

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

DEFENDERS OF WILDLIFE)
1130 17th Street, NW)
Washington, DC 20036)

CENTER FOR BIOLOGICAL DIVERSITY)
PO BOX 11374)
Portland, OR 97211)

WILDEARTH GUARDIANS)
516 Alto Street)
Santa Fe, NM 87501)

Plaintiffs,)

v.)

DAVID BERNHARDT)
Secretary)
U.S. Department of the Interior,)
1849 C Street, N.W.)
Washington, DC 20240)

U.S. FISH AND WILDLIFE SERVICE)
1849 C Street, NW)
Washington, DC 20240)

MARGARET EVERSON)
Principle Deputy Director)
Exercising the Authority of the Director)
U.S. Fish and Wildlife Service)
1849 C Street, N.W.)
Washington, DC 20240)

Defendants.)

Case No. 19-1709

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff conservation organizations hereby challenge the failure of the U.S. Fish and Wildlife Service (“Service”) to complete a 12-month finding to determine whether the lesser prairie chicken (*Tympanuchus pallidicinctus*) warrants protection under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”).

2. The lesser prairie chicken is a striking member of the grouse family native to the southern Great Plains. A resident of short grass prairies, lesser prairie chickens once numbered in the millions but habitat loss due to agriculture, grazing, and oil and gas exploration caused the population to plummet in the late 20th century. Today, fewer than 38,000 birds remain.

3. Plaintiffs petitioned to list the lesser prairie chicken on September 8, 2016. On November 30, 2016, the Service issued a 90-day finding that listing may be warranted. 81 Fed. Reg. 86,315, 86,317-18 (Nov. 30, 2016). A 12-month finding on Plaintiffs’ petition to list the species was due on or about September 8, 2017. 16 U.S.C. § 1533(b)(3)(B) (“Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings [that listing is not warranted, warranted, or warranted but precluded].”); *see also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) (holding that 16 U.S.C. § 1533(b)(3)(B) imposes a mandatory duty on the Service to determine the conservation status of a petitioned species within 12 months).

4. To date, Defendants have failed to publish a finding. Defendants have thus violated the ESA, 16 U.S.C. § 1533(b)(3)(B).

JURISDICTION AND VENUE

5. Plaintiffs bring this suit pursuant to the ESA’s citizen suit provision, 16 U.S.C. § 1540(g).

6. Plaintiffs provided Defendants with written notice of their violation of the ESA via electronic and certified mail on February 14, 2019. (Exhibit A).

7. Defendant Secretary of the Interior received a copy of Plaintiffs' notice letter by electronic mail on February 14, 2019, and by certified mail on February 19, 2019.

8. Defendant U.S. Fish and Wildlife Service received a copy of Plaintiffs' notice letter by electronic mail on February 14, 2019, and by certified mail on February 20, 2019.

9. Defendant Director of the Fish and Wildlife Service received a copy of Plaintiffs' notice letter by electronic mail on February 14, 2019, and by certified mail on February 20, 2019.

10. More than 60 days have passed since Defendants received notice of Plaintiffs' intent to sue in satisfaction of 16 U.S.C. § 1540(g) and the violations complained of in the notice letter are continuing.

11. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g), 28 U.S.C. § 1331, and 28 U.S.C. § 1346.

12. Venue is appropriate in the U.S. District Court for the District of Columbia Circuit pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. § 1391(e), as this civil action is brought against officers and employees of the United States acting in their official capacities and under the color of legal authority, a substantial part of the events giving rise to the claim occurred in the District of Columbia, no real property is involved in this action, and Plaintiffs reside in this judicial district.

