UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, 351 California Street, Suite 600 San Francisco, CA 94104	)	
Plaintiff,	)	Civil No: _____
v.	)	
KEN SALAZAR, Secretary of the Interior, Department of the Interior 1849 C Street NW Washington, DC 20240	)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
and	)	
U.S. FISH AND WILDLIFE SERVICE, 1849 C Street NW Washington, DC 20240	)	
Defendants.	)	

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 failure of the Secretary of the Interior ("Secretary") and the U.S. Fish and Wildlife Service ("FWS") (collectively, "Defendants" or "FWS") to make statutorily-required findings on whether to list seven species as endangered or threatened under the ESA. 16 U.S.C. § 1533(b)(3)(B). These seven species are experiencing steep population declines and myriad threats to their very existence. They are the Barbour's map turtle (*Graptemys barbouri*), Big Blue Springs cave crayfish (*Procambarus horsti*), black rail (*Laterallus jamaicensis*), and four Great Basin springsnail species that depend on groundwater-fed springs in the Nevada desert for their

existence: the bifid duct pyrg (*Pyrgulopsis peculiaris*), flag pyrg (*Pyrgulopsis breviloba*), hardy pyrg (*Pyrgulopsis marcida*), and Lake Valley pyrg ((*Pyrgulopsis sublata*).

2. To obtain federal safeguards and habitat protections, the Center submitted petitions to list these seven species as endangered or threatened pursuant to the ESA. FWS issued "90-day findings" in response to the Center's petitions, which concluded that the petitions presented substantial information indicating that the listings of these seven species under the ESA "may be warranted." 16 U.S.C. § 1533(b)(3)(A); *see also* 76 Fed. Reg. 59,836 (Sept. 27, 2011) (Barbour's map turtle, Big Blue Springs cave crayfish, and black rail); 76 Fed. Reg. 56,608 (Sep. 13, 2011) (bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg). To date, however, FWS has failed to make the mandatory 12-month findings as to whether the listing of the species is actually warranted. 16 U.S.C. § 1533(b)(3)(B). Defendants are therefore in violation of the ESA.

3. Thus, by this action the Center seeks declaratory and injunctive relief to enforce the ESA's mandatory deadline for Defendants to make 12-month findings in response to the Center's petitions to list the Barbour's map turtle, Big Blue Springs cave crayfish, black rail, bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg, and to compel Defendants to determine whether listing these species as endangered or threatened is warranted. 16 U.S.C. § 1533(b)(3)(B).

JURISDICTION

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

5. 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).

6. 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 a letter to Defendants dated May 22, 2012. Defendants have not responded to the notice of intent to sue nor have the Defendants remedied the alleged violations. Therefore, an actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

VENUE

7. Venue is proper in the United States District Court for the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because the Department of the Interior and FWS headquarters are found within this district, and a substantial part of the events giving rise to the Center's claim occurred in this district.

PARTIES

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States, including Arizona, New Mexico, California, Nevada, Oregon, Washington, Alaska, Minnesota, Vermont, Florida, Washington, and Washington, D.C. 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 nearly 39,000 members and more than 350,000 online supporters. The Center and its members are concerned with the conservation of imperiled species, including the Barbour's map turtle, Big Blue Springs cave crayfish, black rail, bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg, and with the effective implementation of the ESA.

9. The Center for Biological Diversity has members who have visited areas where Barbour's map turtles, Big Blue Springs cave crayfish, black rails, bifid duct pyrgs, flag pyrgs, hardy pyrgs, and Lake Valley pyrg are known to occur. The Center's members use these areas for observation of these species and other wildlife, research, nature photography, aesthetic enjoyment, recreational, educational, and other activities. The Center's members derive professional, aesthetic, spiritual, recreational, economic, and educational benefits from these species and their habitats. Those members have concrete plans to continue to travel to and recreate in areas where they can observe these species and will continue to maintain an interest in these species and their habitats in the future.

