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

_____	)	
WILDEARTH GUARDIANS and	)	
WESTERN WATERSHEDS PROJECT,	)	
	)	Case No.
Plaintiffs,	)	
	)	
vs.	)	<b>COMPLAINT</b>
	)	
DIRK KEMPTHORNE,	)	
United States Secretary of the Interior,	)	
	)	
Defendant.	)	
_____	)	

**INTRODUCTION**

1. Plaintiffs, WildEarth Guardians (“Guardians”) and Western Watersheds Project (“WWP”), bring this action against Defendant, Dirk Kempthorne, the U.S. Secretary of the Interior (the “Secretary”) in his official capacity. Guardians and WWP challenge the Secretary’s rejection of their petition to “list,” and thereby protect, the Columbian Sharp-tailed Grouse, *Tympanuchus phasianellus columbianus*, as a threatened or endangered species under the Endangered Species Act (“ESA”). 16 U.S.C. § 1531 *et seq.* Guardians and WWP allege that the Secretary’s decision to deny their petition violated the ESA and is arbitrary, capricious and contrary to law within the meaning of the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 701-706. To remedy the

Secretary's violation of law, Guardians and WWP seek declaratory and injunctive relief reversing and remanding the Secretary's decision and directing him to proceed with the ESA listing process for Columbian Sharp-tailed Grouse.

### **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), the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Equal Access to Judgment Act ("EAJA"), 28 U.S.C. § 2412 *et seq.*

3. This Court has authority to grant Plaintiffs' requested relief pursuant to 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (APA).

4. More than 60 days ago, by letter dated May 28, 2008, Guardians and WWP furnished the Secretary with written notice of the ESA violations alleged in this Complaint and of their intent to sue. *See* 16 U.S.C. § 1540(g). According to certified mail return receipts the Secretary received this notice letter on June 2, 2008.

5. The Secretary has not remedied his violations of the ESA by reversing his negative finding on the listing petition. Therefore an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2001.

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, because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within this judicial district; Plaintiff, WWP

resides in this district; the Columbian Sharp-tailed Grouse lives in this district; and Defendant maintains offices within this district.

### **PARTIES**

8. Plaintiff WILDEARTH GUARDIANS (“Guardians”) sues on behalf of itself and its adversely affected members. Guardians is a new conservation organization 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. Headquartered in Santa Fe, New Mexico, and with offices in Denver, Colorado, and Phoenix, Arizona, Guardians has approximately 4,500 members that live throughout the country, including the range of the Columbian Sharp-tailed Grouse and in Idaho.

9. Forest Guardians, a predecessor in interest to WildEarth Guardians, was the lead petitioner to list Columbian Sharp-tailed Grouse. WildEarth Guardians continues Forest Guardians’ efforts to protect Columbian Sharp-tailed Grouse and their habitat. Forest Guardians invested significant resources into preparing the listing petition, a status update, and pursuing previous litigation to compel the Secretary to protect Columbian Sharp-tailed Grouse under the ESA.

10. Guardians’ members and staff frequently use and enjoy Columbian Sharp-tailed Grouse and their habitat for recreational, aesthetic, and scientific activities and will continue to do so. Mark Salvo, Director of the Sagebrush Sea Campaign for Guardians, has studied and observed Columbian Sharp-tailed Grouse in southwestern Idaho and intends to continue doing so. Guardians and its members have a substantial interest in the conservation of Columbian Sharp-tailed Grouse and are adversely affected by the

Secretary's failure to comply with the ESA. The requested relief will redress Guardians' and its members' injuries.

11. Plaintiff WESTERN WATERSHEDS PROJECT ("WWP") sues on behalf of itself and its adversely affected members. WWP is a non-profit conservation organization headquartered in Hailey, Idaho. It has more than 1,600 members, volunteers and supporters who live in Idaho and throughout the United States. The organization has additional field offices in Boise, Idaho; Mendon, Utah; Reseda, California; Tucson, Arizona; Pinedale, Wyoming; and Missoula, Montana. WWP, as an organization and on behalf of its members, seeks to protect and restore wildlife, riparian areas, water quality, fisheries, and other ecological values of watersheds throughout the West, including Columbian Sharp-tailed Grouse and their habitat. WWP joined the petition to list Columbian Sharp-tailed Grouse to protect its organizational and its members' interests.

