

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

WILDEARTH GUARDIANS,

Plaintiff,

v.

KEN SALAZAR, in his official capacity as
United States Secretary of the Interior,

Defendant.

PETITION FOR REVIEW OF AGENCY ACTION¹

INTRODUCTION

1. Plaintiff, WildEarth Guardians (“Guardians”) brings this action against Defendant, Ken Salazar, United States Secretary of the Interior (“Secretary”) in his official capacity. Guardians challenges the Secretary’s November 9, 2009, determination that the Lesser Prairie-Chicken, *Tympanuchus pallidicinctus*, warrants listing under the Endangered Species Act (“ESA”), but that the immediate proposal and timely promulgation of a final rule listing the species “is precluded by pending proposals” to determine whether any higher priority species is an endangered or threatened species and that the Secretary is making “expeditious progress” in adding and removing species from

¹ In keeping with Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1579-80 (10th Cir. 1994) this initial pleading is captioned as a Petition for Review of Agency Action instead of as a Complaint for Declaratory and Injunctive Relief.

the endangered or threatened species lists. See 16 U.S.C. § 1533(b)(3)(B)(iii). The Secretary's determination, known as a "warranted, but precluded" finding, is published at 74 Fed. Reg. 57804, 57827 (November 9, 2009). Guardians alleges that the Secretary's warranted, but precluded finding for the Lesser Prairie-Chicken violates the ESA and is therefore arbitrary, capricious, and contrary to law within the meaning of the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701-706. Guardians seeks a declaratory judgment to this effect, and an injunction reversing and remanding the Secretary's decision.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (U.S. as a defendant), 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief), 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision), 5 U.S.C. §§ 701-706 (APA), and 28 U.S.C. § 2412 *et seq.* (Equal Access to Justice Act).

3. This Court has authority to grant Guardians' requested relief pursuant to 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (APA). Guardians challenges a final agency action and has exhausted all available administrative remedies.

4. More than 60 days ago, by letter dated May 11, 2010, Guardians furnished the Secretary with written notice of the ESA violations alleged in this Petition for Review and of its intent to sue. See 16 U.S.C. § 1540(g). The Secretary acknowledged receipt of Guardians' 60-day notice letter by return letter dated June 23, 2010.

5. The Secretary has not remedied his violations of the ESA by reversing his warranted, but precluded finding for the Lesser Prairie-Chicken. Therefore an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

6. 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.

7. Venue properly lies in this judicial district by virtue of 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391. The Lesser Prairie-Chicken occurs in this district. Both the Secretary and Guardians maintain major offices within this district.

PARTIES

8. Plaintiff WILDEARTH GUARDIANS (“Guardians”) sues on behalf of itself and its adversely affected members. WildEarth Guardians was created on January 28, 2008, from the merger of three organizations: Forest Guardians, Sinapu, and the Sagebrush Sea Campaign. Guardians works to protect and restore wildlife and wildlands in the American West. Guardians has an active endangered species protection program that seeks to add all qualifying species, such as the Lesser Prairie-Chicken, to the list of threatened and endangered species protected under the ESA. Guardians has approximately 4,500 members that live throughout the country. Most of them live within a day’s drive of the historic or current range of the Lesser Prairie-Chicken.

9. Guardians’ members and staff use and enjoy the Lesser Prairie-Chicken and its habitat for recreational, aesthetic, economic, and scientific activities and will continue to do so. Guardians’ members and staff have observed and enjoyed the Lesser Prairie-Chicken in the wild and have concrete plans to continue to observe and enjoy this

species and its habitat. Guardians' members and staff also attempt to protect and restore habitats where the Lesser Prairie-Chicken lives or could live again. The protection of the Lesser Prairie-Chicken under the ESA and the corresponding legally required designation and protection of its critical habitat and the preparation of a recovery plan for the species would help Guardians and its members and staff in their efforts to protect and restore this species and its habitat. Guardians and its members have a substantial interest in the conservation of the Lesser Prairie-Chicken and are adversely affected by the Secretary's decision to further delay the listing of this species under the ESA. The requested relief will redress Guardians' and its members' injuries.

