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APR 09 2008			
CLERK U S DISTRICT COURT DISTRICT OF ARIZONA			
BY			DEPUTY

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17 Attorneys for Plaintiff WildEarth Guardians
 18 *Pro Hac Vice* Applications Submitted Herewith

19 IN THE UNITED STATES DISTRICT COURT
 20 FOR THE DISTRICT OF ARIZONA

21 _____)
 22 WILDEARTH GUARDIANS,)
 23)
 24 Plaintiff,)
 25)
 26 vs.)
 27)
 28 DIRK KEMPTHORNE, U.S. Secretary of the)
 Interior, sued in his official capacity,)
)
 Defendant.)
 _____)

CIV '08 0689 PHX NVW
 No. _____

COMPLAINT FOR
 DECLARATORY AND
 INJUNCTIVE RELIEF

INTRODUCTION

1
2 1. Plaintiff, WildEarth Guardians (“WildEarth”), challenges the failure of
3 Defendant Dirk Kempthorne, U.S. Secretary of the Interior (the “Secretary”), to designate
4 “critical habitat” for the Chiricahua leopard frog (“Frog”) (*Rana chiricahuensis*).
5 Pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq., the
6 Secretary has a nondiscretionary duty to designate critical habitat for this species.

7 2. The Secretary’s finding that designation of critical for the Frog is “not
8 prudent” is arbitrary and capricious, an abuse of discretion, not in accordance with law,
9 and/or constitutes agency action unlawfully withheld or unreasonably delayed within the
10 meaning of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 – 706.
11 WildEarth seeks a declaration that the Secretary has violated the ESA and the APA by
12 issuing an unlawful “not prudent” determination regarding the designation of Frog
13 critical habitat, and by failing to designate critical habitat for this species. WildEarth
14 further seeks an injunction compelling the Secretary to withdraw the “not prudent”
15 decision and to issue by a certain date a new determination in compliance with the ESA
16 and APA regarding the designation of critical habitat for the Frog.

JURISDICTION AND VENUE

17
18 3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331
19 (federal question), § 1346 (U.S. as a defendant), § 2201 (declaratory relief), § 2202
20 (injunctive relief); 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and
21 citizen suit provision); and 5 U.S.C. §§ 701 – 706 (APA).

22 4. As required by the ESA, 16 U.S.C. § 1540(g), WildEarth furnished the
23 Secretary with written notice regarding the violations alleged in this Complaint more
24 than sixty days ago. The Secretary indicated his receipt of WildEarth’s notice of intent
25 to sue on January 2, 2008, via certified mail return receipt. An actual and present
26 controversy exists between the parties within the meaning of the Declaratory Judgment
27 Act, 28 U.S.C. § 2201.

28 5. Venue is properly vested in this Court pursuant to 16 U.S.C. §

1 1540(g)(3)(A) and 28 U.S.C. § 1391(e). The Frog is a native inhabitant of Arizona,
2 and currently lives in Arizona. The contested critical habitat decision pertains to lands
3 in central and southeastern Arizona, which would, but for the Secretary's unlawful
4 actions, be designated as Frog critical habitat. The U.S. Fish and Wildlife Service
5 ("FWS"), the administrative agency to which the Secretary has delegated his ESA
6 duties, maintains an office in Phoenix, Arizona. Plaintiff WildEarth also maintains an
7 office in Phoenix, Arizona. WildEarth has members who reside in Arizona, in the
8 habitat of the Frog, and in the Phoenix metropolitan area.

9 PARTIES

10 6. Plaintiff WildEarth is a non-profit conservation organization whose mission
11 is to protect and restore wildlife, wild rivers, and wild places in the American West.
12 WildEarth has approximately 4,500 members; many of which reside or recreate in the
13 historic and current range of the Frog in Arizona and New Mexico. WildEarth's
14 members have educational, scientific, moral, spiritual, and recreational interests in the
15 Frog and its habitat. WildEarth's members have participated in efforts to protect and
16 preserve the Frog and the habitat essential to its continued survival. WildEarth's
17 members use and enjoy, and intend to continue to use and enjoy, the land and aquatic
18 areas where the Frog is present and which would be designated as critical habitat under
19 proper application of the ESA. WildEarth's interests and those of its members have been,
20 are being, and unless the requested relief is granted, will continue to be, adversely
21 affected and injured by the Secretary's violations of law. WildEarth brings this action on
22 its own behalf and on behalf of its adversely affected members.