12. WWP's members and staff frequently use and enjoy Columbian Sharp-tailed Grouse and their habitat for recreational, aesthetic, and scientific pursuits and will continue to do so. Kathleen Fite, Biodiversity Director for WWP, has visited public lands in eastern Idaho, including the Rockland area and the Arbon Valley, for the purpose of studying and enjoying Columbian Sharp-tailed Grouse. She has also viewed Columbian Sharp-tailed Grouse in the vicinity of Mann Creek in western Idaho. While working for the Idaho Department of Fish and Game in the 1990s, she participated in efforts to re-establish black hawthorns and other native shrubs to benefit Columbian Sharp-tailed Grouse. Ms. Fite intends to continue observing and enjoying Columbian Sharp-tailed Grouse and the lands they inhabit.

13. WWP and its members have a substantial interest in the conservation of Columbian Sharp-tailed Grouse and are adversely affected by the Secretary's failure to comply with the ESA. The requested relief will redress these injuries to WWP and its members.

14. 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.

#### **STATUTORY FRAMEWORK OF THE ENDANGERED SPECIES ACT**

15. 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." 16 U.S.C. § 1532(3). Accordingly, the ultimate 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 no longer need ESA protection.

16. However, the protective provisions of the ESA do not do anything to conserve a species until that species is officially "listed" as either threatened or endangered under the terms of the Act. 16 U.S.C. § 1533.

17. 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.” 16 U.S.C. § 1532(16).

18. 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).

19. 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).

20. Once a species is listed, the ESA provides strong legal protection 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 subsequently develop recovery plans for such species. 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. 16 U.S.C. § 1536(a)(1) and (2). Additionally, the ESA prohibits any person from "taking" a threatened or endangered species. 16 U.S.C. § 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).

21. The degree of protection that the Secretary provides a listed species depends on whether the species is listed as "threatened" or "endangered." Threatened species may receive less protection under the ESA than endangered species. For example, Section 4(d) of the ESA authorizes the Secretary to promulgate special regulations ("4(d) Rules") affecting the protections afforded threatened species. 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.31(a) and (c). The Secretary may use a special 4(d) Rule to allow otherwise illegal take of threatened species.

22. Any interested person may file a petition with the Secretary to list, uplist (from threatened to endangered), downlist (from endangered to threatened), or delist a species under the ESA. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b).

23. 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.”

24. The Secretary’s initial 90-day review of a listing petition is not exhaustive and is limited to a determination of whether the information in the petition meets the “substantial information” threshold. The Secretary does not conduct additional research at this point, nor does he subject the petition to rigorous critical review. Rather, at the 90-day finding, the Secretary accepts the petitioner’s sources and characterizations of the information unless he has specific information to the contrary.

25. If the Secretary makes a positive 90-day finding, then the Secretary must commence a thorough status review of the species. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(3). After the status review the Secretary must determine whether the petitioned action is actually warranted. 16 U.S.C. § 1533(b)(3)(B)(ii); 50 C.F.R. § 424.14(b)(3).

26. If the Secretary finds that listing is warranted, he must publish a proposed listing regulation in the Federal Register. 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. 16 U.S.C. § 1533(b)(6)(A). At such time, the Secretary must either 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. 16 U.S.C. §§ 1533(b)(6)(A)(1)(III) and (b)(6)(B)(i).

27. The ESA expressly provides that a negative 90-day finding may be challenged in federal court. 16 U.S.C. § 1533(b)(3)(C)(ii).

## **STATEMENT OF FACTS**

### **I. The Columbian Sharp-tailed Grouse**

28. The Columbian Sharp-tailed Grouse is the smallest and rarest of six subspecies of sharp-tailed grouse in North America. First described by Lewis and Clark in 1805, the Columbian Sharp-tailed Grouse was once considered the most abundant grouse in the Intermountain West. The historic range of Columbian Sharp-tailed Grouse included parts of what became ten western states and one Canadian province. However, by 1900 Columbian Sharp-tailed Grouse distribution had declined. Today the species exists in less than ten percent of its historic range.

29. Columbian Sharp-tailed Grouse use different seasonal habitats including: sagebrush steppe, meadows, mountain shrub-lands, brushy grasslands, and riparian and deciduous habitats. . Columbian Sharp-tailed Grouse appear to choose habitat based on its structural characteristics. The species will often use transitional areas between habitat types, especially areas that offer a diversity of vegetative species and structure.