10. Defendant, KEN SALAZAR, is the Secretary of the United States Department of the Interior. As such he is responsible for implementation of the ESA with respect to the Lesser Prairie-Chicken. He is sued in his official capacity. In this case, the Secretary has delegated his responsibilities under the ESA to the U.S. Fish and Wildlife Service ("FWS") an agency within the U.S. Department of the Interior.

STATUTORY FRAMEWORK OF THE ENDANGERED SPECIES ACT

11. The purpose of the ESA is to "provide 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 such endangered and threatened species" 16 U.S.C. § 1531(b). The ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." Id. § 1532(3). Accordingly, the goal of the ESA is not only to temporarily save endangered and threatened species from extinction, but also to recover these species to

the point where they are no longer in danger of extinction, and thus no longer in need of ESA protection.

12. The protective provisions of the ESA are not triggered for imperiled species, however, until after such species are officially “listed” as either “threatened” or “endangered.” 16 U.S.C. § 1533.

13. A species is listed as “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is listed as “threatened” if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20). A “species” is defined 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).

14. The Secretary is required to list as either threatened or endangered any species facing extinction due to any one, or any combination of, the following five factors:

- (A) the present or threatened destruction, modification, or curtailment of the species’ 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 the species’ continued existence.

16 U.S.C. §§ 1533(a)(1)(A)-(E).

15. The Secretary's decision whether to list a species is limited solely to consideration of these five factors. In considering these factors, the Secretary must use only "the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b).

16. Once a species is listed, the ESA provides strong legal protections to encourage the species' recovery. The ESA requires the Secretary to designate critical habitat for all threatened and endangered species concurrently with their listing and to subsequently develop recovery plans for such species. See 16 U.S.C. §§ 1533(a)(3) and (f). The ESA also requires that all federal agencies "carry out programs for the conservation" of threatened and endangered species and consult with the Secretary in order to ensure that their actions are "not likely to jeopardize the continued existence" of such species or "result in the destruction or adverse modification" of their critical habitat. Id. §§ 1536(a)(1) and (2). Additionally, the ESA prohibits any person from "taking" a threatened or endangered species. Id. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21 and 17.31. To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

17. Any interested person may file a petition with the Secretary to list a species as threatened or endangered under the ESA. See 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b).

18. Upon receiving a listing petition, the Secretary must "to the maximum extent practicable," determine within 90-days whether the petition presents "substantial

scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). “Substantial information” is that “amount of information that would lead a reasonable person to believe that the measure proposed in the petition maybe warranted.” 50 C.F.R. § 424.14(b). This initial determination is known as a “90-day finding.”

19. If the Secretary makes a positive 90-day finding, then the Secretary must commence a thorough status review of the species. See 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(3). After the status review, the Secretary must make a determination as to whether listing the species as threatened or endangered is “warranted,” “not warranted,” or “warranted, but precluded.” 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. 424.14(b)(3). This determination is known as a “12-month finding” because it must be made within 12-months of the Secretary’s original receipt of the petition. Id.

20. If the Secretary finds that listing the species under the ESA is warranted, he must publish a proposed listing regulation in the Federal Register. See 16 U.S.C. § 1533(b)(3)(B)(ii). Within one year of this publication, the Secretary is required to render a final determination on the proposal. See id. § 1533(b)(6)(A). At such time, the Secretary must take one of the following actions: list the species; withdraw the proposal; or, if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. See id. §§ 1533(b)(6)(A)(i)(III) and (b)(6)(B)(i).

21. The Secretary may avoid publishing a proposed listing for a species that he concludes warrants listing, by making a “warranted, but precluded” finding. 16

U.S.C. § 1533(b)(3)(B)(iii). To make a “warranted, but precluded” finding the Secretary must determine that:

- (I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action ... is precluded by pending proposals to determine whether any species is an endangered species or a threatened species; and
- (II) expeditious progress is being made to add qualified species to either of the lists [of threatened or endangered species] and to remove from such lists species for which the protections of this Act are no longer necessary.

Id. §§ 1533(b)(3)(B)(iii)(I) and (II).

