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Sagebrush Sea Campaign

**UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

**WESTERN WATERSHEDS PROJECT, )  
BIODIVERSITY CONSERVATION )  
ALLIANCE, CENTER FOR NATIVE )  
ECOSYSTEMS, OREGON NATURAL )  
DESERT ASSOCIATION, and the )  
SAGEBRUSH SEA CAMPAIGN )**

Case No. 06-CV-00127

Plaintiffs, )  
vs. )

**PLAINTIFFS’ OPENING BRIEF IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

**DIRK KEMPTHORNE, Secretary of the )  
Department of the Interior, and the )  
UNITED STATES FISH AND )  
WILDLIFE SERVICE, an agency of the )  
United States, )**

Defendants. )

## INTRODUCTION

Plaintiffs Western Watersheds Project *et al.* (“Western Watersheds”) seek summary judgment reversing the May 2005 decision by Defendants U.S. Fish and Wildlife Service *et al.* (“Service”), which rejected Plaintiffs’ petition to list the pygmy rabbit as threatened or endangered under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (“ESA”).

Plaintiffs’ listing petition contained 216 pages of detailed historical, biological, and related information, and cited over 350 scientific references, all showing that pygmy rabbit habitat and populations are plummeting, and the pygmy rabbit warrants ESA protection. The Service’s own lead pygmy rabbit biologist agreed that the listing petition presented “substantial information indicating” that listing the pygmy rabbit “may be warranted,” thus triggering the Service’s duty to accept the petition and proceed with the listing process by conducting a comprehensive status review. *See AR 1259-96 & 1246-47.*

Her superiors overruled her conclusions, however, and rejected the scores of peer-reviewed publications and other credible information supporting the listing petition, without identifying any countervailing scientific information supporting their position. In so doing, the Service claimed only that the listing petition supposedly failed to provide conclusive scientific proof that the pygmy rabbit warrants protection under the ESA. The Service has misapplied the low threshold required of listing petitions under ESA Section 4(b)(3) and acted arbitrarily and capriciously, thus requiring reversal by this Court – just as many other courts have done where the Service similarly misapplied the ESA’s standards in rejecting listing petitions. *See Center for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137 (D. Colo. 2004); *Moden v. U.S. Fish and Wildlife Service*, 281 F. Supp. 2d (D. Or. 2003); *Colorado River Cutthroat Trout v.*

*Kemphorne*, \_\_\_ F. Supp. 2d \_\_\_, 2006 WL 2572635 (D.D.C. Sept. 7, 2006); *Defenders of Wildlife v. Kemphorne*, CV-05-99-M-DWM (D. Mont. Sept. 29, 2006) (Docket No. 52).

In addition, the Service violated the ESA by improperly considering the threats facing the pygmy rabbit, and by failing to consider whether the pygmy rabbit is threatened or endangered over a “significant portion of its range,” as required by Section 4(a)(1). As the Ninth Circuit has held, in a case squarely on point here, this ESA violation alone requires reversal. *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9<sup>th</sup> Cir. 2001). See also *Center for Biological Diversity v. Lohn*, 296 F.Supp.2d 1223, 1242-3 (W.D. Wash. 2003) (reversing listing decision because the Service failed to assess species status across “significant portion of range”). And as yet another ground for reversal, the Service unlawfully solicited information from hand-selected third parties to refute Plaintiffs’ listing petition, and relied on this information in denying the listing petition without allowing the public or Western Watersheds to comment – which again the courts have held violates ESA Section 4. *Morgenweck*, 351 F. Supp. 2d at 1143; *Colorado River Cutthroat Trout*, 2006 WL 2572635, at \*5-6.

In short, the Service’s May 2005 decision rejecting Plaintiffs’ listing petition violates the ESA in multiple ways, leaving the pygmy rabbit without the ESA protection it deserves. The Court should thus grant Western Watersheds’ Motion for Summary Judgment; reverse and remand the Service’s May 2005 decision; and order the Service to proceed promptly with the listing process.

### **RELEVANT FACTS**

Pursuant to Local Rule 7.1, Western Watersheds is filing herewith a Separate Statement of Undisputed Material Facts (“Sep. Stmt.”), which sets out in detail the facts summarized below, with citations to the Administrative Record.

