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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)
Plaintiffs,)**

Case No. 06-CV-00127

vs.)

COMPLAINT

**GALE NORTON, Secretary of the)
Department of the Interior, and the)
UNITED STATES FISH AND)
WILDLIFE SERVICE, an agency of the)
United States,)
Defendants.)**

NATURE OF ACTION

1. This case represents the second round of litigation before this Court over violations of the Endangered Species Act (“ESA”) by Defendants U.S. Fish and Wildlife Service

et al. (“Service”), with respect to Plaintiffs’ efforts to protect the Pygmy rabbit (*Brachylagus idahoensis*) as an endangered or threatened species under the ESA. *See Western Watersheds Project et al. v. U.S. Fish and Wildlife Service, CIV-04-440-S-BLW (D. Idaho).*

2. In that prior litigation, Plaintiffs sued the Service over its failure even to respond to Plaintiffs’ Listing Petition in accordance with the procedural requirements of the ESA. In settlement of that litigation, the Service agreed to issue an initial “90-Day Finding,” determining whether it would proceed with the ESA listing process in response to Plaintiffs’ Listing Petition for the Pygmy Rabbit.

3. Now the Service has issued the required 90-Day Finding, but has again violated the ESA (and the Administrative Procedure Act) in determining not to proceed with the listing process for the Pygmy rabbit. *See 70 Fed. Reg. 29253 (May 20, 2005).* The 90-Day Finding violates the ESA and APA in multiple respects, including by arbitrarily rejecting the detailed science set forth in Plaintiffs’ Listing Petition identifying the imminent need for protecting the Pygmy rabbit under the ESA.

4. In fact, the Service has ignored the conclusions of its own lead biologist for Pygmy rabbit, who concluded that the Plaintiffs’ Listing Petition presented substantial information that Pygmy rabbit may be threatened or endangered under the ESA, and further recommended that the Service conduct a comprehensive status review. The Service’s unlawful actions here have allowed it to evade conducting a comprehensive status review of the Pygmy rabbit, thereby leaving the Pygmy rabbit without any protection under the ESA despite its imperiled status.

5. Accordingly, Plaintiffs seek judicial relief reversing and remanding the Service’s 90-Day Finding as arbitrary, capricious and contrary to law; and directing the Service to proceed

with the ESA listing process for Pygmy rabbit to ensure that this species receives the protections required by the ESA.

JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) because this action arises under the laws of the United States, including the ESA, *16 U.S.C. §§ 1531 et seq.*; the Administrative Procedure Act (“APA”), *5 U.S.C. §§ 701 et seq.*; the Declaratory Judgment Act, *28 U.S.C. §§ 2201 et seq.*; and the Equal Access to Justice Act (“EAJA”), *28 U.S.C. §§ 2412 et seq.*

7. Plaintiffs have provided the Service with sixty days written notice of the violations alleged herein, as required by the citizen suit provision of the ESA, *16 U.S.C. § 1540(g)*.

8. Venue properly lies in this judicial district under *16 U.S.C. § 1540(g)(3)(A)* and *28 U.S.C. § 1391*, because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district; Plaintiff Western Watersheds Project resides in this district; and Defendant U.S. Fish and Wildlife Service is located in this judicial district.

9. The federal government has waived sovereign immunity in this action pursuant to the ESA, *16 U.S.C. § 1540(g)*, and the APA, *5 U.S.C. § 702*.

PARTIES

10. Plaintiff WESTERN WATERSHEDS PROJECT (“WWP”) is a non-profit membership organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP is based in Hailey, Idaho and has over 1400 members, including many members who reside in Idaho, and members who live or recreate within the habitat of the Pygmy rabbit. WWP, as an organization and on behalf of its members, is concerned with and active in seeking to protect and improve the wildlife, riparian areas, water

quality, fisheries, and other natural resources and ecological values of watersheds throughout the West.

11. Plaintiff BIODIVERSITY CONSERVATION ALLIANCE is a Laramie, Wyoming-based nonprofit conservation organization dedicated to protecting and restoring native species of plants and animals in the Rocky Mountain Region. Biodiversity Conservation Alliance staff and members work to protect Wyoming's high desert, sage-steppe habitats upon which the Pygmy rabbit depends.

11. Plaintiff CENTER FOR NATIVE ECOSYSTEMS ("CNE") is a non-profit advocacy organization based in Denver, Colorado dedicated to conserving and recovering native and naturally functioning ecosystems in the Greater Southern Rockies region, including the sage-steppe habitat upon which the Pygmy rabbit depends. CNE values the clean water, fresh air, healthy communities, sources of food and medicine, and recreational opportunities provided by native biological diversity. CNE uses the best available science to forward its mission through participation in administrative processes, legal action, public outreach and organizing, and education. CNE and its members consider sage-steppe ecosystems a conservation priority.

