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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

F.I.M. CORP., FRED FULSTONE, MARIANNE LEINASSAR, KRISTOFOR LEINASSAR,

NEVADA ASSOCIATION OF COUNTIES,

NEVADA MINERAL RESOURCES ALLIANCE,

and

AMERICAN EXPLORATION & MINING ASSOCIATION

Plaintiffs,

v.

U.S. DEPARTMENT OF THE INTERIOR, SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior, U.S. FISH & WILDLIFE SERVICE, a part of the Department of the Interior, DANIEL M. ASHE, in his official capacity as Director of the U.S. Fish & Wildlife Service, U.S. Department of the Interior, GARY FRAZER, in his official capacity as Assistant Director for Endangered Species at the U.S. Fish & Wildlife Service, U.S. Department of the Interior, REN LOHOEFENER, in his official capacity as the Pacific Southwest Regional Director, U.S. Fish & Wildlife Service, U.S. Department of the Interior, and, EDWARD KOCH, in his official capacity as the State Supervisor, U.S. Fish & Wildlife Service, Reno, NV

Defendants.

Case No. 3:14-cv-00630

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs, the Nevada Association of Counties ("NACO"), the Nevada Mineral Resources Alliance ("NVMRA" or the "Alliance"), F.I.M. CORP., ("FIM"), Fred Fulstone, Marianne Leinassar and Kristofor Leinassar (collectively with Fred Fulstone and Marianne Leinassar, the "Fulstones") and the American Exploration & Mining Association ("AEMA" and, collectively with NACO, FIM, the Fulstones and NVMRA, the "Plaintiffs") bring this action against the U.S. Fish & Wildlife Service ("FWS") seeking declaratory and injunctive relief for violations of the Endangered Species Act ("ESA"), the Administrative Procedure Act ("APA"), and the United States Constitution. Plaintiffs have also submitted a Notice of Intent to Sue, pursuant to 16 U.S.C. § 1540(g), to FWS for violations of the ESA. In the instant suit, Plaintiffs seek relief from FWS's violations under the APA for FWS's actions that are contrary to the ESA and the APA, and for FWS's violation of the Constitution.

2. This action seeks relief from an agency's action purporting to alter its obligations under Federal statutes through settlement of litigation with no Congressional action. By entering into private settlement agreements ("Settlements") with special interest litigants, FWS has circumvented the legislative process and fundamentally changed its obligations under the ESA. Having not had the opportunity to participate in shaping the substantive policy decisions embedded in FWS's Settlements, Plaintiffs have suffered injury from FWS's implementation of the Settlements' provisions which eliminate the statutory option under the ESA for FWS to conclude, based on the best available science and commercial data, that certain species be "warranted but precluded" from listing as endangered or threatened, a determination which would leave primary jurisdiction for wildlife management with the State.

3. Under the express provisions of the ESA, if a species "may" be warranted for listing as endangered or threatened, FWS has the ***duty*** to consider classifying such a species in one of three ways as: (i) not warranted; (ii) warranted; or (iii) warranted but "precluded" by

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FWS's obligation to prioritize its limited resources on species in more imminent danger of extinction by listing them as threatened or endangered species. See 16 U.S.C. § 1533(b)(3)(B). A species receiving the "warranted but precluded" classification is designated as a "candidate species." The Settlements unlawfully eliminate this third statutory option.

4. Moreover, the ESA mandates that for each candidate species, once each year, FWS must review the best available scientific and commercial data and use this information to re-evaluate the same three listing alternatives: (i) listing as endangered or threatened is "not warranted," (ii) listing is warranted and a listing rule is proposed, or (iii) listing is warranted but precluded because the species at issue has a lower listing priority as compared to other species. *See* 16 U.S.C. §§ 1533(b)(3)(B), (b)(3)(C)(i). A recent letter from the regional office of FWS asserts that it will not be completing this annual review (which Federal law requires) because it is too busy given its prioritization of implementing the Settlements.

5. The ESA also requires that FWS's listing decisions be grounded on the "best scientific and commercial data available," on state and private "conservation measures," and on science-driven prioritization of the candidate species. 16 U.S.C. §§ 1533(b)(1), (h).

6. Under the Settlements, FWS voluntarily, and without congressional authority, eliminated one of these three statutory options that the ESA requires it consider. For all of the species included in the 2011 Settlements, FWS eliminated the possibility of a designation of "warranted but precluded." Rather than pursuing this statutory change through legislation, FWS purports to have eliminated any possibility of a designation of "warranted but precluded" through Settlements of a series of lawsuits brought by special interest litigants.

7. FWS's agreement to forego consideration of a species' classification as "warranted but precluded by higher priorities" significantly diminishes the likelihood that conservation measures can achieve the very purpose of the "warranted but precluded" listing

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alternative, which is to stimulate enough successful conservation that listing a species becomes unnecessary. This is a critical component of the letter and spirit of the ESA that FWS has purported to eliminate through the Settlements. By committing in the Settlements to complete listing decisions according to a schedule that imposes arbitrary decision deadlines for hundreds of species within only a few years, FWS bound itself to make substantive decisions – likely to list species – before conservation measures can be implemented to remove the threats posed to these species, and without fully considering best available science and commercial data. Importantly, this also will shift the jurisdiction over conservation of the species from the states where these species are located (and where significant local knowledge and expertise plays a critical role in conservation) to the Federal Government and obstruct states, including the State of Nevada, from exercising their lawful regulatory authority over candidate species. In doing so, the Settlements and FWS actions thereunder interfere with implementation and administration of Nevada's significant conservation planning and efforts.

8. The unlawful and harmful effects of FWS's Settlements are particularly significant for two of the species in Nevada classified as candidate species and included in the Settlements: the Greater Sage-Grouse (*Centrocercus urophasianus*) and the Bi-State Distinct Population Segment ("DPS") of the Greater Sage Grouse. (*Centrocercus urophasianus*). Despite significant and ongoing conservation efforts undertaken by numerous private and public entities in Nevada, including the ten Nevada counties (Churchill, Elko, Eureka, Humboldt, Lander, Lincoln, Nye, Pershing, Washoe, and White Pine) where habitat for the Greater Sage Grouse is located and the five Nevada counties (Carson City, Douglas, Esmeralda, Lyons, and Mineral) where habitat for the Bi-State DPS is located, FWS purports to be compelled by its Settlements to make premature decisions in violation of its obligation to rely upon best scientific and commercial data available and state and private conservation measures, as to whether these

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species should be listed under the ESA as threatened or endangered or continue as candidate species.

9. FWS recently proposed to list the Bi-State DPS as "threatened" and has committed to make a listing decision for the Greater Sage Grouse by September 30, 2015. Although FWS has delayed its determination on the Bi-State DPS and called for additional public comment in light of newly available scientific information, the Settlements preclude FWS from determining that, based on the science (including newly available scientific information), the Bi-State DPS should remain a candidate species rather than being listed or determined to be not warranted. If these candidate species were assessed pursuant to provisions of the ESA, FWS's implementing regulations, and three decades of practice, then-current science and the significant ongoing conservation efforts in the fifteen Nevada counties with sage grouse habitat likely would yield a decision to continue to classify these species as candidate species – leaving the primary jurisdiction over management of the species with the State of Nevada, and to continue to encourage state, county, and private conservation measures. In the words of FWS, advantages to identification of a "candidate species" include maximizing "management options for landowners and for the species, minimiz[ing] the cost of recovery," and "allowing greater management flexibility to stabilize or restore the species and their habitats" as well as shifting priority to species in greatest need of the ESA's protective measures. *See* U.S.F.W.S. "Candidate Species Section 4 of the Endangered Species Act" visited November 20, 2014 at www.fws.gov/endangered/esa-library/. The Settlements purport to eliminate this entirely and mandate that the subject species either be listed or determined to be "not warranted" for listing. In its 2013 Candidate Notice of Review ("CNOR"), the yearly status appraisal required by statute for plants and animals that are candidates for ESA protection, FWS discussed that State conservation plans (such as Nevada's) might have a positive effect on conservation.

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10. The proposed listing decision for the Bi-State DPS and the pending listing decision for the Greater Sage Grouse, which must be made by September 2015 to satisfy the deadline in the Settlements, are premature, violate existing federal law, and have injured and will continue to injure Plaintiffs who have helped develop and support conservation measures for both species. This harm is particularly troubling given a recent USFWS Species' Report that notes core populations for Bi-State have increased by 120-144%. Another recently published study, *A Hierarchical Integrated Population Model for Greater Sage-Grouse (Centrocercus urophasianus) in the Bi-State Distinct Population Segment, California and Nevada*, United States Geological Survey Open-File Report 2014-1165, (hereinafter USGS Study), finds that with the possible exception of the Parker Meadow subpopulation, population trends across the range for the Bi-State DPS are stable. This evidences the success of the ESA provision for candidate species just as Congress intended.

11. Plaintiffs are entitled to have FWS follow the ESA currently in effect and consider whether, based on the science and commercial data and existing and planned conservation measures, the species should be maintained as a candidate species. The purpose of the ESA is not to add species to the protected list but to protect species and their habitat so they never warrant listing as a threatened or endangered species. The "Warranted but Precluded" designation and the candidate species classification are the key tools in the ESA to promote species protection and habitat conservation with the overarching goal of making listing unnecessary and keeping species off of the threatened and endangered species list. Eliminating the "Warranted but Precluded" determination and the candidate species classification undermines the very purpose of the ESA – to incentivize species protection and habitat conservation.

