

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

Civil Action No. \_\_\_\_\_

CENTER FOR NATIVE ECOSYSTEMS;  
FOREST GUARDIANS;  
BIODIVERSITY CONSERVATION ALLIANCE; and  
TERRY TEMPEST WILLIAMS,

Plaintiffs,

v.

DIRK KEMPTHORNE, in his official capacity as  
U.S. Secretary of the Interior,

Defendant.

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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**I. INTRODUCTION**

1. Plaintiffs (collectively “CNE”) challenge Defendant’s (“the Secretary’s”) rejection of their citizen petition to list, and thereby protect, the White-tailed Prairie Dog (*Cynomys leucurus*) under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. CNE seeks an order declaring that the Secretary’s decision was arbitrary, capricious, and contrary to law in violation of the ESA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, and an injunction ordering the Secretary to make a new and lawful decision on CNE’s petition by a date certain.

2. Surprisingly, the Secretary agrees with CNE, at least in part. The Secretary has determined that his decision to reject CNE's White-tailed Prairie Dog petition was improperly influenced by a former Deputy Assistant Secretary of the Interior, Julie MacDonald. Ms. MacDonald's improper behavior was first publicly disclosed in a Washington Post article. Juliet Eilperin, *Bush Appointee Said to Reject Advice on Endangered Species*, WASH. POST., Oct. 30, 2006, at A3. An internal Department of Interior investigation by Inspector General, Earl Devany confirmed Ms. MacDonald had acted inappropriately. Shortly before a Congressional Committee was about to conduct hearings on her behavior, Ms. MacDonald resigned. The Secretary subsequently announced he intends to reverse his initial rejection of CNE's White-tailed Prairie Dog petition, conduct a status review of the species, and make a new decision on CNE's petition.

3. CNE agrees with the Secretary's decision as far as it goes. The problem is the Secretary has not said *when* he will conduct his promised status review for the White-tailed Prairie Dog and make a new decision. CNE has been waiting for a proper ruling on its petition since July 2002, over five years. The ESA provides that the Secretary must conduct a status review within 12 months of receiving a petition. See 16 U.S.C. § 1533(b)(3)(B). The Secretary has missed this legally mandated deadline for reviewing CNE's petition by over 4 years. Because further delay is both illegal and harmful to the White-tailed Prairie Dog, CNE believes it must sue to end the Secretary's unconscionable delay. CNE sues to obtain a judicial reversal of Secretary's rejection of its petition. Here, the Secretary should concede liability as he has already admitted his prior decision was improperly prejudiced by Ms. MacDonald, was contrary to the findings of his own

experts, and was not supported by the best available science. More importantly, CNE sues to obtain an injunction ordering the Secretary to make a new and legal decision on CNE's petition by a date certain. This should be the crux of this case, when will the Secretary finally review CNE's petition which has languished for over five years?

## **II. JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision), and the APA, 5 U.S.C. §§ 701-706. This Court has authority to grant CNE's requested relief pursuant to 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (APA). More than 60-days ago, CNE furnished the Secretary with written notice of his violations of the ESA and of CNE's intent to sue. See 16 U.S.C. § 1540(g)(2). Despite acknowledging the inappropriate nature of his prior actions, the Secretary has not remedied his violation of the ESA. Therefore an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2001.

5. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e). The lead plaintiff, Center for Native Ecosystems, is a Colorado non-profit corporation with its principal place of business in this judicial district, the White-tailed Prairie Dog, the subject of this action, is found in this district, and Defendant maintains a regional office, directly responsible for the challenged decision in this district.

### III. PARTIES

6. Plaintiff, CENTER FOR NATIVE ECOSYSTEMS (“CNE”), is a non-profit advocacy organization, based in Denver, Colorado dedicated to conserving and recovering native and naturally functioning ecosystems. CNE values the clean water, fresh air, sources of food and medicine, recreational opportunities and healthy communities that natural diversity provides. CNE, and its members, firmly believe that all species and their natural communities have the right to exist and thrive. CNE uses the best available science to forward its mission through participation in policy, administrative process, legal action, public outreach and organizing, and education. CNE’s members enjoy scientific, aesthetic, and recreational benefits from the presence of the White-tailed Prairie Dog in its natural habitat. CNE members intend to continue enjoying the White-tailed Prairie Dog and its habitat for recreational, scientific, and aesthetic purposes. The Secretary’s failure to protect the White-tailed Prairie Dog under the ESA has adversely affected, and will continue to adversely affect, the interests of CNE and its members. CNE brings this action on behalf of itself and its adversely affected members. The relief requested would redress CNE’s injuries.

