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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

**CENTER FOR BIOLOGICAL
DIVERSITY;**

Plaintiff,

v.

DAVID BERHNHARDT, in his official
capacity as Secretary of the United States
Department of the Interior; **AURELIA
SKIPWITH**, in her official capacity as
Director of the U.S. Fish and Wildlife Service;
U.S. FISH AND WILDLIFE SERVICE;

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) brings this action under the
Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, to challenge the Secretary of the
Complaint for Declaratory and Injunctive Relief

1 Interior's ("Secretary") and the U.S. Fish and Wildlife Service's ("FWS") (collectively
2 "Defendants" or "FWS") failure to make a mandatory finding on whether the highly-imperiled
3 distinct population segment of relict dace (*Relictus solitarius*) at Johnson Springs Wetland
4 Complex ("JSWC") should be listed as threatened or endangered under the ESA. 16 U.S.C. §
5 1533(b)(3)(B). The JSWC relict dace population is experiencing ongoing threats to its existence.

6 2. To obtain federal safeguards and habitat protections, Forest Service Employees
7 for Environmental Ethics submitted to FWS a petition to list a distinct population segment of the
8 relict dace, located at the Johnson Springs Wetland Complex in Goshute Valley, Nevada
9 (hereinafter "relict dace JSWC DPS"), as "endangered" or "threatened" pursuant to the ESA, on
10 June 27, 2014. Although described as the Big Spring population in the petition, the population of
11 relict dace referenced in the petition also includes individuals that inhabit other areas of the
12 JSWC.

13 3. FWS made an initial, 90-day finding that the petition presented substantial
14 information showing that listing the species "may be warranted." 16 U.S.C. § 1533(b)(3)(A); *see*
15 *also* 80 Fed. Reg. 19259 (April 10, 2015). FWS was therefore required to determine whether
16 listing this species as "endangered" or "threatened" is "warranted" within 12 months of receiving
17 the petitions, yet it has failed to make the requisite finding to date. 16 U.S.C. § 1533(b)(3)(B).
18 Defendants are therefore in violation of the ESA. *Id.*

19 4. To remedy these violations, Plaintiffs seek declaratory relief to affirm that
20 Defendants are in violation of the ESA by failing to make the required 12-month finding on the
21 petition, along with injunctive relief that establishes dates certain for Defendants to determine if
22 listing this species as endangered or threatened is warranted. Compliance with the
23 nondiscretionary deadlines of the ESA is necessary to ensure the continued existence and
24 recovery of this species in the wild.

JURISDICTION

5. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) and (g)(1)(C) (action arising under the ESA's citizen suit provision), 5 U.S.C. § 702 (review of agency action under the APA), and 28 U.S.C. § 1331 (federal question jurisdiction).

6. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g); the APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

7. The Center provided 60 days' notice of its intent to file this suit pursuant to the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter dated November 20, 2019. Defendants have not remedied the violations to date; thus, an actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

8. Venue is proper in the U.S. District Court for the District of Nevada pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because this action is brought against a federal agency and officers of the United States in their official capacity; because a substantial part of the events giving rise to the Center's claim occurred in this district; and because the Center maintains an office in this district.

PARTIES

9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico, including Arizona; California; Florida; Hawaii; Idaho; Minnesota; Nevada; New Mexico; New York; North Carolina; Oregon; Washington; Washington, D.C.; and La Paz, Baja California Sur, Mexico. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has more than 74,000 members. The Center and its members are concerned with the conservation of imperiled species – including the relict dace – and with the effective implementation of the ESA.

1 10. Plaintiffs have members who visit areas where relict dace are known to still occur,
2 including JSWC. Plaintiffs' members use this area for observation of these species and other
3 wildlife; for research; nature photography; aesthetic enjoyment; and recreational, educational,
4 and other activities. Plaintiffs' members derive professional, spiritual, and economic benefits
5 from these species and their habitats. Those members have concrete plans to continue to travel to
6 and recreate in areas where they can observe these species and will continue to maintain an
7 interest in these species and their habitats in the future.

8 11. The Center and its members have participated in conservation efforts for the relict
9 dace and its habitat. The Center has campaigns to protect biodiversity and to raise awareness
10 about the environmental impacts from human activities, including impacts to imperiled species.
11 Likewise, the Center is actively engaged in efforts to protect native plants and animals from the
12 effects of climate change. Protecting the species at issue under the ESA would further these
13 campaigns.