10. In addition to submitting petitions to list these seven species under the ESA, the Center and its members have participated in conservation efforts. For example, the Center has worked to protect the Barbour's map turtle from unsustainable collection by petitioning the states of Florida and Georgia in 2008 to ban commercial harvest of all native freshwater turtles, including the Barbour's map turtle, and filing a petition in 2011 to request protections under the Convention on International Trade in Endangered Species (CITES) for 20 species of native freshwater turtles, including the Barbour's map turtle. The Center has worked to protect habitat for the Big Blue Springs cave crayfish from recreational diving. The Center has a program dedicated to fighting climate change, one of the biggest, emerging threats for the black rail. The Center has also engaged in formal protests of proposed groundwater pumping and other projects in the Great Basin that would undermine the survival of the four springsnail species.

11. The Center's conservation efforts are prompted by the concern that Barbour's map turtle, Big Blue Springs cave crayfish, black rail, bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg are at serious risk of extinction. The Secretary's failure to comply with the

ESA's non-discretionary deadline for issuing 12-month findings on these species deprives these species of statutory protections that are vitally necessary to their survival and recovery. Until these species are protected under the ESA as endangered or threatened species, the Center's interest in their conservation and recovery is impaired. Therefore, the Center's members and staff are injured by the Secretary's failure to make a timely determination as to whether listing these species is warranted, as well as by the ongoing harm to the species and their habitats in the absence of such protections. The injuries described above are actual, concrete injuries presently suffered by the Center and its members and they will continue to occur unless this Court grants relief. These injuries are directly caused by Defendants' inaction. The relief sought herein – an order compelling listing decisions for these species – would redress these injuries. The Center and its members have no adequate remedy at law.

12. Defendant KEN SALAZAR is the Secretary of the Interior and is the federal official in whom the ESA vests final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA, including listing and critical habitat decisions. Secretary Salazar is sued in his official capacity.

13. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for most terrestrial species as well as ensuring prompt compliance with the ESA's mandatory listing deadlines.

LEGAL BACKGROUND

14. The ESA is a comprehensive federal statute declaring that endangered and threatened species are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). Accordingly, the purpose of the

ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species ... ." 16 U.S.C. § 1531(b).

15. To this end, ESA section 4 requires that the Secretary protect imperiled species by listing them as either "threatened" or "endangered." *Id.* § 1533(a).

16. The ESA's conservation measures apply only after the Secretary lists a species as threatened or endangered. For example, section 7 of the ESA requires all federal agencies to ensure 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. *Id.* § 1536(a)(2). Section 9 of the ESA prohibits, among other things, "any person" from intentionally taking listed species or incidentally taking listed species without a lawful authorization from the Secretary. *Id.* §§ 1538(a)(1)(B) and 1539. Concurrently with listing, the Secretary must designate the species' critical habitat, which includes areas that are essential to the conservation of the species. *Id.* §§ 1532(5)(A) and 1533(a)(3)(A). Other provisions of the ESA require the Secretary to "develop and implement" recovery plans for listed species, *id.* § 1533(f), authorize the Secretary to acquire land for the protection of listed species, *id.* § 1534, and make federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species, *id.* § 1535(d).

17. To ensure the timely protection of species at risk of extinction, Congress set forth a detailed process whereby citizens may petition the Secretary to list a species as endangered or threatened. The process includes mandatory, non-discretionary deadlines that the Secretary must meet so that species in need of protection receive the ESA's substantive protections in a timely fashion. The three required findings, described below, are the 90-day finding, the 12-month

finding, and the final listing determination. The Secretary has delegated responsibility for making these findings to FWS.

18. Upon receipt of a listing petition, FWS must "to the maximum extent practicable, within 90-days" make an initial finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." *Id.* § 1533(b)(3)(A). If FWS finds that the petition does not present substantial information indicating that listing may be warranted, the petition is rejected and the process ends.

