



February 14, 2019

Via Electronic Mail & Certified Mail, Return Receipt Requested

Mr. David Bernhardt
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Ms. Margaret Everson
Principal Deputy Director
Exercising the Authority of the Director
U.S. Fish and Wildlife Service
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RE: Sixty-day Notice of Intent to Sue for Failure to Issue a 12-Month Finding on a Petition to List the Lesser Prairie Chicken as Endangered or Threatened Under the Endangered Species Act

Dear Acting Secretary Bernhardt and Acting Director Everson:

The Center for Biological Diversity, Defenders of Wildlife, and WildEarth Guardians ("Petitioners") hereby provide this 60-day notice of intent to sue the U.S. Fish and Wildlife Service ("Service") and the U.S. Department of the Interior over violations of Sections 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533, and its implementing regulations, in failing to issue a 12-month finding regarding Petitioners' petition to list the lesser prairie chicken (*Tympanuchus pallidicinctus*) ("prairie chicken") as an endangered or threatened species. This notice is provided in fulfillment of the requirements of the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).

THE ENDANGERED SPECIES ACT

Congress enacted the ESA in 1973 amid growing concern over the loss of biodiversity stemming from "economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a). The ESA established a comprehensive statutory program to protect and conserve imperiled species and their ecosystems. The ESA sets forth a process to identify species that are "endangered" or "threatened" with extinction and designate their critical habitat. It further directs the Service to develop plans to recover such species and bars the take of endangered species except as authorized under the Act. As the Supreme Court has emphasized, the "plain intent of Congress in passing the statute was to halt and reverse the trend toward extinction whatever the cost." *Babbitt v. Sweet Home*

Chapter of Communities for a Great Oregon, 515 U.S. 687, 699 (1995) (citing *TVA v. Hill*, 437, U.S. 153, 184 (1978)).

The Service is required to “list” species of plants and animals as endangered or threatened if it determines that the species is facing extinction due to “the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.” 16 U.S.C. §§ 1533(a)(1)(A)-(E). A species is deemed to be “endangered” under the Act if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6); 50 C.F.R. § 424.02(e). A “threatened species” is “any species 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); 50 C.F.R. § 424.02(m). In making listing decisions, the Service must rely “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

Upon receiving a petition to list a species, the Service has 90 days to make a finding as to 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); 50 C.F.R. § 424.14(b)(1). Twelve months after receipt of a petition that passes this initial stage of review, the Service must make one of three determinations: 1) listing is not warranted, 2) listing is warranted, or 3) listing is warranted but presently precluded by other pending proposals for listing species, provided other circumstances are met. 16 U.S.C. § 1533(b)(3)(B). If the Service determines that listing a species is warranted, it must then promptly publish in the Federal Register a proposed rule to list the species. 16 U.S.C. § 1533(b)(5). These deadlines are mandatory. *Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015).

THE LESSER PRAIRIE CHICKEN

The lesser prairie chicken is a grassland bird found in southeastern Colorado, western Kansas, eastern New Mexico, western Oklahoma, and the Texas Panhandle. It is recognized by its feathered feet, stout build, ground-dwelling habit, and lek mating behavior. Its preferred habitat is native short- and mixed-grass prairies having a shrub component dominated by sand sagebrush or shinnery oak.

Once numbering in the millions, the prairie chicken has declined to a fraction of its former numbers and range. In the most recent survey, a mere 38,000 lesser prairie chickens were estimated to survive. The primary cause of this precipitous decline is fragmentation, degradation and destruction of the prairie chicken’s grassland habitats by oil and gas drilling and other energy development, agriculture, livestock grazing and the roads and powerlines needed to support these industries. Already much diminished, the prairie chicken now faces the additional threat of climate change—a serious threat to their survival.

A series of seminal, scientific studies on prairie chickens was published in book form earlier in 2016. This book, *Ecology and Conservation of Lesser Prairie-Chickens*, includes a study that found a 38 percent chance of the Colorado-Kansas population dropping below 50 birds within 30 years, which would place them deep within an extinction spiral. ECOLOGY AND CONSERVATION OF LESSER PRAIRIE-CHICKENS (David A. Haukos & Clint W. Boal, eds. 2016). The same study found a troubling 83.5

percent probability of the total worldwide population of the birds dropping below critical population thresholds that make recovery very unlikely. *Id.*

First petitioned for ESA protection in 1995, the prairie chicken was designated a candidate for listing in 1999. In its 2008 candidate notice of review, the Service changed the listing priority number for the prairie chicken from an 8 to a 2, reflecting a change in the magnitude of the threats from moderate to high due to anticipated increases in energy development, associated transmission lines and conversion of Conservation Reserve Program lands from native grass cover to cropland. The Service, however, took no action to list the species. 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 prairie chicken by September 30, 2012.

On December 11, 2012, the Service issued a proposed rule listing the prairie chicken as a threatened species under the ESA and a determination that designating critical habitat for the species is prudent but not determinable at this time. 77 Fed. Reg. 73,828 (Dec. 11, 2012). On May 6, 2013, the Service issued a proposed Section 4(d) rule that exempted a host of activities from the ESA's Section 9 prohibition on take. 78 Fed. Reg. 26,302 (May 6, 2013). Petitioners submitted comments to the Service addressing numerous flaws with the proposed 4(d) rule and calling into question the Service's assertion that the rule would provide for the conservation of the prairie chicken.