12. Plaintiff OREGON NATURAL DESERT ASSOCIATION ("ONDA") is an Oregon non-profit public interest organization of approximately 1400 members. It is headquartered in Bend, Oregon and also has offices in Portland, Oregon. ONDA's mission is to protect, defend, and restore forever, the health of Oregon's native deserts. ONDA actively participates in Department of the Interior proceedings and decisions concerning the management of public lands throughout Oregon.

13. Plaintiff SAGEBRUSH SEA CAMPAIGN is a network of conservation, sport, recreation and other organizations that focuses public attention and conservation resources on

protecting and restoring the vast sagebrush-steppe landscape, including habitat for the Pygmy rabbit. The campaign participates in public planning processes, advocates for natural resource protection, and uses education, research, legislation and litigation to conserve and restore the Sagebrush Sea for present and future generations.

14. Plaintiffs' members and staff live and/or recreate throughout the Great Basin ecosystem, including within the range of the Pygmy rabbit. Plaintiffs use and enjoy, on a continuing and ongoing basis, the Great Basin ecosystem and the habitat of the Pygmy rabbit. They derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from Pygmy rabbit's existence in the Great Basin ecosystem on a regular and continuing basis and intend to do so frequently in the immediate future.

15. Plaintiffs' staff and members observe and study the Pygmy rabbit and the Great Basin ecosystem, and derive recreational, aesthetic, scientific, inspirational, educational, and other benefits from these activities and have an interest in preserving the possibility of such activities in the future. An integral aspect of their use and enjoyment of the Pygmy rabbit is the expectation and knowledge that the species is in its native habitat. For this reason, Plaintiffs' use and enjoyment of the Pygmy rabbit is entirely dependent on the continued existence of healthy, sustainable populations.

16. The above-described aesthetic, conservational, recreational, educational, and wildlife preservation interests have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by Defendants' violations of law as alleged herein. These are actual, concrete injuries to Plaintiffs, caused by Defendants' failure to comply with the ESA and APA and implementing regulations. The relief sought herein would redress these injuries.

17. Defendant GALE NORTON is the Secretary of the Interior, and as such is the federal official ultimately vested with responsibility for properly carrying out the ESA and its implementing regulations with respect to terrestrial species. Defendant Norton is sued solely in her official capacity.

18. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States within the Department of Interior, and is the federal agency to which the Secretary of the Interior has delegated the responsibility of implementing the ESA and its regulations with respect to terrestrial species, including making determinations about listing of species under ESA Section 4. The Service issued the arbitrary 90-Day Finding in this case

THE ESA STATUTORY FRAMEWORK

19. Congress enacted the ESA “to provide a program for the conservation of . . . endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” *16 U.S.C. § 1531(b)*. As the first step in the protection of these species, Section 4 of the ESA, *16 U.S.C. § 1533*, requires the Secretary to list species as endangered or threatened when they meet the statutory listing criteria.

20. The Act defines species to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id. § 1532(16)*. A species is “endangered” when it “is in danger of extinction throughout all or a significant portion of its range.” *Id. § 1532(6)*. A species is “threatened” when it is likely to become endangered within the foreseeable future. *Id. § 1532(20)*.

21. The Secretaries of Commerce (for most marine species) and Interior (for other species) are charged with listing species as threatened or endangered based “solely on the basis of the best scientific and commercial data available . . . ,” *id.* § 1533(b)(1)(A), and whenever listing is warranted based on any one of the following five listing factors:

- (A) the present or threatened destruction, modification, curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1). The Secretary of Interior has delegated her responsibilities under the ESA to U.S. Fish and Wildlife Service. 50 C.F.R. § 17.2(a).

22. The ESA establishes a process for citizens to petition for the protection of species through listing as either endangered or threatened. *See* 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a). The ESA further mandates that, upon receiving a citizen listing petition, the Service must make a finding as to whether the petition presents “substantial scientific or commercial information indicating that the listing may be warranted.” 16 U.S.C. § 1533(b)(3)(A). This finding is to be made within 90 days of receipt of the listing petition, to the maximum extent practicable. *Id.* Hence, this initial finding in response to a listing petition is typically called a “90-Day Finding.”