### **The Pygmy Rabbit And Its Habitat.**

The pygmy rabbit (*Brachylagus idahoensis*) is the smallest rabbit in North America, and one of the smallest members of the family Leporidae (which includes hares and rabbits) in the world. *See Sep. Stmt.*, ¶ 1. Pygmy rabbits are strict sagebrush obligates, inhabiting sage-steppe habitats in the Intermountain West. *See id.* They typically are found in areas of tall, dense sagebrush cover, and are highly dependent on sagebrush to provide both food and shelter throughout the year. *See id.*, ¶ 3.

Because pygmy rabbits are dependent upon a long-lived, slow-recovering food source (i.e., sagebrush), they have a lower potential for rapid increase in numbers than other hares and rabbits. *See id.*, ¶ 4. Population cycles are not known in pygmy rabbit populations, although local rapid declines and extirpations have occurred in the recent past. *See id.*

Pygmy rabbits were once a “fairly abundant” feature of the Intermountain Region, coincident with the distribution of sagebrush. *See id.*, ¶ 5. Pygmy rabbit range historically spanned over 100 million acres, including much of the semi-arid, sage-steppe region of the Great Basin and adjacent intermountain zones, including portions of California, Oregon, Idaho, Nevada, Utah, Montana, Washington, and Wyoming. *See id.*

Now, however, the pygmy rabbit’s geographic range is estimated to have dropped to less than 10 percent of the historic range. *See id.*, ¶ 7. Pygmy rabbit populations are now limited to only 17 counties within its former range, which includes several counties that have only “a few, isolated” individuals. *See id.* Vast expanses of pygmy rabbit habitat have been lost due to agricultural conversion, fire, noxious weed invasion, livestock grazing, and other anthropogenic causes. *See id.*, ¶¶ 7-22.

Due to their shrinking habitat, pygmy rabbit populations have plummeted. *See id.* Recent studies in Idaho, Utah, and other states have found few pygmy rabbits, where once they were abundant. *See id.* (See further discussion below).

**Plaintiffs' Listing Petition.**

On April 21, 2003, Western Watersheds and others submitted to the Service a petition to list the pygmy rabbit as endangered or threatened. *See Sep. Stmt.*, ¶ 26. *See also AR 1841-2056* (listing petition). The petition spent 216 pages explaining the reasons why the pygmy rabbit deserves listing under the ESA, including past and present populations and distribution of the pygmy rabbit, and current threats to the rabbit. *See id.* The petition also cited 350 peer-reviewed scientific articles, federal and state agency publications, and other credible information supporting listing the pygmy rabbit under the ESA. *See id.*

The Service failed to respond to Plaintiffs' listing petition within the one-year timeline required by the ESA. *See Sep. Stmt.*, ¶ 27. Accordingly, on August 31, 2004, Plaintiffs sued the Service. *See id.* On February 11, 2005, Plaintiffs and the Service reached a settlement requiring the Service to finally act on the petition by publishing a so-called "90-Day finding" by May 16, 2005. *See id.*, ¶ 28. This Court approved the settlement on March 2, 2005. *See id.*

On March 11, 2005, the Service's lead biologist for pygmy rabbit drafted a 90-Day finding concluding that Plaintiffs' listing petition presented "substantial information indicating that listing the pygmy rabbit may be warranted." *See Sept. Stmt.*, ¶ 29. Several days later, Marcy Haworth – the Service's lead pygmy rabbit biologist – prepared an internal briefing document concluding, once again, that the petition presents substantial information, and recommending a positive finding on Plaintiffs' listing petition. *See id.*

On May 20, 2005, the Service rejected the recommendations of its own expert biologist, and published its 90-Day finding, which denied the listing petition for reasons discussed below. *See Sep. Stmt.*, ¶ 30. *See also AR 1-13*. Plaintiffs thus filed this lawsuit on March 28, 2006; and now seek summary judgment reversing the May 2005 decision, and remanding for the Service to proceed with the listing process. *See Sep. Stmt.*, ¶ 32.

## ARGUMENT

### **I. THE ESA ESTABLISHES A LOW THRESHOLD FOR LISTING PETITIONS.**

Congress enacted the ESA to establish “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of . . . endangered and threatened species.” 16 U.S.C. § 1531(b). In adopting the ESA, Congress “has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” *TVA v. Hill*, 437 U.S. 153, 194 (1978).

