

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF HOME BUILDERS)
1201 15th Street, N.W.)
Washington, D.C. 20005)

OLYMPIA MASTER BUILDERS)
1211 State Avenue, NE)
Olympia, WA 98506)

HOME BUILDERS ASSOCIATION OF)
GREATER AUSTIN)
8140 Exchange Drive)
Austin, TX 78754)

TEXAS SALAMANDER COALITION, INC.)
P.O. Box 9190)
Austin, TX 78766)

Plaintiffs,

v.

KEN SALAZAR)
In his official capacity as)
Secretary of the Interior)
United States Department of Interior)
1849 C Street, N.W.)
Washington, DC 20240)

and

UNITED STATES FISH AND WILDLIFE SERVICE)
1849 C Street, N.W.)
Washington, DC 20240)

Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, for their Complaint, state and allege as follows:

NATURE OF THE ACTION

1. Plaintiffs, NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB"), OLYMPIA MASTER BUILDERS ("OMB"), HOME BUILDERS ASSOCIATION OF GREATER AUSTIN, and TEXAS SALAMANDER COALITION, INC. ("TSC"), challenge the Secretary of the Interior KEN SALAZAR's (the "Secretary") and the UNITED STATES FISH AND WILDLIFE SERVICE's ("the Service") failure to follow mandatory procedures with regard to the process for responding to petitions to list species as endangered or threatened pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*("ESA").

2. Plaintiffs seek declaratory and injunctive relief to correct and enjoin the actions of the Service pertaining to the process for determining the listing status of species under Section 4 of the ESA.

3. Plaintiffs challenge the Service's recent and proposed actions related to consideration of species where the Service has previously determined that placing the species on the list of threatened or endangered species is "warranted" but "precluded" by higher priorities.

4. The Service has abdicated a mandatory process based on best available science, public input and independent peer review in favor of a private settlement that lets two advocacy groups dictate the order, and pace of its statutorily required decision making process.

5. Under the ESA, the Service must use the best scientific and commercial data available, 16 U.S.C. § 1533(b)(1)(A), to determine whether listing a species as "endangered" or "threatened" is (1) not warranted, (2) warranted, or (3) warranted but precluded by pending

proposals of a higher priority. 16 U.S.C. § 1533(b)(3)(B). Species in the warranted but precluded category are commonly known as "candidate" species.

6. Consistent with the ESA's best available science mandate, the Service has adopted a policy "to incorporate independent peer review in listing and recovery activities, during the public comment period." 59 Fed. Reg. 34270 (07/01/94).

7. If the Service decides that listing is warranted but precluded, the ESA requires the Federal Register notice to include "a description and evaluation of the reasons and data on which the finding is based." 16 U.S.C. § 1533(b)(3)(B)(iii).

8. The Service is required to enact guidelines that set forth "a ranking system to assist in the identification of species that should receive priority review" for listing. 16 U.S.C. § 1533(h)(3).

9. The ESA requires that when the Secretary makes a warranted but precluded finding on a petition, such a petition be treated as one that is resubmitted on the date of such a finding. 16 U.S.C. § 1533(b)(3)(C). Thus, the Service must make findings on candidate species on an annual basis and again determine whether listing is (1) not warranted, (2) warranted, or (3) warranted but precluded. This assessment is based on the priority ranking of the species after consideration of the status of all other candidate species and best available science, including any new information received since the last assessment.

10. The Service publishes an annual assessment of the status of all candidate species and their priority for listing rulemakings. With this annual notice (and in other manners), the Service solicits a wide range of information from the public concerning candidate species and incentivizes private landowners to take action such as setting aside land and other habitat protection measures. The Service must use the information gathered from the public process and

the efforts of private land owners for its assignment of priority ranking as well as in making its annual determination of whether listing is (1) not warranted, (2) warranted, or (3) warranted but precluded.

11. Plaintiffs' members, whose land and activities are regulated under the ESA because of the presence of species and/or their habitat, have undertaken substantial efforts related to providing the Service information concerning species threats and status, and have engaged in habitat conservation efforts related to specific candidate species.

12. On September 9, 2011, the United States District Court for the District of Columbia approved two separate stipulated settlement agreements with environmental advocacy groups: (1) an agreement with Wildearth Guardians ("WEG"), filed on May 10, 2011; and (2) an agreement with Center for Biological Diversity ("CBD"), filed on July 12, 2011 (collectively the "Agreements"). *In Re: Endangered Species Act Section 4 Deadline Litigation*, MDL No. 2165, Case No. 10-377 (D.D.C) (Dkt. # 42-1).