23 7. Defendant Dirk Kempthorne is sued in his official capacity as the U.S.
24 Secretary of the Interior. Although the Secretary executes his ESA duties through FWS,
25 the Secretary is the federal official in whom the ESA vests final responsibility for making
26 decisions and promulgating regulations required by the ESA, including critical habitat
27 designations.

STATUTORY AND REGULATORY FRAMEWORK**A. The Endangered Species Act**

8. The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species...” 16 U.S.C. § 1531(b). “Conservation” is the use of *all methods and procedures* needed to bring a species to the point at which listing under the Act is no longer required. *Id.* § 1532(3) (emphasis added). The designation of critical habitat is one of the ESA’s vital methods for conserving species. *See id.* § 1533(a)(3). *See also Bennett v. Spear*, 520 U.S. 154, 157-58 (1997) (“[T]he objective of the ESA is to enable listed species not merely to survive, but to recovery from their endangered status. To achieve this objective, Congress required the Secretary of the Interior to designate a ‘critical habitat’ for all listed species.”).

9. Section 4 of the ESA requires the Secretary to protect imperiled species by listing them as either threatened or endangered. 16 U.S.C. § 1533(a)(1). Section 4 also requires the Secretary to designate “critical habitat” for each threatened or endangered species “concurrently” with its listing. *Id.* § 1533(a)(3)(A)(i).

Critical habitat is defined as:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the [Act], upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5)(A).

10. Critical habitat benefits listed species primarily through the ESA’s consultation mechanism. Section 7(a)(2) requires federal agencies to consult with the Secretary to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened

1 species or result in the destruction or adverse modification” of that species’ critical
 2 habitat. *Id.* § 1536(a)(2) (Section 7 consultation). Thus, regardless of whether critical
 3 habitat is designated, an agency must consult with the Secretary whenever an action may
 4 “jeopardize the continued existence” of a species. If critical habitat has been designated,
 5 however, the statute imposes an *additional consultation requirement* whenever an action
 6 may result in the “destruction or adverse modification” of critical habitat.

7 **B. Designation of Critical Habitat under the ESA**

8 11. The Secretary must, “to the maximum extent prudent and determinable,”
 9 designate critical habitat for each threatened or endangered species at the time such
 10 species is listed, and “may, from time-to-time thereafter as appropriate, revise such
 11 designation.” *Id.* § 1533(a)(3)(A) (emphasis added). FWS may refuse to designate
 12 critical habitat as “not prudent” in *only two circumstances* – when:

13 (i) the species *is threatened* by taking or other human activity, and identification of
 14 critical habitat can be expected to *increase the degree of such threat* to the species,
 or

15 (ii) such designation of critical habitat would not be beneficial to the species.

16 50 C.F.R. § 424.12(a)(1) (emphasis added).

17 12. Congress has stated that the Secretary is to use the imprudence exception to
 18 the mandatory duty to designate critical habitat sparingly. “It is only in rare
 19 circumstances where the specification of critical habitat concurrently with listing would
 20 not be beneficial to the species.” H.R. Rep. No. 1625, at 17 (1978), reprinted in 1978
 21 U.S.C.C.A.N. 9453, 9467.

22 **C. The Administrative Procedure Act**

23 13. APA § 706(1) empowers citizens to petition the Court to compel agency
 24 action unlawfully withheld or unreasonably delayed. APA §§ 706(2)(A) and (C) – (E)
 25 empower citizens to petition the Court to set aside an agency action that is arbitrary,
 26 capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of
 27 statutory jurisdiction, authority, or limitations, or short of statutory right; without
 28 observance of procedure required by law; and/or unsupported by substantial evidence.

STATEMENT OF FACTS

A. The Chiricahua Leopard Frog

14. The Chiricahua leopard frog is an attractive, often bright green frog. The Frog is native to central and southeastern Arizona, west-central and southwestern New Mexico, and northern Sonora and the Sierra Madre Occidental of Chihuahua and Durango, Mexico. The Frog is distinguished from other leopard frogs by its large size (up to 4.3 inches in length), distinctive pattern, and long, snoring call. The range of the Frog is divided into two parts.



The majority of the Frog's range is located south of the Gila River in southeastern Arizona, extreme southwestern New Mexico, and Mexico. The remainder of the Frog's range is in west-central New Mexico and along the Mogollon Rim in central and eastern Arizona.

15. The Frog is a habitat generalist. The Frog once lived in a variety of aquatic habitats. These included mountain and river valley cienegas, springs, pools, lakes, streams, and rivers. The Frog is currently limited to comparatively few aquatic systems. This is due at least in part to the degradation and/or loss of historical habitat.