To be afforded ESA protection, however, a species must be listed as either “endangered” or “threatened” under Section 4. *See* 16 U.S.C. § 1533. A species is “endangered” if it is in “danger of extinction throughout all or a significant portion of its range,” and a species is “threatened” if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6) & (20).

In determining whether to list a species as endangered or threatened, the ESA also specifies that the Service may only consider five factors, which include “the present or threatened destruction, modification, or curtailment of its habitat or range”; overutilization of the

species; disease or predation; inadequacy of existing regulatory mechanisms; and “other natural or manmade factors affecting its continued existence.” 16 U.S.C. § 1533(a)(1).

Congress specifically provided in ESA Section 4(b)(3) that interested persons may petition the Service to list species. *See* 16 U.S.C. § 1533(b)(3); *ONRC v. Kantor*, 99 F.3d 334 (9<sup>th</sup> Cir. 1996); *Center for Biological Diversity v. Norton*, 254 F.3d 833, 839 (9<sup>th</sup> Cir. 2001) (both addressing ESA listing petition process). Upon receipt of a listing petition, Section 4(b)(3) directs the Service to review the petition and other documents in its files, and then determine whether the listing petition “presents substantial scientific or commercial information **indicating that the petitioned action may be warranted.**” 16 U.S.C. § 1533(b)(3)(A) (emphasis added).

The statute also imposes a mandatory duty requiring the Service to respond promptly to such listing petitions – within 90 days “to the maximum extent practicable,” and certainly no later than 1 year. *See* 16 U.S.C. § 1533(b)(3)(A); *Biodiversity Legal Foundation v. Badgley*, 284 F.3d 1046 (9<sup>th</sup> Cir. 2002) (affirming Service’s duty to respond to listing petitions no later than one year after submission).

By requiring that a listing petition need only to present enough information “indicating” that listing “may be warranted,” and directing the Service to promptly act upon listing petitions, ESA Section 4(b)(3) thus reflects Congress’ intent that the Service should not impose overly restrictive requirements for listing petitions; but instead should act expeditiously to ensure that all deserving species receive protection under the ESA through timely status reviews and listings. *See Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1400-01 (9<sup>th</sup> Cir. 1995) (noting that Congress amended ESA Section 4 in 1982 to tighten listing timelines out of “concern about the low number of additions to the endangered species list”); *Federation of Fly Fishers v. Daly*, 131 F.

Supp. 2d 1158, 1163 (N.D Cal. 2000) (noting that “listing is critically important” to fulfilling Congress’ intent in protecting imperiled species through ESA provisions).

Reflecting this statutory scheme, the Service’s regulations under Section 4(b)(3) likewise specify minimal requirements for citizen listing petitions. Under the regulations, a listing petition need only include: (1) the scientific and common name of the species; (2) a “narrative justification” for the requested listing, including a description of past and present populations, historic and current range of the species, and threats to the species; (3) information regarding the status of the species over all or a significant portion of its range; and (4) a bibliography of supporting documentation, publications, maps and other authorities. *See* 50 C.F.R. § 424.14(b)(2)(i)-(iv).

The Service’s regulations also confirm that the standard for it to accept and act upon a citizen petition is not rigorous – and does not require conclusive scientific proof – by defining the statutory term “substantial information” to mean “that amount of information that would lead a **reasonable person** to believe that the measure proposed in the petition **may be warranted.**” 50 C.F.R. § 424.14(b)(1) (emphasis added). *See also AR 2127* (interpreting this requirement to mean that the Service will make a positive 90-Day finding when information in listing petition “tends” to show that listing may be warranted).

In adopting this “reasonable person” standard to assess whether a listing “may be warranted,” the Service’s regulations again reflect the statutory language and intent of Congress that the threshold is quite low for citizen listing petitions to be accepted, and thus trigger further listing procedures by the Service (including a full status review). In light of the statutory language and these regulations, it is unsurprising that the courts have referred to the Section 4(b)(3) listing petition requirements as “not overly burdensome” and “a lesser standard.” *See*

*Moden v. U.S. Fish and Wildlife Service*, 281 F. Supp. 2d 1193, 1204 (D. Or. 2003); *Center for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1140-1 (D. Colo. 2004) (both reversing Service's rejection of listing petitions due to the Service's misapplication of Section 4(b)(3) standards).

