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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT, )  
BIODIVERSITY CONSERVATION )  
ALLIANCE, CENTER FOR NATIVE )  
ECOSYSTEMS, and OREGON NATURAL )  
DESERT ASSOCIATION )

Plaintiffs, )

vs. )

UNITED STATES FISH AND WILDLIFE )  
SERVICE, an agency of the United States )

Defendant. )

Case No. \_\_\_\_\_

**COMPLAINT**

**INTRODUCTION**

1. This action challenges the failure of the Defendant, U.S. Fish and Wildlife Service (“FWS”), to make mandatory 90-day and 12-month findings required under the Endangered Species Act (“ESA”) in response to Plaintiffs’ Petition to List the Pygmy Rabbit (*Brachylagus idahoensis*) as an endangered or threatened species (“Listing Petition”).

2. FWS has abrogated its mandatory statutory duty under the ESA to issue 90-day and 12-month findings on Plaintiffs’ Listing Petition filed on April 21, 2003; in

fact, FWS is now 13 months overdue in issuing a 90-day finding on the petition, and four months overdue in issuing a 12-month finding on Plaintiffs' Listing Petition.

3. Plaintiffs thus seek judicial relief holding that FWS has violated the ESA by its failure to issue mandatory 90-day and 12-month findings on Plaintiffs' Listing Petition, and requiring FWS to promptly act upon the Listing Petition as required by the ESA, 16 U.S.C. § 1531, et seq.

### **JURISDICTION AND VENUE**

4. Jurisdiction is proper in this Court under 28 U.S.C. §1331 (federal question), as this action arises under the laws of the United States, including the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(ESA citizen suit provision).

5. On April 28, 2004, Plaintiffs provided FWS with sixty days written notice of the violations alleged herein, pursuant to 16 U.S.C. §1540(g).

6. Plaintiffs have demanded that FWS correct the violations of the ESA alleged herein, but FWS has failed to comply with these demands and continues to do so. An actual controversy therefore exists between parties within the meaning of 28 U.S.C. § 2201(a) (declaratory judgment).

7. Venue is appropriate in this Court by virtue 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, and the Snake River Office of FWS, having authority over the actions or inactions alleged herein, is located within this judicial district.

8. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g).

## PARTIES

9. 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 has over 1400 members, including members throughout the Interior West. 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.

10. 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 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. Members of the Plaintiff organizations live and/or recreate throughout the sage-steppe ecosystem, including within the range of the Pygmy rabbit. Plaintiffs’ members and staff use and enjoy, on a continuing and ongoing basis, the sage-steppe ecosystem and the habitat of the Pygmy rabbit. They derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from the existence of the Pygmy rabbit in the sage-steppe ecosystem on a regular and continuing basis and intend to do so frequently in the immediate future.

14. Plaintiffs’ members and staff observe and study the Pygmy rabbit and the sage-steppe 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 Plaintiffs’ use and enjoyment of the Pygmy rabbit is the expectation and knowledge that 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 Pygmy rabbit.

15. The above-described aesthetic, conservational, recreational, educational, and wildlife preservation interests of Plaintiffs and their members and staff have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and

irreparably injured by FWS's violations of law and failure to list Pygmy rabbit as threatened or endangered under the ESA. These are actual, concrete injuries to Plaintiffs and their members and staff, caused by FWS's violations of the ESA and its implementing regulations, and the Administrative Procedure Act. The relief sought herein would redress these injuries. Plaintiffs have no adequate remedy at law.

16. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, 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.

#### **STATEMENT OF FACTS**

17. 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 around one pound, it can fit into the palm of a hand. It is one of only two North American rabbits that dig its own burrows. Pygmy rabbits are a strict sagebrush obligate, inhabiting sage-steppe dominated habitats in the Intermountain Region and Great Basin.

18. Pygmy rabbit was a "once common" feature of the Great Basin and Intermountain Region, coincident with the distribution of sagebrush. The Pygmy rabbit's 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; their range included portions of California, Oregon, Idaho, Nevada, Utah, Montana, Washington, and Wyoming. Current populations occupy a geographic range estimated as

well less than 10 % of the known historic range, and perhaps as little as 5% (estimated at or less than 7 or 8 million acres).

19. Despite historical prevalence in the Intermountain and Great Basin ecosystems, by 1990 all known populations of Pygmy rabbit were plummeting.

20. 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 (ex. fences, pipelines, troughs, etc.), 2) agency proscribed and wild land fire, and 3) extensive agricultural activities.

21. FWS has recognized the imperiled status of the Pygmy rabbit in the past. In 2001, FWS issued an emergency rule listing the Columbia Basin Distinct Population Segment of the Pygmy rabbit as an endangered species.

22. A "distinct population segment" or "DPS" is a population segment of a given species that is both discrete and significant relative to the remainder of the species to which it belongs.