23. If the Service makes a 90-Day Finding concluding that a listing petition presents such information, it then must commence a review of the status of the species, which it typically

does by convening a biological review team comprised of scientific experts in pertinent disciplines. *Id.*

24. The ESA further mandates that, no later than 12 months after receiving the petition, the Service must make a finding that the proposed listing either: (i) is warranted; (ii) is not warranted; or (iii) is warranted but precluded at that time. *16 U.S.C. § 1533(b)(3)(B)*. A finding that a listing is not warranted is subject to judicial review. *Id. § 1533(b)(3)(C)(ii)*.

25. If the Service finds that listing is warranted, it must publish a proposed listing regulation in the Federal Register. *Id. § 1533(b)(3)(B)(ii)*. Within one year of a warranted finding (or after a six-month extension), the Secretary must either publish in the Federal Register a final regulation listing the species or withdrawing the proposed listing. *Id. § 1533(b)(6)(A)*.

Designation of critical habitat for the species must accompany or soon follow a final listing regulation. *Id. § 1533(b)(6)(C)*.

26. Once a species is listed, various safeguards apply to prevent activities that will cause harm to members of the species or that will jeopardize the survival and recovery of the species in its native ecosystem. *See id. §§ 1536, 1538*. The ESA's ultimate goal is recovery of listed species to the point where they no longer need ESA protection. *Id. §§ 1531(b)-(c); 1532(3)*.

STATEMENT OF FACTS

Pygmy Rabbit and its Habitat

27. 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. Weighing less than one pound, it varies in length from approximately nine inches up to 11.5 inches.

28. The Pygmy rabbit is one of only two North American rabbits that dig its own burrows. Pygmy rabbit burrows are typically found in relatively deep, loose soils, although Pygmy rabbit are known to make use of burrows abandoned by other species as well (including yellow-bellied marmot or badger). Pygmy rabbit burrows are relatively simple and shallow, usually no longer than 2 meters long and less than one meter deep, and the rabbits use burrows as protection from predators and inclement weather.

29. Pygmy rabbits are strict sagebrush obligates, inhabiting sage-steppe dominated habitats in the Intermountain Region and Great Basin. Pygmy rabbits 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. The winter diet of the Pygmy rabbit is composed of 99 percent sagebrush, which is unique among hares and rabbits. During the spring and summer months, Pygmy rabbit diet consists of approximately 51 percent sagebrush, 39 percent native bunchgrasses, and 10 percent forbs.

30. Pygmy rabbit was a “once common” feature of the Great Basin and Intermountain Region, coincident with the distribution of sagebrush. Pygmy rabbit range historically spanned over 100 million acres of the American West 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.

31. Historically, Pygmy rabbits were not continuously distributed across their range, and, instead, were generally found in areas within their broader distribution where sagebrush cover was sufficiently tall and dense, and where soils were sufficiently deep and loose to allow burrowing.

32. Current Pygmy rabbit populations occupy a geographic range estimated at less than 10 percent of the known historic range, and perhaps as little as 5 percent (estimated at or less than 7 or 8 million acres).

33. In addition to shrinking habitat, Pygmy rabbit populations have similarly contracted. State and federal agencies have recently conducted surveys of historic Pygmy rabbit sites, and many of these historically-occupied sites are currently void of rabbits. For example, in Oregon, researchers found rabbits at only 4 of 305 historically occupied sites. In fact, BLM researchers spent 114 days surveying areas across eastern Oregon, and located only 5 rabbits.

34. This situation is the same across the historic range of the rabbit, where researchers have located rabbits in two of 200 historic sites in Nevada, in 30 of 300 historic sites in Idaho, and in 50 of 100 sites in Montana.

35. Population cycles are not known in Pygmy rabbit populations, although local, rapid declines have occurred in the recent past. After a population declines, Pygmy rabbit populations may not have the same capacity for rapid increase in numbers as other hares and rabbits due to the close association of Pygmy rabbit populations with specific components of the sagebrush ecosystem.

36. Several factors have contributed to the Pygmy rabbit's slide toward extinction, including, but not limited to: (1) degradation of sage-steppe habitats from cattle grazing and associated rangeland developments (e.g., fences, pipelines, troughs, etc.); (2) agency proscribed and wild land fire; (3) sagebrush eradication efforts; and (4) extensive agricultural activities.

37. The Service has recognized the imperiled status of the Pygmy rabbit in the past. In 1991, the Service added the Pygmy rabbit to its list of candidate species, and assigned it a Category 2 designation. Under this designation, the Service acknowledged that it had sufficient

information indicating that a proposal to protect the Pygmy rabbit as a threatened or endangered species may be appropriate, but it had yet to issue a proposed rule.

