

JO MK

Amy R. Atwood, Oregon State Bar No. 060407  
atwood@biologicaldiversity.org  
Center for Biological Diversity  
P.O. Box 11374  
Portland, Oregon 97211-0374  
(503) 283-5474  
(503) 283-5528 facsimile  
Lead Counsel for Plaintiff Center for Biological Diversity

FILED FEB 17 9 13 AM '10 OFF

**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY,  
Plaintiff,

v.

KEN SALAZAR, in his official capacity as  
Secretary of the Interior; and the UNITED  
STATES FISH AND WILDLIFE SERVICE, an  
agency of the United States Department of the  
Interior,  
Defendants.

Civil Case No. **CV '10-0176-JO**

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**I. INTRODUCTION**

1. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) challenges the failure of Defendants KEN SALAZAR, Secretary of the Interior, and the UNITED STATES FISH AND WILDLIFE SERVICE (collectively “Defendants”) to take required action on four separate petitions (collectively “Petitions”) to list dozens of Pacific Northwest species as “threatened” or “endangered” under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*

("ESA" or "Act"), including the dusky tree vole (*Arborimus longicaudus silvicola*), Lake Sammamish kokanee (*Oncorhynchus nerka*), black-footed albatross (*Phoebastria nigripes*), and 32 species of Pacific Northwest mollusks (*phylum Mollusca*) (collectively "Petitioned Species"). Plaintiff asks this Court to order Defendants to comply with the mandatory, non-discretionary deadlines set forth by the ESA for the processing of citizen petitions to list species, and thereby afford these highly-imperiled species the protections that they need in order to survive and recover in the wild.

2. Specifically, Plaintiff seeks an order declaring that Defendants' failed to comply with their statutorily-mandated duty to process the Petitions in violation of the ESA and the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"). Plaintiff also seeks an order requiring Defendants to make the required findings on the Petitions by a date certain.

## **II. JURISDICTION AND VENUE**

3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, 1346, 2201, 2202 and 16 U.S.C. §§ 1540(c), (g), because this action arises under the laws of the United States and involves the United States as a defendant, and seeks declaratory and injunctive relief. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201. The challenged agency actions and/or inactions are subject to this Court's review under the APA, 5 U.S.C. 702, 704, and 706. As required by the ESA, 16 U.S.C. § 1540(g), Plaintiff formally notified Defendants of its intent to sue to enforce the violations alleged in this Complaint over 60 days ago. Defendants have failed to respond and remedy the alleged violations in that time.

4. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) as Defendant United States Fish and Wildlife Service maintains a regional office in this judicial

district. Assignment is proper in the Portland Division because Defendant United States Fish and Wildlife Service's regional office is located in Multnomah County.

### **III. PARTIES**

5. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3) corporation with an office in Portland, Oregon and elsewhere in the United States. The Center works through science, law and policy to secure a future for all species hovering on the brink of extinction. The Center's members and staff are actively involved in species and habitat protection throughout the United States, including protection of the Petitioned Species. The Center has over 43,000 members throughout the United States and the world. The Center brings this action on its own behalf and on behalf of its adversely-affected members and staff.

6. The Center's members and staff include numerous individuals with a broad range of scientific, professional, educational, recreational, aesthetic, moral and spiritual interests in the Petitioned Species. In addition, the Center's members and staff continuously enjoy the biological, scientific, research, educational, conservational, recreational and aesthetic values of the Petitioned Species. Activities of Center members and staff include observing and attempting to observe the Petitioned Species. Use and enjoyment by Center members and staff of the Petitioned Species and their habitat is dependent on the existence of healthy and sustainable populations in the wild.

7. Defendants' failure to take required action regarding the Petitions has prevented the implementation of protective measures for the Petitioned Species and their habitat. Plaintiff's members and staff spend time in the habitat of the Petitioned Species and are adversely affected by Defendants' refusal to protect these species. Plaintiff's members and staff have been, are being, and unless the specific relief requested is granted, will continue to be

adversely affected and injured by Defendants' refusal to take action on the Petitions. Plaintiff has no other adequate remedy at law.

8. Defendant KEN SALAZAR is the Secretary of the Interior ("Secretary") and is sued in his official capacity. As Secretary, Mr. Salazar has the ultimate responsibility and implement the ESA provisions for the processing of petitions submitted by the public to list species under the Act.

9. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is an agency of the United States government, and is an agency within and under the jurisdiction of the Department of the Interior. Through delegation of authority from the Secretary, FWS is responsible for administering and implementing the Act for terrestrial species. FWS has responsibility under the ESA over the species which are the subject of this action. FWS has failed to take required action with regard to the Petitions, and has failed to meet the statutorily-mandated deadline for processing the Petitions.