23. On March 5, 2003, FWS listed the Columbia River Pygmy Rabbit DPS as endangered, after the Emergency listing period had lapsed.

#### **Plaintiffs' Petition to List Pygmy Rabbit Under ESA**

24. The Endangered Species Act was enacted 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, provides standards and procedures for the Secretary to list species as endangered or threatened.

25. Any interested person can submit a petition to FWS to begin the process to list a species under the ESA. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

26. On April 21, 2003, Plaintiffs and others submitted a petition to FWS requesting that the FWS 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.

27. Plaintiffs' Listing Petition identified the imminent need for this measure, detailing past and present numbers and distributions of the Pygmy rabbit, the real and extensive threats to the species and its habitat, and the current and declining status of the species. The Plaintiffs' Listing Petition included comprehensive scientific data, bibliographic references, and other documentation to reinforce the petition's information.

28. Pursuant to ESA Section 4(b)(3) and its implementing regulations, FWS must respond to a petition to list a species as threatened or endangered by:

(A) Making an initial determination, within ninety (90) days of receipt of a listing petition "to the maximum practicable," of whether the petition presents substantial information demonstrating that listing of the petitioned species is warranted (typically called "90-day finding"), 16 U.S.C. § 1533(b)(3)(A); and

(B) Making a finding within twelve (12) months of receipt of a listing petition as to whether the petitioned action is warranted, not warranted, or "warranted but precluded," pursuant to 16 U.S.C. § 1533(b)(3)(B) (typically called the "12-month finding").

29. FWS was required to make its 90-day determination by July 20, 2003.

30. FWS was required to make its 12-month finding by April 21, 2004.

31. To date, FWS has failed to respond to Plaintiffs' Listing Petition.

32. On April 28, 2004, pursuant to the citizen-suit provision of the ESA, Plaintiffs provided FWS with a written notice that FWS was in violation of the ESA and its implementing regulations by failing to issue a 90-day finding and a 12-month finding.

33. The 90-day and 12-month findings required by the ESA and its implementing regulations are now more than 13 and 4 months overdue, respectively. Absent the legal and habitat protections requested by Plaintiffs in the Listing Petition, the Pygmy rabbit extinction spiral will continue unabated. Consequently, Plaintiffs are injured and their injuries are continuing.

### **CLAIMS FOR RELIEF**

#### **FIRST CLAIM FOR RELIEF: FAILURE TO MAKE A 90-DAY FINDING**

34. Plaintiffs reallege and incorporate by reference the allegations in all preceding paragraphs.

35. The U.S. Fish and Wildlife Service is in violation of Section 4(b)(3)(A) of the ESA, 16 U.S.C. §1533(b)(3)(A), and its implementing regulations, by failing to issue a 90-day finding on Plaintiffs' Listing Petition, and by failing to demonstrate that making such a finding within 90 days was impracticable.

WHEREFORE, Plaintiffs pray for relief as set forth below.

#### **SECOND CLAIM FOR RELIEF: FAILURE TO MAKE A 12-MONTH FINDING**

36. Plaintiffs reallege and incorporate by reference the allegations in all preceding paragraphs.

37. The U.S. Fish and Wildlife Service is in violation of Section 4(b)(3)(A) of the ESA, 16 U.S.C. §1533, and its implementing regulations, 50 C.F.R. § 2.1(b)(3), by failing to perform their mandatory act or duty of issuing a 12-month finding on the Plaintiffs' Listing Petition and to designate a critical habitat concurrent with its listing. WHEREFORE, Plaintiffs pray for relief as set forth below.

**PRAYER FOR RELIEF**

Plaintiffs respectfully request that the Court grant the following relief:

1. Order, declare, and adjudge that Defendant has violated the Endangered Species Act in failing to make a 90-day finding in response to Plaintiffs' Listing Petition;
2. Order, declare, and adjudge that Defendant has separately violated the Endangered Species Act in failing to make a 12-month finding in response to Plaintiffs' Listing Petition;
3. Issue a preliminary and permanent injunction, order of mandamus, or other similar judicial relief requiring Defendant to issue a 90-day finding on Plaintiffs' Listing Petition within 30 days of the court order. Further, if the 90-day finding concludes that the Petition presents substantial information demonstrating that the listing of the Pygmy Rabbit populations of the Intermountain and Great Basin Regions as an endangered or threatened species and the designation of a critical habitat concurrent with its listing may be warranted, require Defendant to issue a 12-month finding on Plaintiffs' Listing Petition within 30 days thereafter, and promptly publish such finding in the Federal Register.
4. Award Plaintiffs their costs of litigation, including reasonable expert witness fees and attorneys fees, pursuant to the Endangered Species Act, Equal Access to Justice Act, and/or any other applicable law; and

5. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated this \_\_\_ day of August 2004.

Respectfully submitted,

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Todd C. Tucci  
Attorney for Plaintiffs