16. Frog habitat is vulnerable to human disturbance. The Frog requires permanent or semi-permanent pools for breeding and water characterized by low levels of contaminants and pH. The Frog has lost otherwise suitable habitat due to human actions. These include the introduction of predatory nonnative species, poor livestock grazing management, and mining practices.

17. The Secretary listed the Frog as a threatened species pursuant to the ESA on June 13, 2002. At that time, the Frog was absent from more than 75 percent of its historical sites. Frog populations were, and are, often small and widely scattered. The small, isolated nature of these populations makes them particularly susceptible to random extinction events caused by fire, drought, pollution, and disease. Most Frog populations

1 occupy habitats that are prone to flooding, drought, and/or human disturbance. Recent
2 surveys show that, in many circumstances, artificial tanks or impoundments constructed
3 for watering livestock provide the only available home for the Frog. Frog populations
4 dependent on artificial stock tanks are unlikely to persist.

5 18. The Frog needs undisturbed, native habitat in order to recover. Scientists
6 predicted in 2002 that the ongoing restriction of Frogs to marginal habitat would
7 eventually wipe out the species. Specifically, scientists predicted that within the next
8 decade, the Frog would face extinction in southern Arizona and extirpation from 90 to
9 100 percent of its range in New Mexico.

10 19. The Secretary failed to designate critical habitat for the Frog at the time of
11 its listing, concluding that it was "not prudent" to do so. The Secretary stated that he
12 would revisit the issue of critical habitat designation during the recovery planning process
13 for the Frog.

14 20. The Secretary issued the final recovery plan for the Frog in June 2007.
15 According to the plan, Frog recovery is limited by a shortage of high quality habitat.
16 Aquatic breeding habitats, including suitable, restored, and created habitats are necessary
17 for the Frog's recovery. The plan calls for the maintenance, restoration, and creation of
18 Frog habitat. Even so, the Secretary did not discuss or otherwise revisit his "not prudent"
19 determination for the designation of critical habitat in the Frog final recovery plan.

20 21. The most recent Frog surveys show the Frog still persists in only 38 sites in
21 Arizona and 30 – 35 sites in New Mexico. These sites represent only about 14 percent
22 and 16 – 19 percent of historical localities in Arizona and New Mexico, respectively.

23 **B. The Secretary's Abuse of the "Not Prudent" Exception**

24 22. In listing the Frog as threatened, the Secretary found pursuant to 50 C.F.R.
25 § 424.12(a)(1) that designating critical habitat for the species was "not prudent" in any
26 area of its occupied or unoccupied range. Specifically, the Secretary found the
27 designation of critical habitat in *occupied* Frog areas to be imprudent because such
28 designation would: 1) increase the risk of human collection, vandalism, and disease

1 transmission via human visitation; and 2) provide no benefit to the species through
2 Section 7 consultations. Similarly, the Secretary found the designation of critical habitat
3 in *unoccupied* Frog areas to be imprudent because such designation would: 1) provide no
4 benefit to the species through Section 7 consultations; and 2) provide no benefit to the
5 species due to nonnative predator occupation. None of these reasons constitutes a
6 rational basis for the Secretary's "not prudent" determination or the Secretary's failure to
7 designate critical habitat for the Frog.

8 *i. Occupied Frog Habitat*

9 23. The Secretary's rationales for refusing to designate as critical habitat some
10 or all of the areas where the Frog still lives do not support the "not prudent"
11 determination. First, the Secretary's conclusion that the publication of Frog locations
12 will increase threats of collection, vandalism, and disease transmission via human
13 visitation is baseless. The documented decline in Frog populations is not attributed to
14 collection, vandalism, or disease transmission via human visitation. It is irrational to
15 conclude that the identification of critical habitat could increase threats to the Frog that
16 do not currently exist. Absent evidence that the Frog is declining due to collection,
17 vandalism, or disease transmission from human visitation, the "increased threat" prong of
18 the imprudence exception, as set forth at 50 C.F.R. § 424.12(a)(1)(i), does not support the
19 Secretary's determination.

