

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

WILDEARTH GUARDIANS  
312 Montezuma Ave.  
Santa Fe, NM 87501

Plaintiff,

v.

DIRK KEMPTHORNE, Secretary of the Interior  
1849 C Street, NW  
Washington, DC 20240

Defendant.

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**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

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**INTRODUCTION**

1. Plaintiff, WildEarth Guardians brings this action against Defendant, Dirk Kempthorne, U.S. Secretary of the Interior, in his official capacity, to force him to carry out his duties under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.* Secretary Kempthorne (the “Secretary”) has failed to comply with his mandatory duty to make a preliminary, “90-day finding,” on two separate ESA “listing” petitions, covering a combined total of 681 species, submitted by WildEarth Guardians (the “Petitions”). This lawsuit seeks to force the Secretary to make the overdue findings on WildEarth Guardians’ Petitions for the 681 species.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”).

3. This Court has authority to grant WildEarth Guardians’ requested relief pursuant to 28 U.S.C. §§ 2201-02 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (APA).

4. More than 60 days ago, WildEarth Guardians furnished the Secretary with written notice of his violations of the ESA concerning the Petitions and of WildEarth Guardians’ intent to sue. See 16 U.S.C. § 1540(g)(2).

5. The Secretary has not remedied his violations of the ESA by making the overdue findings on the Petitions therefore an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2001.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A). Secretary Kempthorne officially resides in this judicial district and the violations set forth in this complaint occurred in this judicial district.

### **PARTIES**

7. Plaintiff WILDEARTH GUARDIANS (“Guardians”) sues on behalf of itself and its adversely affected members. WildEarth Guardians is a new non-profit environmental organization created on January 28, 2008, by the merger of three organizations: Forest Guardians; Sinapu; and Sagebrush Sea Campaign. WildEarth Guardians has over 4,500 members, some of whom reside in the District of Columbia, but most of whom reside in the areas of the country where the 681 species covered by the Petitions are found. Forest Guardians, a predecessor in interest of WildEarth Guardians, drafted and submitted the Petitions. WildEarth

Guardians continues this effort of Forest Guardians. WildEarth Guardians has an active endangered species protection campaign, geographically focused on the southern Great Plains, desert Southwest, Colorado Plateau and Rocky Mountains. As part of this campaign, WildEarth Guardians urges the Secretary to list imperiled species, such as those covered by the Petitions, as threatened or endangered species under the ESA. WildEarth Guardians devoted significant organizational resources to preparing the Petitions and is injured by the Secretary's failure to respond to them. WildEarth Guardians is further injured by the Secretary's failure to respond to the Petitions because the Secretary is denying WildEarth Guardians information, to which WildEarth Guardians has a legal right, concerning the Secretary's opinion as to the biological status of these species. This information would be useful to WildEarth Guardians in prioritizing its conservation efforts and in furthering its mission to save imperiled species. WildEarth Guardians' members frequently use and enjoy the species covered by the Petitions, and their habitats, for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so. WildEarth Guardians' members have specific and concrete future plans to visit and enjoy these species and their habitats. WildEarth Guardians and its members are particularly concerned with the conservation of these vanishing species and the ecosystems upon which they depend. WildEarth Guardians and its members have a substantial interest in this matter and are adversely affected by the Secretary's failure to comply with the ESA. The requested relief will redress WildEarth Guardians' and its members' injuries.

8. Defendant, DIRK KEMPTHORNE, is the Secretary of the United States Department of the Interior. As such he has ultimate responsibility for implementation of the ESA. 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.

### **LEGAL BACKGROUND**

9. Congress passed the ESA 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 species and threatened species....” 16 U.S.C. 1531(b).

10. To this end, the ESA requires the Secretary to list species of plants and animals that are facing extinction as “threatened” or “endangered” and to designate protected “critical habitat” for each listed threatened or endangered species. 16 U.S.C. § 1533(a). An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range....” 16 U.S.C. § 1532(6). A “threatened species” is a species “which is likely to become an endangered species within the foreseeable future....” 16 U.S.C. § 1532(20).

11. In order for the ESA to protect a species, the Secretary must first officially list the species as either threatened or endangered. 16 U.S.C. § 1533(d). The listing process is the critical first step in the ESA’s system of species protection and recovery. The Secretary must also designate portions of a species’ habitat as “critical habitat” in order for that habitat to receive several important substantive and procedural protections under the ESA.

