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

WESTERN WATERSHEDS PROJECT,)	
Plaintiff,)	CASE NO. 11-462
)	
vs.)	
)	COMPLAINT
DANIEL ASHE, Director, and UNITED)	
STATES FISH AND WILDLIFE)	
SERVICE, an agency of the United States,)	
Defendant.)	

INTRODUCTION

1. On September 30, 2010, Defendants U.S. Fish and Wildlife Service’s *et al.* (“the Service”) again refused to protect the Pygmy rabbit (*Brachylagus idahoensis*) as a threatened or endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (“ESA”), despite the uncontested scientific evidence demonstrating that pygmy rabbits have been eliminated across vast areas of their historic range, and populations have shrunk to a fraction of former levels. 75 Fed. Reg. 60516-561 (September 30, 2010) (“September 2010 listing decision”). This case represents the fourth round of litigation before this Court over the Service’s recurring violations of the ESA with respect to Plaintiff Western Watersheds Project’s (“Western Watersheds”) efforts to protect the pygmy rabbit under the ESA. *See Western Watersheds Project v. U.S. Fish and Wildlife Service*, 10-cv-000544-REB; *Western Watersheds Project v. Norton*, 06-cv-00127-EJL, 2007 WL 2827375 (D. Idaho); *Western Watersheds Project*

v. U.S. Fish and Wildlife Service, 04-cv-0440-BLW (D. Idaho). In each of these prior cases, the Court ordered the Service to undertake a new scientific analysis of the status of pygmy rabbit populations and habitat, and issue a new listing rule. *See id.*

2. The September 2010 listing decision is without merit, unlawfully distorted and cherry-picked scientific evidence to support its decision, and ignored inconvenient scientific information demonstrating the threats to pygmy rabbit populations and habitat. Moreover, in the September 2010 listing decision, the Service contrived a new test under the ESA to foreclose protecting the pygmy rabbit under the ESA – a test that runs counter to the Service’s prior interpretation of “significant portion” of a species range, and which the Service has failed to adequately explain or justify.

3. Accordingly, Western Watersheds seeks judicial relief (1) holding that the Service’s September 2010 listing rule violated the ESA when it concluded that pygmy rabbit do not warrant listing over all or a significant portion of its range; (2) reversing and remanding the Service’s September 2010 listing decision; and (3) enjoining the Service to issue a new listing determination within a reasonable period of time, and certainly no later than 90 days.

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); the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*

5. On December 10, 2010, Western Watersheds provided the Service with sixty days written notice of the violations alleged herein, pursuant to 16 U.S.C. §1540(g).

6. Western Watersheds has demanded that the Service correct the violations of the ESA alleged herein, but the Service 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 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.

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

PARTIES

9. Plaintiff WESTERN WATERSHEDS PROJECT (“Western Watersheds”) is a non-profit membership organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. Western Watersheds is headquartered at the Greenfire Preserve along the East Fork of the Salmon River, in Custer County, Idaho, and has over 1,400 members. Western Watersheds, 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. Western Watersheds’ 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, Western Watersheds' use and enjoyment of the pygmy rabbit is entirely dependent on the continued existence of healthy, sustainable populations.

11. 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 the Service's violations of law as alleged herein. These are actual, concrete injuries to Western Watersheds and its members and staff, caused by the Service's failure to comply with the ESA and APA and implementing regulations. The relief sought herein would redress these injuries.

12. Defendant DANIEL ASHE is the Director of the U.S. Fish and Wildlife Service, which is the federal agency charged with properly carrying out the ESA and its implementing regulations with respect to terrestrial species. Defendant Gould signed and approved the September 2010 listing decision challenged herein, and Gould is sued solely in his official capacity.

13. 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 September 2010 listing decision challenged in this case.

THE ESA STATUTORY FRAMEWORK

14. 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.

15. 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.* at § 1532(16). A species is “endangered” when it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* at § 1532(6). A species is “threatened” when it is likely to become endangered within the foreseeable future. *Id.* at § 1532(20).

16. The Secretaries of Commerce (for most marine species) and Interior (for terrestrial species) are charged with listing species as threatened or endangered based “solely on the basis of the best scientific and commercial data available . . . ,” *id.* at § 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. at § 1533(a)(1). The Secretary of Interior has delegated his responsibilities under the ESA to U.S. Fish and Wildlife Service. 50 C.F.R. § 17.2(a).

17. The ESA establishes a process for citizens to petition for the protection of species through listing as either endangered or threatened. 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.”

