

and the U.S. Fish and Wildlife Service (“Service”) related to the status, under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA” or “Act”), of the lesser prairie-chicken (*Tympanuchus pallidicinctus*). Specifically, Plaintiffs challenge the Service’s determination to list the lesser prairie-chicken as “threatened,” rather than “endangered” under the ESA, and the Service’s issuance of a Section 4(d) rule exempting known threats to the species from the protections of the ESA. A “candidate” for protection under the ESA since 1998, the lesser prairie-chicken is a grassland bird that was once common in portions of five States in the Southern Great Plains. Its range is now reduced to a few areas in southeastern Colorado, western Kansas, eastern New Mexico, western Oklahoma, and the Texas Panhandle.

2. Plaintiffs challenge to Defendants’ designation of the lesser prairie-chicken as a “threatened” rather than an “endangered” species under the ESA is based in part on a 2013 population survey that documented a precipitous population decline of fifty percent in a single year. The survey documents a reduction from approximately 35,000 birds in 2012 to approximately 17,616 birds in 2013. In light of this dramatic population decline, as well as the lesser prairie-chickens’ precarious status and ongoing threats to the species – particularly habitat loss and fragmentation and drought – the best available scientific information indicates the Service should have listed the lesser prairie-chicken as endangered rather than threatened, as it is currently “in danger of extinction throughout all or a significant portion of its range,” which is the definition of “endangered” under the ESA. 16 U.S.C. § 1532(6).

3. In making its threatened determination, the Service improperly relied upon a definition of the statutory term “in danger of extinction” that was not developed through notice and comment proceedings as required by the Administrative Procedure Act (“APA”), 5 U.S.C. § 553, and Section 4(h) of the ESA, 16 U.S.C. § 1533(h), and is substantively at odds with the ESA. Moreover, in relying on this interpretive definition, the Service misapplied its own criteria to make a threatened determination.

4. It appears the Service’s decision to list the species as threatened was driven at least in part by the Service’s simultaneous plan to create a 4(d) rule under the ESA, 16 U.S.C. §

1533(d), exempting the primary threats to the species – including loss and fragmentation of habitat from agriculture, livestock grazing, oil and gas activities, and development, 50 C.F.R. § 17.41(d) – from some of the ESA’s most powerful substantive protections under Section 9 of the Act. 16 U.S.C. § 1538. Here, the Service’s desire to exercise the regulatory flexibility of Section 4(d) impermissibly trumped its consideration of the best available science and the ESA’s listing factors.

5. Even if the Service could list the lesser prairie-chicken as threatened and issue a Section 4(d) rule, the final rule violates both the ESA and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347. The 4(d) rule for the lesser prairie-chicken was developed without a NEPA analysis and it exempts from the prohibition on take the very plans and programs the Service characterizes as “voluntary,” “not adequate to fully address the known threats” to the species, and which contain mitigation measures of unknown certainty and effectiveness. Because the 4(d) rule allows nearly all of the primary threats to the species’ existence to continue, it fails to meet the benchmark standard of furthering the conservation of the species.

6. Plaintiffs respectfully request a remand of the decision to list the lesser prairie-chicken as threatened for further consideration of whether the species should be listed as endangered. Plaintiffs further seek vacatur of the 4(d) rule and reinstatement of the protections that are normally afforded threatened species in 50 C.F.R. § 17.31(a), as the 4(d) rule is unlawful under the ESA, 16 U.S.C. §§ 1533(d), 1532, 1536, the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559, 701-706, and NEPA.

JURISDICTION AND VENUE

7. This action arises under the ESA, 16 U.S.C. §§ 1531-1544, NEPA, 42 U.S.C. §§ 4321-4347, and the APA, 5 U.S.C. §§ 551, 706. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g), 28 U.S.C. §§ 1331-1346, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. § 702.

8. As required by Section 11(g) of the ESA, Plaintiffs provided Defendants with written notice of their violations of the ESA on April 10, 2014, via electronic mail and certified mail/return receipt requested.

9. Defendant Secretary of the Interior Sally Jewell received a copy of Plaintiffs' notice letter by electronic mail on April 10, 2014, and by certified mail on April 14, 2014.

10. Defendant Director of the Service Daniel Ashe received a copy of Plaintiffs' notice letter by electronic mail on April 10, 2014, and by certified mail on April 14, 2014.

11. More than 60 days have passed since notice was provided to Defendants, and the violations complained of in the notice letter are continuing or reasonably likely to continue to occur.

12. Venue is proper in the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) 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 at least one Plaintiff resides in this judicial district.

PARTIES

13. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a non-profit, Internal Revenue Service Code Section 501(c)(3) organization headquartered in Washington, D.C. with field offices in Arizona, Alaska, California, Colorado, Florida, Idaho, Montana, Oregon, and Mexico. Founded in 1947, Defenders is a science-based conservation organization with more than 1.2 million members and supporters nationwide. 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 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.

14. Defenders brings this action on its own institutional behalf and on behalf of its members who derive scientific, aesthetic, recreational, and spiritual benefit from the lesser prairie-chicken and its habitat. Defenders' members have observed the lesser prairie-chicken in the wild, photographed the lesser prairie-chicken, and have ongoing interests in the lesser prairie-chicken and its habitat. Defenders' members have concrete future plans to visit and observe the lesser prairie-chicken in the wild. The interests of Defenders and its 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 would be redressed by the relief sought in this case.

15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit Internal Revenue Service Code Section 501(c)(3) corporation that is headquartered in Tucson, Arizona, with offices in San Francisco, Joshua Tree, and Los Angeles, California; Portland, Oregon; Silver City, New Mexico; Tucson and Flagstaff, Arizona; Anchorage, Alaska; Richmond, Vermont; Seattle, Washington; Minneapolis and Duluth, Minnesota; Las Vegas, Nevada; and Washington, D.C. 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 50,500 members throughout the United States and the world.