30. The Columbian Sharp-tailed Grouse mating ritual is fascinating to observe. Each spring, and occasionally in autumn, male grouse congregate on “leks” – ancestral strutting grounds to which the birds return year after year. The males arrive 30-60 minutes before sunrise and may remain on the lek for 2-3 hours. The males’ courtship display consists of animated dancing and “freezing” phases. They strut, push their tails upward,

inflate their air sacs, and rush forward or circle while stamping their feet, clicking their central tail feathers, and emitting hooting, clucking, cackling and gobbling sounds.

Dancing bouts last 30-50 seconds. Males will often dance in synchrony, appearing to start and stop on signal. Mating on the lek is non-random, with the most central, dominant males on the lek doing most of the mating.

Displaying Columbian Sharp-tailed Grouse male



Photo: Washington Department Fish and Wildlife

31. Human activities including livestock grazing, conversion of habitat to agricultural use, application of herbicides and pesticides, fire management, oil and gas development, urban sprawl, and mining have degraded or eliminated much Columbian Sharp-tailed Grouse habitat. The loss of habitat on private land enrolled in the Conservation Reserve Program (CRP) to agricultural production is an especially important threat to Columbian Sharp-tailed Grouse.

32. Historically, it is likely that millions of Columbian Sharp-tailed Grouse occurred in the West. Today, only 18,000 – 25,000 breeding individuals remain in the United States.

33. Once abundant throughout ten western states and into Canada, Columbian Sharp-tailed Grouse are now effectively limited to three metapopulations. These three metapopulations are found in central British Columbia, southeastern Idaho/northern Utah, and northwestern Colorado/south-central Wyoming. At least one expert has estimated that these metapopulations have only a 30% chance of surviving for the next 100 years. Outside of the three metapopulations the few remaining isolated subpopulations of Columbian Sharp-tailed Grouse are expected to die out.

## **II. Plaintiffs' Efforts to Protect the Columbian Sharp-tailed Grouse**

34. Lead petitioner, Forest Guardians, now plaintiff WildEarth Guardians, WWP and others petitioned the Secretary to list the Columbian Sharp-tailed Grouse as a threatened or endangered species in October 2004. When the Secretary failed to make a 90-day finding on their petition for over a year, in March 2006, the petitioners sued to force the Secretary to make the overdue finding. By May 2006, the Secretary settled this initial lawsuit and agreed to make the overdue 90-day finding by November 2006. In early November 2006, the petitioners submitted to the Secretary an updated "status review" containing new information on the status of the Columbian Sharp-tailed Grouse which had been developed since the original petition was filed in 2004. About two weeks later, in late November 2006, the Secretary published a negative 90-day finding on Plaintiffs' petition. 71 Fed. Reg. 67318. This lawsuit challenges the Secretary's negative 90-day finding.

### **CLAIM FOR RELIEF**

35. The allegations of all preceding paragraphs of this Complaint are incorporated herein by reference.

36. The Secretary's 90-day finding that Plaintiffs' ESA listing petition did not present evidence that would lead a reasonable person to believe that the listing of the Columbian Sharp-tailed Grouse as threatened or endangered may be warranted failed to use the best available science; relied on an improper evidentiary standard; failed to consider significant threats to the Columbian Sharp-tailed Grouse addressed in the petition such as threats from increased oil and gas development and the increased withdrawal of private land from the Conservation Reserve Program; failed to articulate a rational connection between the facts found and its conclusion; failed to properly consider whether the Columbian Sharp-tailed Grouse is threatened or endangered in a significant portion of its range and is otherwise arbitrary, capricious, and contrary to law in violation of the ESA within the meaning of the APA. 16 U.S.C. § 1533(b); 5 U.S.C. §§ 701-706.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request that this Court enter judgment providing the following relief:

(A) A declaration that the Secretary violated the ESA and APA by issuing an unlawful 90-day finding on Plaintiffs' petition to list the Columbian Sharp-tailed Grouse as a threatened to an endangered species;

(B) An injunctive order requiring the Secretary to withdraw his unlawful 90-day finding and issue a new finding by a date certain;

(C) An order awarding Plaintiffs their 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, 28 U.S.C. § 2412; and

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

Dated this 25th day of November 2008.

Respectfully submitted,

/s/ Judith M. Brawer  
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