

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

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

WILDEARTH GUARDIANS,

Plaintiff,

v.

KEN SALAZAR, in his official capacity as  
Secretary, U.S. Department of the Interior,

Defendant.

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**COMPLAINT**

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**INTRODUCTION**

1. Plaintiff, WildEarth Guardians (“Guardians”), brings this action against Defendant, Ken Salazar, U.S. Secretary of the Interior (“the Secretary”), in his official capacity, to force him to carry out his duties under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, as amended. The Secretary has failed to comply with his mandatory duty under the ESA to make a required 12-month finding on Guardians’ petition to list the Fremont County rockcress (*Boechnera pusilla*) (“Rockcress”) as an endangered or threatened species and to designate its critical habitat. This lawsuit seeks to force the Secretary to make the overdue 12-month finding on Guardians’ petition.

**JURISDICTION, VENUE, AND NOTICE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief), 5 U.S.C. §§ 701-706 (APA), and 16 U.S.C. § 1540(c) and (g) (action arising under ESA and citizen suit provision).

3. As required by the ESA, Guardians has afforded the Secretary with more than 60-days written notice of its intention to sue over the violations alleged in this complaint.

4. Because the Secretary has not remedied his violations of the ESA by making the overdue finding on Guardians' petition, an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. See 28 U.S.C. § 2201.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A). Both Guardians and the Secretary maintain major offices in this district. The Regional Office in Denver is responsible for reviewing Guardians' petition.

### **PARTIES**

6. Plaintiff, WILDEARTH GUARDIANS, sues on behalf of itself and its adversely affected members. Guardians is a non-profit environmental dedicated to protecting and restoring wildlife, wild places, and wild rivers in the American West. It has over 4,500 members. Guardians has an active endangered species protection campaign, with a geographic focus on the western United States. As part of this campaign, Guardians has repeatedly urged the Secretary to list imperiled species, including the Rockcress, as a threatened or endangered species pursuant to the ESA. Guardians filed its petition to list this species in July 2007. Guardians invested substantial organizational resources in preparing this petition, in conducting an earlier round of litigation to force an initial ruling on the petition, and in submitting timely comments to the U.S. Fish and Wildlife Service in response to the Agency's August 2009 positive 90-day finding for the Rockcress. Guardians members and staff frequently use and enjoy, and will continue to use and enjoy, the Rockcress and its habitat or potential habitat for wildlife and plant viewing and for recreational, aesthetic, and scientific activities. Guardians and its members are particularly concerned with the conservation of the Rockcress and the ecosystems on which it depends for its

survival. 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. The requested relief will redress the injuries of Guardians and its members.

7. Defendant, KEN SALAZAR, is the Secretary of the United States Department of the Interior. As such, he has ultimate responsibility for implementation of the ESA. The Secretary is sued in his official capacity. In this case, the Secretary has delegated his responsibilities under the ESA to the United States Fish and Wildlife Service ("FWS"), an agency within the United States Department of the Interior.

### **LEGAL BACKGROUND**

8. 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 species and threatened species...." 16 U.S.C. 1531(b).

9. 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...." 16 U.S.C. § 1532(6). A "threatened species" is a species "which is likely to become an endangered species within the foreseeable future...." 16 U.S.C. § 1532(20).

10. 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. The listing process is the critical first step in the ESA's system of species protection and recovery. The Secretary must also list the species' habitat as "critical habitat" in order for the habitat to receive ESA protections.

11. Any interested person can initiate the listing process by filing a petition to list a species with the Secretary. See 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

12. Upon receipt of a petition to list a species, the Secretary is required to make an initial finding known as a “90-day finding.” Specifically, “to the maximum extent practicable,” within 90 days, the Secretary must determine whether the petition presents “substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). The ESA’s implementing regulations define “substantial information” as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b).

13. If the Secretary finds that the petition presents substantial information, he “shall promptly commence a review of the status of the species concerned,” and must publish the finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

14. If the Secretary makes a positive 90-day finding, he has 12 months from the date that the petition was received 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 to list species of higher priority, provided that the Secretary is making expeditious progress on listing actions. See 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This is known as the 12-month finding.

15. If the Secretary makes a 12-month finding that the petitioned action is warranted, then he must publish a proposed rule to list the species as endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5). Within one year of this publication, the Secretary is required to render a determination on the proposal. 16 U.S.C. § 1533(b)(6)(A). At such time, the Secretary must either list the species, withdraw the proposal, or if there is substantial

disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) and (b)(6)(B)(i).