16. The Center brings this action on its own institutional behalf and on behalf of its members, who derive scientific, aesthetic, recreational, and spiritual benefits from the lesser prairie-chicken and its habitat. The Center's members endeavor to observe the lesser prairie-chicken in the wild and have ongoing interests in the lesser prairie-chicken and its habitat. The Center's members have concrete future plans to visit the birds' habitat and try to observe the lesser prairie-chicken in the wild. The interests of the Center and its 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 would be redressed by the relief sought in this case.

17. Plaintiff WILDEARTH GUARDIANS ("Guardians") is a non-profit, Internal Revenue Service Code Section 501(c)(3) corporation with offices in Santa Fe, New Mexico; Denver, Colorado; Laramie, Wyoming; Missoula, Montana; Tucson, Arizona; Salt Lake City, Utah; Eugene, Oregon, and Portland, Oregon. WildEarth Guardians protects and restores wildlife, wild places, wild rivers, and the health of the American West. Guardians has more than 43,000 members and activists throughout the United States and the world.

18. Guardians brings this action on its own institutional behalf and on behalf of its members, who derive scientific, aesthetic, recreational, and spiritual benefit from the lesser prairie-chicken and its habitat. Guardians' members have observed and photographed the lesser prairie-chicken in the wild and have ongoing interests in the lesser prairie-chicken and its habitat. Guardians' members have concrete future plans to visit and observe the lesser prairie-chicken in the wild. The interests of Guardians and its 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 would be redressed by the relief sought in this case.

19. Unless the requested relief is granted, Plaintiffs' interests will continue to be injured by the Defendants' failure to list the lesser prairie-chicken as endangered under the ESA, and by Defendants' promulgation of the 4(d) rule, which exempts a host of activities from the ESA's "take" prohibition, without providing for the conservation of the species. The injuries described above are actual, concrete injuries that are caused by Defendants and presently suffered by Plaintiffs and their members and will continue to occur unless relief is granted by this Court. The relief sought herein, which includes an order that Defendants reconsider the listing of the lesser prairie-chicken and issue a new Final Rule within six months, would redress Plaintiffs' injuries. Plaintiffs have no other adequate remedy at law.

20. Defendant SALLY JEWELL, United States Secretary of the Interior, is the highest-ranking official within the U.S. Department of the Interior, and in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to terrestrial endangered and threatened species, and for compliance with all other federal laws applicable to the Department of the Interior. Secretary Jewell is sued in her official capacity.

21. Defendant DANIEL M. ASHE is Director of the U.S. Fish and Wildlife Service, a federal agency within the Department of the Interior that is authorized and required by law to protect and manage the fish, wildlife and native plant resources of the United States, including enforcing and implementing the ESA, and for compliance with all other federal laws that apply to the Service. The Service has primary authority for day-to-day administration of the ESA with respect to terrestrial species. Director Ashe is sued in his official capacity.

22. Defendant the U.S. FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial species, including the lesser prairie-chicken. U.S. Fish and Wildlife Service headquarters in Washington, D.C. issued the listing and 4(d) rule decisions challenged herein.

STATUTORY AND REGULATORY BACKGROUND

A. Endangered Species Act

23. 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,” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. §§ 1531(a)(1), (b).

24. Under ESA regulations, the Service has been delegated responsibility for administering the Act as it pertains to terrestrial species such as the lesser prairie-chicken. 50 C.F.R. § 402.01(b).

25. The ESA provides for the listing of imperiled species as “threatened” or “endangered.” 16 U.S.C. § 1533. The Act defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range,” and a threatened species as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20).

26. In determining whether a species is threatened or endangered, the Service is directed to list a species based on the presence of any one of the following five factors: 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). The Service must determine whether the species is endangered or threatened throughout all or a significant portion of its range.

27. In making its listing determinations, the Service must use the “best scientific and commercial data available” 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

28. Once a species is listed as endangered, the ESA provides a wide variety of procedural and substantive requirements intended to help ensure that such species is adequately protected and ultimately recovered to the point where listing is no longer necessary. *See, e.g.*, 16 U.S.C. § 1533(f)(1) (requiring development and implementation of recovery plan); *id.* § 1536(a)(2) (requiring federal agencies to consult with FWS on the effects of their actions on listed species and their habitat); *id.* § 1533(a)(3)(A) (requiring designation of critical habitat).

29. In addition, the listing of a species as endangered under the ESA triggers prohibitions under Section 9 of the Act, 16 U.S.C. § 1538, that apply to any “person,” broadly defined by the Act to include “an individual, corporation, partnership, trust, association or any other private entity,” as well as “any officer, employee, agent, department, or instrumentality” of Federal, State, and local governments. *Id.* § 1532(13).

30. For example, the ESA and the Service's implementing regulations make it "unlawful for any person subject to the jurisdiction of the United States to take any [listed] species within the United States" 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31. "Take" is defined to include "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(18). "Harm" is further defined to include significant habitat modification or degradation which "actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 17.3.

31. There are limited exceptions to the "take" prohibition; for example, Section 10 of the Act provides that private applicants may receive a permit to take listed species upon submission of a conservation plan (commonly referred to as a habitat conservation plan) that meets several substantive requirements. 16 U.S.C. § 1539(a)(2)(A). Such permit, and the associated habitat conservation plan, can only be issued by the Service after opportunity for public comment is provided. *Id.* § 1539(a)(2)(B). As another example, all federal actions that may affect a listed species must go through a consultation between the Service and the agency taking or approving the action under Section 7 to ensure against jeopardy of the species. *Id.* §§ 1536(a)(2), 1536(a)(4). An activity jeopardizes the continued existence of a species when it "directly or indirectly appreciably reduces the likelihood of both the survival and recovery of a listed species" 50 C.F.R. § 402.02.