38. In 1996, the Service eliminated the Category 2 designation, and the Pygmy rabbit was removed from the candidate species list.

39. In November 2001, the Service issued an emergency rule protecting the Columbia Basin Distinct Population Segment (“DPS”) of the Pygmy rabbit as an endangered species. The Service sought immediate, emergency protection of the Columbia Basin DPS based, in part, on the fact that this population has been reduced to only 50 animals. In this rule, the Service also acknowledged concerns over the declining populations of Pygmy rabbit across its historic range, and planned a status review of the Pygmy rabbit range-wide to determine if it requires protection under the Endangered Species Act.

40. In March 2003, the Service issued a new, final rule protecting only the Columbia Basin DPS as endangered. To date, the Service has never conducted a range wide status review of Pygmy rabbit populations, despite acknowledging the need for a comprehensive review.

41. Pygmy rabbit is classified as a sensitive species in California, Montana, Nevada, Oregon, Utah, Washington and Wyoming – i.e., across its entire historic range.

Plaintiffs’ Efforts to Protect Pygmy Rabbit Under the ESA

42. On April 21, 2003, Plaintiffs and others submitted to the Service a petition requesting that the Service list the Pygmy rabbit populations of the Intermountain and Great Basin Regions, outside the listed Columbia River Distinct Population Segment, as an endangered or threatened species, and to designate a critical habitat concurrent with its listing.

43. The Plaintiffs’ Listing Petition contained 216 pages of scientifically-based information about the Pygmy rabbit, along with explanatory attachments. The petition detailed

the reasons for listing Pygmy rabbit under the ESA's listing factors; described past and present numbers and distribution of the Pygmy rabbit; articulated the extensive threats to the species in its present range; and described the current status of the species over a significant portion of its range. The Plaintiffs' Listing Petition presented the best scientific and commercial data available, demonstrating that the Pygmy rabbit may be endangered or threatened, and cited over 400 scientific articles, bibliographic references, and other documentation reinforcing the petition's information.

44. The Service failed to respond to Plaintiffs' Listing Petition within the timelines required by the ESA. Accordingly, on August 31, 2004, Plaintiffs sued the Service over such violations of the ESA. *See Western Watersheds Project et al. v. United States Fish and Wildlife Service, CIV 04-440-S-BLW (D. Idaho).*

45. On February 11, 2005, Plaintiffs and the Service reached a settlement requiring the Service to submit for publication in the Federal Register a 90-day Finding on Plaintiffs' Listing Petition by May 16, 2005, and, if appropriate, a 12-Month Finding on February 15, 2006. *Id. (Docket No. 20).* This Court approved the Stipulated Settlement Agreement on March 2, 2005.

46. Pursuant to the Settlement Agreement, on May 20, 2005, the Service published a 90-Day Finding which concluded that Plaintiffs' Listing Petition failed to provide substantial scientific or commercial information to demonstrate that listing Pygmy rabbit under the ESA may be warranted. *See 70 Fed. Reg. 29253 (May 20, 2005).*

47. More specifically, the Service concluded that the petition failed to present sufficient scientific evidence establishing a "significant reduction in the range" of the Pygmy rabbit. In making this assertion, however, the Service ignored the best available science

presented in the Plaintiffs' Listing Petition – including over 57 pages detailing the current and historic range of the rabbit on a state, county, and even watershed level.

48. The Service rejected this information on grounds that it “may not accurately reflect” the historic and current distribution of rabbits “because [the information] was not collected in a systematic, comprehensive manner.” The Service, however, failed to cite any scientific or commercial information supporting its position, and, further, failed to identify any competing scientific information questioning the validity of the scientific information in the Listing Petition, which included peer-reviewed publications, as well as the Service's own publications, and publications from the U.S. Bureau of Land Management, the Washington State Department of Fish and Wildlife, other state and federal agencies.

49. Importantly, in establishing the historic and current range of the Pygmy rabbit, Plaintiffs' Listing Petition relied upon information and maps created by the Service's own biologists. In its 90-Day Finding, however, the Service rejected its own maps and scientific information – the exact information it relied upon in issuing the final rule protecting the Columbia Basin DPS back in 2003 – by claiming that these maps were now somehow incapable of establishing the historic range. The Service rejected these maps even after its own biologists explained that the Service had, in fact, “created these maps.”

50. The Service then concluded that the petition failed to present enough evidence demonstrating a “significant” reduction in the range of the Pygmy rabbit. Again, the Service simply ignored the published scientific documentation presented in the petition – this time published by the U.S. Bureau of Land Management and other state and federal agencies – indicating that the current known range of Pygmy rabbit is only a fraction (less than 10%) of its historic range.