19. If, on the other hand, FWS determines that a petition does present substantial information indicating that listing may be warranted, the agency must then conduct a full scientific review of the species' status. *Id.* § 1533(b)(3)(A). 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 circumstances are present. *Id.* § 1533(b)(3)(B).

20. 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 the 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 to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i) and 1533(b)(6)(B)(i).

21. It is critical that FWS follow scrupulously the ESA's listing procedures and

deadlines if species are to be protected in a timely manner, because the ESA does not protect a species facing extinction until it is formally listed as endangered or threatened. Defendants have, as a regular course of business, ignored statutory procedures and missed statutory listing deadlines, leading to extensive litigation to correct these deficiencies.

22. On July 12, 2011, the Center and Defendants entered into a comprehensive stipulated settlement agreement that defines Defendants' responsibilities regarding future ESA statutory deadline litigation between these parties. *In Re Endangered Species Act Section 4 Deadline Litigation*, MDL No. 10-377, Docket No. 42-1 (D.D.C. July 12, 2011). The instant complaint is a "deadline suit" as defined in the settlement. *Id.* § A.14.

23. Under the settlement, the Center may file deadline suits addressing up to 10 species, and to obtain remedies from up to three deadline suits, in each fiscal year from 2012 through 2016. *Id.* § B.10.d. If the Center files suits addressing more than 10 species, or obtains remedies from more than three suits in one of these fiscal years, negotiated deadlines that must be met by Defendants may be pushed back to 2016. *Id.* Under the terms of the settlement, a "remedy" means "a stipulated settlement agreement or judicially enforceable order requiring the [FWS] to make any finding, listing determination, or critical habitat determination for a species." *Id.*

24. As of the date of this filing, during fiscal year 2012, the Center has filed three other deadline suits before this Court, and has not yet received any remedy under any such suit, as defined by the settlement.

FACTUAL BACKGROUND

A. The Barbour's Map Turtle

25. Turtles within the genus *Graptemys* are given the name "map turtles" due to the map-like markings on their shells.

26. The Barbour's map turtle is one of the rarest map turtles, found only in the Apalachicola River system and nearby systems of Florida, Georgia, and Alabama in the southeastern United States. It is found in wide streams with swift currents and abundant downed trees, often in areas exposed to limestone.

27. Many of the 20 remaining populations of the turtle are experiencing substantial declines from habitat loss and degradation. Water pollution caused by toxic industrial discharges is causing extensive deformities and shell ulcerations, and widespread mortality of the mollusks that the turtles eat. In addition, this beautiful turtle – with its spiked shell and intricate pattern of yellow markings – suffers from overcollection for the pet trade, as well as for meat.

28. Based on these threats and the inadequacy of existing regulatory mechanisms, the Center submitted a petition on April 20, 2010 to list the Barbour's map turtle as an endangered or threatened species.

29. On September 27, 2011, FWS issued a 90-day finding on the Barbour's map turtle. This finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the Barbour's map turtle may be warranted.

30. To date, more than two years after receiving the Center's petition, FWS has failed to issue the required 12-month finding as to whether listing the Barbour's map turtle is warranted.

B. <u>The Big Blue Springs Cave Crayfish</u>

31. The Big Blue Springs Cave crayfish is endemic to northern Florida's Jefferson, Leon, and Wakulla counties, with no more than five known occurrences. It has been seen in

aquatic caves at the bottom of limestone springs in the twilight zone between light and dark, both at the boil area of springs as well as in caves at water depths of 70-80 feet.

32. The Big Blue Springs Cave crayfish is adapted to fast-flowing water springs where it is inactive during the day, and at night attacks gastropods (snails and slugs), its only known food source. As a result of these evolutionary adaptations, it is very sensitive to changes in water quality and quantity, and is considered a "Species of Greatest Conservation Need" by the Florida Fish and Wildlife Conservation Commission, and "endangered" by the American Fisheries Society and International Union for Conservation of Nature and Natural Resources.