12. The Secretary must list a species as endangered or threatened if he finds that any of the following factors are present:

- (A) the present or threatened destruction, modification, or 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.

16 U.S.C. § 1533(a)(1). The Secretary must analyze these listing factors “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

13. Any interested person can initiate the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

14. Upon receipt of a petition to list a species, the Secretary is required to make an initial finding known as a “90-day finding.” Specifically, within 90 days, the Secretary must determine, “to the maximum extent possible,” 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). The ESA’s implementing regulations define “substantial information” as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b).

15. If the Secretary finds that the petition presents substantial information, the Secretary “shall promptly commence a review of the status of the species concerned,” and must publish the finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

16. If the Secretary makes a positive 90-day finding, he has 12 months from the date that the petition was received to make one of three additional findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals to list species of higher priority, provided that the Secretary is making expeditious progress on other listing actions. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This is known as the 12-month finding.

17. If the Secretary makes a 12-month finding that the petitioned action is warranted, then he must publish a proposed rule to list the species as endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5).

18. Within one year of the publication of a proposed rule to list a species, the Secretary must make a final decision on the proposal. 16 U.S.C. § 1533(b)(6)(A).

19. “Concurrently” with listing a species as threatened or endangered, the Secretary must designate critical habitat for the species to the maximum extent prudent and determinable. 16 U.S.C. §1533(a)(3)(A)(i), see also § 1533(b)(6)(C).

20. Designation of critical habitat for listed species provides additional necessary protection and aids in the conservation of the species because all federal agencies must consult with the Secretary to “insure that an action authorized, funded, or carried out by [federal agencies] is not likely to jeopardize the continued existence of any endangered species or threatened species *or result in the destruction or adverse modification of [its critical habitat].*” 16 U.S.C. § 1536(a)(2) (emphasis added).

## **FACTS**

### **I. The Southwest Petition**

21. On June 18, 2007, WildEarth Guardians, then known as Forest Guardians, submitted a petition to the Secretary to list 475 species in the U.S. Fish and Wildlife Service’s (“FWS’s”) Southwest Region as endangered or threatened under the ESA and to designate critical habitat for these species (hereinafter the “Southwest Petition”). The 475 species, each specifically identified in the petition, represented all full species in the FWS’s Southwest Region not currently listed or considered candidates for listing, by the Secretary, but which are considered as “critically imperiled” or “imperiled” according to the NatureServe database.

WildEarth Guardians asked the Secretary to incorporate all information in the NatureServe database concerning these species as part of its petition. NatureServe is an authoritative database compiling the best available scientific information on thousands of species. NatureServe defines a “critically imperiled” species as one at a very high risk of extinction due to extreme rarity, very steep population declines, or other factors. NatureServe defines an “imperiled” species as one at high risk of extinction due to very restricted range, very few populations, steep population declines, or other factors. These definitions are the functional equivalent of the ESA’s definitions of endangered and threatened species.

22. The Secretary received the Southwest Petition by certified mail on June 22, 2007, according to certified mail receipts. On July 11, 2007, the Secretary acknowledged receipt of the Southwest Petition by letter stating the Petition was received on June 25, 2007. In his response the Secretary acknowledged that the Petition incorporated all analysis, references, and documentation provided by NatureServe in its online database.

23. Pursuant to the ESA, the Secretary should have made a 90-day finding on WildEarth Guardians’ Southwest Petition on or about September 25, 2007. On October 3, 2007, WildEarth Guardians sent the Secretary and FWS a formal 60-day notice letter pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), informing the Secretary and FWS that they were violating the ESA by failing to make a 90-day finding on the Southwest Petition. According to certified mail receipts, the Secretary and FWS received WildEarth Guardians’ 60-day notice letter on October 10, 2007. Neither the Secretary, nor FWS has responded in any manner to WildEarth Guardians’ 60-day notice letter. WildEarth Guardians’ believes it is practicable for the Secretary to immediately make a positive 90-day finding on all 475 species covered in the Southwest Petition because the Petition and

NatureServe represents the best available science and certainly provide “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b).

24. To date the Secretary has failed to make a 90-day finding on any of the 475 species covered in WildEarth Guardians’ Southwest Petition.

