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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON 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**

1 **INTRODUCTION**

2 1. Plaintiff Center for Biological Diversity (“Center”) brings this case
3 challenging the U.S. Fish and Wildlife Service’s (“Service”) failure to (1) issue final
4 rules on petitions to list the cactus ferruginous pygmy owl, Peñasco least chipmunk,
5 Texas fatmucket, Guadalupe fatmucket, Texas fawnsfoot, Texas pimpleback, Guadalupe
6 orb, false spike, pyramid pigtoe, Mt. Rainier white-tailed ptarmigan, and four distinct
7 population segments (“DPS”) of the foothill yellow-legged frog: the Central Coast DPS,
8 North Feather DPS, South Sierra DPS, and the South Coast DPS; (2) failure to issue a
9 timely 12-month finding for the tall western penstemon; and (3) failure to finalize critical
10 habitat protection for the Pacific marten coastal DPS, in violation of the Endangered
11 Species Act’s (“ESA” or “Act”) nondiscretionary, congressionally mandated deadlines.
12 The agency’s failure to meet these deadlines delays crucial, lifesaving protections for
13 these imperiled species, increasing their risk of extinction.

14 2. Defendants have abrogated their duty to ensure that these species are timely
15 protected to avoid further decline and an increased risk of extinction, in violation of
16 Section 4 of the ESA.

17 3. Plaintiff brings this lawsuit for declaratory and injunctive relief, seeking an
18 Order declaring that the Service violated the ESA by failing to timely finalize 11
19 proposed rules and failing to issue one 12-month finding and a critical habitat designation
20 for the species in this Complaint, and directing the Service to finalize its overdue rules
21 and issue the 12-month finding and critical habitat designation by a date certain.

22 **JURISDICTION**

23 4. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c),
24 (g) (ESA citizen suit provision), and 28 U.S.C. § 1331 (federal question). This Court has
25 authority to issue declaratory and injunctive relief pursuant to the ESA, 16 U.S.C. §
26 1540(g); 28 U.S.C. §§ 2201-2202; and 5 U.S.C. § 706(2).

27 5. Plaintiff provided Defendants with 60-days’ notice of the ESA violation, as
28 required by 16 U.S.C. § 1540(g)(2)(A), by a letter to the Service dated February 7, 2023

1 (received February 13, 2023). Defendants have not remedied the violations set out in the
2 notice and an actual controversy exists between the parties within the meaning of the
3 Declaratory Judgment Act, 28 U.S.C. § 2201.

4 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because
5 Plaintiff resides in this judicial district.

6 **PARTIES**

7 7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-
8 profit conservation organization that works through science, law, and policy to protect
9 imperiled wildlife and their habitat. The Center is incorporated in California and
10 headquartered in Tucson, Arizona, with offices throughout the United States. The Center
11 has more than 89,000 active members throughout the country.

12 8. The Center brings this action on behalf of its organization, and its staff and
13 members who derive ecological, recreational, aesthetic, educational, scientific,
14 professional, and other benefits from these 13 species and their habitats. Plaintiff's
15 interests in protecting and recovering these species and their habitats are directly harmed
16 by the Service's failure to issue timely findings.

17 9. For example, Center member Christina McVie resides in Arizona in cactus
18 ferruginous pygmy owl habitat. Her residence is near Arthur Pack Park, which had the
19 most prolific nest site recorded in Arizona. Ms. McVie is the former Vice-President and
20 Conservation Chair of the Tucson Audubon Society, a former member of the "Cactus
21 Ferruginous Pygmy Owl Recovery Implementation Team," and the board president of the
22 Coalition for Sonoran Desert Protection. She is active in various national and local
23 conservation organizations. Ms. McVie frequently conducts field visits in Pima County
24 and adjoining counties to observe the owl's habitat conditions, including in the Avra and
25 Altar Valleys and other areas where the cactus ferruginous pygmy owl has been detected.
26 Ms. McVie is harmed by the Service's delay in finalizing protections for the cactus
27 ferruginous pygmy owl.

28

1 10. Center member Grant Gourley resides in New Mexico. Mr. Gourley
2 backpacks in the White Mountain Wilderness in Peñasco least chipmunk habitat about
3 twice a year. He backpacked in the chipmunk’s habitat in February 2023 and plans to
4 return in fall 2023 and look for the chipmunk. His recreational and aesthetic interests are
5 harmed by the Service’s delay in protecting the Peñasco least chipmunk because the loss
6 of this chipmunk would lessen his experience in nature.

