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

WESTERN WATERSHEDS PROJECT,)	
)	
Plaintiff,)	CV-
)	
vs.)	
)	COMPLAINT
U.S. FISH AND WILDLIFE SERVICE,)	
an agency of the United States,)	
)	
<u>Defendant.</u>)	

NATURE OF ACTION

1. This action challenges the determination by Defendant U.S. FISH AND WILDLIFE SERVICE (Service) not to list the Greater Sage Grouse (*Centrocercus urophasianus*) under the federal Endangered Species Act (ESA), even though the species is deeply imperiled in Idaho and other western states and warrants ESA protection to prevent it from slipping further toward extinction.

2. Specifically, Plaintiff WESTERN WATERSHEDS PROJECT seeks judicial

review and reversal of the January 2005 determination by the Service that ESA listing of the Greater Sage Grouse is “not warranted.” *See* 70 Fed. Reg. 2248 (Jan. 12, 2005).

3. The Service’s “not warranted” must be reversed and remanded under the APA and ESA as being arbitrary, capricious, and contrary to the requirements of the ESA in numerous respects, including because the Service violated the ESA’s statutory definitions for determining whether species are endangered or threatened; and made unfounded assumptions about the current status of existing protection measures and the severity of threats facing the species, which are contradicted by the record.

4. As a result of the Service’s unlawful “not warranted” determination, the Greater Sage Grouse lacks protection under the ESA, and remains vulnerable to continued population and habitat declines, across Idaho and other states. Accordingly, the “not warranted” determination must be reversed and set aside by the Court, with instructions that the Service must proceed with the ESA listing process for the Greater Sage Grouse.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) because this action arises under the laws of the United States, including the Endangered Species Act, 16 U.S.C. §§ 1531 et seq.; the Administrative Procedure Act, 5 U.S.C. § 701 et seq.; the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.; and the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq. An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is therefore proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 701-06.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Plaintiff resides in this district; and a significant portion of the events or omissions giving rise to the

claims herein occurred within this judicial district.

7. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 701.

PARTIES

8. Plaintiff WESTERN WATERSHEDS PROJECT (“Western Watersheds”) is an Idaho non-profit conservation group, headquartered at its Greenfire Preserve located on the East Fork Salmon River, near Clayton in Custer County, Idaho.

9. The Greenfire Preserve is a former cattle ranch, which Western Watersheds owns (through a subsidiary) and manages to promote the restoration of native habitats and protection of wildlife species there; to educate the public about native habitat restoration, wildlife protection, and other environmental issues; and to carry out science-based advocacy in the region.

10. Western Watersheds has over 1400 members plus additional volunteers and supporters, located in Idaho and around the United States; as well as professional staff in Idaho, Utah, and Wyoming.

11. Through the efforts of its staff, members, and supporters, Western Watersheds advocates science-based management of public lands in Idaho and other western states, with a focus on the sagebrush-steppe ecosystem, which forms the sole habitat of the Greater Sage Grouse.

12. The decline of the Greater Sage Grouse, in Idaho and other states, is of great concern to Western Watersheds’ staff, members and supporters; and the preservation and recovery of Greater Sage Grouse, and its sagebrush-steppe habitat, are highly important to Western Watersheds and its staff, members and supporters.

13. Members, supporters, and staff of Western Watersheds work, live and/or recreate throughout the sagebrush-steppe ecosystem of Idaho and surrounding states, which are currently occupied by Greater Sage Grouse. Plaintiff's members, supporters, and staff derive aesthetic, recreational, scientific, inspirational, educational, and other benefits from this ecosystem on a regular and continuing basis and intend to do so frequently in the immediate future.

14. Western Watershed's members, supporters, and staff observe and study the Greater Sage Grouse and the sagebrush-steppe 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 such use and enjoyment of the Greater Sage Grouse is the expectation and knowledge that species is in its native habitat. For this reason, such use and enjoyment of the Greater Sage Grouse is entirely dependent on its continued existence in the wild.

