



**BY FACSIMILE AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

November 23, 2004

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**Re: 60-DAY NOTICE OF INTENT TO SUE OVER THE WARRANTED BUT  
PRECLUDED STATUS OF THE LESSER PRAIRIE-CHICKEN UNDER  
THE ENDANGERED SPECIES ACT**

Dear Secretary Norton, Director Williams, and Regional Director Hall,

In accordance with the 60-day notice requirement of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), Forest Guardians, the Center for Biological Diversity, Chihuahuan Desert Conservation Alliance, T&E Inc., and other interested parties hereby provide notice of their intent to sue you for failing to issue an adequate warranted but precluded finding for the lesser prairie-chicken (*Tympanuchus pallidicinctus*). The Secretary and the U.S. Fish and

Wildlife Service (collectively “FWS”) have failed to comply with section 4 of the ESA in designating and maintaining the lesser prairie-chicken as a warranted but precluded species. 16 U.S.C. § 1533.

### **Lesser Prairie-Chicken**

The lesser prairie-chicken is one of several “prairie grouse” species. It is approximately the size of a domestic chicken and has brown and buff colored feathers. Male lesser prairie-chickens have large reddish-purple air sacs on their necks that inflate during mating displays in the spring as well as long tufts of feathers on the side of their necks. This species thrives in sandy grassland areas populated by shinnery oak-bluestem and sand sagebrush communities. Before its precipitous decline, the lesser prairie-chicken was widespread in the grassland areas of southeastern Colorado, Kansas, New Mexico, Oklahoma, and Texas. Presently, the lesser prairie-chicken can only be found in small portions of its original range. In fact, the lesser prairie-chicken has lost 78% of its historic range since the 1960’s and 92% of its range from the 1800’s.

### **Warranted But Precluded Finding for the Lesser Prairie-Chicken**

Because of its declining range and continued threats to the species, conservation groups petitioned FWS to list the lesser prairie-chicken as threatened and designate critical habitat on October 5, 1995. FWS issued a positive 90-day finding for the species on July 8, 1997. 62 Fed. Reg. 36482, 36484 (July 8, 1997). Eleven months later, FWS made a 12-month finding and determined that listing the lesser prairie-chicken was warranted, but precluded by work on other actions. 63 Fed. Reg. 31400, 31406 (June 9, 1998) (notice of the 12-month finding). FWS placed the lesser prairie-chicken on the list of candidate species, where it receives none of the protections afforded by the ESA.

The 1998 warranted but precluded finding contains an extensive discussion of the threats facing the lesser prairie-chicken throughout its range. FWS concluded that the species was likely to become endangered in a significant portion of its range in the foreseeable future due to “the loss, modification, and resulting fragmentation of suitable habitat, possibly increased predation rates, the inadequacy of existing regulatory mechanisms to protect the species habitat, and drought, the effects of which are exacerbated when populations are already at low levels.” Twelve-Month Administrative Finding on Petition to List the Lesser Prairie-Chicken, at 39. FWS recognized that there has been a “widespread and substantial decline” in the abundance and distribution of the species as well as an increase in fragmentation, leaving isolated populations vulnerable to extinction. *Id.* at 40. Finding the threats to the lesser prairie-chicken were moderate and on-going, FWS assigned it a listing priority number of 8. *Id.* at 42. The 1998 finding also contained a discussion of the particular actions in Region 2 FWS considered a higher priority than the listing of the lesser prairie-chicken as well as a discussion of listing actions in Region 2 that FWS used to demonstrate expeditious progress. *Id.* at 42-44.

Since 1998, FWS has continued to find that the lesser prairie-chicken remains a warranted but precluded species through findings known as the Candidate Notice of Review (“CNOR”). In the 1999 and 2001 CNORs, FWS simply listed the lesser prairie-chicken, along

with all other candidate species, without providing any individualized findings as to why they remained warranted but precluded. 64 Fed. Reg. 57533, 57538 (Oct. 25, 1999); 66 Fed. Reg. 1295, 1299 (Jan. 8, 2001). Because of a successful legal challenge to this approach, Center for Biological Diversity v. Norton, 254 F.3d 833 (9th Cir. 2001), FWS began including individualized findings for the various species in the October 2001 CNOR.

