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7 **UNITED STATES DISTRICT COURT**
DISTRICT OF ARIZONA
8 **TUCSON DIVISION**

9 _____)
Center for Biological Diversity,) Case No:
10)
Plaintiff,)
11) **COMPLAINT FOR DECLARATORY**
vs.) **AND INJUNCTIVE RELIEF**
12)
U.S. Fish and Wildlife Service,)
13)
Defendants.)
14)
15)
16 _____)

17 **INTRODUCTION**

18
19 1. In this civil action for declaratory and injunctive relief, the Center for Biological
20 Diversity (“Center”) challenges the U.S. Fish and Wildlife Service’s (“Service” or
21 “FWS”) failure to timely designate critical habitat for the northern Mexican garter snake
22 (*Thamnophis eques megalops*) and the narrow-headed garter snake (*Thamnophis*

1 *rufipunctatus*) (hereafter, collectively “garter snakes”), as required by the Endangered
2 Species Act (ESA), 16 U.S.C. §§ 1531-1544. The garter snakes only live in portions of
3 Arizona and New Mexico, and they are highly imperiled due to habitat modification and
4 destruction, water pollution, and the introduction of nonnative species.

5 2. Specifically, the Service failed to designate “critical habitat” for the garter snakes
6 concurrently with its decision to list these species as threatened in 2014. *Id.* § 1533(a)(3),
7 (b)(6)(A)(ii), (b)(6)(C). To date, the Service has not finalized a critical habitat
8 designation for the garter snakes.

9 3. Critical habitat provides important protections for threatened and endangered
10 species beyond that provided by listing alone. Pursuant to section 7(a)(2), federal
11 agencies must ensure through consultation with the Service that any action they
12 authorize, fund, or carry out will not “jeopardize the continued existence of any [listed]
13 species.” 16 U.S.C. § 1536(a)(2). For species with critical habitat, each federal agency
14 must additionally ensure that its actions will not “result in the destruction or adverse
15 modification” of the critical habitat. *Id.* Species with critical habitat designations are
16 twice as likely to be moving toward recovery as species without designated critical
17 habitat.

18 4. The Center brings this action against the Service to (1) secure declaratory relief
19 that the agency is in violation of the ESA for failing to timely designate critical habitat
20 for the garter snakes and (2) enjoin the agency to issue a final rule making such
21 designations by a date-certain.

22

JURISDICTION

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

6 6. The Court may grant the requested relief under the ESA, 16 U.S.C. §1540(g); the
7 APA, 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 2201 and 2002 (declaratory and injunctive
8 relief).

9 7. By letter dated August 21, 2018, the Center provided 60 days’ notice of this suit
10 pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C). Defendants
11 have not remedied the violations to date, thus an actual controversy exists between the
12 parties within the meaning of 28 U.S.C. § 2201.

13 8. Venue is proper in the United State District Court for the District of Arizona
14 pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e). A substantial part of the
15 property that is the subject of the Center’s claims is situated in this District. The Center
16 resides in this judicial district and in Pima County, which is in the Tucson Division.

PARTIES

17
18 9. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY is a non-profit
19 organization that is dedicated to the protection of native species and their habitats through
20 science, policy, and environmental law. The Center is incorporated in California and
21 headquartered in Tucson, Arizona, with offices in Arizona, California, Colorado, the
22 District of Columbia, Florida, Hawai’i, Idaho, Minnesota, Nevada, New Mexico, New

1 York, North Carolina, Oregon, Washington, and Mexico. The Center has more than one
2 million members and online activists.

3 10. The Center has a long history of environmental advocacy for the northern Mexican
4 garter snake and narrow-headed garter snake as further detailed in the Factual
5 Background section at paragraphs 30-33.

6 11. The Center's members include individuals who regularly visit natural areas that
7 are occupied by the northern Mexican garter snake and the narrow-headed garter snake,
8 and seek to observe or study the garter snakes in their natural habitat. The Center's
9 members and staff derive educational, scientific, recreational, spiritual, professional, and
10 aesthetic benefit from these activities, and intend to continue to use and enjoy these areas
11 in the future. Defendants' failure to designate critical habitat has injured and continues to
12 harm the Center and its members' interests in these species' conservation. This harm
13 would be remedied by a court order directing the Service to issue a final rule designating
14 critical habitat for these species by a date-certain.

15 12. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency
16 within the Department of the Interior that is charged with implementing the ESA for the
17 northern Mexican garter snake and the narrow-headed garter snake, and with promptly
18 complying with the ESA's mandatory critical habitat designation deadlines.