12. Among other injuries, once these species are listed under the ESA, Plaintiffs, including the Nevada citizens in the fifteen Nevada counties (represented through NACO) with

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sage grouse habitat and the companies that have mineral exploration, development, and mining projects in these counties will incur expense to comply with a rule accompanying the listing, to avoid a "take" in violation of the ESA, and/or to obtain incidental take permits under the ESA. *See* 16 U.S.C. §§ 1538(a), 1539(a). Nevada citizens and companies with projects located in areas with sage-grouse habitat would also be exposed to potential criminal violations under the ESA and its implementing regulations. *See* 16 U.S.C. § 1540(b). Particularly with more than approximately 83% of Nevada's lands being owned by the Federal Government, Plaintiffs' ability to use the lands with Bi-State DPS and Greater Sage Grouse habitat for ranching, farming, mineral exploration and development, renewable energy, recreation, urban development, and other multiple uses that optimize the management of resources on these lands will be severely restricted with the designation of "critical habitat" by FWS. Finally, the State's regulatory jurisdiction and implementation of the State's conservation plan will be obstructed and Plaintiffs' development, including that of the Nevada citizens in the fifteen counties with sage grouse habitat and mineral exploration and mining companies with projects in these counties, will be denied the benefit of the conservation measures that the State, the counties, county residents, and companies have undertaken for the Bi-State DPS and Greater Sage Grouse in order to preclude an ESA listing.

13. Listing either of these candidate species (without even considering, as the ESA mandates, whether the species should remain as candidate species) will increase the regulatory burden on the Plaintiffs. The FWS' action to propose listing the Bi-State DPS as "threatened" has already made it more cumbersome for Plaintiffs, especially for county governments, residents, and companies located in the five Nevada counties with habitat for the Bi-State DPS. For the Greater Sage Grouse, Nevada has established the Sagebrush Ecosystem Council charged with developing a Nevada Greater Sage Grouse Habitat Conservation Plan, which includes

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conservation programs developed in cooperation with FWS that are unprecedented in the scope of protection they afford the species and the degree of multidisciplinary collaboration that underpins the programs. Moreover, Nevada's most recent significant conservation efforts have been completed at the DOI's invitation.

14. In December 2011, then United States Secretary of the Interior Ken Salazar invited eleven western states, including Nevada, impacted by the potential listing of the Greater Sage-grouse, to develop state-specific regulatory mechanisms to conserve the species and preclude the need to list under the ESA. In response to DOI's invitation, Nevada has expended significant resources, time and effort in its development of Nevada's Greater Sage Grouse Habitat Conservation Plan (the "Conservation Plan"). The State, Counties, county residents, and businesses have devoted a similar level of effort to develop the conservation measures in the Bi-State Action Plan. In addition to DOI's invitation to Nevada, FWS's participation in development of the Conservation Plan led the State to believe FWS would give these conservation measures a chance to work so as to obviate the need for listing the Greater Sage Grouse. Yet, FWS remains committed to the arbitrary and aggressive listing decision deadline of September 30, 2015 mandated in the Settlements, which will not give adequate time to determine the effects of the proposed measures and, in violation of the ESA, will not consider the possibility that the species remain a candidate species. Further, adherence to this arbitrary deadline forces FWS to improperly diminish the impact of the Conservation Plan. In doing so, FWS fails to adequately consider conservation measures, as it must do pursuant to ESA §1533(b)(1)(A), which directs FWS to consider *all* conservation measures as part of a listing decision.

15. Defendants' actions are unlawful under the ESA and APA. First, Defendants have omitted the statutorily mandated consideration of the alternative of retaining these species

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within the candidate species classification pursuant to science-driven priorities which would be the likely outcome given the significant conservation efforts for both the Bi-State DPS and the Greater Sage Grouse, recent science concluding the Bi-State DPS is not in decline rangewide, a new genetic study of the Greater Sage Grouse which did not observe a lack of genetic variability (a genetic characteristic typically associated with threatened populations), and the fact that as of December 2013, the FWS concluded the Greater Sage Grouse still had a listing priority of 8 (out of 12 with 12 being the lowest priority).[1] Second, Defendants have violated their statutory obligation to make ESA listing decisions "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account those conservation efforts, if any, being made by any State . . . or political subdivision of a State to protect such species [including] conservation practices, within any area under its jurisdiction . . .." 16 U.S.C. § 1533(b)(1)(A). Third, Defendants have violated their obligation to ensure well-documented, science-driven listing decisions by their failure to adhere to guidelines (required under 16 U.S.C. 1533(h)(3)) that establish a priority system for removing species from the candidate species classification and instead prioritizing species based solely on the deadlines agreed to in the Settlements. This relative priority ranking system is to ensure that FWS focuses conservation efforts on those species at greatest risk first – a process completely

[1] A "listing priority number"(LPN) is the FWS' way of designating the relative priority of candidate species. FWS has developed guidelines governing the assignment of priorities to species for listing and development and implementation of recovery plans for species that are listed. The guidelines "aid in determining how to make the most appropriate use of resources available to implement the Act." *See Fish and Wildlife Service, Endangered and Threatened Species Listing and Recovery Priority Guidelines*, Federal Register, Vol. 48, No. 184 at 43098 (Sept. 21, 1983). The Settlements violate FWS' own guidelines for using LPNs as a prioritization and decision-making tool. There are hundreds of other species with lower LPNs than the Greater Sage Grouse that are, therefore, at greater risk and higher in priority according to FWS, but not getting the expedited determination under the Settlements. The 1-12 priority scale was adopted pursuant to APA notice and public comment requirements and cannot be ignored, changed or suspended without complying with the APA and providing appropriate notice and opportunity for public comment.

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circumvented by the Settlements which unlawfully purport to establish their own priority ranking. Fourth, Defendants have adopted substantive, binding policies that unlawfully conflict with FWS regulations in derogation of the APA and other rulemaking procedures.

16. Defendants' actions also violate the United States Constitution. Defendants have violated the due process clause of the Fifth Amendment to the Constitution, as applied to the Candidate Species, in adopting, via Settlements without public participation, a substantive, binding rule that eliminates Plaintiffs' statutory rights. Defendants also have violated Article I and the Separation of Powers provisions by usurping legislative authority, purporting to make substantive changes to the ESA (eliminating the Warranted But Precluded category) with no Congressional authority or action.

JURISDICTION AND VENUE

17. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction) and the APA, 5 U.S.C. § 702 (judicial review of final agency action). This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

18. Venue is proper in the U.S. District Court for the District of Nevada under 28 U.S.C. §§ 1391(c)(2) and (e) in that: (i) Defendant resides in the District of Nevada, maintaining an office at 1340 Financial Blvd, Suite 234, Reno, Nevada 89502, from which FWS implements FWS policies within the State of Nevada, (ii) a substantial part of the events and omissions giving rise to these claims occurred in the District of Nevada, and future regulatory impacts of FWS's listing decisions will be felt within this district in that, according to FWS, habitat for the Greater Sage Grouse and Bi-State DPS is located within the District of Nevada; (iii) Plaintiffs Nevada Association of Counties, FIM and the Fulstones reside, for venue purposes, in the

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District of Nevada; and (iv) Plaintiffs Nevada Mineral Resources Alliance and the American Exploration & Mining Association have member companies with projects, businesses, and operations in Nevada.

THE PARTIES

19. Plaintiff F.I.M. Corp. and its shareholders and operators, Fred Fulstone, Marianne Leinassar, and Kristofor Leinassar (collectively "FIM") own and operate a sheep ranch headquartered in Smith, Nevada. This family-owned and operated sheep ranch has lands, property rights and grazing preference within adjudicated range allotments in Nevada. The Fulstone family has been an agricultural producer in western Nevada for more than 150 years. The first Fulstone homesteaded in 1856 near Carson City, Nevada. Fred Fulstone's grandfather bought the family's first ranch in Smith Valley in 1903 and started their sheep ranching business in 1910. FIM owns approximately 15,000 acres of private land in Lyon and Douglas counties in Nevada and holds nearly 1 million acres of grazing permits on BLM and USFS lands. FIM employs a work force of approximately 18 people in addition to family members who work on the ranch. Many of the grazing permits issued to FIM are located on BLM and USFS administered lands that contain Bi-State DPS habitat. The Fulstone family believes that the sheep ranching operation has benefited Bi-State DPS and Bi-State DPS habitat. FIM has been impacted by listing of the Sierra Nevada Bighorn Sheep under the ESA and has incurred demonstrable adverse economic impact from that listing and designation of critical habitat for the species which FIM estimates prohibited grazing within four allotments at a cost to FIM of approximately $400,000 per year since the listing in 2000. FIM believes the FWS' listing of the Bi-State DPS will impose a similar or greater harm on FIM resulting from grazing prohibitions and other restrictions.