7. Plaintiff, FOREST GUARDIANS, is a New Mexico non-profit corporation with offices in Santa Fe, New Mexico and Denver, Colorado. Forest Guardians has approximately 3,500 members, many of whom reside in Colorado. Forest Guardians’ mission is to defend and restore the wildlands and wildlife of the greater American Southwest through fundamental reform of public policies and practices. Forest Guardians has directed substantial resources toward the conservation of the White-tailed Prairie Dog. Members of Forest Guardians frequently use and enjoy the White-tailed

Prairie Dog and its habitat for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so. Forest Guardians and its members are particularly concerned with the conservation of the White-tailed Prairie Dog and the ecosystem on which it depends for its survival. Forest Guardians and its members have a substantial interest in this matter and are adversely affected by the Secretary's failure to comply with the ESA. Forest Guardians brings this action of behalf of itself and its adversely affected members. The requested relief will redress Forest Guardians' and its members' injuries.

8. Plaintiff, BIODIVERSITY CONSERVATION ALLIANCE ("BCA"), is a Wyoming based non-profit organization dedicated to conserving and restoring biological diversity in the forests, rivers, and plains of the Rocky Mountain States. For years, BCA has expressed concern over declines in White-tailed Prairie Dog populations. BCA is also alarmed by declines in numerous prairie species whose continued existence is tied to that of the White-tailed Prairie Dog. BCA believes that prompt conservation efforts are needed to save these species as well as numerous other troubled species that are dependent upon the White-tailed Prairie Dog for their survival. BCA depends on the Secretary's full compliance with the ESA to protect its interests in conserving biological diversity generally, and the White-tailed Prairie Dog specifically. BCA and its members derive scientific, aesthetic, and spiritual benefits from the White-tailed Prairie Dog's existence in the wild and from the ecosystem which the White-tailed Prairie Dog supports, and upon which it depends. The Secretary's failure to comply with the ESA has adversely affected and continues to adversely affect BCA's and its members' interests. BCA brings this action of behalf of itself and its adversely affected members. The requested relief will redress BCA's and its members' injuries.

9. TERRY TEMPEST WILLIAMS is an author, naturalist, educator, and environmental advocate. Her published writings on the natural world include Refuge: An Unnatural History of Family and Place, and Red: Patience and Passion in the Desert. Ms. Williams is a life-long resident of Utah and currently resides for part of each year in Castle Valley, Utah, an area inside the range of the White-tailed Prairie Dog. Ms. Williams frequently uses and enjoys federal lands and other public open spaces in Utah for recreational, aesthetic, and scientific activities. She regularly observes and enjoys wildlife, including the White-tailed prairie dog, in these areas and plans to continue to do so. The Secretary's failure to comply with the ESA has adversely affected and continues to adversely affect Ms. Williams' interests. The requested relief will redress Ms. Williams' injuries.

10. Defendant, DIRK KEMPTHORNE, is the Secretary of the United States Department of the Interior. As such he has ultimate responsibility for implementation of the ESA. He is sued in his official capacity.

#### **IV. STATUTORY FRAMEWORK**

11. The U.S. Secretary of the Interior is responsible for the implementation of the ESA. 16 U.S.C. § 1533(a).

12. Congress passed the ESA to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species ....” 16 U.S.C. § 1531(b).

13. To this end, the ESA requires the Secretary to list species of plants and animals that are facing extinction as “threatened” or “endangered” and to designate

protected “critical habitat” for each listed threatened or endangered species. 16 U.S.C. § 1533(a). An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.” 16 U.S.C. § 1532(6). A “threatened species” is a 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).

14. In order for the ESA to protect a species, the Secretary must first officially list the species as either threatened or endangered. 16 U.S.C. § 1533(d). The listing process is the critical first step in the ESA’s system of species protection and recovery. The Secretary must also designate the species’ habitat as “critical habitat” to ensure it receives several important substantive and procedural protections under the ESA.

15. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533(b)(3)(A). Upon receipt of a petition to list a species, the Secretary has 90 days to make a finding as to whether the petition presents substantial information indicating that the petitioned action may be warranted. Id. If the petition presents substantial information indicating that the action may be warranted, the Secretary must publish a “90-day finding” in the Federal Register and begin an in-depth review of the status of the species. Id.

16. If a positive 90-day finding is made, the Secretary has 12 months from the date he receives the petition to make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted

but presently precluded by other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B). This determination is known as the “12-month finding.”

17. The Secretary must list a species as endangered or threatened if he finds that any of the following factors are present:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). The Secretary must analyze these listing factors “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

18. If the Secretary finds that the listing of a species is warranted, the Secretary must then publish in the Federal Register a proposed rule to list such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

19. Within one year of the Secretary’s publication of a proposed rule to list a species, the Secretary must render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A). The Secretary may either list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i). In each case, the Secretary must make a formal finding within one year of the proposed rule. 16 U.S.C. § 1533(b)(6)(A).

