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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
Portland Division**

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE;
MARTHA WILLIAMS, in her official
capacity as Director of the U.S. Fish and
Wildlife Service; and DEB HAALAND,
in her official capacity as Secretary of the
U.S. Department of the Interior,

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) brings this case challenging the U.S. Fish and Wildlife Service’s (“Service”) failure to issue final rules on the petitions to list the Longsolid (*Fusconaia subrotunda*), Canoe Creek Clubshell (*Pleurobema athearni*), and marrón bacora (*Solanum conocarpum*) and failure to issue a 12-month finding on the petition to list the Siuslaw hairy-necked tiger beetle (*Cicindela hirticollis Sulawesi*’s) in violation of the Endangered Species Act’s (“ESA” or “Act”) nondiscretionary, congressionally mandated

deadlines. 16 U.S.C. § 1533(b)(3). The agency's failure delays crucial, lifesaving protections for these four species and increases their risk of extinction.

2. The Longsolid is a freshwater mussel that can live up to fifty years. It is threatened by habitat destruction and water pollution from agriculture, oil and gas drilling, pipeline construction, coal mining and coal-fired power plants, urbanization, and increased stream temperatures and storm events caused by climate change.

3. The Canoe Creek Clubshell is a freshwater mussel that reproduces by releasing larvae into packets that resemble fish prey; when the larvae are consumed by a fish, they attach onto the fish's gills and transform into tiny mussels, which then drop into the creek to begin their own life. The Canoe Creek Clubshell is threatened by habitat destruction and water pollution from agriculture, forestry, and development. Other threats include severe drought exacerbated by climate change.

4. Marrón bacora is a flowering shrub that can reach ten feet in height and is found on St. John in the U.S. Virgin Islands and Tortola in the British Virgin Islands. There are only a handful of populations with low numbers in each. It is threatened by development and climate change. St. John was devastated in 2017 by hurricanes Irma and Maria.

5. The Siuslaw hairy-necked tiger beetle was named after the Siuslaw people and the Siuslaw River of the Oregon coast. Adults are fast, fierce predators that run across sand in short bursts or short hopping flights to chase prey. They run so fast they need to stop after each burst to visually relocate prey. The beetle is threatened by habitat loss, off-road vehicles, climate change, coastal erosion, trampling by beachgoers, inbreeding, and invasive species.

6. Accordingly, the Center and other interested parties submitted petitions to the

Service to extend the substantive protections of the ESA by listing these species as “endangered” or “threatened.” Defendants’ failure to comply with their nondiscretionary duties under the ESA deprives these four species of the statutory protections that are necessary for their survival and recovery.

7. The Center brings this lawsuit for declaratory and injunctive relief, seeking an Order declaring that the Service is in violation of the ESA by failing to issue final rules on the petitions to list the Longsolid, the Canoe Creek clubshell, and marrón bacora, and by failing to make a required 12-month finding on the Center’s petition to list the Siuslaw hairy-necked tiger beetle, and directing the Service to publish final rules for the Longsolid, the Canoe Creek clubshell, and marrón bacora by a date certain and publish the overdue 12-month listing determination for Siuslaw hairy-necked tiger beetle by a date certain.

JURISDICTION

8. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c), (g) (ESA citizen suit provision) and 28 U.S.C. § 1331 (federal question). This Court has authority to issue declaratory and injunctive relief pursuant to the ESA, 16 U.S.C. § 1540(g); 28 U.S.C. §§ 2201-2202; and 5 U.S.C. § 706(2).

9. Plaintiff provided Defendants with 60-days’ notice of the ESA violation, as required by 16 U.S.C. § 1540(g)(2)(A), by a letter to the Service dated November 17, 2021 (received November 22, 2021). Defendants have not remedied the violations set out in the notices and an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because Defendants reside in this judicial district and a substantial part of the violations of law by Defendants occurred in this district.

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization that works through science, law, and policy to protect imperiled wildlife and their habitat. The Center is incorporated in California and headquartered in Tucson, Arizona, with offices throughout the United States, including in Portland, OR. The Center has more than 81,000 active members throughout the country.