## **II. The Rocky Mountain Petition**

25. On July 24, 2007, WildEarth Guardians, then known as Forest Guardians, submitted a petition to the Secretary to list 206 species in FWS’s Mountain-Prairie Region as endangered or threatened under the ESA and to designate critical habitat for these species (hereinafter the “Rocky Mountain Petition”). The 206 species, each specifically identified in the petition, represented all full species in the FWS’s Mountain-Prairie Region not currently listed or considered candidates for listing, by the Secretary, but which are considered as “critically imperiled” or “imperiled” according to the NatureServe database. WildEarth Guardians asked the Secretary to incorporate all information in the NatureServe database concerning these species as part of its petition.

26. The Secretary received the Rocky Mountain Petition by certified mail on July 30, 2007, according to certified mail receipts. On August 24, 2007, the Secretary acknowledged receipt of the Rocky Mountain Petition by letter stating the Petition was received on July 30, 2007. In his response the Secretary stated that he would begin work on the Petition in October 2007.

27. Pursuant to the ESA, the Secretary should have made a 90-day finding on WildEarth Guardians’ Rocky Mountain Petition on or about October 30, 2007. On November 8, 2007, WildEarth Guardians sent the Secretary and FWS a formal 60-day notice letter pursuant to

the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), informing the Secretary and FWS that they were violating the ESA by failing to make a 90-day finding on the Rocky Mountain Petition. According to certified mail receipts, the Secretary and FWS received WildEarth Guardians' 60-day notice letter on November 14, 2007. FWS's Rocky Mountain Region did respond to WildEarth Guardians 60-day notice letter, by letter dated January 10, 2008, and stated that FWS anticipated making negative 90-day findings on some of the 206 species covered by the Petition by September 2008. WildEarth Guardians believes it is practicable for the Secretary to immediately make a positive 90-day finding on all 206 species covered in the Rocky Mountain Petition because the Petition and NatureServe represents the best available science and certainly provide "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b).

28. To date the Secretary has failed to make the 90-day finding on any of the 206 species covered by WildEarth Guardians' Rocky Mountain Petition. Given past experiences with FWS, WildEarth Guardians has no confidence that FWS will make 90-day findings on any of the species covered by the Rocky Mountain Petition absent a Court Order requiring the agency to do so.

29. For purposes of this lawsuit, and to avoid a proliferation of litigation, WildEarth Guardians has combined both Petitions and all 681 species covered by the Petitions into this single action.

#### **CLAIM FOR RELIEF**

30. Each and every allegation set forth in this Complaint is incorporated herein by reference.

31. The Secretary has failed to make 90-day findings on WildEarth Guardians' Petitions to list 475 species in FWS's Southwest Region and 206 species in FWS's Mountain-Prairie Region, and has failed to publish such findings, or findings for any of the combined 681 species covered by the Petitions, in the Federal Register.

32. The Secretary has violated his duty under the ESA by failing to make these 90-day findings within 90-days because it is practicable to make such findings. 16 U.S.C. § 1533(b)(3)(A); 5 U.S.C. § 706.

33. By failing to render a 90-day finding on either of WildEarth Guardians' Petitions and by failing to render 90-day findings for any of the 681 species covered by the Petitions, the Secretary has unreasonably delayed and unlawfully withheld compliance with section 4(b)(3)(A) of the ESA within the meaning of the APA. 16 U.S.C. § 1533(b)(3)(A); 5 U.S.C. § 706.

#### **PRAYER FOR RELIEF**

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

1. A declaration that the Secretary has violated the ESA by failing to make a 90-day finding on either of WildEarth Guardians' Petitions or for any of the 681 species covered by the Petitions;

2. A declaration that the Secretary has unlawfully withheld and unreasonably delayed agency action in violation of the APA by failing to make a 90-day finding on either of WildEarth Guardians' Petitions or for any of the 681 species covered by the Petitions;

3. An injunction compelling the Secretary to make 90-day findings on WildEarth Guardians' Petitions to list 681 species, and to publish such findings in the Federal Register by a date certain;

4. An order awarding WildEarth Guardians its costs of litigation, including reasonable attorney's fees;

5. Such other and further relief as the Court deems just and proper.

Respectfully submitted this 19th day of March 2008.

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