## **II. PLAINTIFFS' LISTING PETITION EASILY SATISFIED THIS LOW THRESHOLD.**

Plaintiffs' listing petition here easily met and surpassed this low threshold under the ESA, requiring that the petition need only present sufficient information "indicating" to a "reasonable person" that listing the pygmy rabbit under the ESA "may be warranted." *See AR 1868-2056* (Plaintiffs' listing petition). The following discussion of the listing petition makes this point crystal clear.

First, the listing petition cited extensive scientific information to show that, historically, the pygmy rabbit was found throughout much of the sagebrush-dominated habitat of the Interior West, extending from southwestern Montana and Wyoming west through southern Idaho and into central Oregon and Washington, and south to central Nevada, the western portion of Utah and into northeastern California. *See AR 6364-65* (map of historic range), *7103, 9353, 2990, 3123, 4099, 4676, 4838, 2603, 3346, 8683, 9690* (same). This historic range of the pygmy rabbit has been documented in peer-reviewed scientific publications, *see, e.g., AR 7102* (Mammals of North America), *3344* (The American Society of Mammologists), *4217* (Journal of Mammology); federal and state agency reports and publications, *see, e.g., AR 6345* (Idaho Bureau of Land Management publication), *4694* (Montana state publication), & *6902* (Oregon BLM publication); and numerous master's theses and doctoral dissertations. *See, e.g., AR 2990, 3122 & 4099*. The Service itself has previously acknowledged the historic range of the pygmy rabbit, too, when it previously listed the Columbia Basin distinct population segment of the

pygmy rabbit as endangered. *See AR 7584 & 7603* (emergency and final listing rules for Columbia Basin DPS of pygmy rabbit).

Second, Plaintiffs' listing petition also demonstrated that vast areas of this historic habitat have been destroyed or altered, **and** that pygmy rabbit populations have been eliminated over large areas of its former range. *See AR 1868-70* (status in Washington); *1870-74* (Montana); *1874-94* (Idaho); *1894-1900* (Wyoming); *1900-04* (Utah); *1904-1911* (Nevada); *1911-15* (California); *1915-22* (Oregon); & *1922-27* (summary). The listing petition cites over 350 scientific references and reports to support this drastic reduction in the pygmy rabbit's range and population. *See AR 2035-56*.

For example, the listing petition cites a 2002 BLM report that pygmy rabbit populations were historically "common" across the entire Great Basin, yet now are limited to only 17 counties – representing approximately 10% of its historic range – including several counties which had only "a few, isolated" individuals. *See AR 6364-67*.

Likewise, the petition cites other research showing that pygmy rabbit populations and habitat in Idaho are crashing. These include a 2003 Idaho BLM report, which concluded that rabbit have experienced "large scale habitat loss," which has "greatly reduced pygmy rabbit habitat over millions of acres." *AR 7313*. *See also AR 7305* (stating there is "little hope of finding any more than small isolated populations" of rabbits across the Pocatello Field Office); *id.* ("pygmy rabbit habitat in the [Idaho Falls Field Office area] has been greatly reduced by agricultural practices and wildfires and is severely fragmented"); *7307* (habitat in Burley Field Office is "severely fragmented"); *id.* (concluding that "sizeable blocks" of pygmy rabbit habitat have been "decimated" in the Owyhee and Jarbidge Field Offices).

In the course of quantifying the overall reduction in habitat across Idaho, the BLM researcher visited 583,000 acres of pygmy rabbit habitat, and concluded that only 2,000 acres – i.e., 0.3% – had a high habitat value. *See AR 3*. This report concluded that “[p]ygmy rabbit numbers in Idaho are slowly but surely declining based solely on the fact that a large amount of their habitat is being lost **annually**,” and that “pygmy rabbits could be a candidate for listing as a threatened species in the near future based on the very rapid loss of suitable habitat.” *See AR 7314-15* (emphasis added). *See also AR 7271* (recognizing “extirpation of historic populations” within Idaho); *2243* (stating that “any remaining pygmy rabbit populations [in Idaho] are at risk of extirpation”); *2835* (stating that pygmy rabbit numbers have “drastically declined” in the past decade, even in protected areas).