13. The Agreements mandate the order in which the Service must submit proposed listing rules or not warranted findings to the Federal Register. Rulemakings for the species must be undertaken in the order negotiated with the Center for Biological Diversity and Wildearth Guardians ("collectively, "the Advocacy Groups"), with all candidate species rulemakings completed by September 30, 2016.

14. By entering into the Agreements, the Service abandoned the statutorily required process for determining the priority of listing rulemakings for candidate species. Under the Agreements, the Service will no longer consider whether listing is warranted but precluded for any candidate species that is slated for a rulemaking that year under the Agreements. Hence, the Service has limited itself to only 2 of the 3 choices it must consider. The Service has skipped a

step in this manner on several rulemakings since entering into the Agreements and has been clear that it will continue to do so going forward.

15. The review of candidate species must be undertaken through a public process whereby the Service would analyze each candidate species on a case-by-case basis, evaluate the listing priority and rank the species accordingly. Candidate species are given a listing priority number that is based on the best available science, in consideration of taxonomy, threats, and conservation efforts. The listing priority number determines the order in which the Service publishes rulemakings, with the Service working to resolve listing rulemakings on species with the lowest number first.

16. The listing priority process is essential given the Service's limited funding, and occasionally incomplete science. The listing priority process allows for analysis of the status of the species (often privately funded) and for long-range planning efforts to incorporate conservation measures that lessen the threats to species (either lowering priorities further or keeping the species off the list all together).

17. By entering into the Agreements, the Service has replaced that process in favor of a ranking system chosen by the Advocacy Groups. The Service has predetermined listing priorities solely on the basis of its agreement with the Advocacy Groups and has forgone best available science in favor of closed room negotiations. Absent the Agreements, there would be a different priority of listing determinations for several species. At the very least there would be further analysis of the species, some of which might not be listed if the required process was allowed to play out.

18. Consistent with the process the Service has used for considering candidate species, Plaintiffs and Plaintiffs' members have funded research, provided the Service with

considerable information concerning certain species and as part of their land-planning processes have engaged in voluntary conservation actions in order to reduce threats to the species and conserve them. Considerable resources have been spent to keep species from being listed or to change their listing priority number. This includes, for example, efforts in the Austin Texas region related to several species of salamanders and efforts in Washington state related to the pocket gopher.

19. Citing to the Agreements, the Service has told Plaintiffs' members that they no longer have discretion to make warranted but precluded findings or to continue to assess information and conservation efforts that would lead to a warranted but precluded finding. Thus, the Service effectively nullified Plaintiff's participation in the process and rendered moot the considerable investment made in providing information and in conservation actions.

20. In other circumstances, the Service has negotiated with the Advocacy Groups to move deadlines to consider new information and efforts. Ultimately, the Service's decision making concerning candidate species has become an arbitrary process based on closed door negotiations with the Advocacy Groups. Sometimes the Service seeks permission to fulfill its statutory obligations and other times it hides behind the Agreements.

21. Ultimately, the Service's decision to run the ESA listing program at the whim of two advocacy groups violates the ESA and the Administrative Procedure Act, 5 U.S.C. § 706 ("APA").

22. Immediate relief is necessary to undo past decisions and prevent future arbitrary actions that directly harm Plaintiffs' interests.

23. The Agreements and the agency decisions made because of them must be set aside and the Service must properly consider the status of all 251 candidate species, including

whether listing of such species is warranted but precluded after undertaking a ranking analysis based on best available science.

JURISDICTION AND VENUE

24. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. § 702 (right of review under the APA).

25. As required by 16 U.S.C. § 1540(g), on August 29, 2012 Plaintiffs provided the Secretary with written notice of the violations alleged herein more than 60 days prior to commencement of this action. Despite such notice, the Secretary has failed to remedy the ESA violations.

26. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A) because Defendants reside in the district and a substantial part of the events giving rise to the Plaintiffs' claims occurred in this district.

