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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 CENTER FOR BIOLOGICAL)
11 DIVERSITY, PUBLIC EMPLOYEES)
FOR ENVIRONMENTAL)
12 RESPONSIBILITY, and NEVADA)
OUTDOOR RECREATION)
13 ASSOCIATION,)
Plaintiffs,)
14 v.)
15 GALE NORTON, Secretary of the Interior)
and UNITED STATES FISH AND)
16 WILDLIFE SERVICE,)
17 Defendants.)

Case No.:

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

18 **I. INTRODUCTION**

19 1. In this action Plaintiffs, CENTER FOR BIOLOGICAL DIVERSITY (“the
20 Center”), PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (“PEER”),
21 and NEVADA OUTDOOR RECREATION ASSOCIATION (“NORA”), challenge the failure of
22 Defendants, GALE NORTON, Secretary of the Interior, and UNITED STATES FISH AND
23 WILDLIFE SERVICE (the “Service”) (collectively “Defendants”) to take any action on the
24 petition to list the Sand Mountain blue butterfly as endangered or threatened under the
25 Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”). Plaintiffs ask this Court to order
26 Defendants to comply with the mandatory, non-discretionary deadlines set forth by the ESA for
27 the processing of citizen petitions to list species and afford them the protection they deserve.
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2. The Plaintiffs submitted a petition to list the Sand Mountain blue butterfly on April 23, 2004. The entire known geographic range of the Sand Mountain blue butterfly is restricted to the Sand Mountain Recreation Area in Nevada. Threats to the Sand Mountain blue butterfly include: a highly restricted geographic range; specialized habitat needs; and historic, ongoing, and future disturbance from heavy off-road vehicle use in the Sand Mountain Recreation Area.

3. Defendants were required to determine, within ninety days, whether the petition presented substantial information indicating that listing “may be warranted,” and if so, to initiate a status-review of the species. Defendants have failed to make the required finding within ninety days, despite the fact it has now been over twenty months since Defendants received the petition. Until Defendants make the required findings on the petition, and processes the species for listing, the species will receive no protection under the ESA.

4. Through this action, Plaintiffs seek an order declaring that Defendants' failure to complete their statutorily-mandated duty to process Plaintiffs' petition is a violation of the ESA and the Administrative Procedures Act ("APA"), 5 U.S.C. § 706. Plaintiffs further seek an order requiring Defendants to make the required findings on the petitions by a date certain.

II. JURISDICTION AND VENUE

5. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief); 16 U.S.C. § 1540(c) and (g) (action arising under the ESA and citizen suit provision); and 5 U.S.C. § 702 (Administrative Procedure Act). As required by the ESA, 16 U.S.C. § 1540(g), Plaintiffs furnished Defendants with written notice regarding the violations alleged in this Complaint more than sixty days ago. Defendants have failed to remedy the alleged violations in that time. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) as Defendant Service maintains an office in this judicial district.

1 **III. PARTIES**

2 7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-
3 profit corporation with offices in San Francisco, Los Angeles, Joshua Tree, and San Diego,
4 California; Phoenix and Tucson, Arizona; and Silver City, New Mexico. The Center is actively
5 involved in wildlife and habitat protection issues throughout the western United States. The
6 Center has members throughout the United States, some of whom reside in Nevada. The
7 Center’s members and staff include individuals with various interests in the Sand Mountain blue
8 butterfly ranging from educational to scientific, spiritual, and recreational interests. Further, the
9 Center’s members and staff enjoy the biological, recreational, and aesthetic values of the Sand
10 Mountain Recreation Area in Nevada, the only place where this species is found. The Center’s
11 members and staff have participated in efforts to protect and preserve the habitat essential to the
12 continued survival of the Sand Mountain blue butterfly, and continue to use the Sand Mountain
13 Recreation Area which serves as habitat for this species. The Center brings this action on its own
14 behalf and on behalf of its adversely affected members and staff.