22. The Secretary must publish his “warranted, but precluded” finding in the Federal Register together with a description and evaluation of the reasons and data on which the finding is based. See 16 U.S.C. § 1533(b)(3)(B)(iii). “Warranted, but precluded” findings are included in the Secretary’s Candidate Notice of Review (“CNOR”), a Federal Register notice in which the Secretary presents an updated list of those plant and animal species he considers to be “candidates” for listing under the ESA.

23. “A candidate species is one for which [the Secretary] has on file sufficient information on biological vulnerability and threats to support issuance of a proposed rule to list as endangered or threatened, but for which preparation and publication of a proposal is precluded by higher-priority listing actions.” 74 Fed. Reg. 57804 (2009 CNOR). Although the Secretary acknowledges that the listing of all such “candidates” is “warranted” based on the best available data – i.e., that such species need the protections

of the ESA in order to avoid extinction – candidate species do not receive the extensive safeguards otherwise afforded by the ESA.

24. The Secretary must re-examine each of his “warranted, but precluded” findings every 12 months. See 16 U.S.C. § 1533(b)(3)(C)(i). The Secretary reports his findings on these re-examinations in the annual CNORs.

25. A “warranted, but precluded” finding is subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii).

STATEMENT OF FACTS

I. The Lesser Prairie-Chicken, *Tympanuchus pallidicinctus*

26. The Lesser Prairie-Chicken, *Tympanuchus pallidicinctus*, is a medium-sized, gray-brown grouse. Adult plumage is barred with alternating dark and white bands. The species has a rounded tail. Males display bright yellow combs above the eyes and dull red esophageal air sacs on the side of the neck during courtship. Males also have a tuft of elongated feathers (pinnae) on each side of the neck that are held erect during courtship display. Females have shorter pinnae. A photograph of a displaying male Lesser Prairie-Chicken, taken by WildEarth Guardians’ Board of Directors member Jess Alford, is provided on the following page:

