

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
PECOS DIVISION**

WILDEARTH GUARDIANS,

Plaintiff,

v.

KEN SALAZAR, in his official capacity as  
United States Secretary of the Interior,

Defendant.

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CIVIL ACTION NO:

**COMPLAINT FOR DECLATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiff, WildEarth Guardians (“Guardians”) brings this action against Defendant, Ken Salazar, U.S. Secretary of the Interior (the “Secretary”) in his official capacity. Guardians challenges the Secretary’s rejection of its petition to “list,” and, thereby, protect a very rare flower, the Guadalupe Mountains Violet, as a threatened or endangered species under the Endangered Species Act (“ESA”). 16 U.S.C. §§ 1531-1544. Guardians alleges that the Secretary’s decision to deny its petition violated the ESA and is therefore arbitrary, capricious and contrary to law within the meaning of the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 701-706. To remedy the Secretary’s violation of law, Guardians seeks a declaratory judgment that the Secretary’s decision violated the ESA and APA, and an injunction reversing and remanding the Secretary’s decision and directing him to proceed with the ESA listing process for the Guadalupe Mountains Violet.

## JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (U.S. as a defendant), 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief), 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision), the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412 *et seq.*

3. This Court has authority to grant Guardians’ requested relief pursuant to 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (APA).

4. More than 60 days ago, by letter dated August 6, 2009, Guardians furnished the Secretary with written notice of the ESA violations alleged in this Complaint and of its intent to sue. See 16 U.S.C. § 1540(g). The Secretary acknowledged receipt of this letter on or about August 12, 2009.

5. The Secretary has not remedied his violations of the ESA by reversing his negative finding on Guardians’ listing petition regarding the Guadalupe Mountains Violet. Therefore an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

6. The federal government has waived sovereign immunity in this action pursuant to the ESA, 16 U.S.C. § 1540(g), and the APA, 5 U.S.C. § 702.

7. Venue properly lies in this judicial district by virtue of 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391, because populations of the Guadalupe Mountains Violet historically occurred in this district and may potentially still occur in this district.

## **PARTIES**

8. Plaintiff WILDEARTH GUARDIANS (“Guardians”) sues on behalf of itself and its adversely affected members. Guardians is a non-profit organization dedicated to the protection and restoration of wildlife, wild places and wild rivers in the American West. Guardians’ mailing address is as follows: 312 Montezuma Avenue, Santa Fe, NM 87501.

9. Defendant, KEN SALAZAR, is the Secretary of the United States Department of the Interior. As such he has ultimate responsibility for implementation of the ESA. He is sued in his official capacity. The Secretary’s mailing address is as follows: Department of the Interior, 1849 C Street, N.W., Washington DC 20240. In this case, the Secretary has delegated his responsibilities under the ESA to the U.S. Fish and Wildlife Service (“FWS”), an agency within the U.S. Department of the Interior.

10. Guardians was created on January 28, 2008, from the merger of three organizations: Forest Guardians, Sinapu, and the Sagebrush Sea Campaign. Guardians’ has approximately 4,500 members that live throughout the country. Some Guardians members regularly visit, Guadalupe Mountains National Park, the habitat of the Guadalupe Mountains Violet. Guardians has an active endangered species protection program that seeks to add all qualifying species, such as the Guadalupe Mountains Violet, to the list of threatened and endangered species protected under the ESA. According to scientists, there is only one population of the Guadalupe Mountain Violet, which contains approximately thirty-five (35) plants perched along ledges in the Guadalupe Mountains National Park in Culberson County, Texas. The health and survival of the Guadalupe Mountains Violet and its Guadalupe Mountains National Park

habitat are inexorably linked. Indeed, the species' scientific and common names signal as much.

11. Forest Guardians, now WildEarth Guardians, filed the initial petition to list the Guadalupe Mountains Violet on June 18, 2007. WildEarth Guardians continues Forest Guardians' efforts to protect the Guadalupe Mountains Violet and its habitat. Guardians invested significant resources into preparing the initial listing petition. The present lawsuit challenges the Secretary's January 6, 2009, rejection of Guardians' petition.