15 8. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
16 (“PEER”) is national, non-profit corporation based in Washington, D.C. with chapters
17 throughout the United States. PEER represents current and former local, state, and federal
18 scientists and law enforcement officers, land managers and other professionals dedicated to
19 upholding local, state, and federal environmental laws and values. Many of PEER’s members
20 are frustrated by the failure of governmental agencies to enforce or faithfully implement the
21 environmental laws entrusted to them by Congress. The ability of PEER’s members to
22 independently critique agency decisions is frequently compromised by conflicts between their
23 duties as employees of a federal agency to uphold the law and the risk of disciplinary action for
24 insubordination. Consequently, PEER’s members rely on PEER to criticize agency action,
25 including the use of litigation, on their behalf. The staff and members of PEER have scientific
26 and recreational interests in the Sand Mountain blue butterfly. PEER staff and members have
27 visited Sand Mountain and participated in efforts to protect and preserve the habitat essential for
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1 the Sand Mountain blue butterfly's survival. PEER staff and members intend to continue to visit
2 the Sand Mountain Recreation Area and to work to protect and preserve the ecosystem of the
3 area for the Sand Mountain blue butterfly and other species.

4 9. Plaintiff NEVADA OUTDOOR RECREATION ASSOCIATION ("NORA") is a
5 non-profit corporation based in Carson City, Nevada, dedicated to the preservation and
6 management of public lands. NORA's staff and members have scientific and recreational
7 interests in the Sand Mountain blue butterfly. NORA staff and members have participated in
8 efforts to protect and preserve the habitat essential for the Sand Mountain blue butterfly's
9 survival in the Sand Mountain Recreation Area. NORA staff and members intend to continue to
10 visit the Sand Mountain Recreation Area and to work to protect and preserve the ecosystem of
11 the area.

12 10. Defendants' failure to take any action regarding the petition has prevented the
13 implementation of protective measures for the Sand Mountain blue butterfly and its habitat.
14 Plaintiffs' members and staff spend time in the Sand Mountain Recreation Area and are
15 adversely affected by Defendants' refusal to protect these species. Plaintiffs' members and staff
16 have been, are being, and unless the specific relief requested is granted, will continue to be
17 adversely affected and injured by Defendants' refusal to take action on the petition. Plaintiffs
18 have no adequate remedy at law.

19 11. Defendant GALE NORTON, is the Secretary of the Department of Interior. The
20 Secretary of the Interior ("Secretary") is the federal official charged with responsibility for
21 decisions regarding listing species under the ESA. The Secretary has delegated responsibility
22 responding to listing petitions to the United States Fish and Wildlife Service. She is sued in her
23 official capacity.

24 12. Defendant UNITED STATES FISH & WILDLIFE SERVICE ("Service") is an
25 agency of the United States government, and is an agency within and under the jurisdiction of the
26 Department of the Interior. Through delegation of authority from the Secretary, the Service
27 administers and implements the ESA, and is legally responsible for the protection and
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1 management of the fish, wildlife and native plant resources of the United States through
2 enforcement of the ESA. The Service has responsibility under the ESA over the species which
3 are the subject of this action. The Service has failed to take any action with regard to the
4 petition, and has failed to meet the statutorily-mandated deadline for processing the petition.

5 **IV. LEGAL BACKGROUND**

6 13. The ESA is a federal statute whose purpose is to conserve endangered and
7 threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b).
8 To this end, the ESA requires the Secretary to list as “threatened” or “endangered” those species
9 of plants and animals that are facing extinction. 16 U.S.C. § 1533. A species is “endangered” if
10 it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. §
11 1532(6). A species is “threatened” if it “is likely to become an endangered species within the
12 foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

13 14. Before the ESA can protect a species that is facing extinction, or that species’
14 habitat, the species must be “listed” as either “threatened” or “endangered” under the Act. 16
15 U.S.C. § 1533(d). The “listing” process is the essential first step in the ESA’s system of species
16 protection and recovery.

17 15. The listing process can begin either by citizen petition or by internal Service
18 processes. In either case, a strict timeline applies once the process is initiated.

