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10 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
11 SACRAMENTO DIVISION

12 CENTER FOR BIOLOGICAL DIVERSITY,) Case No.:
13 Plaintiff,)
14 vs.) COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
15)
16 DIRK KEMPTHORNE, in his official capacity as)
Secretary of the Interior; H. DALE HALL, in his)
17 official capacity as Director, United States Fish and)
Wildlife Service; and UNITED STATES FISH)
18 AND WILDLIFE SERVICE, an agency of the)
United States Department of the Interior,)
19 Defendants.)

1 **INTRODUCTION**

2 1. This lawsuit concerns the American pika, a remarkable little mammal related to
3 rabbits and hares that is at serious risk of extinction due to global warming. Plaintiff Center for
4 Biological Diversity (the “Center”) challenges the Secretary of Interior’s failure to respond to a
5 petition to protect the pika under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544.

6 2. Scientists have dubbed pikas “the global warming canaries of western North
7 America.” Thick fur and a high metabolism allow pikas to remain active year-round in the icy
8 rubble atop the west’s highest mountains, but these same attributes leave pikas extremely vulnerable
9 to heat stroke at temperatures near or above 80 degrees Fahrenheit. Human-induced global warming
10 has already rendered uninhabitable large tracts of the pika’s historic range, and if current trends
11 continue the species may well become extinct in the foreseeable future.

12 3. On October 1, 2007, the Center petitioned the Secretary of Interior to add the
13 American pika to the list of “threatened” or “endangered” species subject to federal protection under
14 the ESA. To the maximum extent practicable, the Secretary was required to determine within 90
15 days whether the Center’s petition presents substantial information indicating that listing the pika
16 may be warranted. 16 U.S.C. § 1533(b)(3)(A). Over seven months have passed since that deadline,
17 but the Secretary has yet to respond to the Center’s petition.

18 4. The Center therefore brings this lawsuit to enforce the ESA’s mandatory listing
19 deadlines and compel the federal defendants (collectively, the “Secretary”) to determine forthwith
20 whether listing the American pika as threatened or endangered may be warranted.

21 **JURISDICTION AND VENUE**

22 5. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g)
23 (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5
24 U.S.C. § 702 (Administrative Procedure Act), and 28 U.S.C. § 1361 (mandamus). The relief sought
25 is authorized by 28 U.S.C. § 2201 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief).

26 6. As required by 16 U.S.C. § 1540(g), the Center provided the Secretary with written
27 notice of the violations alleged herein more than 60 days before commencing this action. *See*
28 January 3, 2008 letter to Dirk Kempthorne *et al.* from Matthew Vespa, attached hereto. Despite

1 such notice, the Secretary has failed to remedy his violations of the ESA.

2 7. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C.
3 § 1540(g)(3)(A).

4 8. Assignment to the Sacramento Division of this judicial district is proper by virtue of
5 Local Rule 3-120(b).

6 **PARTIES**

7 9. Plaintiff Center for Biological Diversity is a non-profit 501(c)(3) corporation with
8 offices in San Francisco, Joshua Tree, and San Diego, California; Phoenix and Tucson, Arizona;
9 Pinos Altos, New Mexico; Portland, Oregon; and Washington, D.C. The Center works through
10 science, law and policy to secure a future for all species hovering on the brink of extinction. The
11 Center is actively involved in species and habitat protection throughout the western United States,
12 including protection of the American pika. The Center has over 40,000 members throughout the
13 United States and the world. The Center brings this action on its own behalf and on behalf of its
14 adversely affected members and staff.

15 10. The Center's members and staff include numerous individuals with a broad range of
16 scientific, professional, and educational to recreational, aesthetic, moral and spiritual interests in the
17 American pika. In addition, the Center's members and staff enjoy, on an on-going basis, the
18 biological, scientific, research, education, conservation, recreational and aesthetic values of the
19 American pika's alpine habitat. The Center's use and enjoyment of the American pika and its
20 habitat are entirely dependent on the continued existence of healthy, sustainable pika populations in
21 the wild.

22 11. Concerned that the American pika is at serious risk of extinction due to global
23 warming, the Center authored the petition at issue herein to list the species as threatened or
24 endangered under the ESA. In the absence of prompt protection under the ESA, the pika is more
25 likely to continue to decline and become extinct. The Center's members and staff are therefore
26 injured by the Secretary's failure to prepare a timely 90-day finding in response to the Center's
27 petition. This injury is actual and concrete, and it is caused by the Secretary's failure to comply with
28 the ESA. The relief requested will fully redress this injury.

1 of Arizona, and the Canadian provinces of British Columbia and Alberta. Adults weigh less than a
2 half pound, but their dense fur retains heat efficiently, and pikas remain active year-round without
3 hibernating. They spend the short alpine summer collecting and caching the vegetation that will
4 sustain them in their burrows during the long winters that follow.