PARTIES

27. Plaintiff NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB") is a national trade association incorporated in the State of Nevada with its headquarters in Washington, D.C. Founded in 1942, NAHB is a federation of more than 800 state and local associations located in all 50 states. About one-third of NAHB's more than 140,000 members are home builders and/or remodelers. The remaining members are associates working in closely-related fields within the housing industry, such as mortgage finance and building products and services. Through its advocacy function on behalf of the nation's home builders, NAHB represents its members in legal, regulatory and legislative matters affecting the use and

development of their land. It is germane to NAHB's organizational purpose to ensure that its members can use their property to the fullest extent allowed by law so that they may build and supply housing for all people throughout the United States regardless of income level, race, or nationality. NAHB has expended significant resources to ensure that its members understand, and that the government agencies that regulate those members faithfully execute, the goals and requirements of the ESA.

28. NAHB's membership includes property owners in all 50 states and Puerto Rico who have, are and will develop their property.

29. Plaintiff OLYMPIA MASTER BUILDERS (“OMB”) of Washington State is a professional trade association representing nearly 600 member companies located in Thurston, Lewis, Grays Harbor, Mason and Pacific Counties. OMB's members come from all sectors of the building trades including bankers, plumbers, electricians, attorneys and home builders and they are committed to “building strong communities, one home at a time.” Founded in 1959, the Olympia Master Builders has been the voice of the home building industry in that area of Washington State for over 50 years. OMB's primary goal is to provide affordable housing for all segments of society. This is achieved by improving the construction industry and the business climate in which our members operate. OMB does this through advocacy before local, state and national policy makers and other regulatory bodies, builder education, marketing member services and providing medical and state industrial insurance.

30. Plaintiff HOME BUILDERS ASSOCIATION OF GREATER AUSTIN (“HBA”) is a trade association that promotes, protects and educates its members and informs the home buying public. Since 1953, the HBA has served as the leading not-for-profit trade organization dedicated to residential construction and remodeling in Central Texas. With approximately 73

members, the HBA works with government, public, business and community organizations in five counties to protect every family's right to home ownership. Builder members construct 95% of the new homes in the greater Austin market and 87% of the HBA's member firms are small, locally owned businesses. The HBA and its members work to ensure that those who protect us, teach our children, and provide essential services can afford to live in the Austin area.

31. Plaintiff TEXAS SALAMANDER COALITION, INC., a Texas non-profit corporation ("TSC") is a membership organization that represents the interest of its members who are landowners and businesses in Williamson, Bell and Travis Counties who would be impacted by the listing the four Central Texas salamander species as endangered or threatened under the ESA. The goal of the TSC is to raise funds to hire scientists, government affairs experts and legal support to oppose the listing of the salamanders and to formulate local solutions to preclude listing or reduce the impact of the listing of these salamanders.

32. When an endangered or threatened species or their habitat is found in an area, Plaintiffs' members in that area must change their behavior and expend resources to ensure compliance with the ESA.

33. In turn, certain members' property are occupied by some of the 251 candidate species included in the Agreements. Similarly, certain members' property possesses habitat suitable for some of the 251 candidate species included in the Agreements such as the salamander species in Austin and the pocket gopher in Washington. Consequently, Plaintiffs' members have funded studies, provided information and engaged in long-range conservation efforts related to numerous candidate species. These members will spend money and expend resources if the candidate species (or their habitat) are listed pursuant to the Agreements.

34. In the state of Washington, certain members' property proposed for development projects includes habitat that has been documented to be actually occupied or suitable for occupation by one or more of the nine subspecies of Mazama pocket gopher, a candidate species included in the Agreements. If the Mazama pocket gopher is federally listed as a result of the Agreements, these Washington members with previously approved, vested projects containing known or potential Mazama pocket gopher habitat will not be able to obtain grading or building permits to construct the projects without obtaining federal approval. Seeking further federal approval will result in delay of otherwise approved projects for these Washington members as well as require them to incur additional costs for compliance and potential additional mitigation.

35. Since the mid 1990's, the State of Texas, local governments and private landowners have attempted to work in a cooperative fashion with the Service to address potential threats to certain aquatic species found in a geologic formation known as the Edwards Aquifer. When the Service proposed to list the Barton Springs salamander as endangered, the State of Texas entered into a Candidate Conservation Agreement with Assurances with the Service and adopted water quality regulations to protect the Edwards Aquifer and the Barton Springs salamander. These state water quality regulations are known as the "Edwards Rules." Since the listing of the Barton Springs salamander as endangered, the State of Texas has consulted with the Service on at least three other occasions to address the adequacy of the Edwards Rules to protect several candidate species of salamander.