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

23 17. Within one year of receiving a petition, the Secretary must issue a “twelve-month
24 finding” making one of three determinations: (1) that the listing is “warranted,” in which case the
25 Service must also publish a proposed rule to list the species; (2) that the listing is “not
26 warranted,” in which case no further action is taken; or (3) that the listing is “warranted but
27 precluded” by other listing actions of higher priority. 16 U.S.C. § 1533(b)(3)(B). The one-year
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1 finding is mandatory; there is no mechanism by which the deadline to make the finding may be
2 extended. So while the ESA provides the Secretary with some very limited flexibility as to the
3 making of the initial 90-day finding on the petition, the Secretary must comply with the
4 mandatory twelve-month deadline for making one of the above listed determinations.

5 18. Within one year of the publication of a proposed rule to list a species, the ESA
6 requires the Secretary to render a final determination on the proposal. 16 U.S.C. §
7 1533(b)(6)(A)(i). At this point, the Secretary may list the species, withdraw the proposal, or, if
8 there is substantial disagreement about the scientific data involved, delay a final determination
9 for up to six months to solicit more scientific information. 16 U.S.C. § 1533(b)(6)(A)(i) &
10 (B)(i). In any case, the Secretary must make a formal finding within one year of the initial
11 twelve-month finding. 16 U.S.C. § 1533(b)(6)(A).

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

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

20 21. It is critical for the Service, which has been delegated the Secretary’s
21 responsibilities for listing under the ESA, to scrupulously follow the listing procedures and
22 deadlines set forth by the ESA if species are to be protected in a timely manner; none of the
23 ESA’s protections operate to protect a species until the species is formally listed as threatened or
24 endangered by the publication of a final rule in the Federal Register.

25 **V. FACTUAL BACKGROUND**

26 22. Plaintiffs submitted a petition to list the Sand Mountain blue butterfly on April 23,
27 2004. The entire known geographic range of the Sand Mountain blue butterfly is restricted to
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1 Sand Mountain dunes within the Sand Mountain Recreation Area in Nevada. Threats to the Sand
2 Mountain blue butterfly include: a highly restricted geographic range; specialized habitat needs;
3 and historic, ongoing, and future disturbance from heavy off-road vehicle use of the Sand
4 Mountain dunes.

5 23. On September 26, 2005, Plaintiffs sent Defendants a 60-Day Notice of Intent to
6 Sue for failing to make the required 90-day findings for the petition.

7 24. Because of Defendants' inexcusable failure to make the required 90-day finding
8 in a timely manner, it is now impossible for Defendants to comply with the mandatory 12-month
9 finding deadline for the petition.

10 25. If Defendants do not act to process the petition and protect the petitioned species,
11 the species will continue its spiral towards extinction. Although this tragedy is entirely
12 preventable, Defendants inexplicably refuse to act.

13 **VI. CLAIM FOR RELIEF**

14 **Violation of the Endangered Species Act**

15 26. Each and every allegation set forth in this Complaint is incorporated herein by
16 reference as if set forth in full.

17 27. Defendants have failed to make a 90-day finding on the petition to list the Sand
18 Mountain blue butterfly despite the fact it has now been over 20 months since the petition was
19 filed. Accordingly, Defendants are in violation of Section 4(b)(3) of the ESA for failure to
20 perform their non-discretionary duty. By failing to perform a non-discretionary duty under the
21 ESA, Defendants have acted in a manner that is arbitrary, capricious, or otherwise not in
22 accordance with the law, in violation of the ESA, 16 U.S.C. §§ 1533(b)(3) and 1540(g)(1)(C),
23 and the APA, 5 U.S.C. §§ 701-706.

24 **VII. PRAYER FOR RELIEF**

25 FOR THESE REASONS, Plaintiffs respectfully request that the Court:

26 1. Declare that Defendants are in violation of their mandatory duty under the ESA to
27 make, and to publish in the Federal Register, a 90-day finding on the petition to list the Sand
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1 Mountain blue butterfly;

2 2. Provide preliminary and permanent injunctive relief compelling Defendants to
3 publish in the Federal Register a 90-day finding on the petition to list the Sand Mountain blue
4 butterfly by a date certain;

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

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

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

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

11 Respectfully submitted,

12 DATED: January 5, 2006

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