5 19. Pikas are unique among mammals in that they are extremely vulnerable to
6 hyperthermia – or heat stroke – at relatively low temperatures. The same thick fur that allows pikas
7 to endure the harsh alpine winter inhibits evaporative cooling and limits the species’ ability to
8 dissipate heat. Studies have shown that pikas die when ambient air temperatures reach just 77.9 to
9 84.9° Fahrenheit unless they seek shelter in their burrows. Thus, at the lower end of their high-
10 elevation range, pikas can remain active above-ground only during the morning and evening, which
11 restricts significantly their ability to forage and disperse.

12 20. The pika’s alpine habitat in western North America is warming even more rapidly
13 than many other locations around the world. Western temperatures have increased already by 2 to 5°
14 Fahrenheit during the past century, exceeding the average global temperature rise by more than
15 double in many places. As a result, snowpack has decreased significantly in most high elevation
16 regions, including the southern Cascades and Sierra Nevada. And conditions are expected to
17 worsen. In the west, average temperatures are projected to rise by 2.9 to 10.4° Fahrenheit during the
18 winter and by 4.1 to 10.3° Fahrenheit during the summer. Snowpack will continue to decrease,
19 because autumn snowfall will be delayed and winter precipitation will increasingly come as rain
20 instead of snow. On average, the snowline will rise by approximately 500 feet for each 1.8°
21 Fahrenheit increase in temperature.

22 21. While certain animals may be able to survive some degree of global warming by
23 moving north or upslope with the changing climate, most pika populations are already effectively
24 marooned atop the west’s highest mountains and have nowhere to go. Even if society manages to
25 reduce future greenhouse gas emissions significantly, suitable habitat for the American pika is
26 projected to be virtually eliminated by the end of this century.

27 22. Global warming has already extracted a heavy toll on American pikas. A recent
28 study resurveyed 25 historic pika populations in the Great Basin and found that seven have

1 disappeared within the last few decades. The study concluded that “warmer temperatures seem
2 likely to be contributing to apparent losses that have occurred at a pace significantly more rapid than
3 suggested by paleontological records.”

4 23. In California, researchers recently resurveyed several locations in Yosemite National
5 Park where pika were found between 1911 and 1920. The researchers were unable to find pika at
6 the lowest elevation historically occupied site they resurveyed. Subsequent surveys indicate that this
7 Yosemite pika population has retreated 500 feet upslope.

8 **The Endangered Species Act Listing Process**

9 24. Congress enacted the ESA “to provide a program for the conservation of . . .
10 endangered species and threatened species” and “a means whereby the ecosystems upon which
11 endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). The
12 statute defines a species as “endangered” if it is “in danger of extinction throughout all or a
13 significant portion of its range” and “threatened” if it is “likely to become an endangered species
14 within the foreseeable future.” 16 U.S.C. § 1532(6), (20).

15 25. Once a species is listed by the Secretary of Interior as threatened or endangered, an
16 array of statutory protections applies. For example, Section 7 of the Act requires all federal agencies
17 to “insure” that their actions neither “jeopardize the continued existence” of any listed species nor
18 “result in the destruction or adverse modification” of its critical habitat. 16 U.S.C. § 1536(a)(2).
19 Section 9 prohibits, among other things, “any person” from intentionally “taking” listed species or
20 “incidentally” taking listed species without a permit from the Service. 16 U.S.C. §§ 1538(a)(1)(B),
21 1539. Other provisions of the Act require the Secretary to designate “critical habitat” for listed
22 species, 16 U.S.C. § 1533(a)(3), require the Secretary to “develop and implement” recovery plans
23 for listed species, 16 U.S.C. § 1533(f), authorize the Secretary to acquire land for the protection of
24 listed species, 16 U.S.C. § 1534, and make federal funds available to states to assist in their efforts to
25 preserve and protect threatened and endangered species, 16 U.S.C. § 1535(d).

26 26. To ensure the timely protection of imperiled species, Congress set forth a detailed
27 process whereby citizens may petition the Secretary to list a species as endangered or threatened.
28 The process includes mandatory, non-discretionary deadlines that the Secretary must meet, so that

1 species in need of protection do not languish in administrative purgatory. The three required
2 findings, described below, are the 90-day finding, the 12-month finding, and the final listing
3 determination.

4 27. Upon receipt of a listing petition, the Secretary must – “to the maximum extent
5 practicable, within 90 days” – make an initial finding as to whether the petition “presents substantial
6 scientific or commercial information indicating that the petitioned action may be warranted.” 16
7 U.S.C § 1533(b)(3)(A). If the Secretary finds that the petition *does not* present substantial
8 information indicating that listing may be warranted, the petition is rejected and the process ends.