32. The ESA's take provisions do not automatically apply to species listed as threatened, such as the lesser prairie-chicken. 16 U.S.C. § 1538(a)(1). Instead, Section 4(d) of the Act, *id.* § 1533(d), provides that the Service "shall issue such regulations as [it] deems necessary and advisable to provide for the conservation" of threatened species. The Service "may" extend any of the prohibitions in Section 9 of the Act to threatened species.

33. Two years after the ESA was enacted, the Service exercised its authority and responsibility under Section 4(d) to extend the prohibition on "take" in Section 9 of the ESA to all threatened species. 50 C.F.R. § 17.31(a); 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975).

34. That rule further provides that “[w]henever a special rule in §§ 17.40 to 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The special rule will contain all the applicable prohibitions and exceptions.” 50 C.F.R. § 17.31(c).

B. National Environmental Policy Act

35. Passed by Congress in 1969, NEPA is the Nation’s “basic charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Among the critical purposes of the statute are to “insure that environmental information is available to public officials and citizens before . . . actions are taken,” and to “help public officials make decisions that are based on understanding of environmental consequences.” *Id.* §§ 1500.1(b)-(c).

36. NEPA requires each federal agency to prepare and circulate for public review and comment a detailed Environmental Impact Statement (“EIS”) prior to undertaking any major federal action that may significantly affect the environment. 42 U.S.C. § 4332; 40 C.F.R. §§ 1501.4; 1502.5; 1508.3.

37. Major federal actions are defined by NEPA regulations to include “[a]doption of official policy, such as rules, regulations, and interpretations” pursuant to the APA. 40 C.F.R. § 1508.18(b)(1).

38. The Council on Environmental Quality (“CEQ”) has promulgated regulations implementing NEPA, which are binding on all federal agencies. 40 C.F.R. § 1507.1.

39. When a federal agency is not certain whether a federal action will have a significant environmental effect, it must prepare an Environmental Assessment (“EA”). 40 C.F.R. § 1508.9. If the agency concludes in an EA that a project may have significant environmental impacts on the environment, then an EIS must be prepared. *Id.* § 1501.4. If an EA concludes that there are no significant impacts to the environment, the federal agency must provide a detailed statement of reasons why the project’s impacts are insignificant and issue a “finding of no significant impact” to accompany its decision on the project. *Id.* § 1508.13.

40. In determining whether a proposed action may significantly affect the environment, NEPA requires consideration of both the context and intensity of that action. 40 C.F.R. § 1508.27. In considering context, “[s]ignificance varies with the setting of the proposed action.” *Id.* § 1508.27(a). Consideration of intensity, on the other hand, “refers to the severity of the impact,” including “[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat”; “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial”; and “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” *Id.* §§ 1508.27(b)(4), (6), (9).

41. The CEQ regulations also provide that each federal agency shall identify in its NEPA procedures those classes of actions that normally do not require either an EIS or an EA. 40 C.F.R. § 1507.3(b)(2)(ii). These “categorical exclusions” are actions that do not individually or cumulatively have a significant effect on the human environment. If an agency action falls within one of the defined categorical exclusions, then no EIS or EA is required, unless one or more exceptions apply, which are also defined by the agency’s NEPA procedures.

42. As part of the NEPA process, federal agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives,” and describe the “underlying purpose and need to which the Agency is responding in proposing the alternatives, including the proposed action.” 40 C.F.R. § 1502.13. The consideration of alternatives to the proposed action is described by the regulations as the “heart” of proper NEPA analysis. *Id.* § 1502.14.

43. NEPA documents must assess the environmental impacts of the proposed action, including direct effects, indirect effects, and cumulative impacts. 40 C.F.R. § 1502.16. In conducting their analyses, federal agencies are directed to use high quality, accurate scientific information and to ensure the scientific integrity of their NEPA document. *Id.* § 1500.1(b); *id.* § 1502.24.

44. Congress will, in rare circumstances, provide statutory exemptions from NEPA’s requirements. For example, Section 7(k) of the ESA, 16 U.S.C. § 1536(k), provides that

decisions of the Endangered Species Committee (the so-called “God Squad”) exempting federal agency actions found to violate section 7(a)(2) of the Act, *id.* § 1536(a)(2), “shall not be major Federal action” for purposes of NEPA.

45. No similar provision in the ESA exempts the 4(d) rulemaking process from NEPA’s requirements, nor is the 4(d) rulemaking subject to any categorical exclusion adopted by DOI.

FACTUAL ALLEGATIONS

A. Lesser Prairie-Chickens

46. The lesser prairie-chicken (*Tympanuchus pallidicinctus*) is a medium sized, gray-brown grouse with barred plumage with alternating dark and white bands and a rounded tail.

47. Males display bright yellow combs above the eyes and dull red esophageal air sacs on the side of the neck during courtship. Males also have a tuft of elongated feathers (pinnae) on each side of the neck that is held erect during courtship display. Females have shorter pinnae.

48. A photograph of a displaying male lesser prairie-chicken, taken by WildEarth Guardians’ Board of Directors member Jess Alford, is provided below:



49. Lesser prairie-chickens are a unique prairie grouse that serve as a bellwether for short grass prairie ecosystems stretching from Kansas to Texas.

50. Lesser prairie-chickens utilize two primary ecosystem types: shinnery oak and sand sagebrush grasslands in parts of Colorado, Kansas, New Mexico, Oklahoma and Texas. Populations are nonmigratory.

51. The birds require large parcels of intact native grassland and shrubland, often in excess of 8,100 hectares (20,000 acres) to maintain self-sustaining populations.

52. Nesting and brood-rearing habitat are usually within three kilometers of breeding display areas. Lesser prairie-chickens' winter ranges are the same as their breeding and summer ranges.