7 11. Juliet Whitsett is an artist and educator residing in Texas. She uses the
8 habitat of the Texas fatmucket, Guadalupe fatmucket, Texas fawnsfoot, Texas
9 pimpleback, Guadalupe orb, and false spike as inspiration in her art, for recreation, and to
10 develop art curriculums to teach her students about the lives of these mussels. She has
11 taught classes themed on these specific mussels. With her family, Ms. Whitsett intends to
12 return to the mussels’ habitat in 2023. They travel biannually to the Rio Grande and
13 Edwards Plateau regions to specifically search for these mussels. Ms. Whitsett has a
14 spiritual connection with these species. One of the works she created, entitled
15 “Freshwater Saints,” was inspired by how these species clean waterways. Ms. Whitsett’s
16 moral, ethical, professional, aesthetic, spiritual, and recreational interests in Texas
17 fatmucket, Guadalupe fatmucket, Texas fawnsfoot, Texas pimpleback, Guadalupe orb,
18 and false spike are harmed by the Service’s delay in protecting these mussels.

19 12. Center member Tierra Curry, Senior Scientist and Director of the Saving
20 Life on Earth Campaign at the Center, regularly swims, kayaks, and snorkels in the
21 habitat of the pyramid pigtoe, where she enjoys looking for freshwater mussels and
22 mussel shells. She has looked for pyramid pigtoe mussels in the Green, Barren, and
23 Tennessee Rivers in her home state of Kentucky, and in the Clinch, Cumberland, and
24 Duck Rivers in Tennessee. She visited these habitats in 2021 and plans to return to the
25 Green, Clinch, and Cumberland Rivers in summer 2023. Her recreational interests in
26 pyramid pigtoe are harmed by the Service’s delay.

27 13. Center member Ryan Shannon resides in Oregon and has visited the Mt.
28 Rainier white-tailed ptarmigan’s habitat multiple times. Mr. Shannon proposed to his

1 wife in the bird's habitat and visited Mt. Rainier National Park on his honeymoon in 2020
2 to search for the white-tailed ptarmigan. He intends to visit again in summer 2024 to
3 complete the Wonderland Trail at Mount Rainier National Park. Mr. Shannon has a
4 personal connection to this bird and its habitat, and his aesthetic and recreational interests
5 are harmed by the Service's delay in finalizing protections for the Mt. Rainier white-
6 tailed ptarmigan.

7 14. Center member Jeff Miller, Senior Conservation Advocate at the Center,
8 has professional, recreational, aesthetic, and spiritual interests in the conservation of the
9 four DPS of the foothill yellow-legged frog at issue in this complaint. Mr. Miller helped
10 draft the ESA listing petition for the foothill yellow-legged frog, he submitted extensive
11 comments to the Service as part of the agency's status review, and in 2016, he helped
12 draft the state listing petition. Mr. Miller has observed foothill yellow-legged frogs in
13 upper Alameda Creek in Alameda County, Little Carson Creek and Lagunitas Creek in
14 Marin County, and along the Eel River in Mendocino County. He regularly visits rivers
15 and streams that support these frogs. He has visited foothill yellow-legged frog streams in
16 the Central Coast DPS habitat, including Alameda Creek in Alameda County, Corral
17 Hollow Creek in San Joaquin County, and within Pinnacles National Monument; in the
18 North Feather DPS habitat, in the vicinity of Quincy, within the North Fork Feather River
19 drainage; in the South Sierra DPS habitat, along the North Fork Kern River in Sequoia
20 National Forest; and in the South Coast DPS habitat, on the Big Sur River and San
21 Carpoforo Creek. He intends to return to these areas in the next year and will be leading a
22 watershed tour in Alameda Creek in May 2023 and plans to look for the frogs. He has
23 specific plans to return to Big Sur in fall 2023 and to Pinnacles National Monument in
24 spring 2024 in both cases to observe wildlife, including foothill yellow-legged frogs. He
25 has written a forthcoming wildlife guide that includes a chapter on the foothill yellow-
26 legged frog.