19 **LEGAL BACKGROUND**

20 **A. The Endangered Species Act**

21 13. The Endangered Species Act, 16 U.S.C. §§ 1531-1544, is "the most
22 comprehensive legislation for the preservation of endangered species ever enacted by any

1 nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978). Congress enacted the ESA, in part, to
2 provide a “means whereby the ecosystems upon which endangered species and
3 threatened species depend may be conserved . . . [and] a program for the conservation of
4 such endangered species and threatened species” *Id.* § 1531(b).

5 14. To that end, ESA section 4 requires that the Secretary protect such species by
6 listing them as either “threatened” or “endangered,” and by designating “critical habitat”
7 for each listed threatened or endangered species at the time the species is listed. *Id.* §
8 1533.

9 15. The ESA requires the Secretary to protect imperiled species by listing them as
10 either “endangered” or “threatened.” *Id.* § 1533(a)(1). A “species” includes “any
11 subspecies of fish or wildlife or plants, and any distinct population segment of any
12 species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). The
13 Secretary has delegated its administration of the ESA to FWS. 50 C.F.R. § 402.01(b).

14 16. FWS is required to designate “critical habitat” concurrently with listing a species
15 as threatened or endangered with very limited exceptions. *Id.* § 1533(a)(3)(A).

16 17. Critical habitat includes the specific areas occupied by the species with “physical
17 or biological features (I) essential to the conservation of the species and (II) which may
18 require special management considerations or protection.” *Id.* § 1532(5)(A). It also
19 includes specific areas unoccupied by the species at the time of listing “upon a
20 determination by the Secretary that such areas are essential for the conservation of the
21 species.” *Id.* In turn, “conservation” means “the use of all methods and procedures which
22

1 are necessary to bring endangered species or threatened species to the point at which the
2 measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3).

3 18. Protecting a species’ critical habitat is crucial for the protection and recovery of
4 many listed species, particularly those that have become endangered or threatened due to
5 historic and ongoing habitat loss and/or degradation. When critical habitat is designated,
6 federal agencies must ensure that their actions do not “result in the destruction or adverse
7 modification” of a species’ critical habitat. *Id.* § 1536(a)(2).

8 19. Congress prioritized designating critical habitat to ensure species at risk of
9 extinction receive these essential protections in a timely manner. *Id.* § 1533(a)(3), (b)(6);
10 *see also id.* § 1531(b) (statutory directive to “provide a means whereby the ecosystems
11 upon which endangered . . . and threatened species depend may be conserved”). FWS is
12 required “to the maximum extent prudent and determinable,” to designate critical habitat
13 for a species “concurrently with making a determination” that it is endangered or
14 threatened,” *id.* § 1533(a)(3)(A)(i), and within one year of issuing a rule proposing
15 critical habitat. *Id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii).

16 20. The ESA provides only two exceptions to FWS’s duty to designate critical habitat
17 concurrently with listing: (1) where critical habitat is not “determinable,” or (2) where it
18 would not be “prudent” to designate critical habitat. *Id.* § 1533(a)(3).

19 21. If FWS determines that critical habitat is not “determinable” at the time of listing,
20 it must designate critical habitat within one year of the date of listing “based on such data
21 as may be available at that time.” *Id.* § 1533(b)(6)(C)(ii). Defendants have regularly
22

1 ignored these statutory procedures and have missed statutory deadlines for designation of
2 critical habitat, leading to litigation to correct these deficiencies.

3 22. Because the ESA does not safeguard a species' critical habitat until it is formally
4 designated, it is essential that FWS meticulously follow the ESA's procedures and
5 deadlines to ensure critical habitat is designated in a timely manner.

6 **B. Administrative Procedure Act**

7 23. The Administrative Procedure Act (APA) provides that “[a] person suffering
8 legal wrong because of agency action, or adversely affected or aggrieved by agency
9 action within the meaning of a relevant statute, it entitled to judicial review thereof.” 5
10 U.S.C. § 702.

11 24. The APA provides that a court shall “hold unlawful and set aside agency action,
12 findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion,
13 or otherwise not in accordance with law,” *id.* § 706(2)(A), or agency action that is
14 undertaken “without observance of procedure required by law.” *Id.* § 706(2)(D).