15. Many of Western Watersheds' activities – including research and advocacy – have focused on preserving the remaining habitats of Greater Sage Grouse in Idaho and other states, and in restoring those habitats to protect and recover Greater Sage Grouse populations. As just one example of these activities, Western Watersheds has previously brought or joined many cases before this Court in order to protect Greater Sage Grouse and its sagebrush-steppe habitat. Just a few of these cases include:

A. *Western Watersheds Project v. Bennett*, CV-04-181-S-BLW (D. Idaho) (litigation to protect sage grouse from grazing increases in Jarbidge Resource Area);

B. *Idaho Wildlife Federation, Western Watersheds Project, and National Wildlife Federation v. Tower*, CV-04-372-E-BLW (D. Idaho) (challenge to Curlew National Grasslands management plan, for failure to protect sage grouse);

C. *Idaho Conservation League and Western Watersheds Project v. Steele*, No. 01-CV-529-E-BLW (D. Idaho) (challenge to Pleasantview allotment grazing management, which harms sage grouse and other species);

D. *Committee for the High Desert and Western Watersheds Project v. Collinge*, CV-02-172-S-BLW (D. Idaho) (litigation over proposed “sage grouse predators” study which violated NEPA).

16. The above-described aesthetic, conservational, recreational, educational, and wildlife preservation interests of Plaintiff and its members, supporters, and staff have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by Defendant’s violations of law and failure to list the Greater Sage Grouse as threatened or endangered under the ESA. These are actual, concrete injuries to Plaintiff and its members, supporters, and staff, caused by Defendant’s violations of law complained of herein. The relief sought herein would redress these injuries. Plaintiff has no adequate remedy at law.

17. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (“Service”) is an agency or instrumentality of the United States within the federal 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 the listing of terrestrial species, including the Greater Sage Grouse.

STATEMENT OF FACTS

The Greater Sage Grouse.

19. The Greater Sage Grouse (*Centrocercus urophasianus*) is a unique species of grouse only found in sagebrush-dominated habitats of western North America, including much of central, eastern, and southern Idaho. This species is the largest upland gamebird (excluding the turkey) in

North America; and the second largest grouse in the world.

20. Greater Sage Grouse were once widely distributed across the western U.S and Canada, numbering perhaps in the millions. Huge flocks of sage grouse were reported to “blacken the sky” as recently as the late 1800s.

21. Sage Grouse typically inhabit large interconnected expanses of sagebrush, and thus are characterized as a landscape-scale species. Historically, the distribution of Greater Sage Grouse was closely tied to the distribution of the sagebrush ecosystem, and Greater Sage Grouse once occupied parts of 13 states within the western United States and 3 Canadian provinces, including the states of Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming; as well as the Canadian Provinces of Alberta, British Columbia and Saskatchewan.

22. Populations of Greater Sage Grouse have been extirpated in places throughout their former range, concomitant with habitat loss and degradation. Causes for habitat loss, fragmentation, and degradation in sagebrush include livestock grazing and management, energy development, urbanization, and the infrastructure necessary to maintain these activities, brush control and other means to remove sagebrush.

23. Livestock grazing is known to adversely affect sage grouse populations and habitat. Grazing can lead to long-term changes in plant communities and can reduce certain habitat components, such as biological crusts, which contribute to the health of sagebrush habitat. Grazing can also reduce the residual grass height needed for successful sage grouse nesting.

24. Increased fire frequency in lower elevation sagebrush habitats, often closely tied to invasion of annual grasses such as cheatgrass, has also resulted in losses of sagebrush over

large expanses in Idaho, and other parts of the Intermountain West. In addition, decreased fire frequency in higher elevation sagebrush habitats and impacts from livestock grazing and other factors have resulted in conifer encroachment and subsequent reduction of the herbaceous understory and sagebrush canopy cover over large areas.