In the October 2001 CNOR, FWS confirmed that the occupied range of the prairie-chicken has declined at least 78% since 1963 and 92% since the 1800s. 66 Fed. Reg. 54808, 54817 (Oct. 30, 2001). FWS identified the most serious threats to remaining populations as “loss of habitat from conversion of native rangelands to introduced forages and cultivation, and cumulative habitat degradation caused by severe grazing, fire suppression, herbicides, and structural developments.” Id. FWS also recognized that habitat fragmentation poses a serious threat to the existence of the lesser prairie-chicken. Indeed, FWS recognized the “impending loss” of isolated populations in the western panhandle of Texas and in southeastern New Mexico. Id. However, FWS relied on the net benefits of on-going conservation activities to outweigh the impending loss of these isolated populations, despite the fact that these benefits are future speculation only and have yet to be realized. Id. Finally, FWS recognized that the lesser prairie-chicken cannot be sufficiently conserved only on Federal lands. Id. Based on its findings, FWS reconfirmed the warranted but precluded status of the lesser prairie-chicken and the listing priority number of 8.

The vast majority of the October 2001 CNOR was copied word-for-word into the June 2002 CNOR. 67 Fed. Reg. 40657 (June 13, 2002). In the June 2002 CNOR, FWS also identified two new potential threats to the lesser prairie-chicken—pesticide poisoning and hybridization with greater prairie-chickens. 67 Fed. Reg. 40667. FWS also stated that “[a]lthough Federal lands comprise only five percent of currently occupied habitat, these tracts are located in areas essential to population recovery and dispersal. As a result, the Service views habitat management considerations on Federal lands within current and historic range with even greater importance.” Id. The most recent finding, which was 11 months late, was finally made on May 4, 2004. 69 Fed. Reg. 24867 (May 4, 2004). Although some language was eliminated the 2004 CNOR was substantially similar to the June 2002 CNOR.

Through each of its CNORs, FWS has continued to find that listing of the lesser prairie-chicken is warranted but precluded and has provided no protection for the species. Indeed, this past June 9, 2004 marked the sixth anniversary of the lesser prairie-chicken’s status in the black hole of warranted but precluded status.

#### **FWS’s Violations of Section 4**

In designating and maintaining the lesser prairie-chicken as a warranted but precluded species, FWS has violated section 4 of the ESA. In order to find that a species is warranted but precluded, FWS must: (1) show that work on the proposed listing is precluded by pending proposals to determine whether any species is endangered or threatened; (2) demonstrate that it is making expeditious progress to add or remove qualified species from the threatened and endangered species lists; and (3) provide a description and evaluation of the reasons and data on which the finding is based. 16 U.S.C. § 1533(b)(3)(B)(iii). FWS must also rely on the best

scientific information available in making listing decisions. Id. § 1533(b)(1)(A). Finally, once FWS has determined that a species is warranted but precluded, it must “implement a system to monitor effectively” the status of such species. Id. § 1533(b)(3)(C)(iii). For the past six years, each time FWS has found that the lesser prairie-chicken remains a warranted but precluded species, FWS has violated these mandates of the ESA, including the most recent finding on May 4, 2004.

For example, FWS has ignored important scientific evidence showing that since the warranted but precluded finding in 1998, the lesser prairie-chicken has continued to decline throughout its range and faces increasing threats to its survival. Downward population trends have been documented in Colorado, New Mexico, Oklahoma, Texas, and Kansas. In addition, lesser prairie chickens in Kansas now face the new threat of hybridization with greater prairie-chickens and the threats posed by grazing, predation, drought, and oil and gas exploration have increased throughout the range of the prairie-chicken since 1998. We have attached a summary of this information in a report entitled, “Lesser Prairie Chicken: The Sky Really is Falling.” FWS has ignored this information in determining that it will not list the lesser prairie-chicken or give it a higher priority listing number.

In the 2004 CNOR, FWS made no individualized finding as to why listing the lesser prairie-chicken was precluded. Instead, FWS issued a blanket finding for all “warranted but precluded” species. Although the 2004 CNOR states that in the upcoming fiscal year, FWS is funding “actions” on 32 species, FWS did not specify what these “actions” are, whether they are pending proposals to determine whether other species are threatened or endangered, whether they are required under court order or settlement agreement, or why they are a higher priority than the lesser prairie-chicken. 69 Fed. Reg. 24884.

