

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,)
378 North Main Ave.)
Tucson, AZ 85701,)

) Civil No: _____

GREENPEACE, INC.,)
702 H Street, NW, Suite 300)
Washington, D.C. 20001,)

and)

) COMPLAINT FOR DECLARATORY
) AND INJUNCTIVE RELIEF

THE BOAT COMPANY,)
1200 Eighteenth Street NW, Ste. 900)
Washington, D.C. 20036,)

Plaintiffs,)

v.)

SALLY JEWELL, Secretary of the Interior,)
U.S. Department of the Interior)
1849 C Street NW)
Washington, DC 20240,)

and)

U.S. FISH AND WILDLIFE SERVICE,)
1849 C Street NW)
Washington, DC 20240,)

Defendants.)
_____)

INTRODUCTION

1. Plaintiffs Center for Biological Diversity (“Center”), Greenpeace, Inc., and The Boat Company bring this action under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), to challenge the failure of the Secretary of the Interior (“Secretary”) and the U.S. Fish and Wildlife Service (“FWS”) to comply with the non-discretionary listing provisions of the

ESA. Defendants have failed to undertake nondiscretionary action on Plaintiffs' petition to list the Alexander Archipelago wolf (*Canis lupus ligoni*) as a threatened or endangered species under the ESA. 16 U.S.C. § 1533(b)(3)(A) and (B). Plaintiffs request this Court to order Defendants to comply by a date certain with the ESA's mandatory, non-discretionary 12-month finding deadline for processing citizen petitions to list species. *Id.* Compliance with this mandatory deadline is necessary to ensure the continued survival of Alexander Archipelago wolves in the wild.

2. The Alexander Archipelago wolf is a distinct subspecies of gray wolf that inhabits the islands and coastal mainland of Southeast Alaska. Alexander Archipelago wolves face high magnitude, ongoing threats from logging, road building, legal and illegal harvest, small and isolated population structure, and climate change.

3. On August 10, 2011, the Center for Biological Diversity and Greenpeace (Petitioners) submitted to Defendants a formal, detailed petition ("Petition") to list the Alexander Archipelago wolf as a threatened or endangered species pursuant to Section 4 of the ESA. On March 31, 2014, Defendants published in the Federal Register a "90-day finding" pursuant to section 4(b)(3)(A) of the ESA, 16 U.S.C. § 1533(b)(3)(A), which determined that listing the Alexander Archipelago wolf "may be warranted." 79 Fed. Reg. 17,993 (Mar. 31, 2014). Defendants have not yet issued the required "12-month finding" under section 4(b)(3)(B) of the ESA, 16 U.S.C. § 1533(b)(3)(B). The 12-month finding was due August 10, 2012, *i.e.*, nearly two and a half years ago.

4. Hence, Plaintiffs seek declaratory and injunctive relief to enforce the mandatory deadline for Defendants to make a 12-month finding on the Petition to list the Alexander Archipelago wolf, and to compel Defendants to make a finding as to whether listing the wolf as

threatened or endangered under the ESA is warranted. 16 U.S.C. § 1544(b)(3)(B).

JURISDICTION

5. The Court has jurisdiction over this action pursuant to 15 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 APA), and 28 U.S.C. § 1331 (federal question jurisdiction).

6. 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).

7. Plaintiffs provided notice of their intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to Defendants dated July 10, 2012 and again on April 2, 2014. Defendants have not responded to the notices of intent to sue or remedied the alleged violations. Therefore, an actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

8. Plaintiffs and their members are adversely affected or aggrieved by Defendants' violations of the ESA. Defendants' failure to make the statutorily-required 12-month finding on the Petition prevents the completion of the listing process and the implementation of substantive measures pursuant to the ESA to protect Alexander Archipelago wolves. Without the protections of the ESA, Alexander Archipelago wolves are more likely to continue to decline toward extinction. Plaintiffs are therefore injured because their scientific, professional, educational, recreational, aesthetic, moral, spiritual, and other interests in Alexander Archipelago wolves described below are threatened. Defendants' failure to respond to the Petition has also resulted in informational and procedural injury to Plaintiffs, because Plaintiffs have been deprived of a timely opportunity to submit additional information and otherwise participate in the listing process in order to secure protective measures for the species. These are actual, concrete injuries

to Plaintiffs, caused by Defendants' failure to comply with the ESA and its implementing regulations. The relief requested will fully redress those injuries.

9. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

VENUE

10. 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 Plaintiffs' claim occurred in this district.

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation incorporated in California and headquartered in Tucson, Arizona, with offices throughout the United States, including Alaska, Arizona, New Mexico, California, Nevada, Oregon, Washington, 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 more than 50,000 members and more than 700,000 online supporters. The Center and its members are concerned with the conservation of imperiled species, including the Alexander Archipelago wolf, and with the effective implementation of the ESA. The Center has been actively involved in protecting Alaska's wildlife since the early 1990s, has filed petitions to list Southeast Alaska species, and has participated in lawsuits and administrative appeals to stop harmful logging in the wolves' habitat.

12. Plaintiff GREENPEACE, Inc., is a non-profit environmental organization, and its mission is to raise public awareness of environmental problems and promote changes that are

essential to a green and peaceful future. The organization's involvement in forest issues concerning the National Forest system generally and particularly the Tongass National Forest and other forests of Southeast Alaska dates back to the early 1990s. Greenpeace's concerns have included the effects of logging-associated road construction on the Alexander Archipelago wolf in particular, as well as on ecosystems, roadless areas, fish, wildlife and hunting, and the protection of the last remnants of old-growth forest in the United States.

13. Plaintiff THE BOAT COMPANY is a non-profit educational and charitable organization with a 35-year history of offering wilderness cruises in southeast Alaska, helping to build a strong constituency for wildlife conservation through personal experience. The company operates two 150-foot U.S. Coast Guard-inspected passenger vessels during summer months, hosting nearly 700 visitors per year on week-long excursions. Onboard naturalists provide passengers with opportunities to learn about the region's natural history, flora, fauna and cultural history. Experienced wilderness guides introduce passengers first-hand to the rare natural abundance of fish and wildlife still found in many waters and forested shorelines of the northern Alexander Archipelago. The opportunity to glimpse and perhaps photograph a wolf in the wild is, for many passengers, the experience of a lifetime. The Boat Company depends upon its ability to provide high-quality wildlife viewing opportunities, and is harmed when such opportunities are denied because of poor or careless wildlife management practices.

14. Plaintiffs' members and staff include individuals with interests in Alexander Archipelago wolves and their habitat, ranging from scientific, professional and educational to recreational, aesthetic, moral and spiritual. Plaintiffs' members and staff enjoy, on an ongoing basis, the biological, scientific, research, education, economic, conservation, recreational and aesthetic values of Southeast Alaska and the Tongass National Forest, where the Alexander

Archipelago wolf is found.

15. An integral aspect of Plaintiffs' members' use and enjoyment of Alexander Archipelago wolves is the expectation and knowledge that the species is in its native habitat. For this reason, Plaintiffs' use and enjoyment of Alexander Archipelago wolves is entirely dependent on the continued existence of healthy, sustainable populations in the wild.

16. Defendants' failure to comply with the ESA's non-discretionary deadline for issuing a 12-month finding deprives Alexander Archipelago wolves of statutory protections that are vitally necessary to their survival and recovery. Until the wolves are protected under the ESA, Plaintiffs' interests in their conservation and recovery are impaired. Therefore, Plaintiffs' members and staff are injured by Defendants' failure to make a timely determination as to whether to list the wolf, as well as by the ongoing harm to the wolf and its habitat in the absence of such protections. The injuries described are actual, concrete injuries presently suffered by Plaintiffs and their 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 a 12-month finding for the wolf – would redress these injuries. Plaintiffs and their members have no adequate remedy at law.

17. Defendant SALLY JEWELL 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 Jewell is sued in her official capacity.

18. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for the Alexander Archipelago wolf, as well as ensuring prompt compliance with the ESA's mandatory

listing deadlines.

LEGAL BACKGROUND

19. 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.” *Id.* § 1531(b).

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

21. 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 do not “jeopardize the continued existence” of any listed species or “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. Other provisions require the Secretary to designate “critical habitat” for listed species, 16 U.S.C. § 1533(a)(3), require the Secretary to “develop and implement” recovery plans for listed species, 16 U.S.C. § 1533(f), to authorize the Secretary to acquire land for the protection of listed species, 16 U.S.C. § 1534, and to make federal funds available to states to assist in its efforts to preserve and protect threatened and endangered species, 16 U.S.C. § 1535(d).