18. 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.*

19. 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.* at § 1533(b)(3)(C)(ii).

20. If the Service finds that listing is warranted, it must publish a proposed listing regulation in the Federal Register. *Id.* at § 1533(b)(3)(B)(ii). Within one year of a warranted finding, the Secretary must either publish in the Federal Register a final regulation listing the species or withdrawing the proposed listing. *Id.* at § 1533(b)(6)(A). Designation of critical habitat for the species must accompany or soon follow a final listing regulation. *Id.* at § 1533(b)(6)(C).

21. 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.* at §§ 1536, 1538. The ESA’s ultimate goal is recovery of

listed species to the point where they no longer need ESA protection. *Id.* at §§ 1531(b)-(c); 1532(3).

STATEMENT OF FACTS

Pygmy Rabbit and its Habitat

22. 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.

23. 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.

24. 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 mature 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.

25. 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.

26. 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.

27. 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).

28. 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. This situation is the same across the historic range of the rabbit, including in Nevada, Idaho and Montana, where rabbits have been eliminated from their historic range.

29. 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.

30. 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 prescribed and wild land fire; (3) sagebrush eradication efforts; and (4) extensive agricultural activities.

31. 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.

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

33. 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.

34. 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.

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

Western Watersheds’ Efforts to Protect Pygmy Rabbit Under the ESA

36. On April 21, 2003, Western Watersheds 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 (“Listing Petition”).

37. Western Watersheds’ 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. Western Watersheds’ 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.

38. The Service failed to respond to Western Watersheds’ Listing Petition within the timelines required by the ESA. Accordingly, on August 31, 2004, Western Watersheds sued the Service over such violations of the ESA. *See Western Watersheds Project et al. v. United States Fish and Wildlife Service*, No. 04-cv-440-BLW (D. Idaho).

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

40. Pursuant to the Settlement Agreement, on May 20, 2005, the Service published a 90-day finding which concluded that Western Watersheds' 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).

41. Western Watersheds challenged this decision in *Western Watersheds Project v. Norton*, No. 06-cv-0127-EJL (D. Idaho), and in September 2007, this Court held the Service's 90-day finding was arbitrary and capricious, reversed and remanded the decision back to the Service, and ordered a new decision within 90-days. 2007 WL 2827375.

42. In January 2007, the Service issued a new 90-day finding, this time concluding that protecting pygmy rabbit under the ESA may be warranted. 73 Fed.Reg. 1312 (January 8, 2007).

43. After waiting in vain over two years for the Service to issue a 12-month finding as required under the ESA, in February 2010, Western Watersheds again sued the Service alleging violations of the ESA. *See Western Watersheds Project v. U.S. Fish and Wildlife Service*, No. 10-cv-000544-REB (D. Idaho). The parties quickly settled this case, with the Service agreeing to issue a mandatory 12-month finding no later than September 24, 2010, which the Court subsequently approved. *See id.* at Docket Nos. 16, 16-1, and 18.

The September 2010 Listing Rule

44. On September 30, 2010, the Service published in the Federal Register its 12-month finding required under *Western Watersheds Project v. U.S. Fish and Wildlife Service*, 10-cv-000544-REB. 75 Fed. Reg. 60516-561 (September 30, 2010).

45. In its 2010 listing rule, the Service concluded that the pygmy rabbit did not qualify as an endangered or threatened species because, according to the Service, the threats to pygmy rabbit populations through habitat conversion, sagebrush treatments and eradication, livestock grazing, invasive plants, fire, and energy exploration and development, and habitat fragmentation only impact “a handful of specific areas . . . in occupied pygmy rabbit habitat,” and are not widespread across the range of pygmy rabbit.

46. The best available scientific evidence undermines this claim, however, including the scientific information presented in the 2010 listing rule. For example, 18% of pygmy rabbit habitat in Idaho has been lost (or modified) due to agricultural conversion, alone, and the native sagebrush-steppe communities in the other states within pygmy rabbit range have been similarly impacted.

47. Sagebrush treatments – i.e., mowing, chaining, bulldozing, plowing, application of herbicides, and other sagebrush eradication efforts – within pygmy rabbit habitat are also pronounced across its range. For example, the Bureau of Land Management has adopted a national program to “treat” vegetation across 60 million acres in Western states – including within historic and current pygmy rabbit habitat. Despite this effort to alter the native vegetation in the Western states through fire, mechanical treatments, herbicides, and other means across approximately 25% of all BLM lands, the Service concluded that the loss of sagebrush due to sagebrush treatments “are few in number across the range and are not indicative of a systematic or widespread loss” of rabbit habitat.