20. Plaintiff NEVADA ASSOCIATION OF COUNTIES ("NACO") was founded in

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1924 and is a nonpartisan, nonprofit corporation. The membership is composed of Nevada's county government officials and represents all seventeen Nevada counties, which are political subdivisions of the State of Nevada and each of which counties are negatively affected by the Settlements.[2] As such, NACO broadly represents the interests of the State of Nevada and Nevada citizens living in the seventeen Nevada counties. More particularly, NACO represents the interests of Nevada citizens living in the five counties where habitat for the Bi-State DPS is located and the ten counties where habitat for the Greater Sage Grouse is located. NACO's mission is to encourage county government to provide services that will maximize efficiency and foster public trust in county government. NACO works to optimize the management of county resources which is thwarted by FWS's implementation of the Settlements' provisions eliminating the statutory option under the ESA for FWS to conclude, based on the best available science, commercial data, and conservation efforts being made by the State or any political subdivision of the State, that the Bi-State DPS and the Greater Sage Grouse be "warranted but precluded" from listing as endangered or threatened. NACO member counties with sage grouse habitat have allocated significant resources to habitat conservation and preserving both candidate species. These counties are active participants in the Nevada Sagebrush Ecosystem Council, which includes a Council member who represents the interests of local government, including county governments. The Nevada Sagebrush Ecosystem Council has developed the Conservation Plan to aid in maintaining and enhancing habitat in Nevada for the Greater Sage Grouse. Similarly, the five counties with lands identified as habitat for the Bi-State DPS have actively participated in developing the Bi-State Action Plan to conserve habitat for the Bi-State DPS. When candidate species within Nevada are moved to the threatened species list, NACO member counties and

[2] Sixteen out of 17 counties have habitat for the Greater Sage Grouse; 5 counties have Bi-State DPS habitat; and Clark County has habitat for two species (yellow-billed cuckoo and the

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private entities living and working in these counties incur significant regulatory expenses in addition to expenses incurred to avoid a "take" of the species. Perhaps most importantly, NACO member counties will lose flexibility in the range of measures that county governments and county residents may undertake to preserve species without the cumbersome restrictions of a listing under the ESA, including the ability to fully implement the Conservation Plan and the Bi-State Action Plan. Both plans have significant efforts already underway including, but not limited to the detailed Conservation Credit System in the Conservation Plan and the commitment that the Bi-State Executive Oversight Committee has made to implement the Bi-State Action Plan. Pursuant to 16 U.S.C. § 1533(b)(1)(A), FWS must take into account species conservation efforts being made by any State . . . **or any political subdivision of a State** . . . to protect a species. NACO member counties are harmed by the settlement's unlawful elimination of the warranted but precluded listing alternative because were it not for the settlement, FWS would, in compliance with the ESA, consider maintaining the Bi-State DPS and the Greater Sage Grouse as candidate species in light of the conservation measures in the Bi-State Action Plan and the Conservation Plan, both of which are successfully conserving sage grouse habitat.

21. Plaintiff THE NEVADA MINERAL RESOURCES ALLIANCE ("NVMRA") NVMRA is an alliance of mineral exploration and development companies with mineral exploration and development projects in areas of Nevada that have sage grouse habitat. NVMRA was an active participant in meetings of the Governor's Sage Grouse Advisory Committee and has been actively engaged in meetings of the Sagebrush Ecosystem Council. NVMRA members' mineral exploration and development operations in Nevada will be adversely affected if the Bi-State DPS or the Greater Sage Grouse are moved from the candidate species classification to the ESA's endangered or threatened list pursuant to the Settlements.

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southwestern willow flycatcher) subject to the settlement agreements.

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22. Plaintiff THE AMERICAN EXPLORATION & MINING ASSOCIATION (AEMA) is a 119 year old, 2,500-member, non-profit, non-partisan trade association based in Spokane, Washington. Approximately 23 percent of AEMA's members live in Nevada. These Nevada residents, as well as other AEMA members and member companies have mineral exploration and development projects and active mining operations on both public and private lands in Nevada. Many AEMA members are conducting operations at mineral exploration, development, and mining projects in areas of Nevada with sage grouse habitat. AEMA's diverse membership encompasses every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. Many AEMA members provide goods and services to the companies conducting Nevada mineral exploration, development and mining operations in areas with sage grouse habitat. AEMA members will be adversely affected if the Bi-State DPS or the Greater Sage Grouse are moved from the candidate species classification to the ESA's endangered or threatened list pursuant to the Settlements. Because AEMA's membership is comprised of a diverse array of companies and businesses with interests in Nevada, the unlawful elimination of the candidate species classification for the Bi-State DPS and Greater Sage Grouse will adversely impact many Nevada business sectors, which will in turn harm the State's economy.

23. Defendant U.S. DEPARTMENT OF THE INTERIOR ("Interior" or "DOI") is the federal agency charged with administration of much of the ESA including the listing procedures contained in 16 U.S.C. § 1533.

24. Defendant U.S. FISH & WILDLIFE SERVICE ("FWS" or "Service") is a part of Interior that has been delegated the responsibility to implement much of the ESA, including determining the species for which listing under the ESA should be decided and which of these

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species should be classified as candidate species pursuant to 16 U.S.C. § 1533(b)(3)(B)(iii), (C)(i).

25. Defendant SALLY JEWELL is the Secretary of Interior, and is sued in her official capacity. Secretary Jewell, in her capacity as Secretary of Interior, has ultimate responsibility for Interior and FWS's actions under the ESA.

26. Defendant DANIEL M. ASHE is the Director of FWS and is sued in his official capacity. Director Ashe oversees FWS, the agency charged with implementing much of the ESA.

27. Defendant GARY FRAZER is the Assistant Director for Endangered Species at FWS, and is sued in his official capacity. Assistant Director Frazer oversees the listing function of FWS under the ESA.

28. Defendant REN LOHOEFENER, is the Pacific Southwest Regional Director of FWS and is sued in his official capacity. Mr. Lohoefener has participated in FWS's regulatory efforts for the Bi-State DPS and Greater Sage Grouse. He supervises FWS implementation of the ESA within the State of Nevada.

29. Defendant EDWARD KOCH is the State Supervisor for the Nevada Field Office of FWS and is sued in his official capacity. Mr. Koch has participated in FWS's regulatory efforts for the Bi-State DPS and Greater Sage Grouse and has served as an *ex officio* member of the Nevada Sagebrush Ecosystem Council. He supervises FWS implementation of the ESA within the State of Nevada. ("FWS" refers to the Defendants collectively unless otherwise specified.)

LEGAL BACKGROUND

A. THE ENDANGERED SPECIES ACT

30. The ESA provides protection for species that could be at risk for declines in population and, potentially, for extinction. 16 U.S.C. § 1531(b). Section 4 of the ESA requires

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the Service to determine whether a species should be listed as "endangered" or "threatened" based upon five factors. 16 U.S.C. § 1533(a)(1); 50 C.F.R. §§ 424.10, 424.11(c).

31. The ESA prescribes mandates for protecting listed species. See 16 U.S.C. §§ 1532(19), 1533(f), 1536(b)(3)(A), 1538. Once a species is listed as threatened or endangered, the ESA imposes an express prohibition on "taking" the species where taking means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." 16 U.S.C. § 1532(19). Under FWS regulations "harm" can "include significant habitat modification or degradation" where "essential behavioral patterns, including breeding, feeding, or sheltering" are significantly impaired. 40 C.F.R. § 17.3.3

32. A user of public lands can allegedly "take" a listed species if their actions merely modify or degrade the habitat of listed species or inadvertently harass a single member of the species. The costs to the Plaintiffs to avoid a "take" of a listed species in conjunction with activities on public or private lands that have designated critical habitat can be enormous and, in some instances, can preclude development or use of such lands in their entirety.

B. THE ESA'S LISTING PROCEDURES

33. Any "interested person" may petition the Service to list a species as threatened or endangered. *See* 16 U.S.C. § 1533(b)(3). "To the maximum extent practicable," FWS must then determine within 90 days 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). If this finding concludes that the petition does not present substantial information indicating that listing may be warranted, the listing process is terminated. If the Service makes a positive 90-day finding for a species, it must determine, within twelve months, whether the petitioned action is (i) not warranted, (ii) warranted and a listing is proposed, or (iii) warranted but precluded by

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other priorities. *Id.* at 1533(b)(3)(B).

34. The statute mandates that the Service "***shall***" make its listing determinations,

> ***solely*** on the basis of the ***best scientific and commercial data available*** . . . after conducting a review of the status of the species and ***after taking into account those efforts, if any, being made by any State . . . or any political subdivision of a State*** . . . ***to protect such species***, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction.

16 U.S.C. § 1533(b)(1)(A) (emphasis added).

35. If the Service's 12-month finding concludes that listing is "warranted" the ESA provides the Service with two options: (i) issue a proposed listing rule, *id.* at 1533(b)(3)(B)(ii); or (ii) determine, based upon ***science-driven prioritization***, that the listing is "warranted but precluded." 16 U.S.C. §§ 1533(b)(3)(C)(iii), 1533(h)(3).

36. A species that receives the "warranted but precluded" status is considered a "candidate species" and, annually, the Service must re-evaluate each of these candidate species following the statutory criteria for a 12-month finding:

> A petition with respect to which a [warranted but precluded] finding is made . . . ***shall*** be treated as a petition that is resubmitted . . . under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

16 U.S.C. § 1533(b)(3)(C)(i). With each annual review of a candidate species, FWS must repeat the same statutory process, and consider ***all three*** alternatives anew.

37. FWS thus must consider whether:

> The petitioned action is warranted, but that –
>
> (I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . *is precluded by pending proposals to determine whether any species is an*

[3] *See also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great. Or., 515 U.S. 687 (1995).

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> *endangered species or a threatened species*, and
>
> (II) expeditious progress is being made to add qualified species to either of the [ESA] lists . . . and to remove from such lists species for which the protections of this chapter are no longer necessary . . . .

16 U.S.C. § 1533(b)(3)(B)(iii) (emphasis added). FWS is required to consider whether it has sufficient resources to meet its obligations for pending candidate species. Once it knows the agency does not have sufficient resources to propose rules on listing and critical habitat, FWS is required to make a reasoned decision as to which of the candidate species should be brought forward to make a listing decision. This option to preclude a candidate species from listing is critical under the ESA to ensure that species in truly dire need of listing get necessary protection – a statutory objective that is frustrated by the settlement agreements. The ESA was never intended to result in listing any species experiencing any level of adverse impact or threat, but rather for listing those that will not persist without such protection.

