

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA**

FOREST GUARDIANS  
312 Montezuma Ave.  
Santa Fe, NM 87501

CENTER FOR BIOLOGICAL DIVERSITY  
1333 Oracle Street  
Tucson, AZ 85705

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of the Interior  
1849 C Street, NW  
Washington, DC 20240

Defendant.

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**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

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**INTRODUCTION**

1. Plaintiffs bring this action against Defendant, Dirk Kempthorne, U.S. Secretary of the Interior, in his official capacity, to force him to carry out his duties under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.* Secretary Kempthorne (hereinafter the “Secretary,” or alternatively the “U.S. Fish and Wildlife Service” or “FWS,” to signify the agency to which the Secretary has delegated his responsibilities in this case) has failed to comply with his mandatory duty to make a preliminary finding on Plaintiffs’ petition to list the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) (“Butterfly”) as an Endangered or Threatened species under the ESA and to designate its critical habitat. This lawsuit seeks to force the Secretary to make the overdue finding on Plaintiffs’ petition.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”).

3. This Court has authority to grant Plaintiffs’ requested relief pursuant to 28 U.S.C. §§ 2201-02 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (APA).

4. More than 60 days ago, Plaintiffs furnished FWS with written notice of its violations of the ESA and of Plaintiffs’ intent to sue. See 16 U.S.C. § 1540(g)(2).

5. FWS has not remedied its violation of the ESA by making the overdue finding on Plaintiffs’ Petition. Therefore an actual controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2001.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A). Secretary Kempthorne officially resides in this judicial district.

**PARTIES**

7. Plaintiff FOREST GUARDIANS sues on behalf of itself and its adversely affected members. Forest Guardians is a non-profit environmental organization based in Santa Fe, New Mexico. Forest Guardians’ mission is to protect and restore wildlife and wildlands in the American Southwest. Forest Guardians has over 3,500 members, some of whom reside in the District of Columbia, but most of whom reside in New Mexico. Forest Guardians has an active endangered species protection campaign, with a geographic focus on the southern Great Plains and the Southwest. As part of this campaign, Forest Guardians has repeatedly urged FWS to list imperiled species as threatened or endangered species including the Sacramento Mountains Checkerspot Butterfly (the “Butterfly”). Forest Guardians filed a petition to list the

Butterfly in June 2007. Forest Guardians' Petition also sought emergency listing. Forest Guardians sought emergency listing because in June 2007 the Butterfly was imminently threatened by a proposal to spray insecticide on both private and federal lands. Forest Guardians spent a significant amount of time and resources preparing its Petition and is injured by the FWS's failure to respond to it. Forest Guardians also spent significant resources pressuring Otero County, New Mexico and the U.S. Forest Service to delay or stop insecticide spraying proposals that could have extirpated the butterfly throughout its narrow range. Members of Forest Guardians frequently use and enjoy the Butterfly and its habitat for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so on a regular basis. Forest Guardians and its members are particularly concerned with the conservation of the Butterfly and the ecosystem on which it depends for its survival. Forest Guardians and its members have a substantial interest in this matter and are adversely affected by the Secretary's failure to comply with the ESA. The requested relief will redress Forest Guardians' and its members' injuries.

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("CBD") sues on behalf of itself and its adversely affected members. CBD is a non-profit corporation dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands. CBD has over 40,000 members, many of whom reside in New Mexico. CBD filed the first ESA Petition to list the Butterfly in 1998 and sued to force a response to that original petition. CBD joined Forest Guardians on the current ESA Petition at issue in this case. CBD's members and staff have educational, scientific, moral, aesthetic, conservation, and recreational interests in the Butterfly and its habitat. They use and enjoy, and intend to continue to use and enjoy, the current and historical habitat of the Butterfly. CBD and its members are particularly

concerned with the conservation of the Butterfly and the ecosystem on which it depends for its survival. CBD and its members have a substantial interest in this matter and are adversely affected by the Secretary's failure to comply with the ESA. The requested relief will redress CBD and its members' injuries.

9. Defendant, DIRK KEMPTHORNE, is the Secretary of the United States Department of the Interior. As such he has ultimate responsibility for implementation of the ESA. He is sued in his official capacity. For the matter at issue in this case, the Secretary has delegated his responsibilities under the ESA to the U.S. Fish and Wildlife Service ("FWS"), an agency within the U.S. Department of the Interior.