25. Habitat fragmentation resulting from oil and gas development, and associated infrastructure (e.g., powerlines, compressor stations roads, fences, etc.) is also a significant factor contributing to the ongoing degradation of the sage-steppe community. Fragmentation of sage-steppe habitat is also a primary cause of the decline in sage grouse populations, especially because Greater Sage Grouse requires large expanses of contiguous sagebrush.

26. The abundance and distribution of Greater Sage Grouse have declined significantly across North America, and the numbers of male sage grouse counted on leks have declined significantly between 1965 and 2003.

27. Trend data from the mid 1940s to 2003 demonstrates a significant decline in the overall sage-grouse population in North America.

28. The current population of sage grouse is only a fraction of historic levels, and represents less than 10% of historic population levels – i.e., sage grouse populations have experienced a 90% decline in population.

29. Confronted with the population estimates, the Service's own expert acknowledged the "consistent decline in sage grouse in all states . . . [like] an F-16 fighter going down."

30. Sage grouse have been extirpated in Nebraska, Arizona, New Mexico, and significant parts of Oregon, Washington, North and South Dakota, and central eastern California. Further, the Service has acknowledged that long-term existence of sage grouse is "uncertain" in

six of the remaining states where it remains. In these remaining states, sage grouse populations are fragmented, and the Oregon Department of Fish and Wildlife concluded that “the species is depleted throughout most of its range.”

31. Across Canada, sage grouse have been extirpated from British Columbia, and its future is “uncertain” in the remaining two provinces. A leading sage grouse expert, Dr. Clait Braun, has concluded – based on the fragmentation of the habitat and vast reduction in current populations – that sage grouse have “no hope” of persisting in either Alberta or Saskatchewan.

32. Dr. Braun has also concluded that “all studied populations of sage grouse have been in decline for at least 40-50 years,” and that sage grouse experts are unaware of any “sage grouse range expansion anywhere, ever.”

33. Further, a sage grouse biologist with the Idaho Department of Fish and Game has concluded that, “[t]here are no areas over the range of sage grouse that have shown a population increase or even stable population over the last 30 years.”

34. A sage grouse expert has recently concluded that sage grouse are undergoing a “range collapse” – i.e., a “rapid contraction[] of [a] once widespread species to one or a small number of isolated sites.”

34. In addition to the acknowledged population crash of sage grouse population and range, the proportion of small leks has increased over the past 40 years for most states and provinces, while the proportion of large leks has decreased. Small leks are more susceptible to localized extirpation, due to loss of genetic variation, threats of catastrophic fire, and demographic and environmental stochasticity.

35. Sage grouse have a relatively low reproductive rate and their ability to recover from population reductions is low, due to low fecundity rate, low adult survivorship, and very

low productivity. An expert with the Idaho Department of Fish and Game has acknowledged that “populations that have thus far survived extensive habitat loss may still face extinction because of a time lag between habitat loss and ultimate population collapse.”

Greater Sage Grouse in Idaho

36. Sage grouse populations and habitat in Idaho have experienced the same downward trends as across the remainder of the range. For example, a leading sage grouse researcher has concluded that sage grouse breeding populations in Idaho have declined recently by 40%; and another leading researcher concluded that the recent decline in sage grouse numbers across Idaho is even greater than that.

37. A recent study attempted to quantify the crash of sage grouse populations and range across Idaho, and concluded that current sage grouse populations across Idaho are far below historic levels in every category examined, including: (1) proportion of active leks decreased between 1975 and 2003 by nearly 20%; (2) average and median male sage grouse per lek decreased by nearly 60% in the same timeframe; (3) average and median male sage grouse per active lek declined by over 40%; and (4) the number of sage grouse per lek also decreased significantly.

38. The annual rates of change of sage grouse populations demonstrate a long-term decline for sage-grouse in Idaho, and, perhaps most importantly, populations in the late 1960s and early 1970s were approximately 2 to 3 times higher than current populations.

39. Across Idaho, since the early 1980s, the proportion of small leks increased, and the proportion of large leks decreased. From the late 1960s to the late 1970s, approximately 25% to 35% of the leks censused contained more than 50 sage grouse, and from 1995 to 2003, less than 15% of the leks censused contained 50 or more males. In fact, the average number of

sage males at a lek from 2000-2003 numbered only 20 grouse.