12. Guardians' members and staff use and enjoy areas that could provide habitats for the Guadalupe Mountains Violet. Members' uses include-but are not limited to- recreational, aesthetic, and scientific activities, and they intend to continue such uses and activities. In particular, Guardians' members and staff engage in recreational, aesthetic, and scientific activities in the Guadalupe Mountains National Park in Culberson County, Texas, where the Guadalupe Mountains Violet was last observed. Guardians' members have specifically looked for this violet in the course of hiking along Bear Canyon Trail in Park. Due to the extreme rarity of this species, Guardians' members and staff have not observed it. Guardians' members and staff have observed and enjoyed habitats where this species might or could live. Guardians' members and staff are particularly interested in protecting healthy habitats needed by the Guadalupe Mountains Violet. The protection of this plant under the ESA and the corresponding legally required designation and protection of its critical habitat and the corresponding preparation of a recovery plan for the species would help Guardians and its members and staff in their efforts to protect the Guadalupe Mountains Violet and its National Park habitat. In addition, Guardians has

initiated litigation against the state of New Mexico to reduce air pollution from coal-fired power plants that cause harm to the Guadalupe Mountains Violet. Guardians and its members have a substantial interest in the conservation of this species and are adversely affected by the Secretary's rejection of the petition to list this species under the ESA. The requested relief will redress Guardians' and its members' injuries.

### **STATUTORY FRAMEWORK OF THE ENDANGERED SPECIES ACT**

13. The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species ....”

16 U.S.C. § 1531(b). The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” 16 U.S.C. § 1532(3). Accordingly, the ultimate goal of the ESA is not only to temporarily save endangered and threatened species from extinction but also to recover these species to the point where they are no longer in danger of extinction and no longer need ESA protection.

14. However, the protective provisions of the ESA do not do anything to conserve a species until that species is officially “listed” as either threatened or endangered under the terms of the Act. 16 U.S.C. § 1533.

15. A species is listed as “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is listed as “threatened” if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

16. The Secretary is required to list as either threatened or endangered any species facing extinction due to any one, or any combination of, the following five factors:

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

16 U.S.C. § 1533(a)(1)(A)-(E).

17. The Secretary's decision whether to list a species is limited solely to consideration of these five factors. In considering these factors, the Secretary must use only "the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b).

18. Once a species is listed, the ESA provides strong legal protection to encourage the species' recovery. The ESA generally requires the Secretary to designate critical habitat for all threatened and endangered species concurrently with their listing and subsequently develop recovery plans for such species. 16 U.S.C. § 1533(a)(3) and (f). The ESA also requires that all federal agencies "carry out programs for the conservation" of threatened and endangered species and consult with the Secretary in

order to ensure that their actions are “not likely to jeopardize the continued existence” of such species or “result in the destruction or adverse modification” of their critical habitat. 16 U.S.C. § 1536(a)(1) and (2). Additionally, the ESA prohibits any person from “taking” a threatened or endangered species. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21 and 17.31. To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

19. The degree of protection that the Secretary provides a listed species depends on whether the species is listed as “threatened” or “endangered.” Threatened species may receive less protection under the ESA than endangered species. For example, Section 4(d) of the ESA authorizes the Secretary to promulgate special regulations (“4(d) Rules”) affecting the protections afforded threatened species. 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.31(a) and (c). The Secretary may use a special 4(d) Rule to allow otherwise illegal take of threatened species.

20. Any interested person may file a petition with the Secretary to list, uplist (from threatened to endangered), downlist (from endangered to threatened), or delist a species under the ESA. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b).

21. Upon receiving a listing petition, the Secretary must, “to the maximum extent practicable,” 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). “Substantial information” is that “amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b). This initial determination is

known as a “90-day finding.”

22. The Secretary’s initial 90-day review of a listing petition is not exhaustive and is limited to a determination of whether the petition meets the “substantial information” threshold. At the 90-day finding, the Secretary accepts the petitioner’s sources and characterizations of the information unless he has specific information to the contrary.

23. If the Secretary makes a positive 90-day finding, then the Secretary must commence a thorough status review of the species. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(3). After the status review the Secretary must determine whether the petitioned action is warranted, not warranted, or warranted but presently precluded by other more important listing actions. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b).

24. If the Secretary finds that listing is warranted, he must publish a proposed listing regulation in the Federal Register. 16 U.S.C. § 1533(b)(3)(B)(ii). Within one year of this publication, the Secretary is required to render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A). At such time, the Secretary must list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(1)(III) and (b)(6)(B)(i).

25. The ESA expressly provides that a negative 90-day finding may be challenged in federal court. 16 U.S.C. § 1533(b)(3)(C)(ii).