#### **IV. LEGAL BACKGROUND**

10. The ESA is a federal statute whose purpose is to conserve endangered and threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b). To this end, the ESA requires the Secretary to list as "threatened" or "endangered" those species of plants and animals that are facing extinction. 16 U.S.C. § 1533. A "species" includes "any subspecies of fish, wildlife, or plants" or "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). A species is "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 "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).

11. Before the ESA can protect a species that is facing extinction, the species must be “listed” as either “threatened” or “endangered” under the Act. 16 U.S.C. § 1533(d). The “listing” process is the essential first step in the ESA’s system of species protection and recovery. Once listed, the Act’s substantive protections are afforded to threatened and endangered species, including the prohibition against federal actions that would jeopardize the continued existence of species in section 7 of the ESA, and the prohibition against the unlawful “take” of listed species in section 9 of the ESA. 16 U.S.C. §§ 1536(a)(2), 1538.

12. The listing process can begin either by citizen petition or by FWS processes. In either case, a strict timeline applies once the process is initiated.

13. To the maximum extent practicable, within 90 days of receiving a petition to list a species, FWS must make a determination as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted” and publish that finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

14. Within one year of receiving a petition, FWS must issue a “12-month finding” making one of three determinations: (1) listing is “warranted,” in which case FWS must also publish a proposed rule to list the species; (2) listing is “not warranted,” in which case no further action is taken; or (3) listing is “warranted but precluded” by other listing actions of higher priority. 16 U.S.C. § 1533(b)(3)(B). The 12-month finding is mandatory; there is no mechanism by which the deadline to make the finding may be extended. Thus, while the ESA provides the Secretary with some limited flexibility as to the making a 90-day finding on a petition, he must

comply with the mandatory 12-month finding deadline for making one of the above-listed determinations.

15. Within one year of FWS's publication of a proposed rule to list a species in the Federal Register, the ESA requires the Secretary to render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A)(i). At this point, FWS may: (1) issue a final rule to list the species; (2) withdraw the proposed rule; or (3) if there is substantial disagreement about the scientific data involved, delay a final determination for up to six months in order to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i), (B)(i). In any case, FWS must make a formal finding within one year of the initial 12-month finding. 16 U.S.C. § 1533(b)(6)(A).

16. Where FWS has made a final determination to list a species as threatened or endangered, it must, to the maximum extent determinable, concurrently render a final decision concerning the designation of critical habitat for the species. 16 U.S.C. §§ 1533(a)(3), (b)(6)(C).

17. In addition to these mandated procedures, the Secretary has discretion to issue a regulation at any time to prevent an "emergency posing a significant risk to the well being of any species." 16 U.S.C. § 1533(b)(7). Such an emergency regulation remains in effect for up to 240 days, at which time the Secretary must issue a final rule to continue the protection. *Id.*

18. It is critical for FWS to scrupulously follow the listing procedures and deadlines set forth by the ESA if species are to be protected in a timely manner; none of the ESA's protections operate to protect a species until the species is formally listed as threatened or endangered by the publication of a final rule in the Federal Register.

## **V. FACTUAL BACKGROUND**

### **Dusky Tree Vole**

19. On June 22, 2007, a petition to list the dusky tree vole (*Arborimus longicaudus*

*silvicola*) was received by the Secretary. The dusky tree vole is a subspecies of the red tree vole, an old growth-dependent species that occurs in the humid coniferous forests of the Cascade Mountains in western Oregon and northwestern California and is considered to have the narrowest niche of all arboreal mammals in the Pacific Northwest. The dusky tree vole is a small, typically brownish-red rodent that is less than eight inches long and two ounces in weight. Due to their highly-specific habitat requirements, low mobility, poor dispersal capability, and low reproductive rates, tree vole populations are vulnerable to the loss and fragmentation of old-growth forests through logging, fire, and development.

20. On October 28, 2008, FWS issued a 90-day finding that the petition to list the dusky tree vole under the ESA presented “substantial information” indicating that listing under the ESA “may be warranted” for one of three entities: the dusky tree vole as a subspecies of the red tree vole, a north Oregon coast population of the red tree vole, or the red tree vole in a significant portion of its range. 73 Fed. Reg. 63919 (Oct. 28, 2008). This finding was based on FWS’s findings that the dusky tree vole’s existence is threatened by the loss and fragmentation of old-growth forest habitat from logging, development, and roads, inadequate protection from threats by existing regulatory mechanisms, and other factors such as fire severity, small populations size, and genetic isolation. *Id.* at 63926.