Other state-specific studies cited in the petition mirror these conclusions. In Utah, studies conducted in 1946 found pygmy rabbits distributed across the entire western portion of the state, although it found that populations were already experiencing “precipitous” declines. *See AR 9232*. *See also AR 7031 & 3832* (maps delineating historic distribution). Upon revisiting these sites 50 years later, the same author found further declines in rabbit habitat, and stated that there is “no question that pygmy rabbit populations in Utah are low in some areas of former abundance.” *See AR 3953*. After revisiting many of these same sites in 2005, Dr. Bruce Welch, a researcher with the U.S. Forest Service, painted a starker picture, concluding that “strong evidence” indicates that “pygmy rabbit populations have experienced serious decline[s].” *See AR 9732*. Dr. Welch concluded:

2). Pygmy rabbits are endangered because large areas of historical pygmy rabbit habitat have been converted to farmland, cheatgrass, crested wheatgrass, and other weedy non-habitats, and numerous big sagebrush stands have been killed to improve the environment for livestock.

....

4). Pygmy rabbits are rare and endangered because land management agencies and private landowners have a long standing historical bias against big sagebrush and in particular for aged stands of big sagebrush. These agencies will have a very difficult time changing their time honored practices of killing big sagebrush stands to protecting big sagebrush stands without the listing of pygmy rabbits. *Id.*

The situation is no better in Oregon. In a seminal study of pygmy rabbits in Oregon, two professors with Oregon State University found a “marked decline in evidence of pygmy rabbits,” and concluded that rabbit populations were “susceptible to rapid declines and possibly local extinctions.” *See AR 6198*. In 2003, the Oregon BLM conducted a pygmy rabbit survey across nearly 70,000 acres of suitable pygmy rabbit habitat in southeastern Oregon. *See AR 6902-97*. Although BLM surveyed 54 sites – including the largest pygmy rabbit site in Oregon – the researchers found only two rabbits, leading the author to conclude that populations of pygmy rabbit are low. *See AR 6982-83*. *See also AR 1920* (finding rabbits at only 4 of 305 sites); *5357* (Oregon state agency asserting that “population declines and extirpations are occurring”).

The listing petition also demonstrated that this same situation is repeated in Wyoming, Montana and Nevada. *See AR 8916, 8868* (in Wyoming, pygmy rabbit is a “critically imperiled” species, meaning it is an “extreme rarity” or “it is highly vulnerable to extinction”); *AR 3949* (in Montana, pygmy rabbits populations have experienced a “considerable decline” since 1997); *1920 & 5359* (in Nevada, locating rabbits at only two of 200 known pygmy rabbit locations); *2821* (in Nevada, locating two active sites among 40 historic pygmy rabbit sites).

Plaintiff’s listing petition discussed in detail all of these expert reports and peer-reviewed scientific information; in fact, the petition spends nearly 60 pages explaining this historic and current information. *See AR 1868-1927*. The listing petition thus easily meets and exceeds the statutory requirement that it present “substantial” information “indicating” to a “reasonable person” that listing “may be warranted.” *See 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)*.

This fact is further confirmed by the Service's own biologists, who concluded the listing petition was "well written" and fully met the requirements of Section 4(b)(3), and thus drafted a proposed 90-Day finding accepting the petition. *See AR 1259-96, & 1324*. Specifically, on March 11, 2005, Marcy Haworth – the Service's lead biologist on pygmy rabbits – drafted a 90-Day finding that concluded

We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the pygmy rabbit as threatened or endangered under the [ESA]. We find the petition and additional information available in our files present substantial information indicating that listing the pygmy rabbit may be warranted. As a result of this finding, we are initiating a status review.

*AR 1259-96. See also AR 2511* (stating that Haworth is lead biologist). On March 22, 2005, Haworth prepared an internal briefing document also recommending issuance a positive 90-Day finding. *See AR 1246-47*.

In short, the record before the Court confirms that, as a matter of law, Plaintiffs' listing petition fully satisfied the low threshold required of listing petitions under the ESA. The petition certainly presented "substantial" information "indicating" that pygmy rabbit populations "may warrant" protection under the ESA, because of the many threats that have caused vast reductions in the pygmy rabbit's historic range and populations across much of the West. *See* 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b) (2)(i)-(iv). The Service was thus required by the ESA to accept the listing petition, and proceed with a status review.