20. Concurrent with his final determination to list a species, the Secretary must render a final decision concerning the designation of critical habitat for the species to the maximum extent prudent and determinable. 16 U.S.C. §§ 1533(a)(3) & 1533(b)(6)(C).

## **V. FACTUAL ALLEGATIONS**

21. The White-tailed Prairie Dog (*Cynomys leucurus*) is a large ground squirrel. It is approximately 13 to 15 inches long and weights between 1 and 3 pounds. It is one of five species of prairie dogs that inhabit North America. White-tailed Prairie Dogs are social mammals that live in communities called prairie dog “towns” or colonies. Compared to other prairie dogs species, White-tailed Prairie Dogs have a loose social organization. White-tailed Prairie Dog towns are less dense and more dispersed than those of other prairie dog species.

22. Before settlement and wide-spread poisoning campaigns, the White-tailed Prairie Dog ranged across large expanses of Western Colorado, Western Wyoming, Southern Montana and Eastern Utah. Today, the White-tailed Prairie Dog occupies only 8-10 percent of its historic range.

23. The White-tailed Prairie Dog is what scientists call a “keystone species” meaning that it has a large influence on the abundance and distribution of other species within its ecosystem. The endangered Black-footed Ferret, badgers, burrowing owls, ferruginous hawks, golden eagles, mountain plovers, swift foxes, and dozens of other species depend to some extent the existence of White-tailed Prairie Dog for their own survival.

24. The White-tailed Prairie Dog increases the diversity of vegetation in its ecosystem. Through their selective foraging, White-tailed Prairie Dogs create heterogeneous patches of vegetation. Through their burrowing, White-tailed Prairie dogs create a variety of soil types.

25. The White-tailed Prairie Dog does not compete with livestock for forage. The White-tailed Prairie Dog's affect on grass production is minimal.

26. Compared to other rodents, the White-tailed Prairie Dog reproduces slowly. It produces only one litter of four or five pups per year. Thirty to sixty percent of the pups die. Accordingly, White-tailed Prairie Dog populations do not increase quickly.

27. The continued existence of the White-tailed Prairie Dog is threatened by many factors, including: an introduced disease, sylvatic plague; poisoning by humans; shooting; conversion of land to agricultural use; urbanization; oil and gas development, mineral development; other land management practices such as fire suppression; and climate change.

28. In July 2002, a collection of environmental groups and individuals, led by CNE and including all four of the present Plaintiffs, petitioned the Secretary to list the White-tailed Prairie Dog under the ESA.

29. CNE's petition is approximately 363 pages long and references approximately 529 separate sources. CNE's petition contained the best available scientific information at the time and concluded the White-tailed Prairie Dog was threatened with extinction.

30. In August 2002, the Secretary informed CNE that he could not review the petition in a timely manner. After the Secretary delayed making a 90-day finding on CNE's petition for more than 90 days, in late November 2002, CNE sent the Secretary a notice of its intent to file suit. In February 2003, the Secretary again informed CNE that he would not review the petition at that time. Accordingly, in late February 2003, CNE filed suit against the Secretary to compel the Secretary to make a 90-day finding on the petition. This initial lawsuit over the petition settled. Pursuant to that settlement agreement, the Secretary finally made a "90-day" finding on CNE's July 2002 petition on October 31, 2004. The Secretary's October 31<sup>st</sup> 2004, 90-day finding rejected CNE's petition and is now the subject of the present action.

31. In his negative 90-day finding the Secretary concluded that the threats to the White-tailed Prairie Dog were not substantial. 69 Fed. Reg. 64889, 64901.

32. In his negative 90-day finding, the Secretary relied, in part, on a multi-state White-tailed Prairie Dog Conservation Assessment ("Conservation Assessment").

33. The White-tailed Prairie Dog Working Group, a multi-state task force, produced the Conservation Assessment. The White-tailed Prairie Dog Working Group did not commence working on the Conservation Assessment until after CNE filed suit against the Secretary for his failure to respond to the petition. The White-tailed Prairie Dog Working Group completed the Conservation Assessment in late August 2004. The Conservation Assessment was not available when the Secretary received CNE's petition. The Secretary solicited the preparation of the Conservation Assessment after he received CNE's petition.