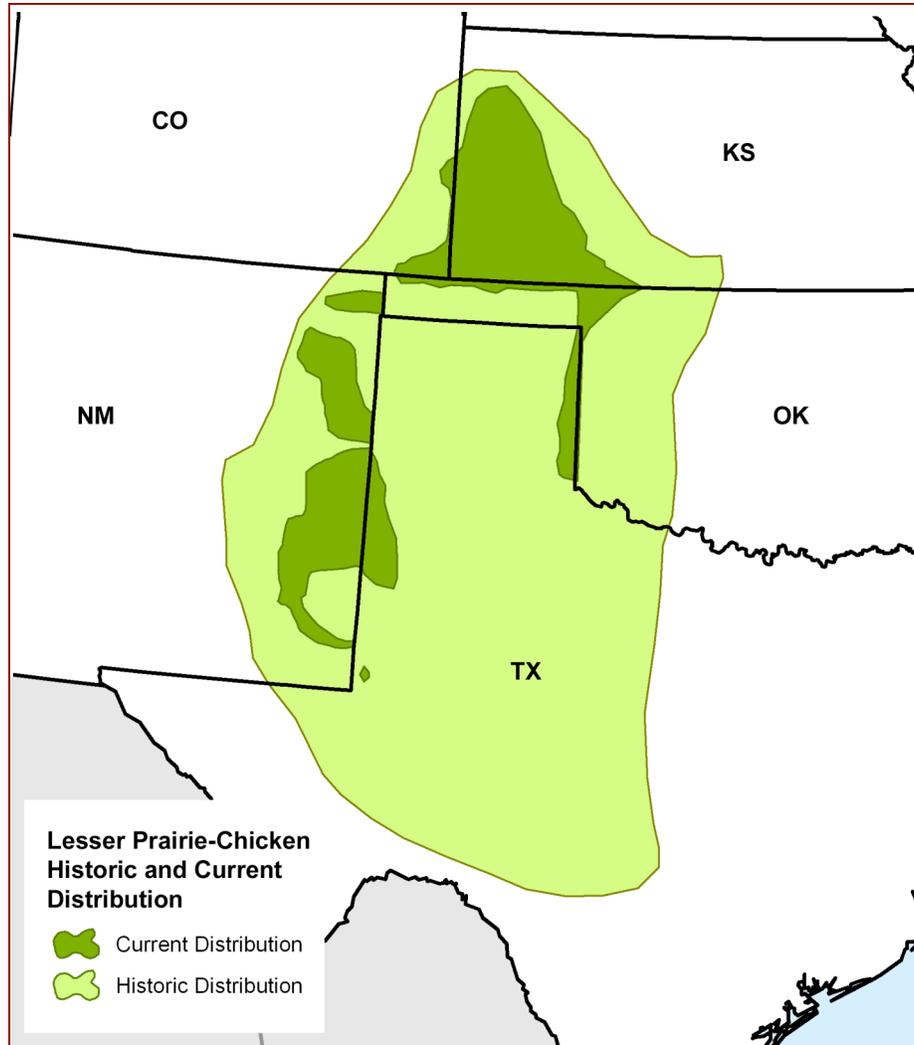


27. The Lesser Prairie-Chicken is comparable in morphology, plumage and behavior to Greater Prairie-Chicken, *Tympanuchus cupido*, although the Lesser Prairie-Chicken, as its name implies, is smaller. The Lesser Prairie-Chicken also exhibits distinctive courtship displays and vocalizations. Greater Prairie-Chickens have orange cervical air sacs and slightly darker plumage. Greater Prairie-Chickens inhabit mixed and tall grass prairies in the central Great Plains. Lesser Prairie-Chickens occur in short-grass rangelands in the southern plains.

28. Like other western grouse, male Lesser Prairie-Chickens engage in a unique, communal breeding display each spring to attract females. Both males and females congregate at breeding grounds (leks), where the males strut (“dance”), vocalize (“boom”) and physically confront other males to defend their territories and court females. The male repertoire will include displaying their bright yellow eye combs, inflating their red air sacs, flutter jumping, cackling and stomping their feet.

29. Lesser Prairie-Chickens use shinnery oak and sand sagebrush grasslands in parts of Colorado, Kansas, New Mexico, Oklahoma and Texas. Populations are non-migratory. Nesting and brood-rearing habitat are usually within 3 kilometers of display areas. Winter range is the same as breeding and summer range. Lesser Prairie-Chickens consume insects, leaves, buds and cultivated grains.

30. The Lesser Prairie-Chicken is present in southeastern Colorado; the southwestern quarter of Kansas; and in limited areas in the panhandle and northwest counties of Oklahoma. The species also occurs in east-central New Mexico, and in small areas in the northeastern and southwestern corners of the Texas Panhandle. Kansas has the largest population of Lesser Prairie-Chicken, where the species relies heavily on habitat on private lands enrolled in the Conservation Reserve Program. The current range of the Lesser Prairie-Chicken is reduced to relatively small and scattered areas totaling about 8 percent of its historic range. Total population size is variously estimated between 39,000-69,000 individuals, although some experts believe there may be fewer than 10,000 birds remaining. A map of the Lesser Prairie-Chicken's historic and current habitat is provided on the following page:



31. Habitat loss and degradation from livestock grazing, agriculture, oil and gas extraction, herbicides, unnatural fire and fire suppression are the primary threats to the Lesser Prairie-Chicken's continued existence. Habitat fragmentation from fences and powerlines, and disturbance from roads, mining, and wind energy production also negatively affect the species. Climate change and drought may exacerbate all of these existing threats. The potential loss of Lesser Prairie-Chicken habitat on private land currently enrolled in the Conservation Reserve Program will have a negative impact on current populations. Prevailing economic conditions and changes in the Conservation

Reserve Program cast doubt on the likelihood that landowners will continue to enroll in the Conservation Reserve Program at existing levels.

32. Historically, the Lesser Prairie-Chicken, like the Passenger Pigeon and the American Bison, was subjected to mass unregulated slaughter by market hunters. Train cars filled with dead Lesser Prairie-Chickens routinely left Denver, Colorado, headed to eastern markets until the population of the species collapsed and market hunting was no longer profitable.

33. Region 2 of the United States Forest Service, covering Colorado and Kansas, and Region 3 of the Forest Service, covering New Mexico, list the Lesser Prairie-Chicken as a “sensitive species.” The state of Colorado lists the bird as “threatened” under its state endangered and threatened species act.