12. The Center and its members have deep, long-standing interests in the preservation and recovery of imperiled species, including those at issue in this Complaint, and in the full and effective implementation of the ESA. The Center's members include individuals with scientific, professional, educational, recreational, aesthetic, moral, and spiritual interests in the species at issue in this Complaint, and who use the habitat of these species for a broad range of reasons. Plaintiff's interests in protecting and recovering these species are directly harmed by the Service's failure to issue final rules for the Longsolid, the Canoe Creek clubshell, and marrón bacora, and its failure to issue a 12-month finding on the petition to list the Siuslaw hairy-necked beetle.

13. The Center's members include individuals who regularly visit areas that are occupied or were formerly occupied by the species at issue in this Complaint and who seek to observe or study these species in their natural habitat. Plaintiff's members derive recreational, spiritual, professional, scientific, educational, and aesthetic benefit from these activities, and intend to continue to use and enjoy these areas in the future.

14. For example, Center member Tierra Curry, Saving Life on Earth Campaign Director and Senior Scientist at the Center, resides in Kentucky and often visits the habitat of the Longsolid. She has concrete plans to look for Longsolid in the summer of 2022 in the Cumberland, Kentucky, Green, Clinch and Powell Rivers. She is passionate about the conservation of freshwater mollusks and has engaged in various campaigns to protect mussels. Water pollution from various industries has made it harder to observe Longsolid, harming Ms. Curry's interests in the species.

15. Center member Doug Morrison resides in Alabama and lives on Big Canoe Creek, the Canoe Creek clubshell's habitat. Mr. Morrison recreates frequently on Big Canoe Creek, floating and paddling at all times of the year. Besides his recreational interest in conserving this mussel's habitat, he has deep aesthetic and spiritual interests in the conservation of Canoe Creek clubshell. Ongoing threats from pollution and climate change harm his interest in the species and his belief that humanity has a duty to act as guardians for all species.

16. Center member Dr. Gary Ray, founding member of the Island Green Living Association, is an expert on the plants of the U.S. Virgin Islands. Dr. Gary Ray has undertaken extensive efforts to protect marrón bacora. He was a declarant for the Center in previous litigation compelling the Service to make a 12-month finding for marrón bacora. He has published scientific reports about the species, worked with the National Park Service to propagate and reintroduce the plant, and has ongoing scientific research on St. John, with concrete plans to visit the plant's habitat this year. The Service's failure to issue final rules harms Dr. Gary Ray's research projects because he would like to turn his attention to protecting other imperiled plants on the Virgin Islands, yet he keeps having to return to ensuring marrón bacora is protected.

17. Center member Jess Tyler, Staff Scientist in the Center's Environmental Health Program, is an entomologist residing in Oregon. He cares deeply about the natural habitats of Oregon and visited the Oregon Dunes National Recreation Area last summer. Mr. Tyler has concrete plans to return to the Oregon Dunes during the summer of 2022 to look for the Siuslaw hairy-necked tiger beetle. Ongoing threats, including habitat loss and impacts from climate change, harm his interest in searching for the Siuslaw hairy-necked tiger and hamper his ability to enjoy searching and observing for it.

18. Defendants' violations of the ESA's nondiscretionary mandatory deadlines have delayed the ESA's protections to the four species at issue in this Complaint, harming Center members' interests in the species. These injuries are actual, concrete injuries that are presently suffered by the Center's members, are directly caused by Defendants' acts and omissions, and will continue unless the Court grants relief. The relief sought would redress these injuries. The Center and its members have no adequate remedy at law.

19. Defendant U.S. FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior charged with implementing the ESA for the species at issue in this suit. The Secretary of the Interior has delegated administration of the ESA to the Service. 50 C.F.R. § 402.01(b).

20. Defendant MARTHA WILLIAMS is the Director of the U.S. Fish and Wildlife Service and is charged with ensuring that agency decisions comply with the ESA. Defendant Williams is sued in her official capacity.

21. Defendant DEB HAALAND is the Secretary of the U.S. Department of the Interior and has the ultimate responsibility to administer and implement the provisions of the ESA. Defendant Haaland is sued in her official capacity.

STATUTORY FRAMEWORK

The Endangered Species Act

22. The Endangered Species Act, 16 U.S.C. §§ 1531–1544, is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “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).