33. Based on its limited range and threats to Florida's freshwater springs system, the Center submitted a petition to FWS on April 20, 2010 to list the crayfish as an endangered or threatened species under the ESA.

34. On September 26, 2011, FWS issued a 90-day finding on the crayfish. This finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the crayfish may be warranted.

35. To date, more than two years after receiving the Center's petition, FWS has failed to issue the required 12-month finding as to whether listing the crayfish is warranted.

C. <u>The Black Rail</u>

36. The black rail is North America's smallest rail, a family of birds, and is a marsh resident of the upper Gulf of Mexico and Atlantic Ocean coasts that winters in southern Florida. Black rails nest on the ground in salt and freshwater marshes, wet meadows, and flooded grassy vegetation.

37. Due to many threats, it is estimated that the black rail has already declined by 75 percent. Habitat degradation and fragmentation from pollution and land use continue to threaten

the black rail. Sea level rise from climate change, an emerging threat, increases storm surge and intensity, and threatens the survival of the black rail, as its low elevation habitat will be among the first to be lost to rising sea levels. It is considered a "Species of Greatest Conservation Need" by the Florida Fish and Wildlife Conservation Commission, and "near threatened" by the International Union for Conservation of Nature and Natural Resources.

38. Based on extensive habitat loss and degradation, the Center submitted a petition to FWS on April 20, 2010 to list the black rail as an endangered or threatened species under the ESA.

39. On September 26, 2011, FWS issued a 90-day finding on the black rail. This finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the black rail may be warranted.

40. To date, more than two years after receiving the Center's petition, FWS has failed to issue the required 12-month finding as to whether listing the black rail is warranted.

D. <u>The Four Springsnails</u>

41. The bifid duct pyrg is a light tan, medium-sized springsnail found at only seven or eight sites in Utah and Nevada. All of the bifid duct pyrg's known inhabited sites occur in a narrow band of elevation between 6150 and 7470 feet above sea level. The Bureau of Land Management includes the bifid duct pyrg in its Special Status Species Program. The State of Utah has named it a Wildlife Species of Concern.

42. The flag pyrg is a small, light brown snail found at only two sites in Nevada. This tiny snail is only 1.2 to 2.2 mm in height. It is included on the Nevada Natural Heritage Program At-Risk Tracking List. Livestock are known to exist at one of only two sites where the flag pyrg survives.

43. The hardy pyrg is a small to medium-sized, tan snail found in only seven springs in two valleys in Nevada. It is included on the Nevada Natural Heritage Program At-Risk Tracking List. At least one of the springs where the hardy pyrg survives has a known diversion leading to a piped irrigation system, while another spring has been highly disturbed by cattle.

44. The Lake Valley pyrg is a medium-sized, tan snail found in a single spring in Lake Valley in Nevada. It is included on the Nevada Natural Heritage Program At-Risk Tracking List. The only spring where it survives has been disturbed in the past by both livestock grazing and water diversion.

45. Freshwater invertebrates like springsnails influence water chemistry, nutrient cycling, rates of productivity and decomposition, and are vital links in the food web. Springsnails in particular convert algae and microorganisms into an accessible food source for other invertebrates, fish, amphibians, turtles, birds, and small mammals. Great Basin spring systems tend to be hotspots of biodiversity, and by protecting springsnails, protection of spring water quality and quantity is guaranteed.

46. Each of these four springsnails is also threatened by proposed groundwater development projects that could, taken together, result in annual pumping of 57 billion gallons of water and damage up to 300 Great Basin springs. These projects could quickly drive the bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg to extinction. These four springsnails are also threatened by grazing, recreational activities, invasion of their small habitats by non-native species, and climate change. Springsnails are also vulnerable to extinction given their limited distribution and low ability to disperse.