Rather than demonstrating FWS is making expeditious progress, the 2004 CNOR’s meager list of past and upcoming “actions” demonstrates the agency’s lack of expeditious progress. The number of listing and de-listing actions FWS completes annually has declined dramatically over the past decade. In the 2004 CNOR, FWS determined that it would not work on protecting a single one of the warranted but precluded species. Instead, FWS added three more species to the warranted but precluded list. Id. In trying to demonstrate that it is making expeditious progress, FWS relies on work on withdrawals of proposed rules to list species and proposals to delist species (thus removing the protections of the ESA) without providing any explanation of why actions to remove protections for species have been prioritized over actions to keep species like the lesser prairie-chicken from becoming extinct. FWS impermissibly relies on court orders and settlement agreements that it must comply with under the law to justify its failure to work on other species. FWS also relies on work on critical habitat designations, which are not pending proposals to determine whether any species is an endangered or threatened species or actions to add or remove qualified species from the lists, as required by the ESA.

In failing to list the lesser prairie-chicken, FWS has also violated the ESA by relying heavily on future, voluntary actions of private parties, states, and federal agencies. Defenders of Wildlife v. Norton, 258 F.3d 1136, 1146 (9th Cir. 2001); Oregon Natural Resources Defense v. Daley, 6 F.Supp.2d 1139, 1154 (D.Or. 1998); Save Our Springs v. Babbitt, 27 F.Supp.2d 739, 744 (W.D.Tex. 1997) Save Our Springs Legal Defense Fund, Inc. v. Babbitt, Civ. No. 96-168-

CA (W.D.Tex., Mar 25, 1997). FWS relies on these actions despite its own admission that the effect of these conservation efforts will not be known for years. In fact, FWS has provided no evidence that these speculative conservation measures are currently effective or will be in the future. For example, as a result of pending budget cuts, there is no guarantee that state conservation efforts will endure.

Finally, FWS has failed to implement a system to monitor effectively the status of the lesser prairie-chicken. In fact, FWS does not conduct its own monitoring system, but rather relies on state reporting to determine the prairie-chicken's status. That state reporting is deficient. For example, in Oklahoma, the 1998 and 1999 surveys from the Oklahoma Department of Wildlife Conservation indicated that many biologists who conduct prairie chicken surveys were not able to devote equal time and effort to surveys in these years "as would have been ideal." Consequently, several counties usually surveyed were not surveyed in these years.<sup>1</sup> In Colorado, in 2002, the agency reported a reduced survey effort.<sup>2</sup> In 2003, the agency reported that there were no counts done in Cheyenne County approximately one half of the leks active in Kiowa County in 2002 were not surveyed in 2003 due to "time constraints."<sup>3</sup>

For these reasons and others, FWS has violated section 4 of the ESA. If you do not take action to correct these violations within 60 days, we will initiate a citizen suit against you in federal district court. If you have any questions, wish to discuss settlement of this matter, or believe this notice is in error, please do not hesitate to contact me.

Sincerely,

Nicole J. Rosmarino, Ph.D.  
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also on behalf of:

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<sup>1</sup>Oklahoma Department of Wildlife Conservation (ODWC). 1998. "Upland Game Investigations: monitoring Greater and Lesser Prairie Chickens." Grant Number W-82-R-37 and Oklahoma Department of Wildlife Conservation (ODWC). 1999. "Upland Game Investigations: monitoring Greater and Lesser Prairie Chickens." Grant Number W-82-R-38.

<sup>2</sup>Yost, Jeffrey A. 2002. Colorado Lesser Prairie-Chicken Breeding Surveys for 2002. Report of the Colorado Division of Wildlife.

<sup>3</sup>Yost, Jeffrey A. 2003. Colorado Lesser Prairie-Chicken Breeding Surveys for 2003. Report of the Colorado Division of Wildlife.

Center for Biological Diversity  
Chihuahuan Desert Conservation Alliance  
T & E, Inc.

Enc.

Cc: Western Governor's Association