14 12. Plaintiff's conservation efforts are prompted by the concern that the relict dace
15 JSWC DPS is at serious risk of extinction. Defendants' failure to comply with the ESA's
16 nondiscretionary deadline for issuing a listing determination for this species deprives it of
17 statutory protections that are vitally necessary to its survival and recovery. Until this species is
18 protected under the ESA, Plaintiff's interest in its conservation and recovery is impaired.
19 Therefore, Plaintiff's members and staff are injured by Defendants' failure to make a timely
20 determination as to whether listing this species is warranted, as well as by the ongoing harm to
21 the species and its habitat in the absence of such protections. The injuries described above are
22 actual, concrete injuries presently suffered by the Plaintiff and its members, and they will
23 continue to occur unless this Court grants relief. These injuries are directly caused by
24 Defendants' inaction, and the relief sought herein – an order compelling a listing decision for this
25 species – would redress these injuries. The Plaintiff and its members have no other adequate
26 remedy at law.

1 18. The ESA’s substantive protections apply; however, only after the Secretary lists a
2 species as threatened or endangered. For example, section 7 of the ESA requires all federal
3 agencies to ensure that their actions do not “jeopardize the continued existence” of any listed
4 species or “result in the destruction or adverse modification” of a listed species’ “critical
5 habitat.” *Id.* § 1536(a)(2). Section 9 of the ESA prohibits, among other things, “any person” from
6 intentionally taking listed species or incidentally taking listed species without a lawful
7 authorization from the Secretary. *Id.* §§ 1538(a)(1)(B) and 1539. Concurrently with listing, the
8 Secretary must designate the species’ critical habitat, which includes areas that are essential to
9 the conservation of the species. *Id.* §§ 1532(5)(A) and 1533(a)(3)(A). Other provisions include
10 the requirement that the Secretary “develop and implement” recovery plans for listed species,
11 authorize the Secretary to acquire land for the protection of listed species, and make federal
12 funds available to states to assist in their efforts to preserve and protect listed species. *Id.* §
13 1533(f), § 1534, and § 1535(d).

14 19. To ensure the timely protection of species that are at risk of extinction, Congress
15 set forth a detailed process whereby citizens may petition the Secretary to list a species as
16 endangered or threatened. The process includes mandatory, non-discretionary deadlines that the
17 Secretary must meet so that imperiled species timely receive the ESA’s substantive protections.
18 The three required findings, described below, are the 90-day finding, the 12-month finding, and
19 the final listing determination. The Secretary has delegated responsibility for making these
20 findings to FWS.

21 20. Upon receiving a listing petition, FWS must “to the maximum extent practicable,
22 within 90-days” make an initial finding as to whether the petition “presents substantial scientific
23 or commercial information indicating that the petitioned action may be warranted.” *Id.* §
24 1533(b)(3)(A). If FWS finds that the petition does not present substantial information indicating
25 that listing may be warranted, the petition is denied, and the process ends.

21. If FWS instead determines that a petition does present substantial information indicating that listing may be warranted, then the agency must conduct a full scientific review of the species' status. *Id.* Upon completion of this status review, and within 12 months from the date that it receives the petition, FWS must make one of three findings: (1) listing is "not warranted"; (2) listing is "warranted"; or (3) listing is "warranted but precluded" by other pending proposals for listing species, provided certain requirements are met. *Id.* § 1533(b)(3)(B).

22. If FWS's 12-month finding concludes that listing is warranted, the agency must publish notice of the proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. *Id.* § 1533(b)(3)(B)(ii). Within one year of publication of the proposed regulation, the ESA requires FWS to render its final determination on the proposal. *Id.* § 1533(b)(6)(A). At such time, FWS must either list the species, withdraw the proposed listing rule, or, if there is substantial disagreement about scientific data, delay a final determination for up to six months in order to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i) and 1533(b)(6)(B)(i).

23. Because the ESA does not safeguard a species facing extinction until it is formally listed as endangered or threatened, it is critical that FWS follow the ESA's listing procedures and deadlines so that such species are protected before it is too late to save them from extinction. Defendants have regularly ignored these statutory procedures and have missed statutory listing deadlines, leading to litigation to remedy these deficiencies.