36. The Service has solicited information regarding four Central Texas salamanders that are candidate species -- the Georgetown salamander, the Salado salamander, the Jollyville plateau salamander and the Austin Blind salamander. Members of NAHB organized and joined the Texas Salamander Coalition to gather information regarding these four salamanders and to

actively respond the Service's listing process. The Service has issued Williamson County, Texas a Section 10(a)(1)(B) permit for a habitat conservation plan ("HCP") that covers several Karst invertebrates. As part of the mitigation under this habitat conservation plan, Williamson County agreed to fund five years of study regarding the Georgetown salamander. In consideration of the water quality benefits from the Williamson County HCP and the commitment to fund five years of studies on the Georgetown salamander, the Service lowered the priority listing number of the Georgetown salamander from 2 to 8. 77 Fed. Reg. 50770 (08/22/12). The second year of studies were nearing completion when the Service entered into the Agreements.

37. Defendant KEN SALAZAR is the Secretary of the Interior and is sued in his official capacity. Mr. Salazar has the ultimate responsibility to enforce and implement the ESA provisions.

38. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency within the Department of the Interior. Through delegation of authority from the Secretary, the Service administers and implements the ESA for terrestrial and freshwater species. The Service has responsibility under the ESA over the species that are the subject of this action. The Service has failed to take required action with regard to the candidate species and has ignored statutory requirements in taking certain actions.

LEGAL BACKGROUND

A. The Endangered Species Act

39. Under the ESA, a species will be added to the list of "endangered" species if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Section 4 of the ESA directs the Secretary to determine whether the species is threatened or endangered based on the following five factors: (A) the present or threatened destruction,

modification, or curtailment of its 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 its continued existence. 16 U.S.C. § 1533(a)(1).

40. Under the ESA, the term "threatened" species means "any species which 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).

41. An endangerment determination is to be made by the Secretary "solely on the basis of the best scientific and commercial data available to him 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 foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." 16 U.S.C. § 1533(b)(1)(A).

42. Once a species is listed by the Secretary as threatened or endangered, various statutory protections apply. For example, Section 7 of the ESA requires all federal agencies to "insure" that their actions neither "jeopardize the continued existence" of any listed species nor "result in the destruction or adverse modification" of a species' critical habitat. 16 U.S.C. § 1536(a)(2).

43. Section 9 of the ESA prohibits, among other things, "any person" from intentionally taking listed species or incidentally taking listed species without a permit from the Secretary. 16 U.S.C. §§ 1538(a)(1)(B). "Take" is broadly defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19). Through its regulatory authority, the Service has defined "harm" to include "significant habitat modification or

degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. In turn, "harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." Id.

44. The ESA provides that within 12 months of receiving a petition to have a species listed as endangered or threatened the Service must complete its review and must make a finding that listing is either: (1) not warranted; (2) warranted (in which case the Service must publish a proposed rule to list the species in the Federal Register); or (3) warranted but precluded by higher listing priorities. 16 U.S.C. § 1533(b)(3)(B).

45. If the Service decides a species listing is warranted but precluded (known as a "candidate" species), the ESA requires the Federal Register notice to include "a description and evaluation of the reasons and data on which the finding is based." 16 U.S.C. § 1533(b)(3)(B)(iii).

46. The Service is required to have in place a "system to monitor effectively the status of all species with respect to which a . . ." warranted but precluded finding is made. 16 U.S.C. § 1533(b)(3)(C)(iii).

47. The Service is required to establish criteria for making the findings required under Section 4 and must enact guidelines that set forth "a ranking system to assist in the identification of species that should receive priority review" for listing. 16 U.S.C. §§ 1533(h)(2) and (3).

48. The ESA requires that when the Secretary makes a warranted but precluded finding on a petition, such a petition be treated as one that is resubmitted on the date of such a finding. 16 U.S.C. § 1533(b)(3)(C)(i). Therefore, the Service must make findings on candidate

species on an annual basis and again determine whether listing is (1) not warranted, (2) warranted, or (3) warranted but precluded. This process is conducted pursuant to procedures mandated by the ESA, the Service's regulations and other guidance documents. Warranted but precluded decisions are judicially reviewable. 16 U.S.C. § 1533(b)(3)(C)(ii).

49. In implementing its duties under the ESA, the Service must cooperate with State and local agencies, particularly with regard to water resource issues. 16 U.S.C. § 1531(c)(2); 16 U.S.C. § 1535(a). Specifically, during the listing process, the Service must provide notice and seek comment from state and local agencies with respect to any proposed regulation or designation. 16 U.S.C. § 1533(b)(5)(A)(ii). The Service must justify regulations that are inconsistent with state comments. 16 U.S.C. § 1533(i).