9 28. If, on the other hand, the Secretary determines that a petition *does* present substantial
10 information indicating that listing may be warranted, the Secretary must then conduct a full scientific
11 review of the species’ status. 16 U.S.C. § 1533(b)(3)(A). Upon completion of this status review,
12 and within 12 months from the date that he received the petition, the Secretary must make one of
13 three findings: (1) listing is not warranted; (2) listing is warranted; or (3) listing is warranted, but
14 presently precluded by other pending proposals for listing species, provided certain circumstances
15 are present. 16 U.S.C. § 1533(b)(3)(B). The 12-month deadline for making this finding is
16 mandatory. There is no mechanism by which the Secretary can extend the deadline for making his
17 12-month finding.

18 29. The Ninth Circuit has held that the ESA’s mandatory deadline for making a 12-month
19 finding as to whether listing a species *is* warranted limits the Secretary’s discretion to delay by more
20 than 12 months his initial, 90-day finding as to whether listing *may* be warranted. *See Biodiversity*
21 *Legal Foundation v. Badgley*, 309 F.3d 1166, 1176 (9th Cir. 2002) (holding that both the 90-day and
22 12-month findings must be made within one year of receipt of listing petition).

23 30. If the Secretary’s 12-month finding concludes that listing is warranted, the Secretary
24 must then publish in the Federal Register for public comment a proposed rule listing the species as
25 threatened or endangered. 16 U.S.C. § 1533(b)(5). Within one year of the publication of the
26 proposed rule, the ESA requires the Secretary to render his final determination on the proposal. 16
27 U.S.C. § 1533(b)(6)(A). At such time, the Secretary must either list the species, withdraw the
28 proposed listing rule or, if there is substantial disagreement about scientific data, delay a final

1 determination for up to six months to solicit more scientific information. 16 U.S.C.

2 §§ 1533(b)(6)(A)(i)(III), 1533(b)(6)(B)(i).

3 31. It is critical that the Secretary follow scrupulously the ESA's listing procedures and
4 deadlines if species are to be protected in a timely manner, because the ESA does not protect a
5 species until it is formally listed as either threatened or endangered.

6 **Procedural History**

7 32. On October 2, 2007, the Secretary received from the Center a petition dated October
8 1, 2007 to protect all 36 subspecies of American pika under the ESA. The Center requested
9 specifically that the Secretary consider listing the five pika subspecies that inhabit the Great Basin as
10 well as two additional subspecies as endangered, and that he consider listing the remaining
11 subspecies as threatened.

12 33. The Center's petition presented abundant scientific evidence that pikas, by virtue of
13 their unique physiology and isolated habitat, are especially sensitive to even slight increases in
14 average temperatures. The petition further documented that average temperatures over the last 100
15 years have increased significantly as a result of global warming and are projected to continue to
16 increase. Finally, the petition cited studies documenting that pika populations are disappearing and
17 indicating that global warming is the likely cause.

18 34. By letter dated January 3, 2008, the Center notified the Secretary that he had violated
19 Section 4(b)(3)(A) of the ESA, 15 U.S.C. § 1533(b)(3)(A), by failing to determine within 90 days
20 whether the Center's petition presents substantial information indicating that listing the American
21 pika may be warranted. The Center advised the Secretary that it intended to file suit to enforce the
22 ESA's mandatory listing deadlines.

23 35. By letter dated January 29, 2008, the Fish and Wildlife Service informed the Center
24 that it had received the Center's notice of intent to sue. The Service stated that it did not have
25 sufficient funds to prepare a 90-day finding for the American pika petition in Fiscal Year 2008 and
26 had only "a tentative budget allocation" to complete a 90-day finding in Fiscal Year 2009.

27 36. The Service has yet to issue a 90-day finding for the Center's petition to list the
28 American pika as threatened or endangered under the ESA.

1 **FIRST CAUSE OF ACTION**

2 **(Failure to Make a Timely 90-Day Finding)**

3 37. The Center re-alleges, as if fully set forth herein, each and every allegation contained
4 in the preceding paragraphs.

5 38. The Secretary's failure to make a timely 90-day finding on the Center's petition to list
6 the American pika as threatened or endangered violates the ESA. 16 U.S.C. § 1533(b)(3)(A). The
7 Secretary's failure to perform his mandatory duty also constitutes agency action "unlawfully
8 withheld or unreasonably delayed" within the meaning of the Administrative Procedure Act
9 ("APA"), 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to comply
10 with the deadline for making this finding is arbitrary and capricious, an abuse of discretion, not in
11 accordance with law, and a failure to observe proper procedure under the APA. 5 U.S.C. § 706(2).

12 **REQUEST FOR RELIEF**

13 Wherefore, the Center requests that this Court:

14 A. Declare that the Secretary has violated the ESA and/or the APA by failing to issue a
15 timely 90-day finding in response to the Center's petition to list the American pika as threatened or
16 endangered;

17 B. Order the Secretary to issue a determination forthwith as to whether the Center's
18 petition presents substantial information indicating that listing the American pika may be warranted;

19 C. Award the Center its costs of litigation, including reasonable attorneys fees; and

20 D. Grant the Center such other relief as the Court deems just and proper.

21 Respectfully submitted,

22 Dated: August 19, 2008

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