38. There is no statutory deadline for proposing a rule to list candidate species, nor any limit to the time a species can remain in "candidate" status. Indeed, such a deadline could defeat the fundamental purpose of the ESA and provision for a "candidate species" by arbitrarily limiting the science and information to be considered. In each annual review after a species is designated as a candidate species, the Service, guided by its evaluation of the five factors specified in the statute and using the "best available science and commercial data " retains the statutory prerogative of determining the species' listing is warranted but precluded by other priorities, and, consequently, the species should remain a candidate species for the following year. *See* 16 U.S.C. §§ 1533(b)(3)(C)(i), (b)(1). The Service must also consider efforts to protect the species undertaken by States and political subdivisions of States. *See* 16 U.S.C. § 1533(b)(1). FWS cannot eliminate, in its annual reconsideration of a candidate species, the alternative of

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retaining that species within the candidate species classification.

39. The Service has promulgated regulations implementing these ESA listing alternatives. FWS's regulations construe the statutory directive for annual review of candidate species as requiring FWS to consider retaining the species within the candidate species category:

> (3) Upon making a positive finding under paragraph (b)(1) of this section, the Secretary shall commence a review of the status of the species concerned and ***shall*** make, within 12 months of receipt of such petition, ***one of the following findings***:
>
> (i) The petitioned action is not warranted, [ ],
>
> (ii) The petitioned action is warranted, [ ] or
>
> (iii) The petitioned action is warranted, but that –
>
> (A) The immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals to list, delist, or reclassify species, and (B) Expeditious progress is being made to list, delist, or reclassify qualified species, in which case, such finding shall be promptly published in the Federal Register together with a description and evaluation of the reasons and data on which the finding is based.
> * * *
>
> (4) If a finding is made under paragraph (b)(3)(iii) of this section with regard to any petition, the Secretary ***shall***, within 12 months of such finding, ***again make one of the findings described in paragraph (b)(3) with regard to such petition***, but no further finding of substantial information will be required.

50 C.F.R. § 424.14(b)(3) (emphasis added).

40. The ESA mandates that FWS choose among *all three alternatives each year*, based upon the information available at that time. The statute does not permit FWS to make a decision based upon speculation as to the future status of a candidate species. Nor may FWS rely on old information that has not been updated in the current year. Rather, FWS must reevaluate the candidate species annually and decide, based upon then available data and conservation practices, *inter alia*, whether the species should remain as a candidate species.

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41. Throughout the last 30 years since the ESA was amended to require consideration of the status "Warranted but Precluded" for species, FWS has followed a practice of reconsidering each candidate species on an annual basis, while retaining the statutory prerogative of keeping each species as a "candidate species" based upon its respective priority for listing which priority, under the ESA must be "science driven." The Settlements violated this fundamental requirement by allowing the private-interest litigants to dictate priority not based on any science but on their own private deal with the Defendants establishing arbitrary listing determination deadlines for certain species they decided would take priority.

C. CANDIDATE SPECIES

42. FWS has described a "candidate species" as a species "for which we have on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or threatened but for which preparation and publication of a proposal is precluded by higher priority listing actions." 78 Fed. Reg. 70,104 (Nov. 22, 2013). If a species is determined to be "warranted" for listing but is "precluded by pending proposals" for listing other species under Section 4(b)(3)(C)(iii), the species becomes a "candidate species." *See* 16 U.S.C. § 1533(b)(3)(C)(iii).

43. One reason FWS classifies species as candidate species is "to provide information that may stimulate and guide conservation efforts that will remove or reduce threats to these species and possibly make listing unnecessary." 78 Fed. Reg. at 70,104. According to FWS, its policy is to "strongly encourage collaborative conservation efforts for candidate species, and offer technical and financial assistance to facilitate such efforts." *Id*. at 70,105.

44. The candidate species classification benefits both landowners and candidate species because it promotes the implementation of voluntary conservation programs that not only avoid "restrictive land use polices" associated with listed species but also allow "greater

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management flexibility to stabilize or restore these [candidate] species and their habitats . . . ."[4] The Service has recognized that, "[i]deally, sufficient threats can be removed to eliminate the need for listing." *Id.* Thus, over time, species which remain in the candidate species classification are given an important opportunity to recover sufficiently and, thereby, justify a finding by FWS that the species are "not warranted" for listing as threatened or endangered.

45. FWS must act on candidate species in accordance with a priority system mandated by Congress. In 1979, Congress amended the ESA, adding a new Section 4(h), requiring FWS to adopt "agency guidelines to insure that the purposes of this section are achieved efficiently and effectively," including "a ranking system to assist in the identification of species that should receive priority review for listing." *See* Pub. L. No. 96-159, 93 Stat. 1225, 1226 (1979). In 1982, Congress elaborated on this mandate, amending Section 4(b)(3)(B) to its current form to require FWS to make one of three substantive determinations for a species: (i) the listing is "not warranted," (ii) listing the species is "warranted" in which case a listing rule will be proposed, or (iii) the listing is warranted but precluded by higher priority pending proposals. *See* ESA § 4(b)(3)(B), 16 U.S.C. § 1533(b)(3)(B).

46. At the time of the 1982 amendment, Congress recognized the Service's limited resources were insufficient to respond to the increasing numbers of petitions filed by advocacy organizations demanding listing decisions for various species on the statutory schedule dictated by the ESA. Congress accordingly determined that: "The listing agencies should utilize a ***scientifically based priority*** system to list and delist species, subspecies and populations based on the degree of threat, and proceed in an efficient and timely manner." H.R. Rep. No. 97-835 (1982) (Conf. Rep.), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2862 (emphasis added). It is this

[4] U.S. FISH &WILDLIFE SERVICE, CANDIDATE SPECIES (2011), http://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf (last visited Mar. 17,

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very statutorily mandated system that FWS has eliminated through the settlement agreements at issue.

47. The statute directs FWS to adopt a "ranking system to assist in the identification of species that should receive priority review under [ESA §4(a)(1)]." 16 U.S.C. § 1533(h)(3). Under the policy adopted in 1983 to implement this requirement, FWS assigns a priority for action to each species on the candidate list. As the Service noted when it adopted this now thirty-year-old policy, "it is necessary to assign priorities to listing, delisting, reclassification, and recovery actions in order to make the most appropriate use of the limited resources available to implement the [ESA]." 48 Fed. Reg. 43,098 (Sept. 21, 1983). FWS has explained that, in order to assign priorities among candidate species, FWS considers, first, the magnitude of the threats to each candidate species; second, the immediacy of the threat; and third, the taxonomic status of the species. *See* 78 Fed. Reg. 70,104, 70,105 (Nov. 22, 2013). This detailed analysis generates a listing priority number ("LPN") ranging from 1 (highest) to 12 (lowest). The "LPN ranking system provides a basis for making decisions about the relative priority for preparing a proposed rule to list a given species." *Id*.

48. Since FWS adopted this science-driven priority system in 1983, the number of species that have become the subject of listing petitions, 90-day findings, and 12-month findings has increased dramatically. By 2010, 251 species were on the candidate species list. *See* 75 Fed. Reg. 69,222 (Nov. 10, 2010). Since FWS entered into the Settlements described below, one of the settling advocacy organizations has petitioned for listing of more than 400 additional species.

D. Nevada's Conservation Efforts

49. The ESA acknowledges the value of conservation efforts led by States and political subdivisions of States, expressly recognizing that "encouraging the States and other

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interested parties, through . . . a system of incentives, to develop and maintain conservation programs" is "key" to "safeguarding" species. 16 U.S.C. § 1531(a)(5). To this end, FWS has encouraged "collaborative" efforts to implement conservation measures as a means to "preclude or remove any need to list the covered species." *See* 64 Fed. Reg. 32,726, 32,727 (June 17, 1999).

50. When FWS undertakes its yearly review of candidate species, it considers the then-current scientific data ***and protective measures adopted by the states, political subdivisions of states,*** and other parties. New data and conservation measures have, in some cases, lowered the priority of species within the candidate species category; in other cases, they have resulted in findings that the candidate species are "not warranted" for listing. In three decades of prioritizing candidate species, the Service has consistently taken the position that there are no deadlines for making a "warranted" or "not warranted" listing decision for candidate species. Congress could have included deadlines if it so intended in the amendments enacted in 1982. It did not and the Defendants' agreement to such deadlines contravenes both the plain language of the ESA and the Congressional intent and purpose under the ESA.

PROCEDURAL & FACTUAL BACKGROUND

A. SETTLEMENTS FOR CANDIDATE SPECIES

51. In 2010, a multi-district litigation panel consolidated in the U.S. District Court for the District of Columbia twelve actions against FWS seeking various listing decisions from the Service for a variety of species.[5] Two special interest litigants – WildEarth Guardians and the Center for Biological Diversity – had brought the actions putting at issue a portion of the candidate species.

[5] *See In re* Endangered Species Act Section 4 Deadline Litigation, 716 F.Supp. 2d 1369 (MDL 2010).

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52. FWS chose not to defend these cases. Instead, FWS entered into settlement negotiations and, in May 2011, concluded its first settlement with WildEarth Guardians.[6] The WildEarth Guardians Settlement was not confined to candidate species at issue in the original WildEarth Guardians complaints.[7] FWS agreed to a settlement that swept in ***all*** of the 251 species within the candidate species classification catalogued in FWS's then most current publication on the subject, the November 10, 2010 Candidate Notice of Review ("CNOR"), 75 Fed. Reg. 69,222 (Nov. 10, 2010).