FACTUAL BACKGROUND

24. The relict dace is a small, minnow-like fish whose range is restricted to four closed basins in the north-central Great Basin in eastern Nevada. The relict dace is restricted to spring systems that are remnants of lakes that formed in Ruby Valley, Butte Valley, Goshute Valley, and Steptoe Valley during the Pleistocene. As the waters of these lakes dried up, some fish survived in isolated pools, drainages and springs in these four valleys. The relict dace is a

1 chubby, soft-bodied fish with small fins. Its color is highly variable and can be dusky violet,
2 yellow, or green above, speckled with brown; with yellow fins.

3 25. The relict dace JSWC DPS is genetically distinct from other relict dace
4 populations, and occurs only in the Goshute Valley, in Elko County, Nevada. Each population of
5 relict dace has unique genetic variation that may not be represented in any other relict dace
6 populations. No single population of relict dace represents all the diversity within the complex of
7 the species; therefore, a loss of one population would result in the loss of the species' unique
8 diversity. The various populations of relict dace are hydrologically isolated from one another by
9 dozens of miles of dry desert. The relict dace JSWC DPS appears to have been isolated for
10 nearly 300,000 years. JSWC contains the most complex system of springs, potholes, ponds, and
11 outflows encountered within the relict dace's known distribution and thus is the most distinctive
12 and significant habitat occupied by the species.

13 26. The primary threats to the survival of the relict dace JSWC DPS are Nevada Gold
14 Mines' Long Canyon Mine, "a multi-million ounce, high-grade oxide, open-pit deposit" of gold
15 located immediately adjacent to JSWC. Current operations of the Long Canyon mine have
16 adversely affected the water quality of JSWC. Surfactants used in connection with mining
17 operations have been detected in the dace's habitat at levels that exceed chronic toxicity levels
18 for aquatic organisms.

19 27. The biggest threat to the relict dace JSWC DPS is a plan by the Nevada Gold
20 Mines to extend the depth of the mine to below the water table, which will require extensive
21 dewatering that will alter the hydrology of the area. This threatens to dry out the springs that are
22 home to the relict dace JSWC DPS. Pump tests by Nevada Gold Mines resulted in loss of flow at
23 Big Spring and other springs in JSWC in less than two weeks. And efforts to supplement the
24 water in the springs during the pump tests resulted in significant changes in the springs'
25 temperature and chemistry, which can negatively impact the relict dace.

1 28. The relict dace JSWC DPS is also threatened by non-mining groundwater use.
2 The appropriated groundwater uses for the basin where Big Spring is located exceed the basin's
3 estimated perennial yield. This means that authorized groundwater users may consume more
4 water than the basin can yield, threatening the natural flows of springs in Goshute Valley,
5 including those at JSWC.

6 29. Forest Service Employees for Environmental Ethics, a conservation group,
7 submitted a petition to FWS on June 27, 2014, to list a distinct population segment of the relict
8 dace, at Big Spring in Goshute Valley, Nevada, as endangered under the ESA due to ongoing
9 threats to its existence. Although described as the Big Spring population in the petition, the
10 population of relict dace referenced in the petition also includes individuals that inhabit other
11 areas of the Johnson Springs Wetland Complex.

12 30. FWS issued a 90-day finding on this petition to list the relict dace Big Spring DPS
13 on April 10, 2015. FWS concluded that the petition presented substantial scientific or
14 commercial information indicating that listing the relict dace Big Spring DPS "may be
15 warranted." 80 Fed. Reg. 19259 (April 10, 2015). FWS was required to make a 12-month finding
16 as to whether listing the relict dace Big Spring DPS is warranted by June 27, 2015, but it has not
17 made this mandatory finding to date, in violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

18 **CLAIM FOR RELIEF**

19 Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Big Spring

20 Distinct Population Segment of Relict Dace

21 31. Plaintiffs re-allege and incorporate by reference the allegations made in all
22 preceding paragraphs.

23 32. FWS's failure to make a timely 12-month finding on the petition to list the relict
24 dace as endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and/or
25 constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within
26 the meaning of the APA. 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court enter Judgment for Plaintiffs providing the following relief:

A. Declare that Defendants violated the ESA and/or APA by failing to issue timely 12-month findings as to whether listing the relict dace is warranted, 16 U.S.C. § 1533(b)(3)(B), 5 U.S.C. § 706(1).;

B. Order Defendants to issue, by dates certain, findings as to whether listing the relict dace is warranted, 16 U.S.C. § 1533(b)(3)(B);

C. Grant Plaintiff their attorneys' fees and costs in this action as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and

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

Respectfully submitted and dated this 1st day of June, 2020.

/s/ Chris Mixson

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