B. The Administrative Procedure Act

50. The Administrative Procedure Act provides that any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is unlawful and must be set aside by the reviewing court. 5 U.S.C. § 706 (2)(A).

51. The APA requires courts to set aside agency actions that are without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

52. The Service is a federal agency that is required to comply with the APA. 5 U.S.C. § 551(1).

53. The APA defines "agency action" as an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). The ESA states that the APA shall apply to any regulation promulgated to carry out the purposes of the Act. 16 U.S.C. § 1533(b)(4).

54. The Agreements and the listing decisions based on them are final agency actions that determine rights or obligations or from which legal consequences flow, and therefore are reviewable under the APA.

55. The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4).

56. "Rulemaking" is defined as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

57. The Agreements qualify as a rule because the Service has modified the regulatory process for making listing determinations under Section 4 of the ESA.

58. Pursuant to the APA, an agency is required to afford adequate public notice and opportunity to comment during rule making. 5 U.S.C. § 553.

ALLEGATIONS

The required public process for considering candidate species

59. Since the enactment of the ESA, the Service has had an open, public process to address the candidate species that are under consideration for possible addition to the list of endangered or threatened species.

60. Towards these ends, since 1975 the Service has published a Candidate Notice of Review (CNOR) in the federal register that provides an annually updated assessment of plants and animals native to the United States that are regarded as candidates for possible listing.

61. The 2010 CNOR, 75 Fed. Reg. 69222 (11/10/10), summarized the status of 251 candidate species. The 2011 CNOR, 76 Fed. Reg. 66370- 66439 (10/26/11), summarized the

status of 244 candidate species. The 2012 CNOR, 77 Fed. Reg. 69994-70060 (11/21/2012), summarizes the status of 192 candidate species.

62. According to the Service, the stated purposes of the CNOR are:

to provide advance knowledge of potential listings that could affect decisions of environmental planners and developers; to provide information that may stimulate and guide conservation efforts that will remove or reduce threats to these species and possibly make listing unnecessary; to request input from interested parties to help us identify those candidate species that may not require protection under the Act or additional species that may require the Act's protections; and to request necessary information for setting priorities for preparing listing proposals.

76 Fed. Reg. at 69370-71 (11/8/11).

63. Towards these ends, the Service solicits and receives a wide range of information from the public concerning candidate species. In turn, the Service incentivizes private landowners to set aside their land to reduce threats to candidate species. Such efforts undertaken by the regulated community and state and local governments are intended to delay or to allow the Service to avoid having to make a determination that the candidate species is threatened or endangered. This public process has proven essential to the Service for analyzing priority ranking, for removing the species from the candidate list and in future listing decisions.

64. As threats are reduced and populations are increased or stabilized, priority for listing can be shifted to those species in greatest need of the ESA's protective measures. Ideally, if the efforts spawned by the CNOR are sufficient threats can be removed to eliminate the need for listing. Plaintiffs have expended resources to analyze and alleviate such threats.

65. In 1983, the Service published guidance that establishes a system for setting a "listing priority number" ("LPN") for each candidate species. 48 Fed. Reg. 43098 (9/21/83). As explained by the Service, "the LPN ranking system provides a basis for making decisions

about the relative priority for preparing a proposed rule to list a given species." 75 Fed. Reg. at 69223.

66. The LPN ranges from 1 (highest priority) to 12 (lowest priority) depending on the magnitude of the threat, the immediacy of the threat and taxonomic status — the lower the LPN, the higher the listing priority. The LPN Guidance ranks species according to: (1) the magnitude of threats they face; (2) the immediacy of these threats; and (3) the taxonomic distinctiveness of the entity that may be listed.

67. Plaintiffs have a significant interest in the listing priority process given that they have candidate species and habitat on their land and are involved in long-term land planning. Considerable resources are expended to address candidate species. If impacts to candidate species can be avoided up front, the likelihood that the species will be listed later is reduced. As noted in the CNOR, the Service uses the public process of candidate review to induce landowners such as Plaintiffs' members to set aside land and undertake other conservation efforts to protect species. Plaintiffs have also funded research and provided information to help the Service assess the priority of species.