21. On June 22, 2008, the deadline for a 12-month finding for the petition to list the dusky tree vole lapsed. By letter dated December 14, 2009, the Center notified the Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to make a 12-month finding on the petition as required by the ESA. The Center advised the Secretary that it intended to file suit to force the ESA’s mandatory listing deadlines.

22. The Secretary has yet to issue a 12-month finding for the petition to list the dusky tree vole as threatened or endangered under the ESA.

23. If Defendants do not act to process the petition, the dusky tree vole will continue toward extinction. Although this tragedy is entirely preventable, Defendants inexplicably refuse to act.

#### **Lake Sammamish Kokanee**

24. A petition to list the Lake Sammamish kokanee (*Oncorhynchus nerka*) as threatened or endangered under the ESA was received by the Secretary on July 9, 2007. The kokanee is a non-anadromous member of the salmon family that spawns in freshwater habitats and migrates to lakes, where it remains for about four years until maturity before returning to natal freshwater streams to spawn and die. The larger Lake Washington-Sammamish watershed is one of five watersheds in Washington that support native populations of resident kokanee, but this population has declined significantly.

25. On May 6, 2008, FWS issued a 90-day finding that listing of the Lake Sammamish kokanee population as a DPS under the ESA may be warranted due to threats to its existence – in particular, the significant alteration of the Sammamish River system, degradation of its water quality, and alteration of its hydrology as well as the lack of adequate existing regulatory mechanisms and competition with nonnative hatchery salmonids. 73 Fed. Reg. 24919 (May 6, 2008).

26. On July 9, 2008 the deadline for a 12-month finding for the petition to list the Lake Sammamish kokanee passed. By letter dated December 14, 2009, the Center notified the Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to



make a 12-month finding on the petition as required by the ESA. The Center advised the Secretary that it intended to file suit to force the ESA's mandatory listing deadlines.

27. The Secretary has yet to issue a 12-month finding for the petition to list the Lake Sammamish kokanee as threatened or endangered under the ESA.

28. If Defendants do not act to process the petition, the Black Lake Sammamish kokanee will continue toward extinction. Although this tragedy is entirely preventable, Defendants inexplicably refuse to act.

### **Black-Footed Albatross**

29. A petition requesting listing of the black-footed albatross (*Phoebastria nigripes*) as threatened or endangered under the ESA was received by the Secretary on October 1, 2004. The black-footed albatross is a large seabird with long wings, gray-black body, and white ring around face at base of bill. The black-footed albatross nests almost exclusively in the Northwestern Hawaiian Islands, with a small population nesting in Japan. The most serious threat to the species is from industrial long-line fishing, which often results in albatross mortality when the albatross become entangled and drown on baited hooks set to catch swordfish and tuna. It is estimated that as many as 14,000 black-footed albatross are killed by long-line fishing each year.

30. On October 9, 2007, over three years after the petition was submitted, FWS issued a 90-day finding which determined that "the petition presents substantial scientific or commercial information indicating that listing the black-footed albatross may be warranted." 72 Fed. Reg. 57278 (Oct. 9, 2007).

31. On October 1, 2005 the deadline for a 12-month finding for the petition to list the black-footed albatross lapsed. By letter dated December 14, 2009, the Center notified the

Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to make a 12-month finding on the petition as required by the ESA. The Center advised the Secretary that it intended to file suit to force the ESA's mandatory listing deadlines.

32. The Secretary has yet to issue a 12-month finding for the petition to list the black-footed albatross as threatened or endangered under the ESA.

33. If Defendants do not act to process the petition, the Black-footed albatross will continue toward extinction. Although this tragedy is entirely preventable, Defendants inexplicably refuse to act.

### **32 Species of Pacific Northwest Mollusks**

34. On March 13, 2008, a petition was submitted to the Secretary to list 32 species of mollusks (*phylum Mollusca*) as threatened or endangered under the ESA, including 15 spring snails, two river snails, 13 land snails, and two slugs. The petition stated that the mollusks' existence is threatened by logging, grazing, wildfire, controlled burning, road construction and maintenance, pesticide application, agriculture, recreation, urbanization, mining, the spread of invasive species, global climate change, water pollution, dams, diversions, and stream destruction and development. The petition also stated that these threats are magnified because many of the species have severely limited distributions and certain other characteristics, such as low fecundity and high annual population turnover, that make them intrinsically vulnerable to extinction.

