is evidence that such areas are threatened with alteration such that the continued viability of the species in that area would be at risk. BLM Manual 6480-Special Status Species Management.

C. United States Forest Service

The United States Forest Service uses the term “sensitive species” to describe those species which the Forest Service Regional Forester identify as species whose viability is a concern and need special management in order to prevent them from becoming threatened or endangered. FS Manual 2670 – Threatened, Endangered, and Sensitive Plants and Animals. The regional forester looks at two criteria in deciding to list a species as sensitive, (1) “significant current or predicted downward trends in population numbers or

³ “In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats, including ESA proposed critical habitat, to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA.” BLM Manual 6480-Special Status Species Management (December 12, 2008).

density, (2) significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution." *Id.* It is the goal of the Forest Service to maintain viable populations of all native and desired nonnative wildlife. *Id.* The Forest Service will try to do this by including sensitive species in their NEPA analysis. *Id.* The Forest Service also wants to achieve its management goals by establishing those management objectives in cooperation with the state when a project on Forest Service land would have a significant effect on sensitive species population numbers or distributions. *Id.* In conducting a NEPA analysis and creating management objectives with the states, the Forest Service ultimately wants to avoid or minimize impacts to sensitive species. *Id.* When impacts cannot be avoided, the line officer must make the decision to allow or disallow the impact, but the decision must not result in loss of species viability or create significant trends toward federal listing. *Id.* Further, the Forest Service still lists Category 2 Species of Concern as a category the FWS uses and will establish objectives for federal candidate species in cooperation with the FWS. *Id.*

Although the Forest Service never states that it acknowledges states lists of "species of concern" when considering management and conservation practices, the Forest Service does state that it will cooperate with state agencies to "inventory, protect, manage, and plan for... sensitive species." *Id.* Further, the Forest Service will inform those agencies of all formal consultations with the FWS and NMFS, and seek their participation in the consultation process. *Id.* Finally, the Forest Service will also enter into memorandums of understanding or cooperative wildlife and fisheries agreements that would include cooperative management of sensitive species. *Id.*

II. DISCUSSION

Because the ESA does not recognize "species of concern," federal agencies charged with protecting sensitive species designate "species of concern" without ESA mandates and based on their own informal criteria. Consequently, no uniform selection criteria exist for federal agencies to select "species of concern." Although no protections are afforded pursuant to federal law or regulation, there is nothing that is either preventing a federal agency from considering "species of concern" in environmental or biological assessments or nothing requiring it either.

Further, the states possess broad powers to protect plant and animal species. Through these statutory powers, states are able to designate “species of concern” and implement state-level conservation programs to manage “species of concern.” However, in the absence of federal guidance or policy for determining and managing “species of concern,” the several states (typically working with conservation entities such as the Natural Heritage Program) do not possess uniform selection criteria or management policies.

No specific regulations governing “species of concern” exist in North Dakota. However, North Dakota does grant broad statutory authority to the North Dakota Game and Fish Department to establish programs and rules and administer state and federal funds provided to the state for the preservation and management of resident species determined by the director to be threatened or endangered species of wildlife. N.D.C.C. § 20.1-02-05(15) (2017). The state can therefore require mitigation for wildlife designated as threatened, endangered, or “species of concern” if the director of the North Dakota Game and Fish chooses to do so.

Due to the informal nature and absence of legal authority for “species of concern” designations (in addition to separate entities compiling their own lists), it does not appear that any uniform criteria exists for designating a species as a “species of concern.”⁴ Species often receive state listing prior to federal listing, and many states designate candidate species or “species of concern” at a standard less than that required for consideration as a federal candidate species.⁵ Ortiz, 33 Ga. L. Rev. at 509. Without federal oversight or

⁴ See Wyoming Natural Diversity Database, *Species of Concern*, <http://www.uwyo.edu/wyndd/species-of-concern/> (last visited August 8, 2017) (outlining criteria for Wyoming Species of Concern List); see also California Department of Fish and Wildlife, *Species of Special Concern*, <https://www.wildlife.ca.gov/Conservation/SSC> (last visited August 10, 2017) (outlining factors for designating California Species of Special Concern); Montana Natural Heritage Program, Animal Species of Concern <http://mtnhp.org/speciesofconcern/?AorP=a> (last visited August 10, 2017).

⁵ Many states, like the FWS, categorize species at levels lower than endangered or threatened. See, e.g., State of Cal., Dep't of Fish & Game, Natural Heritage Div., *Endangered Species Act Listing Process* (last visited August 10, 2017), http://www.dfg.ca.gov/wildlife/nongame/t_e_spp/list_proced.html (defining a

law, “species of concern” criteria varies state by state. North Dakota does not have an endangered species list, and relies exclusively on the list derived under the ESA. North Dakota Game and Fish Department, *Threatened and Endangered Species* <https://gf.nd.gov/wildlife/endangered> (last updated May, 2015). Although North Dakota does not have its own endangered species list, it does have a list of “Species of Conservation Priority.” North Dakota Game and Fish Department, *Species of Conservation Priority* <https://gf.nd.gov/wildlife/scp> (last visited August 10, 2017). The North Dakota Game and Fish Department does not enforce any rules to protect “Species of Conservation Priority,” however, the list is used as a way to prioritize funding in conserving those species listed. *Id.*

III. ISSUES FOR BOWMAN-SLOPE LAND USE PLAN

Given this analysis, I believe that the Bowman-Slope land use plan (“LUP”) should consider including issues regarding the designation of and management for “species of concern.” Those issues may include (but are not limited to):

- A. Because there are no statutory limits on what is defined as a “species of concern,” the land use plan may want to contain policies defining “species of concern”;

state “candidate species” as species for which state Fish and Game Commission has issued formal notice of review for state listing); Florida Natural Areas Inventory, *Explanations and Definitions* (last visited August 10, 2017), <http://www.fnai.org/ranks.cfm> (defining “species of special concern” as “a population which warrants special protection, recognition, or consideration because it has an inherent significant vulnerability to habitat modification, environmental alteration, human disturbance, or substantial human exploitation, which, in the foreseeable future, may result in its becoming a threatened species”); Minnesota Department of Natural Resources, *Minnesota's List of Endangered, Threatened, and Special Concern Species* (Effective August 19, 2013), http://files.dnr.state.mn.us/natural_resources/ets/endlist.pdf (noting that a species is considered a “species of special concern” if, although not endangered or threatened, it “is extremely uncommon in Minnesota, or has unique or highly specific habitat requirements and deserves careful monitoring of its status”).

- B.** The LUP may also want to describe the types of data or information that you believe the Forest Service or BLM should use on which to base a decision that a species should be designated a “species of concern”;
- C.** Once a “species of concern” is designated, how should it be considered and managed by the BLM or Forest Service *vis a vie* other multiple use mandates?
- D.** What type of local government review process should be used by the federal agencies to designate and manage “species of concern?”
- E.** Does the local government want to include policies for getting species off the list of “species of concern” once certain management objectives or other criteria are met?
- F.** How should the counties communicate with the North Dakota Game and Fish Department regarding listing “Species of Conservation Priority,” and use of state resources for those species.

Should you have any questions, please do not hesitate to contact us.