II. The Secretary’s Actions and Guardians’ Efforts to Protect the Species

34. In response to a citizen petition to list the species, and subsequent litigation to force a ruling on that petition, the Secretary first determined that the Lesser Prairie-Chicken warranted listing under the ESA in June 1998. At that time, the Secretary found the listing of the species was “warranted, but precluded” by higher priority listing actions. At every opportunity, for the past eleven years, the Secretary has continued to determine that the listing of the Lesser Prairie-Chicken under the ESA is warranted, but precluded.

35. WildEarth Guardians, originally through its predecessor organization Forest Guardians, has repeated informed the Secretary that it believes his warranted, but precluded finding for the Lesser Prairie-Chicken violates the ESA. WildEarth Guardians sent notice letters to this effect to the Secretary on August 13, 2001, July 23, 2003, and

November 23, 2004. Additionally, in both 2004 and 2008 WildEarth Guardians reported on the species' continued decline while it waited for protection on the Secretary's warranted, but precluded species list. On December 8, 2008, WildEarth Guardians critiqued the Secretary's Candidate Conservation Agreement and Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken in New Mexico. Most recently, on November 2, 2009, WildEarth Guardians provided additional information to the Secretary on the dire threats to the Lesser Prairie-Chicken from wind energy development, climate change, and reduced population viability.

36. On November 9, 2009, the Secretary, for the 11th year in a row, again determined that the listing of the Lesser Prairie-Chicken under the ESA is warranted, but precluded. On May 11, 2010, WildEarth Guardians sent the Secretary a new formal 60-day notice letter informing him it believes his November 9, 2009 decision is illegal. The Secretary's November 9, 2009 decision, and his refusal to take corrective action in response to Guardians' May 11, 2010 notice letter form the basis of the present action.

37. The Secretary's November 9, 2009 warranted, but precluded finding for the Lesser Prairie-Chicken states:

Biologists estimate that the occupied range has declined by 92 percent since the 1800s. The most serious threats to the lesser prairie-chicken are loss of habitat from conversion of native rangelands to introduced forages and cultivation, conversion of suitable restored habitat in the Conservation Reserve Program to cropland, cumulative habitat degradation caused by severe grazing, and energy development, including wind, oil, and gas development. Additional threats are woody plant invasion of open prairies due to fire suppression, herbicide use (including resumption of herbicide use in shinnery oak habitat), and habitat fragmentation caused by structural and transportation developments. Many of these threats may exacerbate the normal effects of periodic drought on lesser prairie-chicken populations. In many cases, the remaining suitable habitat has become fragmented by the spatial arrangement of these individual threats. Habitat fragmentation can be a threat to the species through several mechanisms:

Remaining habitat patches may become smaller than necessary to meet the requirements of individuals and populations, necessary habitat heterogeneity may be lost to areas of homogeneous habitat structure, and the probability of recolonization decreases as the distance between suitable habitat patches expands. We have determined that the overall magnitude of threats to the lesser prairie-chicken throughout its range is high, and that the threats are ongoing, and thus imminent. Consequently, we have assigned an LPN of 2 to this species.

74 Fed. Reg. 57804, 57827 (November 9, 2009). The Secretary's assignment of a Listing Priority Number ("LPN") of 2 to the species is the highest possible LPN the Secretary could assign to the Lesser Prairie-Chicken and indicates the highest level of imminent threat to the species' survival.

38. The Secretary's November 9, 2009 warranted, but precluded finding for the Lesser Prairie-Chicken is similar to the Secretary's previous warranted, but precluded findings for the species in his 2004, 2005, 2006, 2007, and 2008 CNORs. However, it was in his 2008 finding that the Secretary first increased the Listing Priority Number for the Lesser Prairie-Chicken from an LPN of 8 to an LPN of 2, stating, in relevant part:

The magnitude of threats to the species from wind energy development and conversion of CRP lands to croplands has increased recently, both in terms of ongoing activity and potential activity expected in the next few years...