34. The federal biologists directly assigned to review CNE's petition originally concluded that the petition presented substantial scientific and commercial information indicating that the listing of the White-tailed Prairie Dog might be warranted. These biologists prepared a positive 90-day finding notice. Ms. Julie MacDonald, Deputy Assistant Secretary for Fish, Wildlife, and Parks in the Department of the Interior directed these biologists to re-write their initial positive 90-day finding to make it a negative 90-day finding. Ms. MacDonald edited the 90-day finding. Ms. MacDonald's edits altered the analysis of agency biologists. Ms. MacDonald's edits changed the conclusion of agency biologists who had originally determined CNE's petition contained substantial scientific information and should receive a positive 90-day finding. For example, Ms. MacDonald changed the conclusion of an agency biologist to minimize the threat to the White-tailed Prairie Dog from oil and gas extraction in its habitat. Ms. MacDonald also deleted an agency biologists' conclusion that the White-tailed Prairie Dog was threatened by habitat fragmentation.

35. The Secretary adopted Ms. MacDonald's changes to the 90-day finding and rejected CNE's petition.

36. On October 30, 2006, the Washington Post published an investigative report exposing, among other things, Ms. MacDonald's manipulation of the White-tailed Prairie Dog finding. Juliet Eilperin, *Bush Appointee Said to Reject Advice on Endangered Species*, WASH. POST, Oct. 30, 2006, at A3.

37. The Department of Interior conducted its own investigation into Ms. MacDonald's behavior. Department of the Interior Inspector General, Earl Devany,

found Ms. MacDonald released internal information from the Department of the Interior to private individuals and falsified scientific documents.

38. On May 1, 2007, Ms. MacDonald resigned from the Department of the Interior. Her resignation took place approximately a week before a House of Representatives Oversight Committee was set to conduct hearings on accusations Ms. MacDonald censored science, mistreated federal employees and violated the ESA.

39. On May 23, 2007 CNE sent the Secretary a letter giving notice of its intent to sue the Secretary for the violations of law described in this complaint. The Secretary received CNE's letter on approximately May 30, 2007.

40. In July 2007, the Secretary announced he will review his decision rendering the negative 90-day finding on CNE's petition. The Secretary also indicated he would conduct a status review for the White-tailed Prairie Dog and issue a 12-month finding. The Secretary has neither made good on these promises, nor indicated a date certain by which he might.

## **VI. CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

(The Secretary's Negative 90-day Finding on CNE's White-tailed Prairie Dog Petition Was Not Based Solely on the Best Available Science and Violates the ESA)

41. Each and every allegation set forth in this Complaint is incorporated herein by reference.

42. The ESA requires the Secretary to make all listing determinations solely on the basis of the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).

43. In rejecting of CNE's White-tailed Prairie Dog petition, the Secretary did not use solely the best available science, and his decision was therefore arbitrary, capricious, and in violation of the ESA.

**SECOND CLAIM FOR RELIEF**

(The Secretary's Rejection of CNE's White-tailed Prairie Dog Petition is a Violation of Section 4(a) of the ESA and Section 706 of the APA)

44. Each and every allegation set forth in this Complaint is incorporated herein by reference.

45. In his decision rejecting CNE's White-tailed Prairie Dog petition, the Secretary failed to use the best available science, reached arbitrary conclusions as to each of the five listing factors, relied on inappropriate material, issued a decision that is not supported by the reasons provided, and used incorrect legal standards.

46. The Secretary's decision is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the ESA and the APA, 5 U.S.C. § 706(2).

**THIRD CLAIM FOR RELIEF**

(The Secretary's Failure to Make a Proper 90-day Finding on CNE's Petition and Conduct a Status Review Violates the ESA and APA)

47. Each and every allegation set forth in this Complaint is incorporated herein by reference.

48. By failing to make a proper 90-day finding on CNE's Petition to list the White-tailed Prairie Dog and conduct a status review of the species, the Secretary has failed to perform a non-discretionary duty in violation of the ESA, 16 U.S.C. § 1533. The Secretary failure to perform his mandatory, non-discretionary duty also constitutes agency action unlawfully withheld or unreasonably delayed in violation of the APA, 5 U.S.C. § 706(1).

**VII. PRAYER FOR RELIEF**

FOR THESE REASONS, CNE respectfully request that this Court enter judgment providing the following relief:

- (1) Declare that the Secretary's decision rejecting CNE's White-tailed Prairie Dog petition was arbitrary, capricious, contrary to the best available science, and in violation of the ESA and APA;
- (2) Order the Secretary to issue and publish a new 90-day and/or 12-month finding regarding White-tailed Prairie Dog within 120 days of the Court's disposition of this case;
- (3) Award Plaintiffs their costs, including reasonable attorneys' fees; and
- (4) Provide such other relief as the Court deems just and proper.

Respectfully submitted this 27th day of November, 2007

s/James J. Tutchton  
Environmental Law Clinic  
University of Denver,  
Sturm College of Law  
2255 E. Evans Ave., Room 365H  
Denver, Colorado 80208  
Ph: 303-871-7870  
Fax: 303-871-6991  
E-Mail: [jtutchton@law.du.edu](mailto:jtutchton@law.du.edu)