#### **LEGAL BACKGROUND**

10. Congress passed the ESA 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).

11. To this end, the ESA requires FWS to list species of plants and animals that are facing extinction as "threatened" or "endangered" and to designate protected "critical habitat" for each listed threatened or endangered species. 16 U.S.C. § 1533(a). An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range...." 16 U.S.C. § 1532(6). A "threatened species" is a species "which is likely to become an endangered species within the foreseeable future...." 16 U.S.C. § 1532(20).

12. In order for the ESA to protect a species, FWS must first officially list the species as either threatened or endangered. 16 U.S.C. § 1533(d). The listing process is the critical first step in the ESA's system of species protection and recovery. FWS must also list the species'

habitat as “critical habitat” to receive several important substantive and procedural ESA protections.

13. Any interested person can initiate the listing process by filing a petition to list a species with FWS. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

14. Upon receipt of a petition to list a species, FWS is required to make an initial finding known as a “90-day finding.” Specifically, within 90 days, FWS must determine, “to the maximum extent possible,” whether the petition presents “substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). The ESA’s implementing regulations define “substantial information” as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b).

15. If FWS finds that the petition presents substantial information, FWS “shall promptly commence a review of the status of the species concerned,” and must publish the finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

16. If FWS makes a positive 90-day finding, it has 12 months from the date that the petition was received to make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals to list species of higher priority, provided that FWS is making expeditious progress on listing items. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This is known as the 12-month finding.

17. If FWS makes a 12-month finding that the petition action is warranted, then it must publish a proposed rule to list the species as endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5).

18. Within one year of the publication of a proposed rule to list a species, FWS must make a final decision on the proposal. 16 U.S.C. § 1533(b)(6)(A).

19. “Concurrently” with listing a species as threatened or endangered, FWS must designate critical habitat for the species to the maximum extent prudent and determinable. 16 U.S.C. § 1533(a)(3)(A)(i), see also § 1533(b)(6)(C).

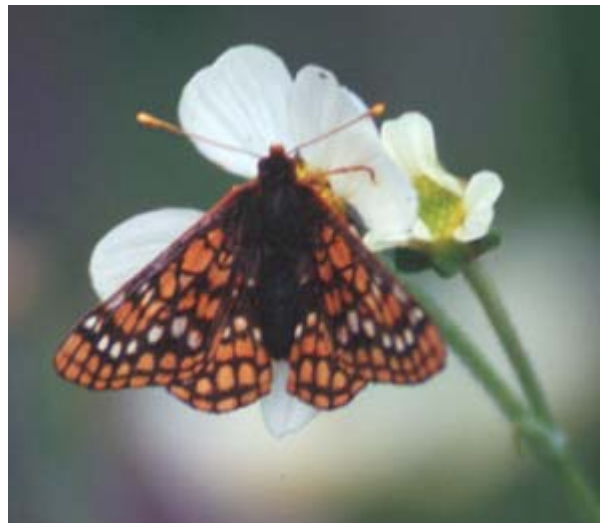
20. Designation of critical habitat for listed species provides additional necessary protection and aids in the conservation of the species because all federal agencies must consult with FWS to “insure that an action authorized, funded, or carried out by [federal agencies] is not likely to jeopardize the continued existence of any endangered species or threatened species *or result in the destruction or adverse modification of [its critical habitat].*” 16 U.S.C. § 1536(a)(2) (emphasis added).

#### **FACTS**

21. The Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) occurs in high elevation, open mountain meadows within mixed-conifer forests in the Sacramento Mountains. Its range is restricted to a 6-mile radius around the Village of Cloudcroft in Otero County, New Mexico. Currently, the Butterfly only occupies approximately 2,000 acres. The Butterfly may be the southernmost subspecies of the Checkerspot Butterfly (*E. anicia*) in the Rocky Mountain cordillera. The Butterfly has a wingspan of 2 inches. The top of its wings are checkered with dark brown, red, orange, white, and black spots and lines. The bottom of its wings are similar to the top, but have alternating cream and orange-colored checkered bands outlined in black. The Butterfly has only been documented to lay eggs on the New Mexico Penstemon (*Penstemon neomexicanus*). This Penstemon is a very narrowly distributed wildflower, found only in Otero and Lincoln Counties, New Mexico. Even under

favorable conditions, the Butterfly produces a maximum of one generation of adults per year.

Ninety-nine percent of its eggs will not survive to adulthood. The Butterfly is pictured below:



Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*).