23. The ESA has a suite of substantive and procedural legal protections that apply to species once they are listed as endangered or threatened. *Id.* § 1532(16) (defining “species”). For example, section 4(a)(3) of the Act requires the Service to designate “critical habitat” for each endangered and threatened species. *Id.* § 1533(a)(3).

24. In addition, ESA section 7(a)(2) requires all federal agencies to ensure that their actions do not “jeopardize the continued existence” of any endangered or threatened species or “result in the destruction or adverse modification” of any listed species’ critical habitat. *Id.* §1536(a)(2).

25. ESA section 9 prohibits, among other actions, “any person” from causing the “take” of any protected fish or wildlife without lawful authorization from the Service. *Id.* §§ 1538(a)(1)(B), 1539; see also *id.* § 1532(19) (defining “take”). Other provisions require the Service to “develop and implement” recovery plans for listed species, *id.* § 1533(f); authorize the Service to acquire land for the protection of listed species, *id.* § 1534; and authorize the Service to make federal funds available to states to assist in the conservation of endangered and threatened species, *id.* § 1535(d).

26. The ESA defines a “species” as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). A “distinct population segment” of a species is also known as a “DPS.” When considering whether a population segment qualifies as a DPS under the Act, Service policy requires the agency to determine whether the population is “discrete” and “significant.” If the Service determines that a population segment is both discrete and significant, then the population qualifies as a DPS and meets the ESA’s definition of a “species” that may be classified as threatened or endangered.

27. A species is “endangered” when it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” when it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

28. The ESA requires the Service to determine whether any species is endangered or threatened because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. *Id.* § 1533(a)(1).

29. To ensure the timely protection of species at risk of extinction, Congress set forth a detailed process whereby citizens may petition the Service to list a species as endangered or threatened. In response, the Service must publish a series of three decisions according to statutory deadlines. First, within 90 days of receipt of a listing petition, the Service must, “to the maximum extent practicable,” publish 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). This is known as the “90-day finding.” If the Service finds in the 90-day finding that the petition does not present substantial information indicating that listing may be warranted, the petition is rejected and the process concludes.

30. If the Service determines that a petition does present substantial information indicating that listing “may be warranted,” the agency must publish that finding and proceed with a scientific review of the species’ status, known as a “status review.” *Id.*

31. Upon completing the status review, and within 12 months of receiving the petition, the Service must publish a “12-month finding” with one of three listing determinations: (1) listing is “warranted”; (2) listing is “not warranted”; or (3) listing is “warranted but precluded” by other proposals for listing species, provided certain circumstances are met. *Id.* § 1533(b)(3)(B).

32. If the Service determines that listing is “warranted,” the agency must publish that finding in the Federal Register along with the text of a proposed regulation to list the species as endangered or threatened and take public comments on the proposed listing rule. *Id.* § 1533(b)(3)(B)(ii).

33. Within one year of publication of the proposed listing rule, the Service must publish in the Federal Register the final rule implementing its determination to list the species. *Id.* § 1533(b)(6)(A). This is known as a “final listing rule.”

FACTUAL BACKGROUND

The Longsolid

34. The Longsolid is a five-inch-long mussel with a light brown shell that has darker brown stripes and a pronounced ridge. It lives in the Ohio, Cumberland, and Tennessee River

basins in Alabama, Kentucky, North Carolina, New York, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

35. Today, the Longsolid only occupies remnants of its historical range. There is a single remaining known population and management unit in the Cumberland River basin. The Longsolid has experienced significant declines and is no longer found in Cumberland River tributaries.

36. The Longsolid is threatened by cold-water discharges from upstream dams. Other threats to this mussel include water pollution from urbanization, agriculture, oil and gas drilling, pipeline construction, coal mining and coal-fired power plants, and increased stream temperatures and storm events caused by climate change.

The Canoe Creek Clubshell

37. The Canoe Creek clubshell is a freshwater mussel that lives only in Big Canoe Creek and Little Canoe Creek West, tributaries of the Coosa River in northeast Alabama. It is about three and a half inches long, with a dark yellow to brown outer shell, an iridescent mother-of-pearl white inner shell, and a salmon-orange body.