51. Similarly, the Service also asserted that the evidence in the petition demonstrating the decline in populations and habitat of the Pygmy rabbit did not meet the threshold of “substantial information” required under the ESA. Although the Service acknowledged that the petition presented 57 pages of “generaliz[ed]” and “specific” information demonstrating the fragmentation and loss of habitat and populations due to agriculture, conversion of sagebrush habitats, livestock grazing, invasive plants, fire, urban and suburban development, mining, energy development, power lines and associated energy infrastructure, military activities, and recreational activities, the Service claimed that the petition failed to demonstrate that these activities are destroying or modifying Pygmy rabbit habitat over all or a significant portion of its range.

52. Here again, the Service’s position flies in the face of the conclusion of its own lead biologist, who concluded that “[h]abitat fragmentation exists over large geographic areas over significant portions of the species range.” In reaching her conclusion, the Service’s biologist cited many peer-reviewed scientific publications identified in the Plaintiffs’ Listing Petition. The Service never explained its about-face here, and also failed to cite any scientific support for its newfound position.

53. In its 90-Day Finding, the Service not only ignored (or selectively discounted) much of the scientific data and information provided in Plaintiffs’ Listing Petition, but it also elicited comments and feedback from hand-selected third-parties who supported its finding not to proceed with a status review of the petitioned population, without even giving Plaintiffs any notice or opportunity to respond to such information.

54. As a result of the Service’s 90-Day Finding, Defendants are not now pursuing listing proceedings – including any status review – for the Pygmy rabbit, nor acting to protect it

from further decline and possible extinction, as required by the Endangered Species Act. Accordingly, Plaintiffs seek relief from this Court to correct these violations of law, and to ensure that the Pygmy rabbit is protected from further harm under the provisions of the ESA.

CLAIM FOR RELIEF:
90-DAY FINDING VIOLATES ESA AND APA

55. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

56. This Court has jurisdiction to judicially review the Service's 90-Day Finding rejecting Plaintiffs' Listing Petition for the Pygmy rabbit pursuant to the ESA and/or the APA.

57. As alleged above, the Service's 90-Day Finding rejecting Plaintiffs' Listing Petition for the Pygmy rabbit violates the mandatory requirements of the Endangered Species and is arbitrary, capricious, and contrary to law in many respects, including without limitation the following:

(a) It is not based solely on the best scientific and commercial data available, which shows that Pygmy rabbit merits protection as a threatened or endangered species under the ESA, and disregards the Service's own scientific information and prior analysis;

(b) It violates the express language and requirements of the ESA and implementing regulations, including by requiring Plaintiffs to unequivocally demonstrate that protecting Pygmy rabbit is required under the ESA, when the ESA imposes a far lesser standard for the Service to proceed with the listing process in response to Plaintiffs' Listing Petition; and

(c) It unlawfully expands the scope of review of a listing petition during a 90-day Finding, and selectively elicited comments and feedback from hand-selected outside "experts" on the Plaintiffs' Listing Petition, without permitting the public or Plaintiffs to respond to these comments.

58. Plaintiffs have been substantially harmed by the Service's unlawful action and failure to protect Pygmy rabbit under the ESA, as alleged hereinabove.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

A. Order, declare, and adjudge that Defendants have violated the Endangered Species Act and/or the Administrative Procedures Act in issuing the 90-Day Finding, and reverse and remand same;

B. In light of the Service's extensive delays and repeated violations of law in responding to Plaintiffs' Listing Petition, order, declare and adjudge that Plaintiffs' Listing Petition presents substantial scientific and commercial information indicating that protecting Pygmy rabbit under the ESA may be warranted; and direct the Service to conduct promptly a full status review in accordance with the ESA listing procedures and requirements, to be completed within a reasonable time after the Court's order;

C. Enter such preliminary or permanent injunctive relief as Plaintiffs may hereafter seek from the Court;

D. Award Plaintiffs their costs of litigation, including reasonable expert witness fees and attorneys fees, pursuant to the Endangered Species Act, the Equal Access to Justice Act, and/or any other applicable law; and

E. Grant Plaintiffs such other relief as the Court deems just and proper in service of the goals of the Endangered Species Act to protect the Pygmy rabbit and the public interest.

Dated this 28th day of March 2006.

Respectfully Submitted,

/s/

Todd C. Tucci
Laird J. Lucas

Attorneys for Plaintiffs