22. 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.

23. 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.

24. If, on the other hand, FWS determines that a petition does present substantial information indicating that listing may be warranted, then the agency must 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).

25. 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 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 in order to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i) and 1533(b)(6)(B)(i).

26. It is critical that Defendants 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 regularly ignored statutory procedures and have missed statutory listing deadlines, leading to litigation to correct these deficiencies.

27. 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. The instant complaint is a "deadline suit" as defined in the parties' settlement.

28. 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. 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 under the agreement may be pushed back to 2016. Under the settlement, a "remedy" means a stipulated settlement agreement or judicially-enforceable order requiring Defendants to make any finding, listing determination, or critical habitat determination for a species before April 1, 2017.

29. As of the date of this filing, during fiscal year 2014, the Center has not yet filed a "deadline suit," within the meaning of the parties' settlement agreement.

FACTUAL BACKGROUND

30. Plaintiffs Center for Biological Diversity and Greenpeace filed their Petition to list the Alexander Archipelago wolf on August 10, 2011. As summarized below, the detailed scientific Petition details the factors that threaten Alexander Archipelago wolves with extinction within the foreseeable future.

31. Large-scale logging on the Tongass National Forest and private and state lands, cumulative over six decades and still ongoing, poses a primary threat to the Alexander Archipelago wolf because logging: diminishes and fragments the low-elevation forest habitat that wolves need for denning, pup-rearing, and foraging; reduces the long-term carrying capacity of the wolf's principal prey, the Sitka black-tailed deer; increases the density of roads, which facilitates unsustainable legal and illegal hunting and trapping; disturbs wolf dens; and injures salmon runs that provide an important seasonal food source for wolves. Direct mortality from legal and illegal hunting and trapping poses another primary threat to the wolf because hunting and trapping appear to be occurring at unsustainable levels, and illegal hunting may account for as much as half of human-caused wolf mortality on the Tongass National Forest.

32. The Alexander Archipelago wolf is more vulnerable to population declines, extinctions, and loss of genetic diversity than wolf species that inhabit the interior of North America, due to its small, isolated, and largely island-based population structure. Climate change is likely to result in the increased frequency of severe winter storm events and above-normal snowfalls that adversely affect the wolf's primary prey species, the Sitka black-tailed deer; climate change is already leading to a significant change in forest composition and structure in Southeast Alaska due to climate-related die-offs of yellow cedar.

33. The wolves on Prince of Wales Island and its associated islands are genetically

and morphologically distinct from other Alexander Archipelago wolves. Plaintiffs' Petition presented data showing that Prince of Wales and its associated islands constitutes a significant portion of the Alexander Archipelago wolf's range, meaning that threats to wolves on Prince of Wales Island can, in and of themselves, necessitate the ESA listing of the wolves. Logging on Prince of Wales Island has significantly increased the pressure on the islands' wolves.

34. Section 4(b)(3) of the ESA and its implementing regulations required Defendants to respond to the Petition setting forth the threats to Alexander Archipelago wolves by making an initial determination "to the maximum extent practicable" within 90 days of receiving the petition and a listing determination within 12 months. 16 U.S.C § 1533 (b)(3)(A).

35. The Petition was sent via email on August 10, 2011. One year from the date that Defendants received the Petition was August 10, 2012. Defendants issued a belated 90-day finding on March 31, 2014. Defendants have failed to issue 12-month finding by the statutory deadline.

CLAIM FOR RELIEF

Violation of Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B): Failure to make a 12-Month Finding on the Listing Petition

36. Plaintiffs reallege and incorporate by reference all the allegations set forth in this Complaint.

37. Defendants' failure to make a 12-month finding on the Petition to list the Alexander Archipelago wolf as a threatened or endangered species is a violation of the ESA and its implementing regulations, 16 U.S.C. § 1533(b)(3)(B), and constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).


REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court enter Judgment for Plaintiffs providing the following relief:

- A. Declare that Defendants violated the ESA and APA by failing to issue a timely 12-month finding on the Petition to list the Alexander Archipelago wolf under the ESA;
- B. Order Defendants to issue, by a reasonable date certain, the 12-month finding on the Petition to list the Alexander Archipelago wolf under the ESA, 16 U.S.C. § 1533(b)(3);
- C. Grant Plaintiffs their 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: June 10, 2014

Respectfully submitted,



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