53. Lesser prairie -chickens consume insects, leaves, buds, and cultivated grains.

54. The lesser prairie-chicken is comparable in morphology, plumage and behavior to the greater prairie-chicken (*Tympanuchus cupido*) although the lesser prairie-chicken, as its name implies, is smaller.

55. Greater prairie-chickens have orange cervical air sacs and slightly darker plumage. Greater prairie-chickens inhabit mixed and tall grass prairies in the central Great Plains. Lesser prairie-chickens occur in shortgrass rangelands in the southern plains. The two species' ranges overlap in several states.

56. Like other western grouse, male lesser prairie-chickens engage in a unique, communal breeding display each spring to attract females.

57. Lesser prairie-chickens exhibit distinctive courtship displays and vocalizations. In the spring, both male and female lesser prairie-chickens congregate at breeding grounds called leks, where the males strut ("dance"), vocalize ("boom"), and physically confront other males to defend their territories and court females. The male repertoire includes displaying their bright yellow eye combs, inflating their red air sacs, flutter jumping, cackling, and stomping their feet.

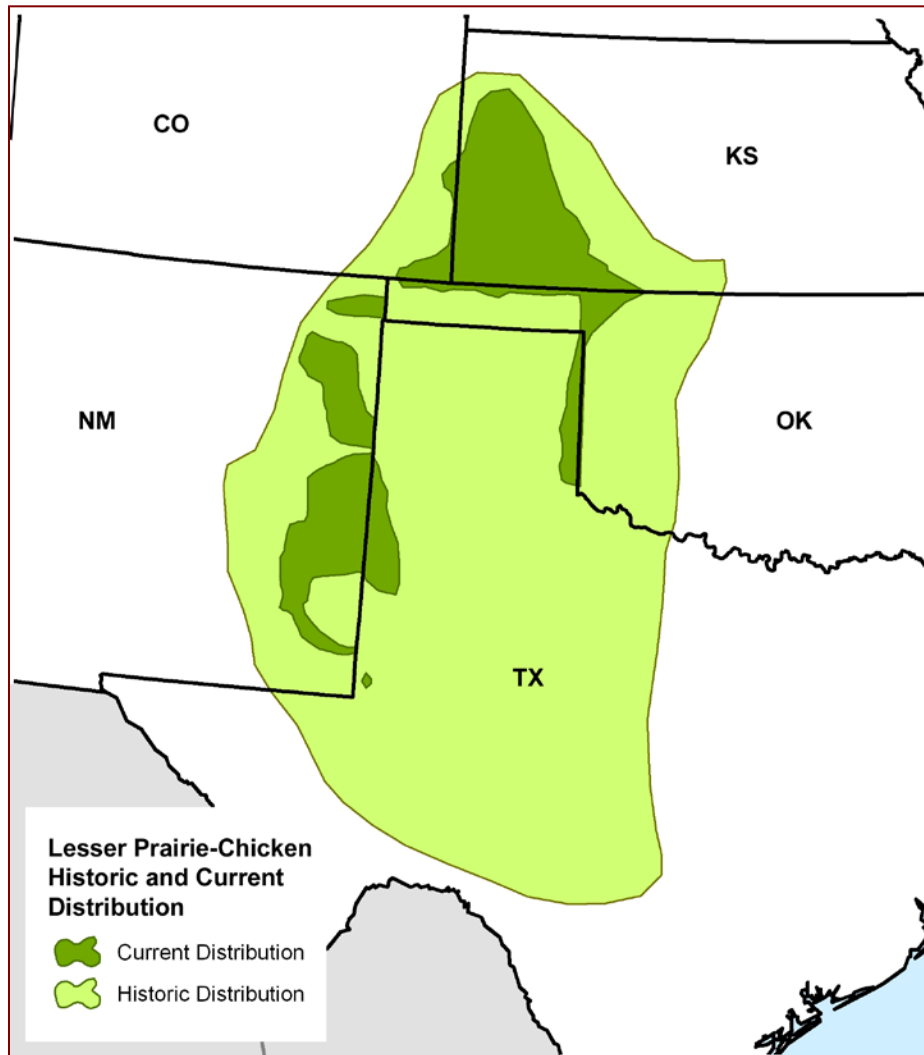
58. The nesting season generally occurs between mid-April and May with lesser prairie-chickens showing high site fidelity.

59. Lesser prairie-chickens prefer nesting sites with more than twenty percent cover and vegetation over nine inches tall.

60. Currently, the lesser prairie-chicken is present in southeastern Colorado; the southwestern quarter of Kansas; and in limited areas in the panhandle and northwest counties of Oklahoma. The species also occurs in east-central New Mexico, and in small areas in the northeastern and southwestern corners of the Texas Panhandle.

61. Kansas has the largest population of lesser prairie-chicken, where the species relies heavily on habitat on private lands enrolled in the Conservation Reserve Program (“CRP”).

62. A map of the lesser prairie-chicken’s historic and current habitat is provided below:



63. Historically, the lesser prairie-chicken was a wide-ranging and commonly hunted species. Today, the bird's currently-occupied range is thought to be just 16 percent of its historic range.

64. Once common, with an estimated population of as many as two million birds, the lesser prairie-chicken was thought in 2012 to number approximately 35,000 individuals.

65. One year later, in a study released September 24, 2013, the population was estimated at just 17,616 birds remaining in the U.S. (90 percent upper and lower confidence intervals of 20,978 and 8,442 individuals, respectively). This is a roughly 50 percent decline from the 2012 population estimate.

66. Habitat loss and fragmentation have been the primary reasons for lesser prairie-chicken decline.

67. Conversion of prairie habitat to farmland and use of such habitat for energy development have been the greatest contributors to habitat loss and fragmentation. Grazing, wind energy production, and other practices have also converted lesser prairie-chicken habitat.