13. This Court has the authority to grant Plaintiffs' requested relief under the ESA, 16 U.S.C. § 1540(g).

PARTIES

14. Plaintiff Defenders of Wildlife (“Defenders”) is a non-profit, Internal Revenue Service Code Section 501(c)(3) organization headquartered in Washington, DC with offices throughout the country. Founded in 1947, Defenders is a science-based conservation organization with more than 1.8 million members and supporters nationwide and a substantial number of members in the range of the lesser prairie chicken. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities and the preservation of the habitat on which they depend. Defenders advocates for new approaches to wildlife conservation that will help keep species from becoming endangered, and it employs education, litigation, research, legislation and advocacy to defend wildlife and their habitat. Defenders is one of the nation’s leading advocates for endangered species and has been involved in issues of ESA implementation for more than thirty-five years.

15. Plaintiff Center for Biological Diversity is a non-profit corporation headquartered in Tucson, Arizona, with offices in various locations throughout the country, including Washington DC, Silver City, New Mexico, Portland, Oregon, Oakland, California, and elsewhere. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues. The Center has more than 63,000 members throughout the United States and the world, including hundreds of members in the range of the lesser prairie chicken.

16. Plaintiff WildEarth Guardians (“Guardians”) is a non-profit, 501(c)(3) membership organization based in Santa Fe, New Mexico, with offices throughout the West. Guardians has more than 231,000 members and activists in the United States, with a substantial number of members in Colorado and New Mexico. Guardians and its members are dedicated to

protecting and restoring the wildlife, wild places, and wild rivers of the American West. Towards this end, Guardians and its members work to protect all species native to the West, with emphasis on protecting threatened and endangered species and their habitat.

17. Plaintiffs bring this action on their own institutional behalf and on behalf of their members, who derive scientific, aesthetic, recreational, and spiritual benefit from endangered and threatened species and their habitats. Plaintiffs' members have observed and photographed the lesser prairie chicken in the wild and have ongoing interests in the lesser prairie chicken and its habitat. Plaintiffs' members have future plans to visit and observe the lesser prairie chicken in the wild. The interests of Plaintiffs and their members in observing, studying, and otherwise enjoying the lesser prairie chicken and its habitat, and in obtaining and disseminating information regarding the survival of the lesser prairie chicken, have been harmed by Defendants' actions and Defendants' failure to make a 12-month finding as required by the ESA, 16 U.S.C. § 1533(b)(3)(B). Plaintiffs' injuries would be remedied by an order from this Court compelling compliance with the statute.

18. Defendant David Bernhardt is sued in his official capacity as Acting Secretary of the Department of the Interior.

19. Defendant U.S. Fish and Wildlife Service is an agency of the federal government located within the U.S. Department of the Interior. The Secretary of the Interior has charged the Service with implementing and enforcing the ESA. 50 C.F.R. § 402.01(b).

20. Defendant Margaret Everson is sued in her official capacity as the Acting Director of U.S. Fish and Wildlife Service.

21. Unless the requested relief is granted, Plaintiffs' interests will continue to be injured by Defendants' failure to comply with their statutory obligation. The injuries described

above are actual and imminent and are caused by Defendants' failure to complete a 12-month finding for the species. The relief sought herein would redress Plaintiffs' injuries. Plaintiffs have no other adequate remedy at law.

STATUTORY AND REGULATORY BACKGROUND

22. Finding that "fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," Congress passed the ESA in order to "provide a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. §§ 1531(a)(1), (b).

23. An endangered species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

24. A threatened species is one "which 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(20).

25. The statute establishes a procedure for the Secretary to follow when determining whether a species is either "threatened" or "endangered."

26. Upon receiving a petition to determine a species' status, which the statute allows any interested person to submit, *see* 16 U.S.C. § 1533, the Secretary has 90 days to determine whether the petition presents substantial evidence indicating that the requested action may be warranted. 16 U.S.C. § 1533(b)(3)(A).

27. If the Service makes a positive 90-day finding it then has one year to determine whether the species warrants federal protection. 16 U.S.C. § 1533(b)(3)(B). The 12-month requirement established by 16 U.S.C. § 1533(b)(3)(B) is a mandatory deadline. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002).