The increasing level of habitat fragmentation means that (1) some of the remaining habitat patches may become smaller than necessary to meet the requirements of individuals and populations; (2) necessary habitat heterogeneity may be lost to areas of homogeneous habitat structure; (3) areas between habitat patches may harbor higher levels of predators or brood parasites; and (4) the probability of recolonization of habitat that becomes unoccupied decreases as the distance between suitable habitat patches expands. Based on our most recent assessment, we find that ongoing threats to the lesser prairie-chicken have increased in terms of the amount of habitat involved and that the overall magnitude of threats to the lesser prairie-chicken throughout its range is high because the threats put the viability of the lesser prairie chicken at substantial risk. The threats are ongoing and thus, imminent. Consequently, we changed the LPN from an 8 to a 2 for this species.

73 Fed. Reg. 75176, 75179-80 (December 10, 2008).

39. Of 35 species assigned the same or a lower Listing Priority Number (LPN 8) than Lesser Prairie-Chicken in the 1999 CNOR, 10 have been listed or are currently under review for listing, including: the Carson wandering skipper, *Pseudocopaeodes eunus obscurus*, (1999 LPN of 12, listed as “endangered” in 2002); Santa Ana sucker, *Catostomus santaanae*, (1999 LPN of 8, listed as “threatened” in 2000); bull trout, *Salvelinus confluentus*, (1999 LPN of 9, listed as “threatened” in 1998); fluvial Artic grayling (1999 LPN: 9, under review); purple amole, *Chlorogalum purpureum*, (1999 LPN of 9, listed as “threatened” in 2000); Chupadera springsnail, *Pyrgulopsis chupaderae*, (1999 LPN of 8, under review); New Mexico springsnail, *Pyrgulopsis thermalis*, (1999 LPN of 11, under review); blackline Hawaiian damselfly, *Megalagrion nigrohamatum nigrolineatum*, (1999 LPN of 9, under review); Pecos sunflower, *Helianthus paradoxus*, (1999 LPN of 8, listed as “threatened” in 1999); and DeBeque phacelia, *Phacelia submutica*, (1999 LPN of 11, proposed for listing as “threatened” in 2010). In addition, the Secretary determined that 11 of 35 species in this group did not warrant listing under the ESA. Of the remaining 14 species, only two others (Warton’s cave spider, *Cicurina wartoni* and Coral Pink Sand Dunes tiger beetle, *Cicindela limbata albissima*) have advanced to a Listing Priority Number of 2. The Lesser Prairie-Chicken is currently among the most imperiled species on the candidate species list. The Lesser Prairie-Chicken has waited on the candidate species list for protection longer than most other similarly situated species.

40. As required by 16 U.S.C. § 1533(b)(3)(B)(iii)(I), the Secretary’s most recent 2009 warranted, but precluded finding for the Lesser Prairie-Chicken was based in

part on the assertion that he was working on “higher priority listing actions.” 74 Fed. Reg. at 57804. However, the Southwest Region of the FWS, which is responsible for listing decisions on species occurring in Arizona, New Mexico, Oklahoma, and Texas, and to which the Secretary has assigned the listing decision for the Lesser Prairie-Chicken, has not listed any species since 2005. The Secretary points to the time and expenses needed to issue 90-day and 12-month petition findings for other species and a general lack of financial resources as excusing him from working on the Lesser Prairie-Chicken. However, these preliminary 90-day and 12-month petition findings are not work on pending proposals to list species of higher priority than the Lesser Prairie-Chicken.

41. As required by 16 U.S.C. § 1533(b)(3)(B)(iii)(II), the Secretary’s 2009 warranted, but precluded finding for the Lesser Prairie-Chicken was based in part on the assertion that he is making “expeditious progress” in adding other species to the lists of threatened and endangered species in fiscal year 2009. See 74 Fed. Reg. at 57814-57819. Since the current administration took office on January 20, 2009, the Secretary has listed only one new species in the continental United States under the ESA. The Southwest Region of the FWS, which is responsible for the Lesser Prairie-Chicken, has not listed any species since 2005. The Secretary currently has approximately 250 species, including the Lesser Prairie-Chicken on his candidate species list. At the present rate of progress it may require more than a hundred years for the Secretary to take final listing action on all the species presently on his candidate species list.

42. Between 1974 and 2000, the Secretary listed an average of 45 species per year. In the last decade, the Secretary has listed and continues to list only a few species each year.