20 24. Second, the Secretary's conclusion that the species would not benefit from
21 Section 7 consultations in occupied critical habitat is overreaching. Predicting that *in*
22 *most cases*, the outcome of Section 7 consultations would be unaltered by a critical
23 habitat designation, the Secretary concluded that *none* of the Frogs would benefit from
24 critical habitat. This type of lopsided inference does not support the Secretary's "not
25 prudent" determination. As long as *some* Frogs – even if only a minority of the
26 remaining populations – will benefit more from Section 7 consultations as a result of a
27 critical habitat designation, the Secretary cannot rationally conclude that the species will
28 enjoy "no benefit" under 50 C.F.R. § 424.12(a)(1)(ii).

1 25. The Secretary's "no benefit" conclusion is further unsupported in that it
2 overlooks any additional benefits to the species beyond those of the consultation
3 mechanism. These include, but are not limited to, informational benefits to the public,
4 state and local governments, and scientific organizations, as well as opportunities to
5 prevent harm to protected areas. Thus, even if the Secretary reasonably predicted that the
6 outcome of every Section 7 consultation in occupied habitat would remain unaffected by
7 a critical habitat designation, he cannot reach a "no benefit" conclusion without
8 considering other, informational and protective benefits, which may flow from such
9 designation.

10 26. Before refusing to designate an area as critical habitat, the Secretary must
11 determine – based on the "best scientific data available" – that the benefits of such refusal
12 "outweigh the benefits" of a critical habitat designation. 16 U.S.C. § 1533(b)(2). See
13 also 49 Fed. Reg. 38900, 38903 (1984) (stating that FWS will forgo habitat designation
14 as a matter of prudence only "in those cases in which the possible adverse consequences
15 would outweigh the benefits of designation."). Furthermore, when issuing a "not
16 prudent" determination, the Secretary must explain how the benefits of denying critical
17 habitat outweigh the benefits of designating critical habitat. See 50 C.F.R. § 424.12(a)(1)
18 (requiring FWS to state its reasons for failing to designate critical habitat in the
19 publication of proposed and final rules listing that species at issue as either threatened or
20 endangered).

21 27. Here, the Secretary failed to mention any benefits of designating occupied
22 areas as Frog critical habitat beyond those purportedly not afforded by Section 7
23 consultation. Accordingly, the Secretary failed to weigh those benefits against the
24 alleged adverse consequences of designating critical habitat. Moreover, the Secretary
25 failed to weigh the benefits of consultation to some – even if a minority – of the Frogs
26 against any alleged adverse consequences. Therefore, the Secretary's reliance on the "no
27 benefit" prong of the imprudence exception, as set forth at 50 C.F.R. § 424.12(a)(1)(ii),
28 with respect to consultation in occupied Frog habitat is arbitrary and capricious, an abuse

1 of discretion, and/or otherwise not in accordance with law.

2 *ii. Unoccupied Habitat*

3 28. The Secretary's rationales for refusing to designate as critical habitat some
4 or all of the areas where the Frog was historically present similarly do not support the
5 "not prudent" determination. First, the Secretary's conclusion that it would be imprudent
6 to designate *any* unoccupied Frog sites as critical habitat because *some* of these sites have
7 been rendered unsuitable is irrational. Granted, predation by nonnative species is a
8 documented cause of Frog decline. However, the Secretary offered no explanation
9 supporting his conclusion that currently unoccupied sites *without* nonnative predators are
10 somehow still unsuitable for critical habitat designation. Without more, conclusory
11 statements of "no benefit" do not properly support reliance on 50 C.F.R. §
12 424.12(a)(1)(ii) as justification for failing to designate critical habitat.

13 29. As discussed above, neither the ESA nor its implementing regulations
14 contemplates lopsided inferences or conclusory statements as justification for a "not
15 prudent" determination. Still, the Secretary failed to list any benefit of either including
16 in, or excluding from, a critical habitat designation any and/or all unoccupied, predator-
17 free Frog habitat. The Secretary also failed to explain in the final rule listing the Frog as
18 threatened why or how the benefits of exclusion outweigh the benefits of a critical habitat
19 designation. The Secretary's reliance on the "no benefit" prong of 50 C.F.R. §
20 424.12(a)(1) with respect to "unsuitable" Frog habitat is therefore arbitrary and
21 capricious, an abuse of discretion, and/or otherwise not in accordance with law.