22. The Butterfly is imperiled by multiple threats, including insecticide spraying, habitat, loss and destruction, climate change, invasive species, fire suppression and off-road vehicles. The butterfly is threatened by recurring insecticide applications directed at other species, but which kill the Butterfly. It is also threatened by continued habitat loss and degradation related to growth of the Village of Cloudcroft and recreation development on Forest Service lands. Given the butterfly's narrow, high elevation range and dependence on only one plant, the New Mexico Penstemon, for egg-laying, climate changes that results in either a shift in range or timing of the Penstemon's growth could extirpate the species. The proliferation of non-native weeds also harms the Butterfly. Fire suppression likewise threatens the Butterfly by harming its habitat. Finally, proliferation of off-road vehicle recreation presents a threat to the habitat of the butterfly. All of these threats pose an imminent danger to the very existence of this Butterfly

23. FWS received a petition from the Southwest Center for Biological Diversity (now Plaintiff, the Center for Biological Diversity) on January 28, 1999 requesting emergency listing of the Butterfly as endangered. On December 27, 1999 FWS published a positive 90-day finding on the Butterfly petition. On July 31, 2001, FWS was ordered by a Federal Court to complete a 12-month finding on the Butterfly petition within 30 days. In response, on September 6, 2001, FWS published a proposed rule in the Federal Register to list the Butterfly as Endangered and to designate its critical habitat. However, FWS never finalized this proposed rule and on December 21, 2004, withdrew its proposal to list the Butterfly. FWS cited a reduction in the threats facing the Butterfly as the reason for the withdrawal.

24. Plaintiffs did not believe the threats to the Butterfly had abated and accordingly submitted a new petition to list the Butterfly on June 28, 2007. FWS received the petition on July 5, 2007. Plaintiffs requested emergency listing in their June 28, 2007 petition. The emergency listing request was based on an immediate threat posed by private insecticide spraying and a U.S. Forest Service proposal to spray insecticide within the Butterfly's range. Plaintiffs' emergency listing request was also based on the threat posed by climate change due to the narrow ranges of the Butterfly and its host plant, the Penstemon. FWS denied Plaintiffs' emergency listing request. Plaintiffs do not currently challenge FWS's denial of their emergency listing request, because the threat from insecticide spraying was averted in 2007. However, this threat may recur in 2008 and Plaintiffs will again be forced to pursue the emergency listing issue. In the meantime, Plaintiffs are pursuing a standard track "non-emergency" ESA listing for the Butterfly as soon as possible. FWS stated in a December 10, 2007 letter to Plaintiffs that it expected to complete a standard 90-day finding on the Butterfly Petition sometime in fiscal year 2008. However, FWS's promise to make a 90-day finding in 2008 is not enforceable.

Additionally, given Plaintiffs' past experience with FWS, Plaintiffs believe the veracity of FWS's representation is speculative at best.

25. Pursuant to the ESA, FWS should have made a 90-day finding on or about October 3, 2007.

26. To date FWS has failed to make the 90-day finding on Plaintiffs' Petition.

27. On October 12, 2007, Plaintiffs provided FWS with written notice of their intention to file suit unless it acted on their Petition. FWS received the notice on October 12, 2007 via fax and on October 18th via certified mail. FWS acknowledged receipt in a letter dated November 6, 2007.

#### **CLAIM FOR RELIEF**

28. Each and every allegation set forth in this Complaint is incorporated herein by reference.

29. FWS has failed to make a 90-day finding on Plaintiffs' Petition to list the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*) and has failed to publish such finding in the Federal Register.

30. FWS has violated its duty under the ESA by failing to make an initial 90-day finding within 90-days because it is practicable to make such a finding. 16 U.S.C. § 1533(b)(3)(A); 5 U.S.C. § 706(1).

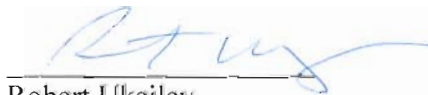
31. By failing to render a 90-day finding on the petition to list the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*), FWS has unreasonably delayed and unlawfully withheld compliance with section 4(b)(3)(A) of the ESA within the meaning of the APA. 16 U.S.C. § 1533(b)(3)(A); 5 U.S.C. § 706.

**PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs request that this Court enter judgment providing the following relief:

1. A declaration that FWS has violated the ESA by failing to make a 90-day finding on Plaintiffs' petition to list the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*);
2. A declaration that FWS has unlawfully withheld and unreasonably delayed agency action in violation of the APA by failing to make a 90-day finding on Plaintiffs' petition to list the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*);
3. An injunction compelling FWS to make a 90-day finding on the petition to list the Sacramento Mountains Checkerspot Butterfly (*Euphydryas anicia cloudcrofti*), and to publish such finding in the Federal Register;
4. An order awarding Plaintiffs their costs of litigation, including reasonable attorney's fees;
5. Such other and further relief as the court deems just and proper.

Respectfully submitted this 2nd day of January 2008,



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