68. At the behest of the Service, Plaintiffs' members have taken numerous voluntary steps to reduce threats to candidate species in order to lessen the listing priority thereby allowing the Service to continue to find that listing is warranted but precluded (which allows the Service to focus on higher priorities). There are ongoing efforts in several states including Texas, Arizona and Washington, impacting numerous candidate species ranging from salamanders to gophers.

The abdication of the Service's authority as a result of the Agreements

69. In 2011, the Service abandoned its statutorily required process in favor of one based solely on negotiations with the Advocacy Groups.

70. The Agreements are inconsistent with the ESA and prior Service policy, and they result in arbitrary and capricious decision-making.

71. The Agreements set forth a rigid schedule (a "work-plan") for the Service to complete listing rulemakings on the 251 candidate species that were on the 2010 CNOR, stating "for all 251 species that were designated as 'candidates' in the 2010 CNOR, [the Service shall] submit to the Federal Register for publication either a Proposed Rule or a not-warranted finding no later than September 30, 2016." The work plan determines which species are considered during each fiscal year.

72. The Agreements make clear that the work plan "will require substantially all of the resources in the Listing Program."

73. The Service and the advocacy groups jointly agree to use combined "best efforts . . . to ensure that any court order resulting from a case filed by a non-signatory to [the Agreements]. . . [including any] challenge [to] the merits of a listing or critical habitat petition finding or rulemaking does not interfere with [the Service's] ability to satisfy their obligations under" the Agreements. Further, if there is such litigation, "in the remedy phase of any successful merits challenge to a listing or critical habitat petition finding or rulemaking, the [Service, CBD and WEG] state that, in considering any appropriate relief, the court with jurisdiction over that case should ensure that the relief granted will not interfere with the Defendants' ability to comply with the requirements of [the Agreements], giving due weight to Defendants' assessment of their available resources."

74. The Agreements allow for the Service to modify the deadlines by stipulation with the Advocacy Groups or by its own motion, effectively contracting away its authority to make independent judgments.

75. The Agreements require the Service to meet annually with the Advocacy Groups to "discuss whether any modifications to the Agreement[s] are appropriate." The public has no role in these closed door meetings.

76. By entering into the Agreements, the Service abandoned the statutorily required process for reevaluating candidate species. During the annual review, the Service will no longer consider whether listing is warranted but precluded for any candidate species that is slated for a rulemaking that year under the Agreements. For such species, the Service has limited itself to considering only whether listing is warranted or not warranted — with an obviously high probability of the former given that the prior finding was that listing was warranted but precluded by higher priorities. Skipping this step is a procedural violation of the ESA and is arbitrary and capricious. The Service has already followed this illegal course of action for several candidate species and has indicated that it will continue to proceed in this manner.

77. By entering into the Agreements the Service has discarded the listing priority process. Under Section 4, decisions concerning listing priority must be based on a ranking system that is founded on best available science as applied under the LPN guidelines. Yet, the Agreements predetermined the priority of listings irrespective of the current status of the species (including information annually provided to the Service such as ongoing research and conservation efforts), the prior LPN of the species, or any analysis of relative priority. Even if there are ongoing studies, or the species has a low LPN, the Service will proceed with its rulemaking. By predetermining the order for 251 species based on a litigation settlement, the

ranking system of the LPN has been rendered moot and decisions are made regardless of best available science. Consequently, the Service has proposed rulemakings in an order that is inconsistent with its past priority rankings and is ignoring best available science. The Service has already done this for several species and has indicated that it will continue to proceed in this manner. Without the Agreements, the Service would have different listing priorities and certain proposed listing rulemakings would not occur in the order that they have or not at all.

78. By entering into the Agreements, an open listing process with public participation has been replaced by a private process negotiated with the Advocacy Groups behind closed doors. The Service has informed the regulated community that because of the Agreements, it is bound to undertake listing rulemakings regardless of the fact that there is ongoing analysis and conservation efforts by public entities and private parties. Yet, on other occasions, the Service has stipulated with the Advocacy Groups to amend the Agreements to move dates to allow such analysis. Thus, the Service has ceded its discretion to these groups to determine priorities and does so in an arbitrary manner.

79. By entering into the Agreements, the Service has rendered moot the efforts of Plaintiffs. The Service has informed the regulated community that because of the Agreements, it is bound to undertake listing rulemakings regardless of the fact that there is ongoing analysis and conservation efforts by public entities and private parties. Without the Agreements, the Service would have different listing priorities and certain proposed listing rulemakings would not occur in the order set by the Agreements.