On December 11, 2013, the Service proposed a revised 4(d) rule and reopened the public comment period on the proposed listing of the prairie chicken. 78 Fed. Reg. 75,306 (Dec. 11, 2013). Petitioners again submitted comments reaffirming concerns with the 4(d) rule and raising new issues with the revised rule and proposed listing. In particular, Petitioners commented that alarming new survey results warranted an explanation from the Service as to whether the species warrants listing as an "endangered species" based on threats throughout all or a significant portion of its range.

On December 18, 2013, the Service published a Federal Register notice announcing the draft Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances ("CCAA") for the prairie chicken. 78 Fed. Reg. 76,639 (Dec. 18, 2013). The CCAA would extend regulatory assurances to participants in the plan that, in exchange for voluntarily agreeing to undertake certain conservation measures for the species, they would not be imposed with additional conservation requirements or regulatory restrictions in the event the prairie chicken was listed as endangered or threatened under the ESA. Petitioners submitted comments to the Service on the draft CCAA addressing numerous flaws and deficiencies with the agreement that they believed would undermine conservation of the species.

On April 10, 2014, the Service published a final rule listing the prairie chicken as a threatened species with a Section 4(d) special rule setting forth the take prohibitions applicable to the species. 79 Fed. Reg. 19,974 (Apr. 10, 2014). The Service indicated that critical habitat was not determinable at that time.

On September 1, 2015, the U.S. District Court for the Western District of Texas vacated the listing decision for the prairie chicken. *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015). Rather than appeal the ruling, the Service filed a motion to amend the judgment requesting that, instead of vacating the listing decision, the court leave the ESA's protections in place and remand the listing decision to the Service for further review. On February 29, 2016, the same court rejected the Service's request to reinstate ESA protections for the bird and remand the decision

to the Service for further review. *Permian Basin Petrol. Ass'n v. Dep't of the Interior*, No. 7:14-CV-50 (W.D. Tex. Feb. 29, 2016). Consequently, on July 20, 2016, the Service formally removed the lesser prairie-chicken from the ESA's List of Endangered and Threatened Wildlife. 81 Fed. Reg. 47,047 (July 20, 2016).

Petitioners then submitted a new petition to list the prairie chicken on the basis of the best scientific and commercial data available. The Service received that petition on September 8, 2016. 81 Fed. Reg. 86,315 (Nov. 30, 2016). The petition asked the Service to reinstate federal protections for the entire species; it also sought emergency protections for the most imperiled isolated populations, in Colorado and western Kansas and along the Texas-New Mexico border.

On November 30, 2016, the Service completed its initial review of the petition and issued a 90-day finding that listing may be warranted. 81 Fed. Reg. 86,315 (Nov. 30, 2016). The Service noted that in the spring of 2015, it had begun assessing the biological status of the prairie chicken "to ensure future actions related to the species are based on the best available science." That assessment was expected to be completed in the summer of 2017. See 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) at https://www.fws.gov/news/ShowNews.cfm?ref=petitions-to-federally-protect-the-lesser-prairie-chicken-increase--&_ID=35899. The status assessment was submitted for peer review but never released.

A 12-month finding on the petition was due on or about September 8, 2017. To date, however, the Service has not issued a 12-month finding nor proposed any action to list the species. Petitioners have contacted the Service repeatedly, but the Service has not indicated it will act on the petition any time soon.

In *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002), the Ninth Circuit explicitly held that 12-month findings on a citizen petition to list a species under the ESA must in all cases be made within 12 months of receipt of the petition. *Accord Friends of Animals v. Ashe*, 808 F.3d 900, 903 (D.C. Cir. 2015). The Service is indisputably in violation of the ESA, 16 U.S.C. § 1533. Accordingly, we request that the Service remedy this violation by promptly publishing a 12-month finding.

PETITIONERS

The Center for Biological Diversity is a national, non-profit conservation organization supported by more than 1.4 million members and online activists. The Center and its members have a long-standing interest in the conservation of the lesser prairie chicken and its habitat in the United States.

Defenders of Wildlife is a national, non-profit conservation organization with more than 1.8 million members and supporters. 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 has a long-standing interest in the conservation of the lesser prairie chicken and other grassland species.

WildEarth Guardians is a regional non-profit conservation organization working to protect and restore the wildlife, wild places, wild rivers, and health of the American West. Guardians and its more than 223,000 members and online activists have long been active seeking to protect the lesser prairie

chicken and the habitat in the United States that it needs to thrive.

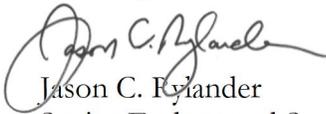
Members and staff of the Petitioners reside in the current and historic range of the lesser prairie chicken and regularly use areas within the lesser prairie chicken's habitat for recreational, wildlife viewing, scientific and educational purposes. Petitioners bring this notice on their own behalf and on behalf of their members and staff who have been, and will continue to be, harmed by the Service's failure to respond to the listing petition and protect the lesser prairie chicken and its habitat under the ESA.

CONCLUSION

This letter provides notice that Petitioners will take the necessary steps to compel the Service to lawfully protect the lesser prairie chicken, and meet its mandatory duties under the ESA, as well as its duties under the APA. If the Service does not act to remedy these violations within 60 days, Petitioners will initiate litigation in federal district court against the Service concerning these violations and will seek declaratory and injunctive relief and reasonable attorneys' fees and costs.

If you would like to discuss these issues or believe that anything stated above is in error, please contact Mr. Rylander at (202) 682-9400 x. 145. We appreciate your prompt consideration of these concerns.

Sincerely,



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