53. In the WildEarth Guardians Settlement, FWS agreed to submit either a "warranted" decision along with proposed listing rule or a "not warranted" decision for each of the 251 candidate species on a schedule ending in Fiscal Year 2016. The WildEarth Guardians Settlement establishes a timeline for species to either be proposed or determined to be listed: 130 out of 251 by September 30, 2013, no fewer than 160 out of 251 by September 30, 2014, and no fewer than 200 out of 251 by September 30, 2015.[8] In addition, the WildEarth Guardians Settlement required that FWS make a series of determinations and propose listings as specified in fiscal years 2011 and 2012.[9]

54. Under the WildEarth Guardians Settlement, FWS committed to proposing a listing of the Bi-State DPS by no later than 2013 and for the Greater Sage Grouse by no later than 2015. On October 28, 2013, FWS proposed a rule to list the Bi-State DPS as threatened. The AEMA and NACO counties with Bi-State DPS habitat commented on the proposed rule

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[6] *See* Stipulated Settlement Agreement, *In re* Endangered Species Act Section 4 Deadline Litigation, Misc. Action No. 10-377 (EGS) (D.D.C. May 10, 2011) (the "WildEarth Guardians Settlement").

[7] In addition to the candidate species at issue in the litigation, WildEarth Guardians also had cases that addressed nine Texas mollusks, the Utah population of the gila monster, and the Mexican wolf consolidated for purposes of resolving 90-day and 12-month findings.

[8] WildEarth Guardians Settlement at ¶ 6.

[9] *Id.* at ¶ 1, Exh. B.

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noting, among other things, that listing was premature and could interfere with conservation efforts, including the Bi-State Action Plan. On April 8, 2014, "based on substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the proposed listing" FWS reopened the public comment period to solicit additional information for 60 days before publishing a listing determination on or before April 28, 2015.

55. Under the settlement agreements, FWS also committed that, for each of the 251 candidate species, the Service would ***not*** consider the alternative otherwise available under the ESA: to retain the candidate species classification beyond the WildEarth Guardians Settlement-imposed deadlines for listing decisions. In total disregard of the express provisions of the ESA, the Settlements require this outcome regardless of any scientific data, any change in priority for a species, or the effect of conservation measures that might provide ample justification for FWS to retain the candidate species classification.

56. Similarly, for certain candidate species, the WildEarth Guardians Settlement imposes a two-year schedule for listing decisions and prohibits the Service from retaining the species in the candidate species classification beyond the specified date giving certain species priority under the settlement without regard to whether it would have a lower priority vis-à-vis other species by virtue of conservation measures, scientific data, or other available data that would otherwise merit retention of the candidate species classification.

57. On July 12, 2011, the Service entered into a settlement with the other special interest plaintiff, Center for Biological Diversity.[10] In this settlement, the Service similarly committed itself to submit a proposed listing rule or a "not warranted" finding for additional species within specified fiscal years for a period extending from 2011 to 2017. (Collectively, the

[10] *See* Stipulated Settlement Agreement, *In re* Endangered Species Act Section 4 Deadline Litigation, Misc. Action No. 10-377 (EGS) (D.D.C. July 12, 2011) (the "CBD Settlement").

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WildEarth Guardians Settlement and the CBD Settlement are referred to as the "Settlements").

58. In the CBD Settlement, FWS committed that, for each of these additional species, the Service would ***not*** consider the alternative available under the ESA to retain the candidate species classification regardless of then-available scientific data, any change in priority for a species, or conservation measures that might otherwise be the basis to retain the candidate species classification under the ESA.

59. At the time FWS entered into the Settlements, the agency knew or should have known it would not have the resources to make listing decisions in accordance with its statutory duty to use the best scientific and commercial data available for all of the hundreds of species subject to the Settlements. FWS has never made so large a number of listing decisions in so short a time. FWS knew or should have known that, for many of the species scheduled for a "warranted" or "not warranted" decision under the Settlements, the agency simply would not have the resources to make decisions, propose the requisite listing rules, and keep up with its other non-settlement agreement listing obligations under the ESA. Indeed, FWS should have recognized at the time that the number of species slated for such decisions would overwhelm the resources available for listing leaving no resources for other species. In essence, the agency and the two special interest plaintiffs disregarded the ESA and instead adopted their own work plan for species they identified as the priority to be evaluated in their priority and with only the possibility of listing or not listing, eliminating the candidate species option provided under the ESA.

60. FWS knew or should have known that, for many of the hundreds of species for which it obligated itself to make decisions the "proposal and timely promulgation of a final regulation implementing the petitioned [listing] action" would be "precluded by pending proposals." 16 U.S.C. § 1533(b)(3)(B)(iii)(1). FWS knew or should have known that, to follow

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the dictates of the statute, the agency is *required* to prioritize candidate species and to retain some of these species within the candidate classification on the basis of that prioritization.

61. In its listing program, FWS places its highest priority on "[c]ompliance with court orders and court-approved settlement agreements requiring that petition findings or listing or critical habitat determinations be completed by a specific date." 78 Fed. Reg. 49,422, 49,436 (Aug. 14, 2013). FWS is complying with the Settlements' arbitrary deadlines even when newly available scientific or commercial data demonstrate that, due to its relatively low priority, a species should properly remain within the candidate species classification for a time period exceeding the deadlines imposed by the Settlements.

62. FWS did not defend the litigation giving rise to these Settlements, and when two other parties attempted to intervene (one of which sought to intervene for the sole purpose of challenging terms of the settlement agreements), FWS vigorously objected to the court allowing intervention. The court adopted the government's position, rejecting participation by entities that had not previously been a party to the litigation.[11]

63. One of the primary benefits to FWS in entering the Settlements was supposed to be reduction in the volume of listing deadline litigation, yet FWS continues to receive many new petitions including a single petition from CBD, the special interest litigant responsible for the CBD Settlement, to list 404 species. The Service has acknowledged these new petitions will "significantly increas[e]" the number of listing and critical habitat actions "with absolute statutory deadlines." 78 Fed. Reg. 49,436 (Aug. 14, 2013). FWS lacks the resources to engage in a listing evaluation for all of the species subject to the Settlements, and many of them clearly

[11] *See In re* Endangered Species Action Section 4 Deadline Litigation, 270 F.R.D. 1 (D.D.C. 2010) (rejecting proposed intervention from Tejon Ranch Company concerning the Tehachapi Slender Salamander); *In re* Endangered Species Action Section 4 Deadline Litigation, 277 F.R.D. 1 (D.D.C. 2011) (rejecting intervention regarding Lesser Prairie-Chicken, New England

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should be retained as candidate species. Moreover, even if, under FWS's longstanding guidance for prioritizing species, some of the candidate species at issue in this litigation would have a relatively low priority, FWS will make a listing decision on species subject to the Settlements *before* it will consider other, higher-priority species – in direct violation of the ESA.

64. The Settlements require, for 290 candidate species, most of which were not even the subject of the consolidated litigation, that FWS (i) eliminate continuation of the ESA-authorized candidate species classification regardless of the applicable science, conservation measures, or priority; (ii) decide, for each of these species, either that listing is "not warranted," or that listing is "warranted" and a listing rule must be proposed; and (iii) abide by a lockstep schedule to make these listing decisions through late 2017. FWS denied the public an opportunity to participate in this regulatory decision; FWS never proposed a change to existing statutes or regulations that require FWS to consider retaining the candidate species classification. The Plaintiffs never had an opportunity to participate in the decision that gave rise to FWS's disregard of its statutorily-imposed obligations and departure from its decades-old policy for candidate species.

B. <u>The Nevada Species</u>

65. Among the species that are the subject of the 2011 Settlements are two species that involve millions of acres of land in Nevada, the Greater Sage Grouse and the Bi-State Distinct Population Segment (DPS) of Greater Sage Grouse. The Service has already proposed moving the Bi-State DPS from the candidate species category to a "threatened" listing. The Greater Sage Grouse currently is a candidate species with a LPN of 8 (out of 12, with 12 being the lowest priority), but FWS will move the Greater Sage Grouse from the candidate species list

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Cottontail, and Greater Sage Grouse); *see also In re* Endangered Species Action Section 4 Deadline Litigation, 704 F.3d 972 (D.C. Cir. 2013) (affirming rejection of intervention).

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no later than Fiscal Year 2015 under the Settlements.

66. The Plaintiffs suffer injury when decisions are made with respect to these species whose listings are pending pursuant to the Settlements. Moving either of the sage grouse species from the candidate list to being threatened or endangered increases the regulatory burden on Plaintiffs, will narrow the State's flexibility with regard to regulating habitat, impede and interfere with the State's regulatory jurisdiction, and interfere with the ongoing implementation of the Conservation Plan and the Bi-State Action Plan, which will harm Plaintiff NACO that has devoted considerable resources towards development of these plans.

67. Pursuant to applicable law, the State has maintained authority and jurisdiction over waters of the State and all wildlife owned by the State that is not listed under the ESA. For example, the State has exclusive authority to oversee the appropriation of water rights and has primacy for implementation of the Clean Water Act within Nevada. Designation of either of the sage grouse species could lead to demands that State agencies adjust water appropriations and modify water discharge permits to accommodate listed species. Designation of such species will also interfere with land use planning conducted by State and local governments. Moreover, requirements attendant to a listing would impede the State's ability to allow and regulate recreational activities within Nevada.