## STATEMENT OF FACTS

### **I. *Viola guadalupensis***

26. *Viola guadalupensis* is commonly known as the Guadalupe Mountain Violet (“Guadalupe Mountain Violet”). It is a flowering plant in the order *Violales*, family *Violaceae*, genus *Viola*.

27. A small perennial flower, the Guadalupe Mountains Violet is up to 1 decimeter (dm) tall, with ovate leaves and yellow flowers with prominent brown veins on the lower, spurred petal. No other yellow-flowered violets are known from the Guadalupe Mountains. The Guadalupe Mountains Violet’s likely habitats are ledges of dolomitized limestone, in the shade of Douglas fir and pine woodlands.

28. The Guadalupe Mountains Violet is endemic to Guadalupe Mountains National Park in Culberson County, Texas. As of 2002, a single population of only thirty-five (35) plants was known to exist.

### **II. NatureServe**

29. NatureServe is a non-profit organization. Its mission is to provide a scientific basis for effective conservation action. NatureServe is comprised of a network of over 80 Natural Heritage Programs and conservation data centers throughout all 50 States, Latin America, and the Caribbean. It compiles the work of nearly 1,000 scientists and has an annual budget of approximately 45 million dollars. NatureServe’s headquarters are in Arlington, Virginia. It also maintains four regional offices in the U.S. and Canada.

30. NatureServe maintains an online encyclopedia, called NatureServe Explorer. NatureServe Explorer maintains the best available scientific information on

approximately 50,000 plants, animals, and ecological communities in the U.S. and Canada. FWS refers to NatureServe Explorer as an authoritative source for conservation information on thousands of species. FWS has also acknowledged that NatureServe Explorer provides in-depth information on rare and endangered species. FWS relies on NatureServe's system, ranking species by their degree of imperilment, in its own efforts to rank species within FWS' listing priority number system.

31. NatureServe ranks species by their degree of imperilment. The highest possible rank, indicating the highest degree of imperilment, is G1. A G1 ranking indicates a full species is critically imperiled and is at very high risk of extinction due to extreme rarity (often 5 or fewer populations), very steep population declines, or other factors. NatureServe ranks the Guadalupe Mountains Violet as G1.

### **III. Guardians' Efforts to Protect the Guadalupe Mountains Violet and the Secretary's Actions**

32. On or about June 18, 2007, Guardians petitioned the Secretary to list as threatened or endangered under the ESA all species ranked as G1 (critically imperiled) or G2 (imperiled) by NatureServe in FWS' Southwest Region. (Region 2). Guardians excluded from its request subspecies and species already listed, or identified as candidates for listing, by the Secretary. Guardians' hope was that the Secretary could use the substantial expertise and previous efforts used to compile the NatureServe list of critically imperiled species to properly expand the Secretary's own list of threatened and endangered species. Through its petition, Guardians sought to make the process of listing species under the ESA more efficient and quicker by taking advantage of existing resources, such as the NatureServe Explorer database, and to avoid duplicating the efforts of others. Accordingly, Guardians incorporated by reference all analysis, references, and

documentation provided by NatureServe into its petition. The Guadalupe Mountains Violet was one of the species included in Guardians' June 2007 listing petition.

33. On or about July 11, 2007, FWS responded to Guardians' petition and noted that the petition incorporated all analysis, references, and documentation provided by NatureServe in its online database into the petition.

34. On January 6, 2009, the Secretary denied Guardians' June 2007 petition for the Guadalupe Mountains Violet. 74 Fed. Reg. 419-427 (January 6, 2009). In this decision, the Secretary used a classification scheme to explain the rationale for the numerous negative 90-day findings made in the same document. The Secretary denied the Guadalupe Mountains Violet based on rationale B. Category B indicates that the Secretary determined the petition and the NatureServe database:

contained basic information on the range of the species, based on some level of survey effort. Habitat was frequently mentioned as well as other aspects of the species' biology, such as food habitats. Population size or abundance, if addressed, was rarely quantified, and the database instead used descriptors such as large, small, or numerous. The available information we reviewed did not address specific threats to the species.

74 Fed. Reg. 419 at 421.

35. On August 6, 2009, Guardians wrote the Secretary to inform him that he was in violation of Section 4 on the ESA, 16 U.S.C. §§ 1533(a)(1)(A-E), 1533(a)(1)(A-E), 1533(b)(1)(A), and 1533(b)(3)(A), by denying the June 18, 2007, petition which included the Guadalupe Mountains Violet. The Secretary acknowledged receipt of this letter on or about August 12, 2009.