15 **FACTUAL BACKGROUND**

16 **A. The Northern Mexican Garter Snake**

17 26. The northern Mexican garter snake reaches a maximum length of approximately
18 44 inches and ranges in color from olive to olive-brown to olive-gray with three stripes
19 running the length of the body. It is considered to be a highly aquatic species, but uses
20 terrestrial habitat for hibernation, gestation, seeking mates, and dispersal. The northern
21 Mexican garter snake is a riparian obligate and occurs chiefly in streams, rivers, cienegas,
22 stock tanks, and spring sources that are often found within riparian forests. The northern

1 Mexican garter snake is an active predator whose diet consists mainly of native
2 amphibians and fishes.

3 27. The northern Mexican garter snake historically existed in every county and nearly
4 every sub basin within Arizona. Its historic range also included northern Mexico and
5 New Mexico, with a very limited distribution in the latter. Over the last 30 years, the
6 northern Mexican garter snake has suffered significant reductions in range and population
7 densities in the United States. The northern Mexican garter snake is gone or occurs at
8 very low densities in as much as 90 percent of its historic range. At the time of listing in
9 2014, only five viable populations of northern Mexican garter snakes remained. The
10 northern Mexican garter snake's viability is threatened by habitat modification and
11 destruction, the introduction of nonnative species, climate change, environmental
12 contaminants, and other anthropomorphic factors.

13 **B. Narrow-Headed Garter Snake**

14 28. The narrow-headed garter snake is widely considered to be one of the most aquatic
15 garter snakes in the U.S. It inhabits the Mogollon Rim in New Mexico and Arizona. The
16 narrow-headed garter snake is a tan or grey-brown small to medium sized snake with
17 brown, black, or reddish spots that fade near the snake's tail. Its eyes are set high on an
18 unusually elongated head. The narrow-headed garter snake is associated with clear, rocky
19 stream habitats, including pools and riffles, although it has also been observed using lake
20 shoreline habitat in New Mexico. Its diet consists almost exclusively of native fish.

21 29. The narrow-headed garter snake's population density and distribution is
22 significantly lower in areas where it was previously well-documented. At the time of

1 listing in 2014, only five viable populations of the narrow-headed garter snake remained.
2 The narrow-headed garter snake is threatened by the introduction of non-native species,
3 both as predators and competition for prey, and habitat degradation caused by dams,
4 livestock grazing and agricultural and urban sprawl. The aquatic nature of the narrow-
5 headed garter snake makes it vulnerable to the effects of climate change and drought.

6 **C. Protection Under the Endangered Species Act**

7 30. In 2003, the Center filed a petition with the Service to list the northern Mexican
8 garter snake as threatened or endangered under the ESA.

9 31. The Service initially determined that the listing was not warranted in 2006, but in
10 response to a lawsuit from the Center challenging the finding, the Service agreed to
11 conduct another status review in 2008. That status review resulted in a determination by
12 the Service that listing was warranted for the northern Mexican garter snake, but that its
13 listing was precluded by other listing priorities at that time.

14 32. The Service proposed the narrow-headed garter snake as a candidate species in
15 1991. In 2011, the Service announced the initiation of a status review for the narrow-
16 headed garter snake, a candidate species since 1991, and the Center submitted a status
17 report for this species, urging the Service to take action to protect it under the ESA.

18 33. On July 25, 2011, the Center and the Service reached a legal settlement agreement
19 requiring the agency to make overdue decisions on whether to add 757 species, including
20 the northern Mexican garter snake and narrow-headed garter snake, to the endangered list
21 by 2018.

22

1 34. Following that agreement, on July 10, 2013 the Service published a proposed rule
2 to list both the northern Mexican garter snake and the narrow-headed garter snake as
3 threatened under the ESA. Proposed Listing Rule, 78 Fed. Reg. 41500 (July 10, 2013).
4 The Service concurrently proposed the designation of 421,423 acres of critical habitat for
5 the northern Mexican garter snake and 210,189 acres of critical habitat for the narrow-
6 headed garter snake. Proposed Critical Habitat, 78 Fed. Reg. 41550, 41,559-61 (July 10,
7 2013).

8 35. On July 8, 2014 the Service published a final rule protecting the northern Mexican
9 garter snake and narrow-headed garter snake as threatened species under the ESA. In its
10 final listing rule, the Service explained that the most significant threat affecting both
11 species of garter snake across their range is predation from and competition with non-
12 native species, including several species of fish, bullfrogs, and crayfish. The Service also
13 identified “large-scale wildfires and land uses that divert, dry up or significantly pollute
14 aquatic habitat” as significant threats to both species. Final Listing Rule, 79 Fed. Reg.
15 38,678 (July 8, 2014).