1. The Bi-State Distinct Population Segment of Greater Sage Grouse

68. On October 28, 2013, FWS proposed a rule to list the Bi-State DPS as "threatened," removing it from the candidate species list. FWS had placed the Bi-State DPS on the candidate species list in 2010 and assigned it an LPN of 3. The Bi-State DPS was among the 251 candidate species that FWS agreed to rush to judgment under the settlement deadlines. The State of Nevada filed comments opposing the listing of the Bi-State DPS stating:

> It is especially troubling that this listing has been proposed in the

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> face of more than a decade of conservation and restoration initiatives, and in spite of the fact that over the last twelve years, sage-grouse populations in the Bi-State DPS have exhibited a stable-to-increasing trend in Nevada, and monitored leks in California have displayed record- to near-record-high numbers.
>
> Through this proposal, more than 1.8 million acres of habitat could be declared "critical" under the ESA. If ultimately approved, the listing could result in gratuitous impediments for Nevada ranchers, renewable energy companies, and everyday citizens who enjoy access to our beautiful public lands. . . .
>
> The Bi-State Area Working Group (LAWG), comprised of local, state, and federal partners as well as the private and non-profit sector, has been working for more than a decade to develop and implement strategies to conserve the Bi-State DPS. In 2002, the group began work on a conservation plan that was approved in 2004 and has been implemented over the course of the past decade; it has yielded significant results for the Bi-State DPS.

Comments of Office of the Governor of the State of Nevada (November 18, 2013). The State noted that since the "2004 plan was approved, 298 projects aimed at conserving, expanding and improving habitat for sage-grouse have been implemented in both Nevada and California," conservation easements have been established on more than 16,000 acres; more than 7,000 acres of important seasonal sage-grouse habitats have been acquired; more than 16,000 acres of encroaching pinyon juniper have been removed; and, grazing management to improve habitat on more than 1 million acres have been instituted. *Id.* The 2004 conservation plan was reviewed in 2011. In 2012, the 2012 Bi-State Action Plan was endorsed by the Bi-State Executive Oversight Committee.

69. On April 8, 2014, the FWS extended the comment period acknowledging that some commenters raised questions regarding the interpretation of scientific information used in the proposed listing rule and scientific literature that was not yet available for use in the analysis. For example, since publication of the October 2013 proposed listing rule, the USGS developed an integrated population model (the aforementioned USGS Study) that is generating

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new information "valuable for our listing determination" according to FWS. Fed. Reg. Vol. 79, No. 67 at 19315. FWS acknowledged that "there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to our listing determination." *Id.* FWS will make its final listing decision on the Bi-State DPS by no later than April 2015. As noted above, the USGS Study documents that the Bi-State DPS population is stable.

70. Although FWS extended the public comment period on the proposed rule to list the Bi-State DPS as "threatened" it will not consider the possibility, required under the ESA, that the species remain a candidate species because under the Settlements, that is prohibited and the species must either be listed or determined not warranted. This unlawful elimination of the possibility to consider the best available science and commercial information and the conservation efforts in the Bi-State Action Plan developed by the State, political subdivisions of the State including counties, and private entities which, were it not for the settlement, would require FWS to consider maintaining the candidate species status in light of the significant conservation efforts and regulatory mechanisms in place and the increasing population of the species. FWS is unwilling to maintain the species as a candidate species because it believes it is handcuffed by the Settlements from doing so. Unless restrained, FWS will unlawfully follow the same course of action for the Greater Sage Grouse species.

2. The Greater Sage Grouse

71. In December 2003, FWS was petitioned to list the Greater Sage Grouse as endangered across the entire range. In November 2005, FWS determined listing the species was not warranted. In July 2006, Western Watershed Project initiated a lawsuit in Federal District Court in Idaho challenging the FWS decision that the Greater Sage Grouse was not warranted for listing. In December 2007, the Federal District Court of Idaho overturned the FWS decision that the listing was not warranted and remanded the decision to FWS for further consideration. In

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March 2010, FWS determined that that listing of the Greater Sage Grouse under the ESA was "warranted but precluded" by other higher priority actions and classified the Greater Sage Grouse as a candidate species. In March 2011, under the Settlements, the Greater Sage Grouse was among the species FWS agreed must be considered for listing by no later than September 2015 without the possibility of keeping it as a candidate species if that is what the science and consideration of State, County, and other conservation efforts would require under the ESA.

Notably, as of December 2013, the most recently published CNOR, the priority of the Greater Sage Grouse has remained unchanged – at an 8 under the FWS 12-point scale. The 2013 CNOR acknowledges the significant effect that ongoing conservation measures are having in sage-grouse habitat conservation:

> "However, many of these habitat impacts are being actively addressed through conservation actions taken by local working groups, and State and Federal agencies. Notably, the National Resource Conservation Service has committed significant financial and technical resources to address threats to this species on private lands through their Sage-grouse Initiative. These efforts, when fully implemented, will potentially provide important conservation benefits to the greater sage-grouse and its habitats. We consider the threats to the greater sage-grouse to be of moderate magnitude, because the threats are not occurring with uniform intensity or distribution across the wide range of the species at this time, and substantial habitat still remains to support the species in many areas. The threats are imminent because the species is currently facing them in many portions of its range. Therefore, we assigned the greater sage-grouse an LPN of 8." (FR Page 70120)

Were it not for the settlement, the findings in the 2013 CNOR would otherwise lead to a decision to maintain the candidate species status for the Greater Sage Grouse

72. A recent peer reviewed and published study is of critical relevance to the FWS determination -- *Comparison of Patterns of Genetic Variation and Demographic History in the Greater Sage-Grouse (Centrocercus urophasianus): Relevance for Conservation*, (Zink, *The Open Ornithology Journal*, 2014). Dr. Zink concludes:

> "There is no clear evidence that the population genetic variability of the greater sage-grouse has been influenced by range reduction and

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> fragmentation. The microsatellite data suggest that despite past population trends, there is no evidence of heightened inbreeding in smaller populations. Indeed, over deep evolutionary time, populations ebb and flow. Only in the case of the geographically isolated Columbia Basin populations is there a demonstrable effect of population declines and loss of genetic variability, but even in these populations there is no clear evidence of inbreeding. Because genetic variability is thought to be a proxy for population health, it does not appear that demographic declines have reached a point where genetic variation is affected in greater sage-grouse, with the exception of the Columbia Basin populations."

73. Dr. Zink's conclusions contradict the findings of Garton, et. al., as cited by USFWS that habitat fragmentation caused by human activities is responsible for a decline in sage-grouse populations. FWS has relied on this habitat fragmentation concept in Garton et. al. to support the warranted but precluded determination. FWS must consider the more recent, peer-reviewed and published findings in Zink as a significant new contribution to the body of scientific data that must be used to determine what is best available science for Greater Sage Grouse. If properly considered by FWS, Dr. Zink's findings could potentially result in a not warranted decision. At the very least, Dr. Zink's research could be used to support a warranted but precluded determination; however, the settlement makes this outcome impossible.

74. The Secretary of the United States Department of Interior invited 11 states with Greater Sage Grouse habitat that may be impacted by the listing of the greater sage grouse as endangered or threatened, including Nevada, to develop state-specific regulatory mechanisms to conserve the species and make such a listing unnecessary. The State of Nevada accepted this invitation and, by Executive Order 2012-09 on July 31, 2012, established the Greater Sage-Grouse Advisory Committee to consider the 2004 Nevada Sage-Grouse Conservation Team's first edition of the Greater Sage-Grouse Conservation Plan for Nevada and Eastern California. The Greater Sage-grouse Advisory Committee, was to provide further recommendations for developing a state-specific strategy to conserve the greater sage grouse.

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75. Recognizing that the listing of the greater sage grouse or any other species that inhabits sagebrush ecosystems pursuant to the Endangered Species Act will have a significant adverse effect on the customs, culture and economy of the State of Nevada, the 2013 Nevada Legislature codified the establishment of the Sagebrush Ecosystem Council to, continue its work and among other duties, implement a conservation strategy for the greater sage grouse and sagebrush ecosystems and oversee the work of the Sagebrush Ecosystem Technical Team. In establishing the Sagebrush Ecosystem Council, the Nevada Legislature directed that the Council include a member to represent local governments including the Nevada counties with Greater Sage Grouse habitat. Since its inception, NACO member counties have actively participated in and been represented on the Sagebrush Ecosystem Council. The Nevada Legislature authorized the Division of State Lands of the State Department of Conservation and Natural Resources (the "Division") to establish and carry out programs to preserve, restore and enhance sage grouse ecosystems on public land in Nevada or on private land with the consent of the landowner. Nevada law now requires the Division to oversee a program to mitigate damage to sagebrush ecosystems through a system that awards credits to persons and governmental entities for taking measures to protect, enhance or restore sagebrush ecosystems, identify and prioritize projects to improve sagebrush ecosystems, restore habitat, reduce nonnative grasses and plants and mitigate damage to or the expansion of scientific knowledge of sagebrush ecosystems. The Division must coordinate activities with federal agencies; suggest measures to avoid, minimize and mitigate the impact of activities conducted in areas which include sage grouse habitat to persons conducting those activities who make a request; and, submit an annual progress report to the Sagebrush Ecosystem Council. The Division is legislatively mandated to cooperate with the Department of Wildlife, the State Department of Agriculture, and the Division of Forestry of the State Department of Conservation and Natural Resources and to coordinate activities with

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federal agencies.

76. The WildEarth Guardians Settlement dictates a listing determination deadline by FY 2015. FWS is precluded, under this settlement, from considering retaining the Greater Sage Grouse as a candidate species notwithstanding FWS' findings in the 2013 CNOR acknowledging the recent, robust conservation efforts, and the new genetic data recently published in Zink that might otherwise support FWS's assigning the Greater Sage Grouse an even higher LPN (i.e., a lower priority for conservation in comparison to other candidate species) – or at the very least, maintaining the current relatively high LPN of 8 on FWS' 12 point system.