40. Dr. Clait Braun has concluded that if spring sage grouse lek counts falls below approximately 50 to 100 birds, then the population is unrecoverable and headed for imminent extirpation.

41. In the Jarbidge Resource Area of southern Idaho, the sage-steppe community historically offered abundant suitable habitat for sage grouse breeding, nesting, rearing, overwintering and other essential biological functions; and historically numbers of sage grouse were abundant in the area year-round.

42. However, according to the Idaho Department of Fish and Game, sage grouse numbers across the Jarbidge have declined over 85 percent in recent years (from 2465 to 373), and the number of active leks have also declined by 63 percent (from 120 to 44 active leks) in the last 20 to 50 years.

43. The Bureau of Land Management (“BLM”) has attributed this decline to overgrazing of sagebrush habitats, along with wildfires, habitat fragmentation, drought, invasion of exotic plants, and conversion of sagebrush habitat to agriculture. In fact, in the Jarbidge Resource Area alone, BLM has converted literally hundreds of thousands of acres to non-native crested wheatgrass (an exotic species used primarily for livestock forage); and many miles of fences, pipelines, roads, watering troughs, and other infrastructure have been built to facilitate higher livestock numbers. Indeed, BLM’s figures show that monocultures of crested wheatgrass have nearly doubled from 350,000 to 650,000 acres in the Jarbidge between 1987 to 2004 – meaning that these seedings now occupy more than one-third of the public lands within the entire Jarbidge Resource Area.

44. The Curlew National Grassland, a unit of the Caribou-Targhee National Forest

located in south-central Idaho, consists of 47,000 acres of once abundant, but now rare, sage-steppe habitat. The Curlew is home to the imperiled Greater Sage Grouse, and the Forest Service designated Greater Sage Grouse a species of concern on the Curlew.

45. Since 1965, the long-term trend for Greater sage grouse populations on the Curlew demonstrate alarming population declines. Recent information indicates that the Greater sage grouse population declines are continuing – and even accelerating – across the Curlew. For example, monitoring of the 24 known leks between 1999 and 2002 demonstrated a consistent decline in both the number of total males counted (declining from 265 to 126), as well as the number of active leks (declining from 24 to 10). In 2000, the total number of male sage grouse counted at 11 core leks was 101 males, and by 2002, on 67 males were counted on these leks.

46. As in the Jarbidge, the decline in Greater Sage Grouse populations across the Curlew can be correlated with the degradation and destruction of sage grouse habitat. In the Curlew, the ongoing and persistent habitat destruction is tied to excessive grazing and associated infrastructure, as well as efforts by the Forest Service to increase forage capacity through prescribed burns, reseeding with non-native crested wheatgrass and other forage-based exotics, herbicide and pesticide application designed to increase the forage base, and the rapid expansion of Cheatgrass (*bromus tectorum*). Additionally, most riparian areas across the Curlew are in poor or non-functioning condition, the same riparian areas that are critical to sage grouse chick rearing and survival.

ESA Listing History and Related Developments

47. On December 29, 2003, Western Watersheds Project and others submitted to the Service a “Status Review and Petition to List the Greater Sage Grouse as Threatened or Endangered Under the Endangered Species Act” (hereafter “Plaintiff’s Listing Petition”). Plaintiff’s Listing

Petition presented extensive scientific evidence amply demonstrating that Greater Sage Grouse is in danger of extinction throughout all or a significant portion of its range.

48. Plaintiff's Listing Petition included citations to over one hundred peer-reviewed scientific publications supporting the need to protect the Greater Sage Grouse as a threatened or endangered species.

49. On April 21, 2004, the Service issued its 90-Day Finding pursuant to Section 4(b)(3)(A) of the ESA. In its 90-Day Finding, the Service concluded that Plaintiff's Listing Petition presented substantial information indicating that listing the Greater Sage Grouse under the Endangered Species Act may be warranted. *See* 69 Fed. Reg. 21484.