68. Fragmentation of habitat by fences, roads, and other man-made structures has further reduced the remaining available habitat for the species.

69. Recent data show that between 2008 and 2011, more than 23 million acres of wildlife habitat was converted into row crop agriculture in the Midwest and Great Plains, including more than 1.5 million acres in the counties where the lesser prairie-chicken still occurs.

70. Roads and fences are also sources of mortality of lesser prairie-chickens causing death or injury in various ways such as when the birds strike rails, wires, vehicles.

71. Lesser prairie-chickens are at further risk from predators such as hawks, falcons, or owls. Manmade structures, ranging from fences, power lines, oil and gas rigs, and wind turbines, that serve as perches for predators, or that appear to provide perches, are avoided by lesser prairie-chickens for up to a mile around the structure.

72. In addition to being sources of mortality, these structures further fragment remaining prairie chicken habitat.

73. As a result of habitat loss and fragmentation, the Service has identified lesser prairie-chickens as occurring in only small segments of their historic range. These occupied areas are divided into the Shinnery Oak Prairie Region, the Sand Sagebrush Prairie Region, the Mixed Grass Prairie Region, and the Short Grass Prairie/Conservation Reserve Program Mosaic Region. In recent times, the latter two regions have seen particularly steep declines in lesser prairie-chicken numbers.

74. The 2013 survey results show that all four regions suffered declines in 2013.

75. In 2012, 20,413 chickens were estimated to be in the Shortgrass Prairie-Conservation Reserve Program Mosaic (northwestern Kansas) and in 2013 there were 10,279 birds, for a loss of 10,134 birds.

76. In 2012, 8,076 chickens were estimated to be in the Mixed-Grass Prairie Region (the northeast Texas Panhandle-western Oklahoma-south central Kansas) and in 2013 there were 3,567 birds, for a loss of 4,509 birds.

77. In 2012, 3,005 chickens were estimated to be in the Sand Sagebrush Prairie Region (southeastern Colorado-southwestern Kansas-western Oklahoma Panhandle) and in 2013 there were 1,802 birds, for a loss of 1,203 birds.

78. In 2012, 2,946 chickens were estimated to be in the Shinnery Oak Prairie Region (eastern New Mexico-southwest Texas Panhandle) and in 2013 there were 1,967 birds, for a loss of 979 birds.

79. In light of decreased lesser prairie-chicken populations, their isolation in limited areas, and small tracts of remaining habitat, lesser prairie-chickens are particularly susceptible to stochastic events.

80. Drought is of particular concern for this species.

81. Not only is drought becoming the new norm over much of the lesser prairie-chicken's range, but drought has the ability to adversely affect the remaining few populations of prairie chickens simultaneously across their range. This is evidenced by the population decline shown in the 2013 survey.

B. Efforts to Protect Lesser Prairie-Chickens Under the ESA and Other Plans and Agreements for the Species

82. In response to a citizen petition to list the species, and subsequent litigation to force a ruling on that petition, the Secretary first determined that the lesser prairie-chicken warranted listing under the ESA in June 1998.

83. At that time, the Secretary found the listing of the species was “warranted, but precluded” by higher priority listing actions.

84. Thereafter, for the next twelve years, the Secretary continued to determine that the listing of the lesser prairie-chicken under the ESA was warranted, but precluded.

85. In its 2008 candidate notice of review, the Service changed the Listing Priority Number (“LPN”) for the lesser prairie-chicken from an 8 to a 2, reflecting a change in the magnitude of the threats from moderate to high due to an anticipated increase in the development of wind energy and associated transmission lines throughout the occupied range of the chicken.

86. The Secretary’s assignment of a LPN of 2 to the species represented the highest possible LPN the Secretary could assign to the lesser prairie-chicken and indicated the highest level of imminent threat to the species’ survival. The change in status also reflected the effects of conversion of certain Conservation Reserve Program lands from native grass cover to cropland and increases in oil and gas development in the prairie chicken’s habitat. The Service, however, took no action to list the species.

87. On November 10, 2010, the Secretary, for the twelfth year in a row, again determined that the listing of the lesser prairie-chicken under the ESA was warranted, but precluded. In doing so the Secretary stated:

Biologists estimate that the occupied range has declined by 92 percent since the 1800s. The most serious threats to the lesser prairie-chicken are loss of habitat from conversion of native rangelands to introduced forages and cultivated crops; conversion of suitable restored habitat in the Conservation Reserve Program to cropland; cumulative habitat degradation caused by severe grazing; and energy development, including transmission, and wind, oil, and gas development. Additional threats are woody plant invasion of open prairies due to fire suppression, herbicide use (including resumption of herbicide use in shinnery oak

habitat), and habitat fragmentation caused by structural and transportation developments. Many of these threats may exacerbate the normal effects of periodic drought on lesser prairie-chicken populations. In many cases, the remaining suitable habitat has become fragmented by the spatial arrangement of these individual threats. Habitat fragmentation can be a threat to the species through several mechanisms: Remaining habitat patches may become smaller than necessary to meet the requirements of individuals and populations, necessary habitat heterogeneity may be lost to areas of homogeneous habitat structure, and the probability of recolonization decreases as the distance between suitable habitat patches expands. We have determined that the overall magnitude of threats to the lesser prairie-chicken throughout its range is high, and that the threats are ongoing, and thus imminent. Consequently, we have retained an LPN of 2 for this species.

75 Fed. Reg. 69,222, 69,243 (Nov. 10, 2010).

88. In 2011, the Service entered into a pair of landmark settlement agreements with plaintiffs Center for Biological Diversity and WildEarth Guardians. In an exhibit to the Guardians' agreement, the Service committed to submit to the Federal Register either a proposed listing or a negative listing determination for the lesser prairie-chicken by September 30, 2012. *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377, MDL Docket No. 2165 (D.D.C. May 10, 2011), ECF Dkt. 31-1.