CLAIMS FOR RELIEF

Count One: failure to consider whether listing is warranted but precluded

80. Plaintiffs re-allege, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

81. As a result of the Agreements, the Service will not consider whether listing is warranted but precluded for any of the 251 candidate species covered by the Agreements.

82. The Service's failure to follow the required procedure for consideration of candidate species is inconsistent with the requirements of Section 4 of the ESA, 16 U.S.C. § 1533(b)(3)(B) and (C), such actions are arbitrary, capricious, and otherwise not in accordance with the law under the APA, 5 U.S.C § 706(2)(A), and are without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

Count Two: predetermining listing priorities

83. Plaintiffs re-allege, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

84. The Agreements set forth a static order in which candidate species are evaluated for possible listing.

85. The Service has denied Plaintiffs' members the opportunity to continue to work with their local governments, their states and the Service to develop conservation measures to allow the Service to reach a “not warranted” finding.

86. By predetermining the listing priorities for 251 candidate species, the Service is ignoring the ESA, 16 U.S.C. § 1533(h), its listing priority guidelines and prior decisions concerning priority under the required ranking system of the ESA, and such actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law under the APA, 5

U.S.C. § 706(2)(A), and are without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

Count Three: failure to render decisions based on best scientific and commercial data available

87. Plaintiffs re-allege, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

88. For certain species, the Agreements set forth an order that is inconsistent with the prior LPN, information concerning the species status and ongoing conservation efforts. Nonetheless, the Service has stated that it must meet the deadlines established under the Agreements.

89. In predetermining the listing priorities for 251 candidate species, the Service fails to make decisions based on the best scientific and commercial data available, 16 U.S.C. § 1533(b)(1)(A), and such actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law and under the APA, 5 U.S.C. § 706(2)(A).

Count Four: Failure to allow for public notice and comment on the Agreements

90. Plaintiffs re-allege, as if fully set forth herein, each and every allegation alleged in the preceding paragraphs.

91. The APA prohibits the Service from implementing changes to the listing process without observing the procedures required by law. 5 U.S.C. § 706(2)(D).

92. Under the Agreements, the Service altered the process for consideration of the status of candidate species by establishing a ranking system to assist in the identification of species that should receive priority review as would be required by 16 U.S.C. § 1533(h)(3).

93. This change to agency guidelines was undertaken without public notice and opportunity for comments, in violation of the ESA, 16 U.S.C. § 1533(h), and the APA, 5 U.S.C. § 553.

94. Under the Agreements, the Service altered the statutory process for consideration of the status of candidate species by eliminating consideration of warranted but precluded status as required by the ESA.

95. This change to the law or policy related to the listing process is considered a rulemaking, 5 U.S.C. § 551(5), and was undertaken without proper notice and comment as required by the APA, 5 U.S.C. § 553.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court grant the following relief:

- 1) Declare that the Agreements are in violation of Section 4 of the ESA and/or the APA and are invalid.
- 2) Provide preliminary and permanent injunctive relief setting aside the Agreements.
- 3) Declare that Defendants are in violation of the ESA and/or the APA by failing to consider whether listing is warranted but precluded for the 251 candidate species that are the subject of the Agreements.
- 4) Declare that Defendants are in violation of the ESA and/or the APA by ignoring the listing priority guidelines for the 251 candidate species that are the subject of the Agreements.
- 5) Declare that Defendants are in violation of the ESA and/or the APA by ignoring the best scientific and commercial data available in making decisions related to the 251 candidate species that are the subject of the Agreements.

- 6) Provide preliminary and permanent injunctive relief compelling Defendants to consider whether listing is warranted but precluded for each of the 251 candidate species that are the subject of the Agreements along with any other candidate species.
- 7) Provide preliminary and permanent injunctive relief compelling Defendants to reconsider the listing priority for the 251 candidate species that are the subject of the Agreements along with any other candidate species.
- 8) Provide preliminary and permanent injunctive relief setting aside any listing rulemaking for the 251 candidate species that are the subject of the Agreements where the Service did not consider whether listing is warranted but precluded.
- 9) Make such additional judicial determinations and enter such additional orders as may be necessary to effectuate the foregoing.
- 10) Retain continuing jurisdiction to review Defendants' compliance with all judgments and orders herein
- 11) Award Plaintiffs their costs of litigation, including reasonable attorney's fees.
- 12) Grant Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

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