77. Pursuant to the WildEarth Guardians Settlement, the Service will not re-evaluate the priority of the Greater Sage Grouse, based upon current science and conservation measures, to discern whether the Greater Sage Grouse's listing priority might have declined as against other candidate species.

78. If FWS were not unlawfully restrained by the Settlements it could consider a number of relevant developments that might lead FWS to conclude that the Greater Sage Grouse's listing priority, vis-à-vis other species, is unchanged or perhaps is even lower, and that the Greater Sage Grouse should remain a candidate species with a LPN of 8 or a higher LPN, which would indicate a lower listing priority. Among the subjects that FWS should consider in assessing whether the Greater Sage Grouse should remain as a candidate species are:

a. evidence that the population of the Greater Sage Grouse is stabilizing and may be increasing;

b. the Conservation Plan; practices adopted by the Nevada Sagebrush Ecosystem Council including the Conservation Credit system; and

c. recent conservation efforts made by developers and users of lands in Nevada and advancements in land management tools.

79. Following FWS policies designed to conserve candidate species and thereby

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retain flexibility that is unavailable for a listed species, the State of Nevada, through its Council which includes a council member who represents county governments (e.g., NACO members) and coordination with stakeholders throughout various industries, interest groups and geographically representative of the entire state, developed, with the ongoing participation and encouragement of the FWS and BLM – the Conservation Plan.

80. Despite ongoing implementation of the Conservation Plan, FWS continues to insist that under the settlement agreements it cannot consider retaining the species as a candidate species but, instead, must list or determine the species is not warranted by September 2015. Under the settlement agreements, FWS cannot consider the best available science and commercial information and the significant conservation efforts in the Conservation Plan in the context of maintaining the candidate species status of Greater Sage Grouse, which, but for the settlement agreements would be the course of action for FWS as expressly required under the ESA. Moreover, a recent memorandum issued by FWS Region 8 declares that Region 8 will no longer be doing CNORs because all of its resources are devoted to complying with the settlement agreements. This action by FWS to unilaterally determine it will no longer complete a statutorily required function under the ESA is unlawful and further evidence of the injuries imposed by the settlement agreements.

CLAIMS FOR RELIEF

Count I
Violation of the APA and ESA:
Elimination of the ESA's "Warranted but Precluded" Alternative

81. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 80 of this Complaint, as though fully set forth below.

82. The ESA requires that, upon receiving a petition for listing a species as threatened or endangered, the Secretary must make a preliminary finding as to whether that petition

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"presents substantial scientific or commercial information indicating that the petitioned action *may* be warranted." 16 U.S.C. § 1533(b)(3)(A) (ESA § 4) (emphasis added); 50 C.F.R. § 424.14(b).

83. If the Secretary concludes that listing *may* be warranted, the Secretary must review the status of the species and, within 12 months, make one of the following *three* findings:

a. The petitioned action is not warranted;

b. The petitioned action is warranted and listing is proposed; or

c. The petitioned action is warranted, but the immediate proposal and timely promulgation of a final regulation implementing the petitioned action is precluded by pending proposals.

See 16 U.S.C. § 1533 (b)(3)(B); *see also* 50 C.F.R. § 424.14(b).

84. Where FWS determines that listing for a species is "warranted but precluded," the Service must revisit that decision annually. Id.

85. Neither the statute nor FWS's regulations limit the time that a particular species can remain as a "candidate species," and FWS itself has formally taken the position that there is no time limit on its ability to declare annually that a species should remain a "candidate species."

86. By entering into the Settlements, FWS has agreed, without the benefit of either statutory amendment or administrative rulemaking procedures, to eliminate one of the statutorily mandated alternatives for categorizing species that are the subject of a listing petition: FWS has agreed to eliminate the possibility of retaining the "candidate species" classification.

87. FWS, in evaluating the potential listing of the Bi-State DPS and Greater Sage Grouse will choose between two options: proposing to list the species or eliminating it from listing consideration altogether.

88. FWS's agreement to eliminate one of the statutorily mandated alternative findings violates the ESA as well as FWS's own regulations, and, therefore, is not in accordance with law

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and must be set aside under 5 U.S.C. § 706(2).

Count II

Violation of the APA and ESA: Failure to Consider
Best Scientific and Commercial Data and Conservation Practices

89. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 88 of this Complaint, as though fully set forth below.

90. Section 4(b)(1)(A) of the ESA requires that the Secretary "shall make determinations" as to listing

> *solely* on the basis of the *best scientific and commercial data* available to [her] after conducting a review of the status of the species *and after taking into account those efforts, if any, being made by any State . . .* ***or any political subdivision of a State*** *to protect such species . . . by . . . conservation practices, within any area under its jurisdiction . . . .*

16 U.S.C. § 1533(b)(1)(A) (emphasis added).

91. Under the ESA and FWS's regulations, the Service must decide whether to list a species "*solely* on the basis of the best available scientific and commercial information regarding a species' status." 50 C.F.R. § 424.11(b) (emphasis added). The Service must "take into account, in making [listing] determinations . . . those efforts, if any, being made by any State . . . ***or any political subdivision of a State*** to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction . . . ." 50 C.F.R. § 424.11(f).

92. FWS can decide,

> on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors: (i) [t]he present or threatened destruction, modification, or curtailment of its habitat or range; (ii) [o]verutilization for commercial, recreational, scientific, or educational purposes; (iii) [d]isease or predation; (iv) [t]he

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> inadequacy of existing regulatory mechanisms; or (v) [o]ther natural or manmade factors affecting its continued existence.

50 C.F.R. § 424.11(c).

93. Under the Settlements, FWS has committed itself to make its final listing decision on the Greater Sage Grouse by FY 2015 and Bi-State DPS by FY 2013 (now delayed to FY 2015).

94. Nevada and NACO member counties, other states and stakeholders, have developed and designed conservation practices, to eliminate any need to list the Greater Sage Grouse and Bi-State DPS as threatened or endangered.

95. Under the Settlement Agreements, in violation of the ESA, FWS will not sufficiently review and analyze scientific data and conservation practices prior to committing to remove the species from the candidate species category and prior to proposing a listing decision pursuant to the arbitrary and aggressive deadlines to which FWS agreed in the Settlements. FWS's commitments to the Settlements' timetables for the Greater Sage Grouse and Bi-State DPS, regardless of then-current data and conservation measures, violate the ESA. Therefore, FWS's listing decisions and commitments for the Nevada Candidate Species are contrary to law and must be set aside under 5 U.S.C. § 706(2).

Count III

Violation of the APA and ESA:
Failure to Comply With ESA Section 4(h) Guidelines

96. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 95 of this Complaint, as though fully set forth below.

97. The ESA mandates that FWS "shall" establish guidelines "to insure that the purposes of [ESA § 4] are achieved efficiently and effectively." 16 U.S.C. § 1533(h). Among the purposes of ESA § 4 is the requirement, as codified in FWS regulations, that the Service make its

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listing decisions based upon the "best scientific and commercial data available" as well as state and political subdivisions' conservation practices. This mandate extends to all aspects of listing including the Service's decision to remove a species from the candidate species classification.

98. Congress mandated a particular practice to implement efficient and effective science-driven listing decisions: ESA Section 4(h) requires that the "Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to - . . . (3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section[.]" 16 U.S.C. § 1533(h).

99. FWS promulgated such guidelines, revising and publishing them in the Federal Register in 1983, and has applied them since that time in addressing the relative priority of species for listing. *See* U.S. FWS, "Endangered and Threatened Species Listing and Recovery Priority Guidelines," 48 Fed. Reg. 43,098, 43,102 (1983).

100. With respect to the Bi-State DPS and Greater Sage Grouse and other species subject to the Settlements FWS has deviated from the ESA requirements and the guidance that FWS adopted thereunder by committing in advance to specified deadlines for addressing candidate species, thereby (i) ignoring the priorities among the existing candidate species – including candidate species not subject to the Settlements, (ii) eliminating consideration of the relative priorities of species that are the subject of subsequent petitions, and (iii) obligating the Service to conduct perfunctory listing determinations for candidate species.

101. FWS's actions are unlawful and should be set aside pursuant to 5 U.S.C. § 706(2).

Count IV

Violation of the APA: Rulemaking Without the Requisite Legal Process

102. Plaintiffs incorporate by reference the allegations contained in paragraphs 1

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through 101 of this Complaint, as though fully set forth below.

103. Under 16 U.S.C. § 1533(b)(4), FWS's promulgation or amendment of rules implementing the ESA must comply with the rulemaking provisions of the Administrative Procedure Act, set forth in 5 U.S.C. § 553.

104. Under the APA, FWS can adopt or amend its rules only if it (a) publishes notice of the proposed action in the Federal Register, (b) gives interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments, (c) considers all such comments before adopting the rule or amendment, and (d) incorporates in the rule a concise general statement of its basis and purpose. 5 U.S.C. § 553(c). FWS's compliance with all of these requirements must be evident and transparent to the public and to a reviewing court in a proper administrative record.

105. "Rulemaking" as defined in 5 U.S.C. § 551(5) "means agency process for formulating, amending, or repealing a rule." FWS's commitment in the Settlements to truncate its decision-making process constitutes rulemaking because it nullifies key parts of FWS's regulations for listing decisions as applied to almost 300 species, including *all* of the species then classified as "candidate" species.

106. Where FWS makes a preliminary finding that listing may be warranted, the regulations require it to further review the species' status and make one of three findings:

> (i) The petitioned action is not warranted or
>
> (ii) the petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a proposed regulation to list the species or
>
> (iii) The petitioned action is warranted, but that—
>
> (A) The immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals to list, delist, or

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> reclassify species, and
>
> (B) Expeditious progress is being made to list, delist, or reclassify [other] qualified species.