38. The range of the Canoe Creek clubshell is less than 100 square km in northeast Alabama. It is restricted to roughly six sites in a single small (less than 500 square km) watershed in northeast Alabama. There are only 19 known individuals and only one-third of these are from recent collections

39. Although little is known about long-term trends for the Canoe Creek clubshell, since it was only discovered in 2006, it appears to already be extirpated in the Coosa River proper. The Canoe Creek clubshell is threatened by habitat loss, habitat modification, and any

factor which degrades water quality or threatens host fish populations. It is vulnerable to extinction because of its small population size and restricted range.

Marrón bacora

40. Marrón bacora is a flowering shrub that can reach 10 feet in height and is found on St. John in the U.S. Virgin Islands and Tortola in the British Virgin Islands. It has small purple flowers and produces fruit. The plant requires pollinators but is capable of self-pollination. Marrón bacora was thought to be extinct until it was rediscovered in the 1990s.

41. Historically, the range of marrón bacora included St. John, possibly St. Thomas, and possibly Gordon Peak on Virgin Gorda, British Virgin Islands. Recently, it has been found on Tortola, British Virgin Islands. At least three populations of the plant on St. John have already gone extinct. A fragmented distribution of seven populations are currently found on St. John and a single population currently exists on Tortola.

42. Historically, development and land-use changes on St. John resulted in degradation of suitable habitat for marrón bacora. Moreover, it is threatened by climate change. St. John was devastated in 2017 by hurricanes Irma and Maria. The Service found that climate change is predicted to increase the frequency and intensity of tropical storms, hurricanes, and severe droughts.

Siuslaw hairy-necked tiger beetle

43. Named after the Siuslaw people and the Siuslaw River of the central Oregon coast, the Siuslaw hairy-necked tiger beetle hunts its prey in coastal areas where fresh water meets ocean beaches.

44. The Siuslaw hairy-necked tiger beetle was once found on coastal beaches from northern California to Washington but has been lost from most places it was historically found.

The most recent surveys found the beetle at only 17 sites in Oregon and two sites in Washington. At nearly all sites, fewer than 50 individuals were found.

45. Seven of the 17 remaining beetle sites in Oregon are concentrated along a 10.5 mile stretch of the New River Area of Critical Environmental Concern, one of the last remaining wild places along the Oregon coast. Other Oregon sites occur on the Siuslaw National Forest in the Oregon Dunes National Recreation Area, one of the most popular areas for off-road vehicle use in the world, as well as State Parks in Oregon and Washington.

46. The Siuslaw hairy-necked tiger beetle is severely threatened by habitat loss, off-road vehicles, climate change, coastal erosion, trampling by beachgoers, inbreeding, and invasive species.

Listing Petition and Response

47. Due to these threats and others, on April 20, 2010, the Center and its partners petitioned the Service to list the Longsolid and Canoe Creek clubshell as threatened or endangered under the ESA.

48. On September 27, 2011, the Service issued a partial 90-day finding that the petition to list the Longsolid and Canoe Creek clubshell presented “substantial scientific or commercial information indicating that listing may be warranted.” 76 Fed. Reg. 59,836 (September 27, 2011).

49. On September 29, 2020, the Service issued a 12-month finding for the Longsolid and proposed to designate approximately 1,115 river miles of critical habitat for the Longsolid. 85 Fed. Reg. 61,384 (September 29, 2020).

50. On November 3, 2020, the Service issued a 12-month finding for the Canoe Creek clubshell and proposed to designate approximately 36.3 river miles of critical habitat for the Canoe Creek clubshell. 85 Fed. Reg. 69,540 (November 3, 2020).

51. The Service had a mandatory duty to finalize its 12-month finding and critical habitat designation and publish a final listing rule in the Federal Register by September 29, 2021 for the Longsolid and by November 3, 2021 for the Canoe Creek clubshell. Until Defendants publish the legally required final listing rules, the Longsolid and Canoe Creek clubshell will continue to lack necessary protections under the ESA.

52. On November 20, 1996, a petition was submitted to the Service to list marrón bacora as threatened or endangered under the ESA.