47. Based on historic and ongoing threats to these springsnails and on the inadequacy of existing regulatory mechanisms, the Center, the Freshwater Mollusk Conservation Society,

and two independent scientists submitted a petition to FWS on February 17, 2009 to list 42 Great Basin springsnail species, including the bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg, as endangered or threatened species under the ESA.

48. On September 13, 2011, FWS issued a positive 90-day finding on 32 Great Basin springsnails, including the bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg. This finding concluded that the petition presented substantial scientific or commercial information indicating that listing these four springsnails under the ESA may be warranted.

49. To date, more than three years after receiving the Center's petition, FWS has failed to issue the required 12-month finding as to whether listing these four springsnail species is warranted.

FIRST CLAIM FOR RELIEF
Violation of the ESA: Failure to Make a Timely 12-Month Finding
for the Barbour's Map Turtle

50. Plaintiff hereby incorporates all preceding paragraphs.

51. FWS's failure to make a timely 12-month finding on the Center's petition to list the Barbour's map turtle as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld" within the meaning of the APA. 5 U.S.C. § 706(1).

SECOND CLAIM FOR RELIEF
Violation of the ESA: Failure to Make a Timely 12-Month Finding
for the Big Blue Springs Crayfish

52. Plaintiff hereby incorporates all preceding paragraphs.

53. FWS's failure to make a timely 12-month finding on the Center's petition to list the Big Blue Springs crayfish as an endangered or threatened species violates the ESA, 16

U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld" within the meaning of the APA. 5 U.S.C. § 706(1).

THIRD CLAIM FOR RELIEF
Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Black Rail

54. Plaintiff hereby incorporates all preceding paragraphs.

55. FWS's failure to make a timely 12-month finding on the Center's petition to list the black rail as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld" within the meaning of the APA. 5 U.S.C. § 706(1).

FOURTH CLAIM FOR RELIEF
Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Bifid Duct Pyrg

56. Plaintiff hereby incorporates all preceding paragraphs.

57. FWS's failure to make a timely 12-month finding on the Center's petition to list the bifid duct pyrg as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld" within the meaning of the APA. 5 U.S.C. § 706(1).

FIFTH CLAIM FOR RELIEF
Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Flag Pyrg

58. Plaintiff hereby incorporates all preceding paragraphs.

59. FWS's failure to make a timely 12-month finding on the Center's petition to list the flag pyrg as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld" within the meaning of the APA. 5 U.S.C. § 706(1).

SIXTH CLAIM FOR RELIEF
Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Hardy Pyrg

60. Plaintiff hereby incorporates all preceding paragraphs.

61. FWS's failure to make a timely 12-month finding on the Center's petition to list the hardy pyrg as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld" within the meaning of the APA. 5 U.S.C. § 706(1).

SEVENTH CLAIM FOR RELIEF
Violation of the ESA: Failure to Make a Timely 12-Month Finding for the Lake Valley Pyrg

62. Plaintiff hereby incorporates all preceding paragraphs.

63. FWS's failure to make a timely 12-month finding on the Center's petition to list the Lake Valley pyrg as an endangered or threatened species violates the ESA, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld" within the meaning of the APA. 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

Plaintiff respectfully requests that the Court enter Judgment for Plaintiff providing the following relief:

A. Declare that Defendants violated the ESA and APA by failing to issue a timely 12-month finding as to whether listing the Barbour's map turtle, Big Blue Springs cave crayfish, black rail, bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg is warranted;

B. Order Defendants to issue, by reasonable dates certain, findings as to whether listing the Barbour's map turtle, Big Blue Springs cave crayfish, black rail, bifid duct pyrg, flag pyrg, hardy pyrg, and Lake Valley pyrg is warranted, 16 U.S.C. § 1533(b)(3)(B);

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

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

Dated: September 13, 2012

Respectfully submitted,

Amy R. Atwood, DC Bar No. 470258
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
Telephone: (503) 283-5474
Facsimile: (503) 283-5528
Email: atwood@biologicaldiversity.org

Attorney for Plaintiff