16 36. In the 2014 final listing rule, the Service indicated its intent to finalize designation
17 of critical habitat for the northern Mexican garter snake and the narrow-headed garter
18 snake “in a separate rule in the future.” 79 Fed. Reg. at 38,678.

19 37. Under the proposed critical habitat rule, the Service described the physical and
20 biological features essential to the conservation of the northern Mexican garter snake as
21 including: (1) aquatic or riparian habitat (perennial or spatially intermittent streams,
22 lentic wetlands, shoreline habitat with adequate structural complexity, aquatic habitat that

1 supports native amphibian prey), (2) adequate terrestrial space adjacent to designated
2 stream systems, (3) a prey base of viable populations of native amphibian and fish
3 species, (4) an absence of nonnative fish species of the families Centrarchidae and
4 Ictaluridae, bullfrogs, and/or crayfish. Proposed Critical Habitat, 78 Fed. Reg. at 41,555.

5 38. Under the proposed critical habitat rule, the Service described the physical and
6 biological features essential to the conservation of the narrow-headed garter snake as
7 including: (1) stream habitat (perennial or spatially intermittent streams, a natural,
8 unregulated flow regime that allows for periodic flooding, shoreline habitat with adequate
9 structural complexity, aquatic habitat with no or minimal pollutants), (2) adequate
10 terrestrial space adjacent to designated stream systems, (3) a prey base of viable
11 populations of native fish species or soft-rayed, non-native fish species, (4) an absence of
12 nonnative fish species of the families Centrarchidae and Ictaluridae, bullfrogs, and/or
13 crayfish. *Id.*

14 39. The Service has not finalized the proposed rule for designation of critical habitat
15 for the northern Mexican garter snake and narrow-headed garter snake.

16 **FIRST CLAIM FOR RELIEF**

17 Violation of the ESA: Failure to Make a Timely Critical Habitat Designation for the 18 Northern Mexican Garter Snake

19 40. Plaintiff incorporates all preceding paragraphs by reference.

20 41. The ESA required FWS to designate critical habitat for the northern Mexican
21 garter snake concurrently with its decision to list the species, 16 U.S.C. §
22

1 1533(a)(3)(A)(i), (b)(6)(C), and within one year of proposing critical habitat. *Id.* §
2 1533(b)(6)(A)(ii).

3 42. On July 10, 2013, the Service issued a proposed rule to designate 421,423 acres of
4 critical habitat for the northern Mexican garter snake. 78 Fed. Reg. 41,550. The Service
5 has not issued a final critical habitat rule. The Service's failure to timely issue a final
6 critical habitat designation violates the ESA. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C).

7 43. The Service's violations are subject to judicial review under the ESA. *Id.* §
8 1540(c), (g)(1)(C).

9 **SECOND CLAIM FOR RELIEF**

10 Violation of the ESA: Failure to Make a Timely Critical Habitat Designation for the 11 Northern Mexican Garter Snake and the Narrow-headed garter snake

12 44. Plaintiff incorporates all preceding paragraphs by reference.

13 45. The ESA required FWS to designate critical habitat for the narrow-headed garter
14 snake concurrently with its decision to list the species, 16 U.S.C. § 1533(a)(3)(A)(i),
15 (b)(6)(C), and within one year of proposing critical habitat. *Id.* § 1533(b)(6)(A)(ii).

16 46. On July 10, 2013, the Service issued a proposed rule to designate 210,189 acres of
17 critical habitat for the narrow-headed garter snake. 78 Fed. Reg. 41,550. The Service has
18 not issued a final critical habitat rule. The Service's failure to timely issue a final critical
19 habitat designation violates the ESA. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C).

20 47. The Service's violations are subject to judicial review under the ESA. *Id.* §
21 1540(c), (g)(1)(C).

REQUEST FOR RELIEF

Wherefore, the Center respectfully requests that the Court:

1. Declare that Defendants violated the Endangered Species Act by failing to designate critical habitat for the northern Mexican garter snake;
2. Declare that Defendants violated the Endangered Species Act by failing to designate critical habitat for the narrow-headed garter snake;
3. Order the Service to designate critical habitat for the northern Mexican garter snake under the ESA by a date-certain, 16 U.S.C. § 1533(a)(3)(A);
4. Order the Service to designate critical habitat for the narrow-headed garter snake under the ESA by a date-certain, 16 U.S.C. § 1533(a)(3)(A);
5. Grant Plaintiff its reasonable attorneys’ fees and costs associated with this action, as provided by the Endangered Species Act, § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. §2412; and
6. Grant such other relief as the Court deems just and proper.

Dated: December 20, 2018

Respectfully submitted,

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