22 30. Beyond his failure to assess the suitability of such unoccupied habitat, the
23 Secretary also failed to assess whether unoccupied habitat is essential to the conservation
24 of the species in accordance with 16 U.S.C. §§ 1532(5)(A)(ii) and 1533(a)(3)(A)(i).
25 Under the ESA, the Secretary must, to the maximum extent determinable, designate any
26 unoccupied Frog habitat, which he finds to be essential to the conservation of the species,
27 as critical habitat. The Secretary cannot possibly make a rational determination *not* to
28 designate critical habitat in currently unoccupied areas of a species' historic range

1 without first deciding whether that unoccupied habitat is essential to conserving, *i.e.*,
2 recovering, the species. This is especially true for an imperiled species like the Frog.
3 The Frog suffers from habitat degradation and loss, and is thus in dire need of new areas
4 in which to live and eventually thrive. Without additional, higher quality habitat than is
5 currently available, the Frog is unlikely to bounce back to the point of delisting. For this
6 additional reason, the Secretary's reliance on the "no benefit" prong of 50 C.F.R. §
7 424.12(a)(1) with respect to "unsuitable" Frog habitat is arbitrary and capricious, an
8 abuse of discretion, and/or otherwise not in accordance with law.

9 31. Second, the Secretary's conclusion that the species would not benefit from
10 Section 7 consultations in unoccupied critical habitat is both circular and wholly
11 unsupported. The Secretary offered no explanation as to why designating critical habitat
12 in unoccupied Frog range – an act that would trigger the independent "adverse
13 modification" prong of the consultation process – would offer no benefit to the species.
14 Instead, the Secretary simply reiterated his "not prudent" decision regarding the
15 designation of critical habitat in unoccupied areas. According to the Secretary, the Frog
16 would not benefit from Section 7 consultation in areas of unoccupied habitat simply
17 because he has no intention of designating them as critical. The Secretary's reliance on
18 the "no benefit" prong of 50 C.F.R. § 424.12(a)(1) with respect to consultation in
19 unoccupied Frog habitat is therefore arbitrary and capricious, an abuse of discretion,
20 and/or otherwise not in accordance with law.

21 **CLAIM FOR RELIEF**

22 32. Each and every allegation set forth in this Complaint is incorporated herein
23 by reference.

24 33. The Secretary violated the ESA by issuing an unlawful "not prudent"
25 critical habitat determination for the Frog. The unsupported "not prudent" finding has
26 resulted in a failure to designate critical habitat for the Frog to the maximum extent
27 prudent and determinable as required by 16 U.S.C. § 1533(a)(3). By issuing this
28 improper "not prudent" finding and failing to designate critical habitat for the Frog, the

1 Secretary failed to perform a non-discretionary duty under the ESA, and acted in a
2 manner that is arbitrary, capricious, or otherwise not in accordance with law in violation
3 of the ESA, 16 U.S.C. § 1540(g)(1)(C), and the judicial review provisions of the APA, 5
4 U.S.C. §§ 701 – 706.

5 **PRAYER FOR RELIEF**

6 FOR THESE REASONS, Plaintiff respectfully requests that this Court enter
7 judgment providing for the following relief:

8 A. A declaratory judgment that Defendant violated the ESA and APA by
9 failing to designate critical habitat for the Chiricahua leopard frog;

10 B. A declaratory judgment that Defendant's "not prudent" determination is
11 unlawful;

12 C. Injunctive relief requiring Defendant to withdraw the "not prudent" critical
13 habitat determination for the Frog by a certain date;

14 D. Injunctive relief requiring Defendant to make a new determination in
15 accordance with the ESA and the APA for the designation of Frog critical habitat by a
16 certain date;

17 E. An order awarding Plaintiff its costs of litigation, including reasonable
18 attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access
19 to Justice Act ("EAJA"), 28 U.S.C. § 2412; and

20 F. Such other relief as the Court deems just and proper.

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23 Dated April 8, 2008.

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25 Respectfully Submitted,

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Attorneys for Plaintiffs

CIVIL COVER SHEET 080689 PHX NVW

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Wild Earth Guardians

(b) County of Residence of First Listed Plaintiff Maricopa (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