28. Listing a species as either threatened or endangered triggers the substantive and procedural requirements of other parts of the act. *See* 16 U.S.C. § 1536 (consultation and substantive conservation requirement imposed on federal agencies); *id.* § 1538 (prohibition on take by public and private entities).

FACTUAL ALLEGATIONS

The Lesser Prairie Chicken

29. The lesser prairie chicken is a medium-sized grouse native to the southern Great Plains. Plump, brown, and with thickly feathered feet, lesser prairie chickens avoid predators mainly by camouflage, hunkering down in thick scrub and tall grasses to avoid detection, and flying short distances when flushed.

30. As breeding season approaches, however, the birds shed their cautious nature and amass at communal display sites known as leks. Leks are relatively exposed areas of elevated prairie where the birds gather in one of the more spectacular mating displays of the natural world.

31. Hoping to attract many female onlookers, males release a deep booming sound from their bright orange air sacs. The call can be heard for miles around, drawing in potential mates and more competition.

32. With feather tufts erect and tails splayed, the males joust in a demonstration of evolutionary fitness, battling to win the attention of females. In what appears to be a not-so-carefully choreographed dance, males approach and retreat, stamp their feet and circle, cluck and boom. At the height of competition males will even throw themselves a few feet into the air, bursting from the ground like firecrackers. The victor's prize is the chance to mate and reproduce.

The Bird's Decline

33. The species once numbered around a million birds, but today there are fewer than 38,000 lesser prairie chickens remaining. Conversion to agriculture, the introduction of cattle, and the construction of roads, pipelines, powerlines, and drilling pads to support the oil and gas industry have fragmented the bird's preferred habitat, separated individuals from lek sites, and driven a sharp reduction in numbers.

34. The dramatic impact that human development has had on lesser prairie chickens has been evident for decades.

The Fight to Protect this Dwindling Species

35. In October 1995, the Biodiversity Legal Foundation and Marie E. Morrissey petitioned the Service to list the lesser prairie chicken as threatened. The Service responded with a 90-day finding that the petition presented substantial scientific and commercial evidence indicating that the species may warrant protection under the ESA. 62 Fed. Reg. 36,482 (July 8, 1997). On June 9, 1998, the Service found that listing was warranted but precluded by higher priority species and placed the lesser prairie chicken on the candidate species list. 63 Fed. Reg. 31,400 (June 9, 1998).

36. Over the next 13 years, the Service reviewed the lesser prairie chicken's status 11 times, each time determining that the species warranted listing but that granting it formal protection under the ESA was precluded by higher priority activities. The only noticeable change during this period occurred in 2008 when the Service upgraded the species' priority ranking from 8 to 2 reflecting an increase in threats from energy development in the species' territory. 73 Fed. Reg. 75,176, 75,179-80 (Dec. 10, 2008).

37. A settlement agreement in *In re Endangered Species Act Section 4 Deadline Litigation*, NO. 10-377, MDL Docket No. 2165 (D.D.C. May 10, 2011) required the Service to submit a proposed listing for the lesser prairie chicken by September 30, 2012.

38. On December 11, 2012, the Service published a proposed rule listing the lesser prairie chicken as threatened under the ESA, accompanied by a finding that designating critical habitat for the species was not then determinable. 77 Fed. Reg. 73,828 (Dec. 11, 2012).

39. On May 6, 2013, the Service proposed a special rule under Section 4(d) of the ESA that would have exempted a host of habitat destroying activities from the statutory protections that would otherwise have attached upon listing. 78 Fed. Reg. 26,302 (May 6, 2013).

40. On December 11, 2013, the Service proposed a revised 4(d) rule and reopened the public comment period on the proposed listing. 78 Fed. Reg. 75,306 (Dec. 11, 2013).