89. On December 11, 2012, the Service issued a proposed rule listing the lesser prairie-chicken as a threatened species under the ESA. 77 Fed. Reg. 73,828 (Dec. 11, 2012).

90. On May 6, 2013, the Service reopened the comment period on its threatened listing and issued a proposed Section 4(d) rule that exempts implementation of certain "comprehensive lesser prairie-chicken conservation programs" and certain "conservation practices on privately owned agricultural lands" from the Section 9 prohibition on take in the ESA. 78 Fed. Reg. 26,302, 26,308 (May 6, 2013).

91. In making its proposed threatened determination, 77 Fed. Reg. at 73,884, the Service relied upon an interpretation of the term "in danger of extinction" contained in a December 22, 2010, memorandum related to the decision to list the polar bear as a threatened species under the ESA. Supplemental Explanation for the Legal Basis of the Department's May

15, 2008, Determination of Threatened Status for Polar Bears (Dec. 22, 2010) (hereafter “polar bear memorandum”).

92. The polar bear memorandum was prepared during the course of litigation concerning the listing of the polar bear at the request of the court and represents the agency’s litigation position.

93. The Service never provided a notice in the Federal Register requesting public comment on the polar bear memorandum or explaining the basis for its interpretation of this core statutory term.

94. In fact, the Service previously represented to the Honorable Judge Sullivan of the United States District Court for the District of Columbia that such notice and comment was not necessary because the agency would not use the polar bear memorandum for making listing determinations for any other species.

95. In the lesser prairie-chicken rule, the Service now directly relies on the interpretation of law contained in the polar bear memorandum.

96. Although the Service now claims that it “provided the public the opportunity to comment on the use of the Polar Bear Memo as it applies to the lesser prairie-chicken through the publication of the proposed listing rule,” 79 Fed. Reg. 19,974, 19,987 (April 10, 2014), the general public was not given adequate opportunity to comment on the memo or its application to the lesser prairie-chicken.

97. The polar bear memorandum was not available on regulations.gov as part of the supporting materials for the lesser prairie-chicken rule.

98. The polar bear memorandum is not available online except through the Court’s ECF system under the docket for *In re Polar Bear*, 1:08-cv-2113 (D.D.C.).

99. The Service did not include the memorandum in its list of issues they particularly sought public comments on during the lesser prairie-chicken rulemaking.

100. Many conservation groups, including Plaintiffs, submitted comments to the Service addressing numerous flaws with the proposed listing and 4(d) rules.

101. Comments on the 4(d) rule pointed out the need for a NEPA review of the rule and consultations under Section 7 of the ESA, and called into question the agency's assertion that the rule would provide for the conservation of the lesser prairie-chicken.

102. On October 23, 2013, the Service endorsed the Western Association of Fish and Wildlife Agencies' voluntary *Lesser Prairie-Chicken Range-Wide Conservation Plan* ("Range-Wide Plan"), a collaborative multi-state planning effort for the species. U.S. FWS Press Release (available at: <http://www.fws.gov/news/ShowNews.cfm?ID=E6267BFC-E38A-E402-8295AE3A5FD77DF1>) (last visited June 6, 2014). The Service pledged to "consider the plan, its implementation and effectiveness when it makes a final determination on whether to list the lesser prairie-chicken under the ESA in March, 2014." *Id.*

103. The Range-Wide Plan is "a voluntary conservation strategy that establishes a mitigation framework" for impacts to lesser prairie-chickens. 79 Fed. Reg. 20,074, 20,075 (April 10, 2014). The Plan covers: oil and gas activities; agricultural activities; wind power, cell and radio towers and power line activities; road activities; "general" activities such as incidental take from hunter harvest, OHV use, and construction; and land management activities including game and predator management.

104. The Range-Wide Plan provides for adaptive management, which means it can evolve over time without public input.

105. The Range-Wide Plan estimates "take" of lesser prairie-chickens from oil and gas (10,778 birds over 30 years), wind turbines and vertical structures (2,755 birds over 30 years), transmission development (1,734 birds over 30 years), primary roads (4,585 birds over 30 years), secondary roads (1,369 birds over 30 years), and habitat improvement projects (335 birds a year or 10,050 birds over 30 years). These estimates amount to a total take of 31,271 birds over the life of the Plan, nearly double the current population of the species.

106. The plans allows take of 1,042 birds a year, which is roughly 5.9 percent of the total population.

107. These take estimates do not include take from hunting or other actions related to agriculture, industrial development, and civil infrastructure that could result in take of lesser prairie-chickens through harassment, direct mortality, and direct habitat loss or indirect habitat loss resulting from avoidance.

108. On November 22, 2013, the Service and the U.S. Department of Agriculture's Natural Resources Conservation Service ("NRCS") completed consultations on a Conference Opinion for NRCS's lesser prairie-chicken initiative and related programs funded through the Farm Bill. These programs outline measures farmers can implement to help avoid or minimize impacts to lesser prairie-chickens.

109. The Service describes these programs as "encouraging landowners and ranchers to continue managing the remaining landscape in ways that meet the needs of their operation while simultaneously providing suitable habitat for the lesser prairie-chicken." 79 Fed. Reg. at 20,078.

110. The Conference Opinion indicates NRCS and the Service's intent to convert the report into a Biological Opinion and authorize incidental take of lesser prairie-chickens once the species is listed.