50. On January 12, 2005, the Service issued its 12-Month Finding on Plaintiff's Listing Petition, determining that listing the Greater Sage Grouse under the ESA was "not warranted." 70 Fed. Reg. 2248 (Jan. 12, 2005). The "not warranted" determination acknowledged the threats to sage grouse and its habitat are "real," but asserted that the prospective impact of these threats is uncertain. Based on this uncertainty, the Service claimed that "there were reasons to be encouraged by current assessments of grouse population status, trends and distribution."

51. This conclusion flies in the face of the 2004 Western Association of Fish and Wildlife Association's Sage Grouse Conservation Assessment – which the Service admitted was the most up-to-date scientific information on the status of the Greater sage grouse populations and habitat. That WAFWA Conservation Assessment concluded that "long-term population changes coupled with continued loss and degradation of habitat and other factors (including West Nile Virus) do not provide causes for optimism."

52. Further, the Service concluded that protecting Greater Sage Grouse as threatened or

endangered under the ESA was “not warranted” because sage grouse was not likely to become extinct in the foreseeable future, in ways which misapply the standards for endangered and threatened species under the ESA and are contrary to the Service’s own past policies and the best available scientific information.

53. The “not warranted” determination further violated the ESA’s requirements for assessing whether species should be listed as endangered or threatened by failing to consider whether Greater Sage Grouse is threatened or endangered over a significant portion of its range.

54. The “not warranted” determination further violated the ESA’s definitions and standards, and its “best available science” requirement, by relying on voluntary and unproven conservation measures; wrongly assuming that adequate conservation efforts are underway; misstating the rate and extent of sage grouse habitat degradation; and other factual and legal errors, which render the “not warranted” determination arbitrary, capricious, and contrary to law under the ESA and APA.

55. As a result of the Service’s violations of law, Greater Sage Grouse remains unprotected under the ESA, even though it faces imminent further declines and possible extinction and warrants protection under the ESA. Western Watersheds has been harmed by the Service’s unlawful refusal to protect the grouse under the ESA. Accordingly, Western Watersheds prays for judicial relief as set forth below.

CLAIM FOR RELIEF

56. Plaintiff realleges and incorporates by reference the allegations of all preceding paragraphs.

57. The Service’s “not warranted” determination declining to list the Greater Sage Grouse as threatened or endangered is a final agency action which is subject to judicial review

by this Court under the Administrative Procedure Act, 5 U.S.C. § 706; and which must be reversed and remanded as being arbitrary, capricious, an abuse of discretion, and/or contrary to law, including (but not limited to) the following reasons:

- a. The Service did not follow the ESA's statutory definitions of "threatened" and "endangered," and, instead, applied novel and legally improper definitions of "threatened" and "endangered" to further preclude protecting sage grouse;
- b. The Service never considered whether Greater Sage Grouse was threatened or endangered over a significant portion of its range;
- c. The Service relied on incorrect factual assumptions in deciding to forego protection sage grouse;
- d. The Service relied upon unproven and speculative conservation measures to preclude protecting the Greater Sage Grouse under the ESA; and
- e. The Service allowed political considerations to preclude protecting Greater Sage Grouse under the ESA.

58. For these and other reasons, the Service's "not warranted" determination for the Greater Sage Grouse must be reversed and remanded as being arbitrary, capricious, an abuse of discretion, and/or contrary to the Endangered Species Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

- A. Declare and adjudge that the Service acted unlawfully in issuing the January 2005 "not warranted" determination for the Greater Sage Grouse;
- B. Reverse and remand the "not warranted" determination with instructions that the Service must proceed expeditiously with the ESA listing process for the Greater Sage Grouse;

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 Greater Sage Grouse; 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 14th day of July 2006

Respectfully submitted,

/s/ Laird J. Lucas

Laurence ("Laird") J. Lucas (ISB #4733)

Attorneys for Plaintiff Western Watersheds Project