41. On December 18, 2013, the Service published a draft Range Wide Oil and Gas Candidate Conservation Agreement with Assurances (“CCAA”) for the lesser prairie chicken. 78 Fed. Reg. 76,639 (Dec. 18, 2013). In exchange for undertaking voluntary conservation measures, participants in the CCAA would be absolved of future regulatory requirements if the lesser prairie chicken was listed as either threatened or endangered.

42. On April 10, 2014, the Service published a final rule listing the lesser prairie chicken as threatened. 79 Fed. Reg. 19,974 (Apr. 10, 2014). A special rule under Section 4(d) of the ESA was published concurrent with listing to allow “take” of the species in special circumstances. *Id.* The Service again found that critical habitat was not then determinable. *Id.*

43. A group of oil and gas producers challenged the listing decision in the U.S. District Court for the Western District of Texas on June 9, 2014. That court vacated the listing

decision for the prairie chicken on September 1, 2015. *Permian Basin Petroleum Ass'n. v. Dep't of the Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015).

44. On February 29, 2016, the same court denied the Service's motion to amend the judgment, which would have left the listing in place until the Service completed further review. *Permian Basin Petroleum Ass'n. v. Dep't of the Interior*, No. 7:14-CV-00050-RAJ (W.D. Tex. Feb. 29, 2016).

45. The Service formally removed the lesser prairie chicken from the ESA's List of Endangered and Threatened Wildlife on July 20, 2016. 81 Fed. Reg. 47,047 (July 20, 2016). As a result, the species currently lacks federal ESA protection.

46. On September 8, 2016, Plaintiffs in this case submitted a new petition to list the lesser prairie chicken throughout its range, and to grant emergency protections to the most imperiled and isolated populations in Colorado, western Kansas, and along the Texas-New Mexico border. 81 Fed. Reg. 86,315 (Nov. 30, 2016).

47. The Service issued a positive 90-day finding that listing may be warranted on November 30, 2016. *Id.* At that time, the Service stated that it was assessing the biological status of the lesser prairie chicken "to ensure future actions related to the species are based on the best available science." U.S. Fish & Wildlife Serv., Press Release: Petitions to Federally Protect the Lesser Prairie-Chicken, Increase Protections for Leopard Move Forward to Next Review Phase (Nov. 29, 2016) *available at* https://www.fws.gov/news/ShowNews.cfm?ref=petitions-to-federally-protect-the-lesser-prairie-chicken-increase--&_ID=35899. The Service expected to complete that review during the Summer of 2017 but has yet to do so. *Id.*

48. A 12-month finding on Plaintiffs' petition was due on or about September 8, 2017, but the Service has issued no such finding.

49. Plaintiffs provided the Service with notice of their intent to pursue these claims on February 14, 2019.

50. On June 4, 2019, Plaintiffs received a response from Gina Shultz, Deputy Assistant Director for Ecological Services, indicating that the Service would not complete work on a 12-month finding until at least 2021. (Exhibit B)

CLAIM FOR RELIEF

51. Plaintiffs incorporate by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

52. Defendants' failure to make a 12-month finding on Plaintiffs' petition to list the lesser prairie chicken is a violation of the Endangered Species Act. 16 U.S.C. § 1533(b)(3)(B).

53. Defendants' violation of law poses actual and imminent harm to the protected interests of Plaintiffs and their members, and it is likely that a favorable judicial decision will prevent or redress such injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' ongoing failure to publish a 12-month finding on Plaintiffs' petition to list the lesser prairie chicken violates the ESA;
2. Order Defendants to publish a proposed rule by a date certain;
3. Award Plaintiffs their costs of litigation; and
4. Grant Plaintiffs such other relief as the Court deems just and proper.

DATED: June 12, 2019.

Respectfully Submitted,

/s/ Jason C. Rylander _____

Jason C. Rylander
Defenders of Wildlife
1130 17th Street, NW
Washington, D.C. 20036
202-682-9400 x. 145

Attorney for Plaintiffs