See attachment

DEFENDANTS

U.S. Dept of Interior, Dirk Kempthorne, Secretary

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question, 4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship options: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large grid of checkboxes for various legal categories: 110 Insurance, 120 Marine, 130 Miller Act, 140 Negotiable Instrument, 150 Recovery of Overpayment, 151 Medicare Act, 152 Recovery of Defaulted Student Loans, 153 Recovery of Overpayment of Veteran's Benefits, 160 Stockholders' Suits, 190 Other Contract, 195 Contract Product Liability, 196 Franchise, PERSONAL INJURY (310-368), PERSONAL PROPERTY (370-385), 610 Agriculture, 620 Other Food & Drug, 625 Drug Related Seizure, 630 Liquor Laws, 640 R.R. & Truck, 650 Airline Regs., 660 Occupational Safety/Health, 690 Other, 710 Fair Labor Standards Act, 720 Labor/Mgmt. Relations, 730 Labor/Mgmt. Reporting & Disclosure Act, 740 Railway Labor Act, 790 Other Labor Litigation, 791 Empl. Ret. Inc. Security Act, 422 Appeal 28 USC 158, 423 Withdrawal 28 USC 157, 820 Copyrights, 830 Patent, 840 Trademark, 861 HIA (1395ff), 862 Black Lung (923), 863 DIWC/DIWW (405(g)), 864 SSID Title XVI, 865 RSI (405(g)), 870 Taxes (U.S. Plaintiff or Defendant), 871 IRS—Third Party 26 USC 7609, 400 State Reapportionment, 410 Antitrust, 430 Banks and Banking, 450 Commerce, 460 Deportation, 470 Racketeer Influenced and Corrupt Organizations, 480 Consumer Credit, 490 Cable/Sat TV, 810 Selective Service, 850 Securities/Commodities/Exchange, 875 Customer Challenge 12 USC 3410, 890 Other Statutory Actions, 891 Agricultural Acts, 892 Economic Stabilization Act, 893 Environmental Matters, 894 Energy Allocation Act, 895 Freedom of Information Act, 900 Appeal of Fee Determination Under Equal Access to Justice, 950 Constitutionality of State Statutes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation, 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): Endangered Species Act, 16 U.S.C. § 1531 et seq. Brief description of cause: Challenge to Defendant's "not prudent" critical habitat determination.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMANDS JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 4/31/08 SIGNATURE OF ATTORNEY OF RECORD Melvin Wiley

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Civil Cover Sheet Attachment

Plaintiff's Attorneys of Record:

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Telephone: (303) 573-4898

UNITED STATES DISTRICT COURT

District of Arizona

Wild Earth Guardians

SUMMONS IN A CIVIL CASE

v.

Dirk Kempthorne, U.S.
Secretary of The Interior,
Sued in his official capacity

CASE **CIV '08 0689 PHX NVW**

TO: (Name and address of Defendant)

Dirk Kempthorne, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

Melissa Hailey
Wild Earth Guardians
312 Montezuma Avenue
Santa Fe, NM 87501

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

CLERK

DATE

(By) DEPUTY CLERK

AO 440 (Rev. 8/01) Summons in a Civil Action

RETURN OF SERVICE

Service of the Summons and complaint was made by me ⁽¹⁾	DATE
NAME OF SERVER (<i>PRINT</i>)	TITLE

Check one box below to indicate appropriate method of service.

G Served personally upon the defendant. Place where served: _____

G Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
 Name of person with whom the summons and complaint were left: _____

G Returned unexecuted: _____

G Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ Date _____ Signature of Server _____

 Address of Server

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

AO 440 (Rev. 8/01) Summons in a Civil Action

UNITED STATES DISTRICT COURT

District of Arizona

WildEarth Guardians

SUMMONS IN A CIVIL CASE

v.

Dirk Kempthorne, U.S.
Secretary of The Interior,
Sued in his official capacity

CASE **CIV '08 0689 PHX NVW**

TO: (Name and address of Defendant)

Michael B. Mukasey
U.S. Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

Melissa Hailey
WildEarth Guardians
312 Montezuma Avenue
Santa Fe, NM 87501

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

CLERK

DATE

(By) DEPUTY CLERK

AO 440 (Rev. 8/01) Summons in a Civil Action

RETURN OF SERVICE

Service of the Summons and complaint was made by me ⁽¹⁾	DATE
NAME OF SERVER (<i>PRINT</i>)	TITLE

Check one box below to indicate appropriate method of service

G Served personally upon the defendant. Place where served: _____

G Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
 Name of person with whom the summons and complaint were left: _____

G Returned unexecuted: _____

G Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date *Signature of Server*

Address of Server

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT

District of Arizona

Wild Earth Guardians

SUMMONS IN A CIVIL CASE

v.

Dick Kempthorne, U.S.
Secretary of The Interior,
Sued in his official capacity

CASE

CIV '08 0689 PHX NVW

TO: (Name and address of Defendant)

Civil Process Clerk
United States Attorney's Office
District of Arizona
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, AZ 85004-4408

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

Melissa Healey
Wild Earth Guardians
312 Montezuma Avenue
Santa Fe, NM 87501

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