53. On November 16, 1998, the Service issued a positive 90-day finding that the petition to list marrón bacora may be warranted. In 2004, the Center filed suit against the Service challenging a late 12-month finding. 76 Fed. Reg. 9722 (February 22, 2011). On March 7, 2006, the Service published a 12-month finding that listing marrón bacora was not warranted. *Id.* On September 9, 2008, the Center filed suit again challenging the Service's not warranted finding. *Id.* On February 22, 2011, the Service issued a 12-month finding stating that listing is warranted, but "precluded by higher priority actions." *Id.*

54. On August 26, 2020, the Service issued a proposed rule to list marrón bacora as an endangered species and proposed to designate approximately 2,549 acres of critical habitat for this plant on St. John, U.S. Virgin Islands.

55. The Service had a mandatory duty to finalize its 12-month finding and critical habitat designation and publish a final listing rule for marrón bacora in the Federal Register by

August 26, 2021. Until Defendants publish the legally required final listing rule, marrón bacora will continue to lack necessary protections under the ESA.

56. On December 14, 2020, the Center petitioned the Service to list the Siuslaw hairy-necked tiger beetle as threatened or endangered under the ESA.

57. On September 29, 2021, the Service issued a positive 90-day finding that the petition to list the Siuslaw hairy-necked tiger beetle presented “substantial scientific or commercial information indicating that listing the Siuslaw hairy-necked tiger beetle as an endangered or threatened species may be warranted.” 86 Fed. Reg. 53,940 (September 29, 2021).

58. Although Defendants issued a positive 90-day finding, Defendants had a mandatory duty to issue a 12-month finding by December 14, 2021. Until Defendants publish the legally required 12-month finding, the Siuslaw hairy-necked tiger beetle will continue to lack necessary protections under the ESA.

CLAIMS FOR RELIEF

Violation of the ESA for Failure to Publish a Final Listing Rule for the Longsolid

59. Plaintiff re-alleges and incorporates all allegations set forth in the preceding paragraphs.

60. Defendants failed to perform their nondiscretionary duty to publish the final listing rule and final critical habitat designation for the Longsolid, in violation of the ESA. 16 U.S.C. § 1533(b)(6)(A) and (b)(6)(B)(iii).

Violation of the ESA for Failure to Publish a Final Listing Rule for the Canoe Creek

Clubshell

61. Plaintiff re-alleges and incorporates all allegations set forth in the preceding paragraphs.

62. Defendants failed to perform their nondiscretionary duty to publish the final listing rule and final critical habitat designation for the Canoe Creek clubshell, in violation of the ESA. 16 U.S.C. § 1533(b)(6)(A) and (b)(6)(B)(iii).

Violation of the ESA for Failure to Publish a Final Listing Rule for marrón bacora

63. Plaintiff re-alleges and incorporates all allegations set forth in the preceding paragraphs.

64. Defendants failed to perform their nondiscretionary duty to publish the final listing rule and final critical habitat designation for marrón bacora, in violation of the ESA. 16 U.S.C. § 1533(b)(6)(A) and (b)(6)(B)(iii).

**Violation of the ESA for Failure to Publish a Timely 12-Month Listing Determination for
Siuslaw hairy-necked tiger beetle**

65. Plaintiff re-alleges and incorporates all allegations set forth in the preceding paragraphs.

66. If, as in this case, the Service finds that listing may be warranted, the ESA requires the Service to publish a “12-month finding” with a listing determination within one year of receiving a listing petition. Defendants failed to perform their nondiscretionary duty to publish a timely 12-month listing determination on the petition to list the Siuslaw hairy-necked tiger beetle as endangered or threatened, in violation of the ESA. 16 U.S.C. § 1533(b)(3)(B).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated the ESA by (1) failing to issue a final listing rule for the Longsolid, the Canoe Creek clubshell, and marron bacora, and (2) failing

- to issue a timely 12-month listing determination in response to the Center's petition to list the Siuslaw hairy-necked tiger beetle;
2. Provide injunctive relief compelling Defendants to publish in the Federal Register final listing rules for the Longsolid, the Canoe Creek clubshell, and marrón bacora, and a 12-month listing determination on the petition to list the Siuslaw hairy-necked tiger beetle by a date certain;
 3. Retain continuing jurisdiction to review Defendants' compliance with all judgments and orders herein;
 4. Grant Plaintiff its reasonable attorneys' fees and costs as provided by the ESA, 16 U.S.C. § 1540(g)(4); and
 5. Provide such other relief as the Court deems just and proper.

Respectfully submitted and dated this 14th day of June, 2022.

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