36. The Secretary's rationale for his 90-day finding on Guardians' petition as to the Guadalupe Mountains Violet is factually incorrect. Contrary to the Secretary's description of a species assigned to Category B, Guardians provided the Secretary with

the only one known location for this species: Guadalupe Mountains National Park in Culberson County, Texas. Contrary to the Secretary's contention that Guardians did not address the species' population size or abundance, through the NatureServe account for this species, and a scientific article published in 1990 by A. Michael Powell and Brent Wauer reviewed by FWS in making its finding, Guardians indicated that only 1 known location was known and that the best available information indicated that as of 2002, a single population of only thirty-five (35) plants had been identified. The 1990 article by Powell and Wauer further stated on discovering this species that "it is an immediate candidate for endangered status." Indeed, FWS considered this species to be an ESA candidate in an official notice published on September 30, 1993 (58 Fed. Reg. 51144 at 51190). It lost that status, along with thousands of other imperiled species, in 1996. 61 Fed. Reg. 7596-7613 (February 28, 1996).

37. The Secretary's decision that the Guadalupe Mountains Violet is not threatened simply because it occurs at only a single known location is inconsistent with other decisions and positions taken by the Secretary. For each of the following species, the Secretary has determined that the species' low numbers or the low number of populations of the species is a threat to the species continued existence, making its listing under the ESA warranted: *Partula langfordi*; *Myrsine mezii*; *Megalagrion nesiotes*; *Tryonia circumstriata*; *Ostodes strigatus*; *Doryopteris takeuchii*; *Melicope degeneri*; *Huperzia stemmermanniae*; *Peperomia subpetiolata*; *Melicope hiiakae*; *Phyllostegia bracteata*; *Noturus crypticus*; *Pyrgulopsis chupaderae*; *Leavenworthia texana*; *Ptychobranthus jonesi*; *Phacelia stellaris*; *Drosophila attigua*; *Villosa fabilis*; *Partulina semicarinata*; *Newcombia cumingi*; *Platydesma remyi*; and *Megalagrion leptodemas*.

38. The Secretary's decision to issue a negative 90-day finding for the Guadalupe Mountains Violet even though the best available information indicates the species has just a single known population is inconsistent with the Secretary's decision to issue a positive 90-day finding for the Tehachapi slender salamander. The Secretary issued a positive 90-day finding for the Tehachapi slender salamander, in part, because the species has only two known populations and thus is vulnerable to extinction by stochastic events. The same is true for the Guadalupe Mountains Violet.

39. Because the Secretary's decision to issue a negative 90-day finding for the Guadalupe Mountains Violet is neither supported by the facts in the record before the agency, nor consistent with positions the Secretary has taken for dozens of other species, Guardians has brought this litigation.

#### **CLAIM FOR RELIEF**

40. The allegations of all preceding paragraphs of this Complaint are incorporated herein by reference.

41. The Secretary's 90-day finding that Guardians' ESA listing petition did not present evidence that would lead a reasonable person to believe that the listing of the Guadalupe Mountains Violet as threatened or endangered may be warranted: failed to use the best available science; relied on an improper evidentiary standard; failed to consider significant threats to the species addressed in the petition and supporting scientific literature; failed to articulate a rational connection between the facts found and its conclusion; and is otherwise arbitrary, capricious, and contrary to law in violation of the ESA within the meaning of the APA. 16 U.S.C. § 1533(b); 5 U.S.C. §§ 701-706.

## PRAYER FOR RELIEF

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

(A) A declaration that the Secretary violated the ESA and APA by issuing an unlawful 90-day finding on Guardians' petition to list the Guadalupe Mountains Violet (*Viola guadalupensis*) as a threatened or an endangered species;

(B) An injunctive order requiring the Secretary to withdraw his unlawful 90-day finding and issue a new finding by a date certain;

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

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

Respectfully Submitted,

Dated: May 24, 2011

S/ Adam R. Abrams  
Adam Abrams (TX Bar No. 24053064)  
Texas Environmental Law Center  
P.O. Box 685244  
Austin, Texas 78768  
Tel: 713.444.2252  
E-Mail: adamrabrams@gmail.com

Of Counsel:

James J. Tutchton (CO Bar No. 21138)  
WildEarth Guardians  
6439 E. Maplewood Ave.  
Centennial, CO 80111  
Tel: 720-301-3843  
E-Mail: jtutchton@wildearthguardians.org