48. The Service also concluded that the explosion of non-native weeds across the West, including within pygmy rabbit occupied habitat, does not adversely impact pygmy rabbit populations because examples of the invasion of cheatgrass and other non-native weeds into pygmy rabbit habitat “are few in number and not considered to be indicative of a widespread habitat condition.” This conclusion flies in the face of the best available scientific information, which shows that 80% of the land within the Great Basin is susceptible to cheatgrass invasion, and 65 percent of this area is at a moderate to high risk of cheatgrass displacement within 30 years.

49. The 2010 listing rule similarly ignored or misapplied the best available scientific information on the impacts on pygmy rabbit populations and habitat of livestock grazing, fire, energy exploration and development, and habitat fragmentation.

50. The 2010 listing rule further violated the ESA’s requirements for assessing whether a species should be listed as endangered or threatened over a significant portion of its range. Instead of applying the Service’s traditional test for determining whether a portion of a species range is “significant” – which requires considering whether the habitat under review contributes to the resiliency, redundancy or representation of a species – the Service looked to only some of the resiliency factors, and ignored the other factors completely.

51. In the 2010 listing rule, the Service never explained why it applied an entirely new test for determining whether pygmy rabbit is threatened or endangered over a “significant portion of its range,” and the 2010 listing rule is at odds with other recent listing rules, where the Service applied its traditional test for determining “significant portion of range.” *See, e.g.*, 75 Fed. Reg. 6438 (Feb. 9, 2010) (12-month finding for American pika); 74 Fed. Reg. 47545 (Sept. 16, 2009) (12-month finding for Bliss rapids snail); 74 Fed. Reg. 63343 (Dec. 3, 2009) (12-

month finding for Black-tailed prairie dog); 73 Fed. Reg. 12929 (March 11, 2008) (12-month finding for North American wolverine); 73 Fed. Reg. 4380 (Jan. 24, 2008) (12-month finding for Siskiyou Mtns. Salamander); 72 Fed. Reg. 37346 (July 9, 2007) (12-month finding for Bald eagle).

52. As a result of FWS's violations of law, pygmy rabbit remains unprotected under the ESA, even though it faces further declines and warrants listing under the ESA. Western Watersheds has been harmed by the Service's unlawful refusal to protect the pygmy rabbit under the Endangered Species Act. Accordingly, Western Watersheds prays for judicial relief as set forth below.

CLAIM FOR RELIEF:
SEPTEMBER 2010 LISTING RULE
VIOLATES THE ESA AND APA

53. Western Watersheds realleges and incorporates by reference the allegations in all preceding paragraphs.

54. As alleged above, the Service's September 2010 listing decision refusing to protect the pygmy rabbit under the ESA 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. the Service ignored the best available scientific information on the impacts of habitat conversion, agriculture, sagebrush treatment, livestock grazing, nonnative invasive plants, fire, energy exploration and development, habitat fragmentation, and other known threats to pygmy rabbit populations and habitat, and arbitrarily downplayed the impacts of these threats on pygmy rabbit populations and habitat; and

B. the Service violated the Endangered Species Act and/or the Administrative Procedure Act by using an arbitrary and capricious new test for determining whether pygmy rabbit qualified as

a threatened or endangered species over “all or a significant portion of its range,” as required under 16 U.S.C. § 1533; and

55. For these and other reasons, the Service’s 2010 listing decision for the pygmy rabbit must be reversed and remanded as being arbitrary, capricious, an abuse of discretion, and contrary to the Endangered Species Act and/or Administrative Procedure Act.

WHEREFORE, Western Watersheds prays for relief as set forth below.

PRAYER FOR RELIEF

Western Watersheds respectfully request that the Court grant the following relief:

A. Order, declare, and adjudge that the U.S. Fish and Wildlife Service has violated the Endangered Species Act and/or the Administrative Procedure Act in issuing the September 2010 pygmy rabbit listing decision;

B. Reverse and remand the September 2010 listing decision with instructions that the Service must proceed expeditiously with the ESA listing process for pygmy rabbit;

C. Grant such other and further relief as may be requested hereafter by Plaintiff, or as may be deemed appropriate by the Court in order to protect the public interest and the pygmy rabbit; and

D. Award Plaintiff its reasonable litigation costs (including attorney fees and expert witness fees) incurred in bringing this action, pursuant to EAJA, ESA, and/or other provisions of law.

Dated this 3rd day of October, 2011

Respectfully submitted,

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