50 C.F.R. § 424.14(b).

107. The Settlements unlawfully amend the FWS regulations by imposing mandatory deadlines for removing *all* of the 2010 candidate species from the candidate species classification. FWS has, through its Settlements, amended its regulations to eliminate the candidate species classification, without regard for science, conservation measures, or any other criteria that must be considered under the ESA and that might support keeping the species within the candidate species classification.

108. The Settlements require that FWS either propose the Bi-State DPS and Greater Sage Grouse for listing or remove these species from consideration with a "not warranted" finding in FY 2014 and 2015. FWS agreed not to retain the species' classification as candidate species (even if the science, commercial information, and conservation efforts led by the State and political subdivisions of the State would lead to a determination that the species remain a candidate species). Beyond the specified deadlines, the Settlements do not allow FWS to consider classifying these species as "warranted but precluded" by higher-priority decisions for other species. Eliminating one of the regulatory options for all of the candidate species is an unlawful attempt to impart substantive changes to the regulations without the requisite rulemaking procedures or, at the very least, a clear violation of these regulations.

109. The Court should set aside FWS's decision not to consider continued retention of the Bi-State DPS Sage Grouse and the Greater Sage Grouse as candidate species beyond the deadlines in the Settlements as contrary to section 706 of the APA because that decision constitutes rulemaking "without observance of procedure required by law." FWS effectively

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amended its regulations without publishing notice in the Federal Register, without giving the public an opportunity to comment, and without providing a statement of basis and purpose. Alternatively, FWS's commitment in the Settlements to ignore its regulations as applied to the species at issue is blatantly "not in accordance with law," and for that further reason this Court should set aside these commitments under the APA.

Count V

Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution

110. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 109 of this Complaint, as though fully set forth below.

111. In the Settlements, FWS agreed that it would determine whether listing the candidate species would be "warranted" or "not warranted" without consideration for the potential that these species could, under the terms of the statute, retain their classification as "candidate species" due to conservation measures, new data, or simply their low priority as compared to other species.

112. FWS has committed itself, in the Settlements, to forego a statutory alternative for *all* of the 2010 candidate species. As applied to the Bi-State DPS and Greater Sage Grouse species, FWS committed to a decision that injures the Plaintiffs without consulting them or even considering the impact on the State of Nevada and its political subdivisions of a decision to list candidate species located in Nevada.

113. The State, NACO member counties, NVMRA and AEMA member companies, and other stakeholders, invested significant sums in their effort to adopt conservation measures that, if considered on their merits, could forestall the listing. The State and Nevada counties are in the midst of implementing a series of conservation measures yet FWS already has decided not

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to retain these species' candidate species status. By committing itself to a process that nullifies the terms of the statute, the Settlements unlawfully eliminate the requirement established in the statute that directs FWS to give full and proper consideration to the efforts and investments by Plaintiffs and others to improve the viability of candidate species and thereby avoid the hardships posed by an ESA listing.

114. The Supreme Court has long-recognized that settlements cannot bind nonparticipating third parties. At least one court has already recognized that the Settlements should not prevent assertion of ESA claims in a different court. In Western Watersheds Project v. U.S. Fish & Wildlife Serv.,[12] the Court noted that it would be "unjust" to "bind [the plaintiff] to [the Settlements] it never signed."[13]

115. Yet, FWS claims the Settlements bind the State, political subdivisions of the State, and NVMRA, AEMA and other members of the regulated community to terms procured without their participation. The government did not contest the special interest litigants' desire to eliminate the candidate species category. Plaintiffs had no opportunity to contest FWS's decision to eliminate this statutory alternative for the sage grouse species at issue.

116. The due process clause of the Fifth Amendment to the Constitution forbids government practices and policies that violate precepts of fundamental fairness. Here, FWS's decision to forego a specific statutory provision, to the detriment of the Plaintiffs, denies Plaintiffs due process and is fundamentally unfair to Plaintiffs.

117. Because the Settlements purport to abrogate the rights of the State of Nevada, political subdivisions within the State, and Nevada businesses, companies, and other stakeholders, the application of the Settlements to the Nevada Candidate Species violates due

[12] No. 4:10-CV-229-BLW, 2012 WL 369168 (D. Idaho Feb. 2, 2012).

[13] *Id.* at *10.

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process.[14] As applied to the Nevada Candidate Species, Defendants' agreement to forego considering the merits of retaining these species within the classification of candidate species, without the participation of affected parties – including the State of Nevada, Nevada counties, and Nevada businesses, companies, and other stakeholders – violates due process.

118. This Court should declare that, as applied to the Nevada Candidate Species, FWS has violated the due process clause of the Constitution in its agreement to bind states and the regulated community, including the State of Nevada, Nevada counties, and Nevada businesses, companies, and other stakeholders to a process that does away with a statutory alternative under the ESA.

119. This Court should further (i) declare that the obligations FWS undertook in the Settlements with respect to the Nevada Candidate Species are null and void, (ii) vacate any regulatory action, including any ESA listing FWS has proposed or completed pursuant to the Settlements, and (iii) direct Defendants to consider annually, for each of the Nevada Candidate Species, *all three* of the alternatives Congress provided in the ESA, including the potential for the species to continue as a candidate species under the ESA's statutory criteria.

Count VI

Violation of Article II of the United States Constitution & Separation of Powers

120. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 119 of this Complaint, as though fully set forth below.

121. The executive branch is obligated by Article II, Section 1 of the Constitution to execute laws enacted by Congress. In addition, Article I, Section 1 of the Constitution vests all

[14] *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n. 7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *accord* Sanguine, Ltd. v. U.S. Dep't of Interior, 798 F.2d 389, 392 (10th Cir. 1986).

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legislative powers in Congress.

122. In the ESA, Congress specified that, for candidate species, on an annual basis, FWS "shall" make one of three findings. Despite this Congressional mandate, the Service refuses to implement this provision having committed itself, in a court-enforceable settlement, *not* to consider the third category prescribed by Congress. 16 U.S.C. § 1533(b)(3)(B)(iii). The Settlements eliminate, for *all* of the candidate species identified by FWS as of 2010, the statutory category that Congress required in 16 U.S.C. § 1533(b)(3)(C)(iii).

123. The executive branch has ceded to the special interest plaintiffs, who are empowered by the Settlements to enforce provisions of the Settlements, its authority to decide which species should remain candidate species. As a result, the special interest litigants may dictate, via enforcement of their settlement agreements, the removal of species from the candidate species classification. In addition, the Defendants, through the settlement agreements, violated the Separation of Powers by usurping legislative power vested in Congress agreeing in the settlements to eliminate a substantive and critical provision of the ESA.

124. This Court should declare that, as applied to the Nevada Candidate Species, FWS has exceeded executive branch authority and violated the Separation of Powers provisions under the Constitution in its decision to bind the executive branch to a settlement that transfers authority away from the executive branch to special interest litigants, contrary to Article II of the Constitution and usurps legislative powers vested in Congress under Article I.

125. This Court should further (i) declare that the obligations FWS undertook in the Settlements with respect to the Nevada Candidate Species are null and void, (ii) vacate any regulatory action, including any ESA listing FWS has proposed or completed pursuant to the Settlements, and (iii) direct Defendants to carry out the constitutional duties of the executive branch and consider annually, for each of the Nevada Candidate Species, *all three* of the

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alternatives Congress provided in the ESA, including the potential for the species to continue as a candidate species under the ESA's statutory criteria and to continue to conduct CNORs as required under the ESA.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment in their favor, and:

1. Declare that FWS has violated the ESA, its implementing regulations, the APA, and the Constitution by eliminating, from among the alternatives prescribed by 16 U.S.C. § 1533(b)(3)(B), the ability to retain the candidate species classification for Nevada Candidate Species;

2. Declare that FWS has violated the ESA and APA by failing to consider available data and conservation measures as required by Section 4(b)(1)(A) of the ESA, 16 U.S.C. § 1533(b)(1), and ESA regulations at 50 C.F.R. § 424.11;

3. Declare that FWS violated the ESA and APA in failing to comply with its own Section 4(h) guidelines;

4. Declare that FWS's actions in violation of the ESA, and its implementing regulations and guidelines thereunder, must be set aside and vacated as "not in accordance with law," under Section 706 of the APA;

5. Declare that FWS's elimination of the candidate species alternative is an unlawful rulemaking without required legal process in violation of the APA;

6. As applied to the Nevada Candidate Species, declare that FWS's actions in purporting to impose the results of the Settlements on non-parties to those Settlements, including the public and the Plaintiffs, and to adopt, via the Settlements, policies extending well beyond the purview of the litigation leading to the Settlements, violate the Due Process Clause of the Fifth Amendment to the Constitution;

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7. As applied to the Nevada Candidate Species, declare that FWS has exceeded executive branch authority under Article II of the Constitution and usurped legislative powers in violation of Article I of the Constitution and the Separation of Powers in its decision to re-write the ESA and bind the executive branch to the special interest litigants' Settlements, thereby abdicating executive branch authority to decide, based upon an ESA-required annual evaluation, whether a species should retain its candidate species classification;

8. Vacate and remand to FWS any FWS decision to propose a listing of any of the Nevada Candidate Species as threatened or endangered under the ESA, and any decision to list a Nevada Candidate Species as threatened or endangered under the ESA;

9. Enjoin any decision for any other Nevada Candidate Species that would exclude from consideration the potential for determining that one or more of these species should remain a candidate species; and

10. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted this 4th day of December, 2014.

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