35. On June 11, 2008, the deadline for a 90-day finding for the petition to list the 32 mollusk species passed. By letter dated December 14, 2009, the Center notified the Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to make a 90-

day finding on the petition as required by the ESA. The Center advised the Secretary that it intended to file suit to force the ESA's mandatory listing deadlines.

36. The Secretary has yet to issue a 90-day finding for the petition to list the 32 mollusk species as threatened or endangered under the ESA.

37. If Defendants do not act to process the petition, the 32 mollusk species will continue toward extinction. Although this tragedy is entirely preventable, Defendants inexplicably refuse to act.

## **VI. CLAIMS FOR RELIEF**

### **First Claim for Relief: Failure to Make a Timely 12-Month Finding on Petition to List the Dusky Tree Vole**

38. The Center re-alleges, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

39. The Secretary's failure to make a timely 12-month finding on the petition to list the dusky tree vole as threatened or endangered violates the ESA. 16 U.S.C. §§ 1533(b)(3)(B) & 1540(g). The Secretary's failure to perform his mandatory, non-discretionary duty also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

### **Second Claim for Relief: Failure to Make a Timely 12-Month Finding on Petition to List the Lake Sammamish Kokanee**

40. The Center re-alleges, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

41. The Secretary's failure to make a timely 12-month finding on the petition to list the Lake Sammamish kokanee as threatened or endangered violates the ESA. 16 U.S.C. §§ 1533(b)(3)(B) & 1540(g). The Secretary's failure to perform his mandatory, non-discretionary duty also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

**Third Claim for Relief: Failure to Make a Timely 12-Month Finding on Petition to List the Black-Footed Albatross**

42. The Center re-alleges, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

43. The Secretary's failure to make a timely 12-month finding on the petition to list the black-footed albatross as threatened or endangered violates the ESA. 16 U.S.C. §§ 1533(b)(3)(B) & 1540(g). The Secretary's failure to perform his mandatory, non-discretionary duty also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

**Fourth Claim for Relief: Failure to Make a Timely 90-Day Finding on Petition to List 32 Pacific Northwest Mollusk Species**

44. The Center re-alleges, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

45. The Secretary's failure to make a timely 12-month finding on the petition to list the 32 species of Pacific Northwest mollusks as threatened or endangered violates the ESA. 16 U.S.C. §§ 1533(b)(3)(B) & 1540(g). The Secretary's failure to perform his mandatory, non-discretionary duty also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

#### **VII. PRAYER FOR RELIEF**

FOR THESE REASONS, Plaintiff respectfully requests that the Court:

1. Declare that Defendants are in violation of their mandatory duty under the ESA to make, and to publish in the Federal Register, a 12-month finding on the petition to list the dusky tree vole;
2. Provide preliminary and permanent injunctive relief compelling Defendants to publish in the Federal Register a 12-month finding on the petition to list the dusky tree vole;
3. Declare that Defendants are in violation of their mandatory duty under the ESA to make, and to publish in the Federal Register, a 12-month finding on the petition to list the Lake Sammamish kokanee;
4. Provide preliminary and permanent injunctive relief compelling Defendants to publish in the Federal Register a 12-month finding on the petition to list the Lake Sammamish kokanee;
5. Declare that Defendants are in violation of their mandatory duty under the ESA to make, and to publish in the Federal Register, a 12-month finding on the petition to list the black-

footed albatross;

6. Provide preliminary and permanent injunctive relief compelling Defendants to publish in the Federal Register a 12-month finding on the petition to list the black-footed albatross by a date certain;

7. Declare that Defendants are in violation of their mandatory duty under the ESA to make, and to publish in the Federal Register, a 12-month finding on the petition to list 32 species of Pacific Northwest mollusks;

8. Provide preliminary and permanent injunctive relief compelling Defendants to publish in the Federal Register a 12-month finding on the petition to list 32 species of Pacific Northwest mollusks by a date certain and a 12-month finding by a date certain thereafter;

9. Retain continuing jurisdiction to review Defendants' compliance with all judgments and orders herein;

10. Make such additional judicial determinations and enter such additional orders as may be necessary to effectuate the foregoing;

11. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and

12. Provide such other relief as the Court deems just and proper.

Dated: February 17, 2010

Respectfully submitted,



Amy R. Atwood, Oregon State Bar No. 060407  
atwood@biologicaldiversity.org  
Center for Biological Diversity  
P.O. Box 11374  
Portland, Oregon 97211-0374  
(503) 283-5474  
(503) 283-5528 facsimile

Attorney for Plaintiff  
Center for Biological Diversity