### **III. THE SERVICE MISAPPLIED THE ESA'S LOW THRESHOLD FOR LISTING PETITIONS.**

Yet instead of heeding the ESA's requirements, the Service first delayed even responding to the listing petition; and then when it was forced to act by Plaintiffs' prior litigation, the Service overrode the recommendations of its own expert pygmy rabbit biologist and rejected the listing petition in its May 2005 decision. To do so, the 90-Day finding asserted only that the

information presented in the petition “may not” accurately reflect the historic and current range and population of the pygmy rabbit. *See AR 4-5*. In other words, the Service rejected the listing petition because, according to the Service, the petition failed to demonstrate conclusively that pygmy rabbits require immediate protection under the ESA. This decision must be reversed for two reasons.

First, by requiring the listing petition to prove conclusively that the pygmy rabbit warrants protection under the ESA, the Service erred as a matter of law in misapplying the low threshold required of listing petitions under the ESA. *See Pacific Coast Federation v. NMFS*, 265 F.3d 1028, 1034 (9th Cir. 2001) (Service decision must be reversed if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

Again, ESA Section 4(b)(3)(A) and the Service’s regulations require that the agency must accept a listing petition if a “reasonable person” would conclude that it presents information “indicating” that listing “may be warranted” under the five criteria of Section 4(a)(1). Demonstrating the fact that any “reasonable person” would conclude the listing petition here easily met this standard, the Service’s own pygmy rabbit biologist found the petition to be adequate and drafted a 90-Day finding to accept it. By overriding this recommendation, and imposing instead the requirement that the listing petition must demonstrate conclusively that the pygmy rabbit warrants immediate protection, the Service raised the threshold for listing petitions far higher than the ESA allows.

Indeed, many other courts have rejected the Service’s similar misapplication of the ESA’s requirements for listing petitions in other cases. For example, in *Center for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137 (D. Colo. 2004), the court reversed a negative 90-Day finding because the Service there required “conclusive evidence” that Yellowstone

cutthroat trout warranted protection under the ESA, very similar to its position here. More recently, in *Defenders of Wildlife v. Kempthorne*, CV-05-99-M-DWM (D. Mont. Sept. 29, 2006) (Docket No. 52), the court similarly reversed a 90-Day finding rejecting a listing petition, holding that “a standard that required conclusive evidence is inappropriate.” *See id.*, p. 15. *See also Moden v. U.S. Fish and Wildlife Service*, 281 F.Supp.2d (D. Or. 2003) (also reversing 90-Day finding).

Because the Service here has likewise misapplied the ESA by imposing a standard of scientific proof far beyond the statutory requirements, the Court should follow the holdings in *Morgenweck*, *Kempthorne*, and *Moden* and reverse the Service’s 90-Day finding.

Moreover, the Service cannot discard the scores of peer reviewed and other credible information supporting the listing petition by claiming only that this information “may not” accurately reflect the conditions of pygmy rabbit populations and habitat. *See AR 4-5*. The Service considers peer-reviewed scientific literature as among the “most reliable and credible sources” of information, and its own policy requires it to present countervailing information to cast doubt on reliable science. *See AR 2128* (memorandum from Service Director). *See also Defenders of Wildlife v. Kempthorne, supra, pp. 12-14, 17* (requiring the Service to present countervailing scientific information to dispute listing petition).

In the context of a 90-Day finding, the Service recently stated that it must “accept the petitioner's sources and characterizations of the information unless we have specific information to the contrary.” *See 69 Fed. Reg. 60,605,60,606 (2004)* (90-Day finding on a petition to delist plant).

In this case, the Service rejected the approximately 350 scientific references in the listing petition, but the Service failed to present **any** contrary science disputing the reliability or

credibility of the science in the listing petition – which, again, included peer reviewed publications, state and federal agency reports, and master’s theses and doctoral dissertations. *See AR 4-5*. The Service offers no legitimate reason for rejecting the undisputed scientific information presented in Plaintiffs’ listing petition. *See id.*

This court should thus follow the reasoning in *Kemphorne*, and find that the Service violated Section 4 when it rejected the scientific references supporting the listing petition without presenting any countervailing evidence.