43. In 1990, the Department of Interior's Inspector General (IG) conducted a comprehensive review of FWS's listing program and found that the Agency was not making expeditious progress in adding candidate species to the threatened or endangered species lists. The IG found that even if FWS met its then applicable goal of listing 50 species per year, it could take from 38 to 48 years to list just those species then estimated to qualify for protection under the ESA.

44. The 1990 IG review also revealed that 34 candidate species on FWS's waiting list had gone extinct since 1980 and that even listing 50 species per year would not qualify as expeditious progress.

45. In 1992, FWS promised to substantially increase its rate of listings in order to settle a federal lawsuit. As a result, FWS listed an average of 89 species per year between 1992 and 1995, and listed 152 species between February 1996 and September 1997.

46. In May 2004 the Secretary published a CNOR indicating that he had only listed four species since his 2002 CNOR and that 279 species were designated as candidate species.

47. On May 11, 2005, the Secretary published a new CNOR indicating that he had only listed two species since his May 2004 CNOR.

48. In 2008, FWS's then Director acknowledged in testimony before the House of Representatives' Committee on Appropriations that FWS had failed to list a

single species for the proceeding 661 days even though it had been given millions of dollars for that purpose.

49. On December 10, 2008, FWS published a CNOR indicating that it had only listed one species, the polar bear, between September 2007 and September 2008 and that listing took place only as a result of a court order and settlement.

50. On June 29, 2009, the House Committee on Appropriations issued a report expressing “[concern] about the known backlog of candidate species that warrant listing proposals,” and directed FWS to “ensure the orderly and timely listing of any species warranting the protection of the Endangered Species Act.”

51. On average, the top 40 most imperiled candidate species on the Secretary’s candidate species list must wait at least 13 years for final ESA listing.

52. The Secretary’s challenged November 9, 2010 CNOR indicates that he listed only a single species during fiscal year 2009 and that 249 other candidate species, including the Lesser Prairie-Chicken, continued to wait for ESA listing. At this present listing rate, it will take the Secretary 249 additional fiscal years to complete his review of just the current candidate species list. Even this extremely protracted estimated timeline is based on the unlikely assumption that no new species will be added to that candidate list during the next 249 years.

53. The Secretary is not presently precluded from immediately issuing a listing proposal for the Lesser Prairie-Chicken by his work on pending proposals to list species of a higher listing priority. The Secretary is not making expeditious progress in adding or removing species from the threatened or endangered species lists.

CLAIM FOR RELIEF

54. The allegations of all preceding paragraphs of this Petition for Review are incorporated herein by reference.

55. The ESA allows the Secretary to issue a finding that the immediate proposal and timely promulgation of a final regulation listing a warranted species is precluded (a warranted, but precluded finding) only if such action is (1) precluded by the Secretary's work on pending proposals to determine whether some higher priority species is an endangered or threatened species, and (2) the Secretary is making expeditious progress in adding or removing other species from the threatened and endangered species lists.

56. The Secretary's November 9, 2009 warranted, but precluded finding for the Lesser Prairie-Chicken fails to establish that the Secretary is precluded from immediately proposing the Lesser Prairie-Chicken for listing by his work on pending proposals to list higher priority species or that the Secretary is making expeditious progress in listing or delisting species pursuant to the ESA.

57. Accordingly, the Secretary's November 9, 2009 warranted, but precluded finding for the Lesser Prairie-Chicken is arbitrary, capricious, and otherwise contrary to the ESA, 16 U.S.C. § 1533(b)(3)(B)(iii), within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, WildEarth Guardians requests that this Court enter judgment providing the following relief:

(A) A declaration that the Secretary violated the ESA and APA by issuing an unlawful warranted, but precluded finding for the Lesser Prairie-Chicken;

(B) An injunction requiring the Secretary to withdraw his unlawful warranted, but precluded finding and issue a new finding for the Lesser Prairie-Chicken by a reasonable date certain;

(C) An order awarding Plaintiff its costs of litigation including reasonable attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g) and/or the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412; and

(D) Such other further relief as the Court deems just and proper.

Respectfully Submitted,

Dated: September 1, 2010

S/James J. Tutchton
James Jay Tutchton
WildEarth Guardians
6439 E. Maplewood Ave.
Centennial, CO 80111
Tel: 720-301-3843
E-mail: jtutchton@wildearthguardians.org