111. The Conference Opinion estimates authorizing take of 282 birds a year, which is 1.6 percent of the population.

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

113. The revised 4(d) rule exempted: (1) activities on private lands by participants enrolled in or operating in compliance with the Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan; (2) activities on private agricultural lands carried out pursuant to the NRCS's "Lesser Prairie-Chicken Initiative and related NRCS activities;" and (3) certain "routine agricultural practices, as specified [], on cultivated lands that are in row crop, hay, or forage production that meet the definition of

cropland at 7 CFR 718.2, and, in addition, must have been cultivated, meaning tilled, planted, or harvested, within the previous 5 years.” 78 Fed. Reg. at 75,313.

114. Plaintiffs again submitted comments reaffirming their concerns with the 4(d) rule, reiterating the need for a NEPA review of the rule, and raising new issues with the revised 4(d) rule and proposed listing.

115. In particular, Plaintiffs commented that the new survey results from the fall of 2013 warranted an explanation from the Service as to whether the species is “endangered” based on threats throughout all or a significant portion of its range.

116. On March 27, 2014, the Service announced its decision to issue final rules listing the lesser prairie-chicken as a threatened species with a 4(d) rule.

117. In making its threatened determination, the Service explained that despite the significant habitat loss and fragmentation and recent drastic population reduction “there appear to be sufficient stable populations to ensure the persistence of the species over the near term. That is, the Service does not believe the species is currently at risk of extinction. However, as a result of continued population declines predicted into the future, the species is likely to become in danger of extinction in the foreseeable future.” 79 Fed. Reg. at 20,016.

118. Scientists asked to peer-review the listing decision noted that conservation efforts have not been adequate to address known threats to lesser prairie-chickens.

119. In making its final threatened determination, the Service relied upon the polar bear memorandum to “assess whether the species is in danger of extinction now (i.e., an endangered species) or is likely to become in danger of extinction in the foreseeable future (i.e., a threatened species).” The Service concluded “while there have been major range reductions (84 percent) as a result of factors that have not been abated (cumulative habitat fragmentation and drought), there are sufficient stable populations such that the species is not on the brink of extinction” chiefly in “northwestern Kansas.”

120. The final 4(d) rule mirrors the rule proposed on December 11, 2013 authorizing take of lesser prairie-chickens: 1) “[o]n privately owned, State, or county land from activities that

are conducted by a participant enrolled in, and operating in compliance with” the Range-Wide Plan as endorsed by the Service; 2) “[o]n privately owned agricultural land from the following conditioned conservation practices that are carried out in accordance with a conservation plan providing for lesser prairie-chicken conservation developed by the U.S. Department of Agriculture’s Natural Resources Conservation Service in coordination with the U.S. Fish and Wildlife Service;” and 3) “As a result of the continuation of routine agricultural practices, as specified below, on cultivated lands that are in row crop, seed-drilled untilled crop, hay, or forage production that meet the definition of cropland at 7 CFR 718.2, and, in addition, must have been cultivated, meaning tilled, planted, or harvested, within the 5 years preceding the proposed routine agricultural practice that may otherwise result in take” 50 C.F.R. § 17.41(d).

121. The first two programs authorized under the 4(d) rule, the Range-Wide Plan and the NRCS’s plans, together authorize take of more than 1,324 birds a year. The rule as a whole authorizes ten percent or more of the population to be taken each year. Thus, the 4(d) rule will most likely result in additional population decline.

122. The 4(d) rule also authorizes taking of lesser prairie-chickens incidental to hunting of greater prairie-chickens and several other activities.

123. The plans and programs covered by the 4(d) rule are speculative.

124. For example, the Service discusses how the Range-Wide Plan will only provide benefits to lesser prairie-chickens “*if* enrollment is sufficient and *if* the plan is appropriately managed” that “the rangewide plan has not eliminated or adequately reduced the threats identified” for lesser prairie-chickens. The Service acknowledges even if the Plan is implemented there will be a “lag time between authorizing impacts [to the birds and] securing contracts with landowners to apply conservation to mitigate for those impacts.”

125. The Service concludes that there is uncertainty about whether the Range-Wide Plan will conserve lesser prairie-chickens.

126. Defendants' promulgation of the final 4(d) rule, authorizing take of lesser prairie-chickens is a major federal action significantly affecting the quality of the human environment under NEPA.

127. Defendants failed to complete NEPA analysis for the 4(d) rule.

128. A 4(d) rule is an agency action that requires conference or consultation under Section 7 of the ESA.

129. Defendants did not complete conference or consultation on the 4(d) rule pursuant to Section 7 of the ESA.

130. A 4(d) rule must provide for the conservation of the species.

131. The lesser prairie-chicken 4(d) rule authorizes excessive take, exempts harmful activities in the species' range, and does not provide for conservation of the species.

CLAIMS FOR RELIEF

132. For each of the Claims in this Complaint, Plaintiffs incorporate by reference each and every factual allegation set forth in this Complaint as if set out in full below.

FIRST CLAIM

Violations of the Endangered Species Act and Administrative Procedure Act in the decision to list the lesser prairie-chicken as threatened instead of endangered. 16 U.S.C. §§ 1533(a)(1), 1533(b), 5 U.S.C. § 706

133. The ESA permits the listing of any "species," which is defined to include any "subspecies of fish, wildlife or plant" and "any distinct population segment of species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). The Act defines an "endangered" species as one that is "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A "threatened" species, likewise, is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

134. The Service makes listing determinations on the basis of an analysis of the following factors: 1) the present or threatened destruction, modification, or curtailment of its

habitat or range; 2) over utilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) the inadequacy of existing regulatory mechanisms; or 5) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1).

Under the ESA, the Service is obligated to list a species if any *one* or a combination of the five listing factors is triggered.

135. In addition to the listing factors outlined in 16 U.S.C. § 1533(a), the ESA requires that listing determinations be based “solely on the basis of the best scientific and commercial data available . . . after taking into account those efforts, if any being made by any State . . . or any political subdivision of a State . . . to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices.” *Id.* § 1533(b)(1)(A). The Service’s regulations further provide “[t]he Secretary shall make [listing decisions] solely on the basis of 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).