#### **IV. THE SERVICE IMPROPERLY EVALUATED THREATS.**

In a related vein, the Service further violated ESA § 4(b)(3) when it rejected the listing petition based on the Service’s assertion that the petition failed to draw explicit conclusions between the threats to pygmy rabbit and the direct impact to rabbit habitat and populations. *See AR 5*.

Section 4 does not require a petition to draw such explicit conclusions at the 90-Day finding stage, however, and only requires that a listing petition include a “narrative justification” of any threats to the species. *See* 50 C.F.R. § 424.14(b)(2)(ii). *See also Kemphorne, supra, at pp. 14-16* (stating that a petition does not have to draw “explicit conclusions” between threats and direct impacts of wildlife habitat and populations).

Plaintiff’s listing petition spends 57 pages discussing the threats to pygmy rabbit across its historic and current range – at a state, county, and even watershed level – including wildfire, *see AR 1959-65*; invasion of exotic weeds, *see AR 1942-48*; recreational activities and residential development, *see AR 1973-75*; and livestock grazing and associated infrastructure, *see AR 1940-41, & 1948-59*. The listing petition also shows that hard rock mining, as well as other energy development, also threatens pygmy rabbit across its historic range. *See AR 1975-83*.

The listing petition cites several peer-reviewed publications, as well as state and federal agency documents acknowledging these threats. *See AR 1940-1988. See also, e.g., AR 9717-9802, 9732* (U.S. Forest Service report); *6345-6375, 6370 et seq.* (Idaho BLM Report); *9197-9242, 9232 et seq.* (Utah Division of Wildlife Resources report); *6195- 99* (peer-reviewed publication discussing threats from cheatgrass and other exotics); *7662-73, 7667* (University of Nevada report on rangewide threats). The Service has provided no countervailing information questioning the reliability or credibility of any of this information. *See AR 1-15.*

In other words, Plaintiffs' listing petition easily exceeded the requirement to present a "narrative justification" discussing the threats to pygmy rabbit populations and habitat across its historic range. *See 50 C.F.R. § 424.14(b)(2)(ii).* Accordingly, in rejecting Plaintiffs' listing petition, the Service has again violated the low threshold for ESA listing petitions; and this Court thus must reverse the May 2005 finding.

**V. THE SERVICE FAILED TO CONSIDER THE STATUS OF PYGMY RABBIT OVER A SIGNIFICANT PORTION OF ITS RANGE.**

In addition to these errors, the Service further ran afoul of ESA Section 4 in rejecting the listing petition, because it focused only on the pygmy rabbit's entire range and failed to consider whether the pygmy rabbit faces threats across a "significant portion of its range."

Again, the ESA requires that the Service "shall" list a species under the ESA if it is threatened or endangered "throughout all **or a significant portion of its range.**" 16 U.S.C. § 1532(6) & (20) (emphasis added). The Ninth Circuit has held that the Service thus violates the ESA when it only considers whether to list a species based on its status throughout its entire range, rather than also considering a species' status across a "significant portion of its range" in making listing determinations. *See Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9<sup>th</sup> Cir. 2001). *See also Center for Biological Diversity v. Lohn*, 296 F.Supp.2d 1223, 1242-3 (W.D.

Wash. 2003) (reversing listing decision because the Service failed to assess species status across “significant portion” of range).

As previously shown, the listing petition and Administrative Record here confirm that the current range and populations of pygmy rabbit are greatly reduced from the past, and indeed there are large areas of the pygmy rabbit’s historic range in Idaho, Utah, Nevada, Wyoming, Montana and Oregon where the rabbits have been extirpated and can no longer be found. *See supra*, pp. 8-13. Although this information was presented in Western Watersheds’ listing petition, *see AR 1868-1927*, the Service ignored these scientific reports, and never examined whether the portion of the pygmy rabbit’s historic range where it has been extirpated represents “a significant portion of its range” thus requiring listing under ESA Section 4. As the Ninth Circuit held in *Defenders*, this omission alone requires reversal.

In *Defenders*, conservation groups challenged the Service’s withdrawal of a proposed rule to protect the flat-tailed horned lizard under the ESA, because it considered only the status of the species across its entire range, and failed to consider whether the lizard was endangered or threatened across “significant portions of its range.” The Ninth Circuit agreed, stating:

We conclude, consistently with the Secretary’s historical practice, that a species can be extinct “throughout . . . a significant portion of its range” if there are major geographical areas in which it is no longer viable but once was. . . . But where, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a ‘significant portion of its range.’