16. “Concurrently” with listing a species as threatened or endangered, the Secretary must designate critical habitat for the species “to the maximum extent prudent and determinable.” 16 U.S.C. §§ 1533(a)(3)(A) and (b)(6)(C).

17. Designation of critical habitat for listed species provides additional necessary protection and aids in the conservation of the species because all federal agencies must consult with the FWS to “insure that an action authorized, funded, or carried out by [federal agencies] is not likely to jeopardize the continued existence of any endangered species or threatened species *or result in the destruction or adverse modification of [its critical habitat].*” 16 U.S.C. § 1536(a)(2) (emphasis added).

### FACTS

18. The Fremont County rockcress (*Boecheera pusilla*) (“Rockcress”) is a small flowering plant in the mustard family found only in the South Pass area in Fremont County, Wyoming, on federal public lands in the southern Wind River Range. Its habitat is in cracks and crevices of sparsely vegetated outcrops between 8,000 and 8,100 feet amidst a surrounding community of sagebrush grassland. The Rockcress is shown here.<sup>1</sup>



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<sup>1</sup> Photo of Fremont County Rockcress by Bonnie Heidel, Wyoming Natural Diversity Database.

19. The Rockcress dwindled from 800 to 1,000 individual plants in 1988 to 100 to 150 plants in 2003, on just 6 to 16 acres. The Rockcress population decline is possibly due to drought.

20. The Rockcress is threatened by off-road vehicle use and livestock grazing. The species is also threatened by drought and vulnerability to extinction due to its small geographic range and small number of individuals.

21. On July 24, 2007 Guardians filed a petition requesting that the Secretary list the Rockcress as a threatened or endangered species under the ESA throughout its range. The Secretary received the petition on July 30, 2007.

22. On or about October 3, 2007, Guardians sent the Secretary a notice letter indicating that it would file suit to force the Secretary to make an initial 90-day finding on the petition. When the Secretary failed to respond to Guardians' notice letter, Guardians filed suit in federal court on March 19, 2008. This lawsuit, WildEarth Guardians v. Salazar, 1:08-CV-472-CKK (D.D.C.), subsequently settled on March 13, 2009, when the Secretary agreed to make all of the remaining overdue 90-day petition findings by a date certain.

23. On August 18, 2009, the Secretary issued a positive 90-day finding on Guardians' petition for the Rockcress. 74 Fed. Reg. 41649-41662. The Secretary concluded that the petition presented substantial scientific and commercial information that Guardians' request to list the Rockcress as a threatened or endangered species might be warranted. The Secretary found that off-road vehicle use in the species' habitat was likely imperiling the Rockcress. Id. at 41656.

24. Because the Secretary rendered a positive 90-day finding, he was then obligated to proceed to the second step in the ESA listing process, completing a 12-month finding. A 12-month finding must be completed within 12-months of the receipt of a petition.

25. On August 26, 2009, Guardians provided the Secretary with a written 60-day notice of its intent to sue for the Secretary's failure to make a 12-month finding on the petition to list the Rockcress. At that time, more than 12 months had passed since Guardians submitted its petition.

26. The Secretary sent a letter to Guardians dated September 24, 2009, affirming that he received Guardians' notice of intent to sue on August 31, 2009. More than 60 days have passed since Guardians provided this written notice. In the Secretary's September 24, 2009 letter, he did not specify when he would issue a 12-month finding for the Rockcress.

27. To date, the Secretary has not made the required 12-month finding on the petition to list the Rockcress.

#### **CLAIM FOR RELIEF**

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

29. The Secretary has failed to make a mandatory 12-month finding concerning Guardians' petition to list the Rockcress within 12 months of receiving Guardians' petition and has failed to publish such finding in the Federal Register.

30. By failing to render a 12-month finding on Guardians' petition within 12 months of receipt, the Secretary has failed to perform a mandatory act or duty pursuant to the ESA. See 16 U.S.C. § 1533(b)(3)(B).

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff WildEarth Guardians requests that this Court enter judgment providing the following relief:

A. A declaration that the Secretary has violated the ESA by failing to make the 12-

month finding on Guardians' petition to list the Rockcress;

B. An injunction compelling the Secretary to make the 12-month finding on Guardians' petition to list the Rockcress and to publish such findings in the Federal Register by a reasonable date certain;

C. An order awarding Guardians its costs of litigation, including reasonable attorney's fees; and

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

Respectfully submitted this 23rd day of December 2009.

/s/ Samantha Ruscavage-Barz  
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