136. When making listing determinations, the Service may not rely upon conservation agreements that are not certain to be implemented and effective. U.S. FWS, Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003). The Service must also define the foreseeable future and articulate why the species is not threatened with extinction now. Solicitor General Memo on Foreseeable Future, M-37021 (Jan. 16, 2009).

137. The Service failed to evaluate adequately the ESA’s statutory listing factors, utilize the best scientific data available, define the foreseeable future, and consider adequately whether the lesser prairie-chicken meets the definition of an endangered species in a “significant portion of its range.” The Service further unreasonably relied upon speculative and unproven conservation agreements and otherwise considered factors in making its listing decision that are not authorized by the ESA. In so doing, the Service has violated the APA, 5 U.S.C. § 553; the

ESA, 16 U.S.C. § 1533; and otherwise acted contrary to law, abused its discretion, and acted arbitrarily and capriciously in violation of the APA, 5 U.S.C. § 706(2).

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

SECOND CLAIM

The Service's reliance on the polar bear memorandum's interpretation of the statutory term "in danger of extinction" in making its threatened determination for the lesser prairie-chicken violated the APA and ESA.

139. The Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and Section 4(h) of the ESA, 16 U.S.C. § 1533(h), require public notice and the opportunity for comment on Service regulations and policies.

140. By relying upon the interpretation of "in danger of extinction" in the Service's Supplemental Explanation for the Legal Basis of the Department's May 15, 2008, Determination of Threatened Status for Polar Bears (Dec. 22, 2010) in listing the lesser prairie-chicken as threatened – without providing public notice and an opportunity to comment on the polar bear memorandum – the Service has violated the APA, 5 U.S.C. § 553; the ESA, 16 U.S.C. § 1533(h); abused its discretion, and acted contrary to law and arbitrarily and capriciously in violation of the APA, 5 U.S.C. § 706(2).

141. Notwithstanding the Service's procedurally improper reliance on the statutory interpretation contained in the polar bear memo, the memo also articulates an improper and incomplete standard for determining when a species is endangered or threatened that is arbitrary and capricious and contrary to the ESA.

142. Furthermore, even if the standard outlined in the polar bear memo were appropriate to apply to the lesser prairie-chicken, the Service misapplied that standard in this case. The lesser prairie-chicken meets the polar bear memo standard for an endangered listing, thus the listing decision is arbitrary and capricious. 5 U.S.C. § 706(2).

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

THIRD CLAIM

The Service's decision to issue a Section 4(d) rule for the lesser prairie-chicken violates the ESA, 16 U.S.C. §§ 1533(d), 1532, 1536(a)(4), NEPA, 42 U.S.C. §§ 4321-4347, CEQ's Implementing Regulations, 40 C.F.R. §§ 1500.1-1508.28, and is contrary to the APA, 5 U.S.C. § 706.

144. Section 4(d) of the ESA requires the Service to establish regulations that are necessary and advisable for the conservation of threatened species. 16 U.S.C. § 1533(d).

145. If the Service violated the ESA and APA by listing the lesser prairie-chicken as threatened, the 4(d) rule must be vacated, as the provisions of Section 4(d) of the ESA do not apply to endangered species. 16 U.S.C. § 1533(d).

146. If the Service properly listed the lesser prairie-chicken as threatened, its issuance of this 4(d) rule is unlawful because the Service failed to carry out the environmental analysis required under NEPA, 42 U.S.C. §§ 4321-4347, of the environmental impacts of its promulgation of the 4(d) rule in violation of NEPA, 42 U.S.C. §§ 4321-4347, the CEQ's implementing regulations, 40 C.F.R. §§ 1500.1-1508.28, and the APA's requirements, 5 U.S.C. § 706(2).

147. Moreover, the 4(d) rule promulgated for the lesser prairie-chicken is neither necessary nor advisable for the conservation of the species. The Service violated the clear commands and plain language of the ESA, 16 U.S.C. §§ 1533(d) (the Service "shall issue" regulations "necessary and advisable" for the conservation of the species and "may" issue regulations extending Section 9's prohibitions), 1532(3) (defining conservation), and its own stated intent to establish a 4(d) rule that is necessary and advisable for the conservation of the species.

148. The Service's attempts to justify the 4(d) rule and explain its "conservation" finding are arbitrary and capricious and contrary to law. 5 U.S.C. § 706(2); 16 U.S.C. §§ 1533(d), 1532.

149. The 4(d) rule is also unlawful because it was adopted without the required consultations or conferences under Section 7 of the Act. 16 U.S.C. §§ 1536(a)(2), 1536(a)(4).

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court:

- (1) Declare that Defendants' April 10, 2014, decision to list the lesser prairie-chicken as threatened rather than endangered violates the APA and the ESA;
- (2) Declare that Defendants unlawfully relied upon the polar bear memorandum in making the threatened determination for the lesser prairie-chicken;
- (3) Order Defendants to reconsider the listing of the lesser prairie-chicken and issue a new Final Rule within six months;
- (4) Order Defendants to undertake a public notice and comment process consistent with the APA and ESA prior to any further reliance upon the polar bear memorandum;
- (5) Declare that Defendants' April 10, 2014 4(d) rule for the lesser prairie-chicken is contrary to the ESA and APA;
- (6) Declare that Defendants' promulgation of the 4(d) rule prior to preparation of an EIS or EA and issuance of a decision approving such document violates NEPA;
- (7) Declare that Defendants' promulgation of the 4(d) rule prior to completing Section 7 consultations violates the ESA;
- (8) Vacate the 4(d) rule;
- (9) Award Plaintiffs their costs of litigation; and
- (10) Grant Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

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s/ Jason C. Rylander

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