*Defenders*, 258 F.3d at 1145.

*Defenders* controls disposition of this case. Like *Defenders*, the Service here failed to examine whether pygmy rabbit was threatened or endangered across a “significant portion of its range.” Because large areas of historically occupied habitat no longer support pygmy rabbit

populations, as previously demonstrated, the Service was required to consider this factor – and at least explain its position – but it did neither. *See Defenders*, 258 F.3d at 1145.

Accordingly, the Service again has violated the ESA and acted in an arbitrary and capricious manner, thus requiring this Court to reverse the May 2005 decision.

## **VI. THE SERVICE UNLAWFULLY SOLICITED OPINIONS FROM THIRD PARTIES.**

Finally, in yet another violation of the ESA's listing provisions that requires reversal here, the Service wrongly solicited advice on the listing petition from hand-selected third parties, and then rejected Plaintiffs' listing petition based on the information submitted by these parties, without allowing the public and Western Watersheds to respond to these comments.

In preparing a 90-Day finding on listing petitions, the ESA expressly limits the Service to reviewing the information presented in the listing petition, as well as other information in its files. *See* 16 U.S.C. § 1533(b)(3)(A). The courts have repeatedly recognized that the Service violates the ESA if it exceeds this statutory limitation by soliciting comments from third parties, and relying on the input of third parties to reject listing petitions, as it did here.

For example, in a recent decision from the U.S. District Court for the District of Columbia, conservation groups sued over the Service's negative 90-Day finding rejecting their petition to list the Colorado River cutthroat trout. *See Colorado River Cutthroat Trout v. Kempthorne*, \_\_\_ F. Supp. 2d \_\_\_, 2006 WL 2572635 (D.D.C. Sept. 7, 2006). Plaintiffs there asserted that the Service violated the ESA when it solicited information from various state and federal wildlife regulatory agencies about the listing petition, and then rejected the petition without full public notice and comment. The Court agreed, holding that the ESA "does not authorize the [Service] to weigh the information provided in the petition against information selectively solicited from third parties." *See id.*, at \*5. The Court reasoned that the Service

“cannot simply bypass the initial 90-day review and proceed to what is effectively a 12-month status review, but without the required notice and opportunity for public comment.” *Id.* See also *Morgenweck*, 351 F. Supp. 2d at 1143 (similarly holding that “petitions that are meritorious on their face should not be subject to refutation by information and views provided by selected third-parties solicited by [the Service]”).

In this case, like in *Colorado River Cutthroat Trout* and *Morgenweck*, the Service solicited information and advice from various state wildlife agencies, as well as tribal governments. See AR 1598-1611, & 1552-97. Several of these third parties responded with detailed information, which the Service relied upon in making its 90-Day finding rejecting the listing petition. See, e.g., AR 1315-23, 1305-07 & 1297-1301. Yet Western Watersheds and other the petitioners were given no notice of these actions, nor any opportunity to respond to the information submitted by the third parties.

As in *Colorado River Cutthroat Trout*, the Service’s actions here improperly allowed other parties to submit information that the agency relied upon to reject Plaintiffs’ listing petition, yet without allowing the public comment or conducting the full status review required by the ESA. See 16 U.S.C. § 1533(b)(3)(B). Western Watersheds was thus deprived of its right to respond to the information, prejudicing its interests. Instead of rejecting the listing petition based on the input of these third parties, the Service should have followed the path required of it under ESA, by **accepting** the listing petition and then conducting a status review and taking public comment. *Id.*; *Morgenweck*, 351 F.Supp.2d at 1143 (“[i]nvitations by [the Service] to others to respond to the Petition should await the 12-month status review”). In failing to follow the correct statutory path, the Service thus again violated the ESA, requiring that the Court reverse the May 2005 decision.

**CONCLUSION**

For the foregoing reasons, this Court should reverse and remand the Service's May 2005 decision rejecting Plaintiffs' listing petition for the pygmy rabbit; find that the listing petition satisfies the requirements of ESA Section 4(b)(3); and order the Service to proceed promptly with the ESA listing process.

Dated this 23<sup>rd</sup> day of October 2006.

Respectfully Submitted,

/s/

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