27 15. Center member Quinn Read, Oregon Policy Director at the Center, is a
28 regular visitor to the Tualatin River National Wildlife Refuge where the tall western

1 penstemon resides. She takes her young son to the refuge to see the bird and plant life.
2 Last year, Ms. Read spent her entire visit looking for the tall western penstemon and
3 intends to return to the refuge this year during mid-summer 2023 when the flowers are in
4 bloom. Ms. Read resides in Oregon and wrote the petition to list the penstemon and is
5 therefore professionally harmed by the Service's failure in issuing a timely 12-month
6 finding. She is also recreationally and aesthetically harmed.

7 16. Center member Noel Soucy resides in Humboldt County. She is a
8 consulting wildlife biologist and spatial analyst, with some of her work focusing on
9 conservation efforts for native predators, including the Pacific marten coastal DPS. She
10 participated in genetic field studies that documented the presence of the coastal marten in
11 the Blue Creek watershed in Six Rivers National Forest for the first time in over 50 years.
12 She regularly frequents the marten's habitat for photography, recreation, and inspiration.
13 She also frequents the coastal marten's habitat for professional reasons, including
14 observing past fire impacts on marten habitat and looking for any signs of martens, such
15 as scat and prints. She has concrete plans to visit the marten's habitat in Blue Creek this
16 summer.

17 17. Defendants' violations of the ESA's nondiscretionary mandatory deadlines
18 have delayed the ESA's protections for these 13 species, harming the Center's members'
19 interests in them. These injuries are actual, concrete injuries that are presently suffered by
20 the Center's members, are directly caused by Defendants' acts and omissions, and will
21 continue unless the Court grants relief. The relief sought would redress these injuries.
22 The Center and its members have no other adequate remedy at law.

23 18. Defendant U.S. FISH AND WILDLIFE SERVICE is the agency within the
24 Department of the Interior charged with implementing the ESA for the 13 species at issue
25 in this suit. The Secretary of the Interior has delegated administration of the ESA to the
26 Service. 50 C.F.R. § 402.01(b).

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1 1534; and authorize the Service to make federal funds available to states to assist in the
2 conservation of endangered and threatened species, *id.* § 1535(d).

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

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

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

22 28. To ensure the timely protection of species at risk of extinction, Congress set
23 forth a detailed process whereby citizens may petition the Service to list a species as
24 endangered or threatened. In response, the Service must publish a series of three
25 decisions according to statutory deadlines. First, within 90 days of receipt of a listing
26 petition, the Service must, “to the maximum extent practicable,” publish an initial finding
27 as to whether the petition, “presents substantial scientific or commercial information
28 indicating that the petitioned action may be warranted.” *Id.* § 1533(b)(3)(A). This is

1 known as the “90-day finding.” If the Service finds in the 90-day finding that the petition
2 does not present substantial information indicating that listing may be warranted, the
3 petition is rejected and the process concludes.

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

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

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

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

20 **FACTUAL BACKGROUND**

21 **Cactus ferruginous pygmy owl**

22 33. The cactus ferruginous pygmy owl is a small, fierce raptor found in
23 Arizona, Texas, and northern Mexico. They are named for the saguaro cactuses they live
24 in, their rusty-colored stripes, and their small size. These 2.5-ounce raptors prey on birds
25 twice their size and feed lizards to their chicks.

26 34. In Arizona and northern Sonora, Mexico, the species is threatened by
27 urbanization and the planting and rapid spread of invasive buffelgrass, which spreads fire
28 that eliminates the columnar cactuses and other desert vegetation needed by the owl. It is

1 also threatened by droughts driven by climate change. Cactus ferruginous pygmy owl
2 numbers have declined to the low fifties in Arizona.

3 35. In Texas and Chihuahua, Mexico, the pygmy owl is threatened by
4 agricultural development and human population growth, which fragments populations.
5 Further south in western Mexico, including portions of Sinaloa, Nayarit, Jalisco, and
6 Michoacan, pygmy owl habitat is threatened by urbanization and agriculture.

7 **Peñasco least chipmunk**

8 36. The Peñasco least chipmunk is a chipmunk found only in the Sacramento
9 and White mountains of southwestern New Mexico. As the name indicates, Peñasco least
10 chipmunks are smaller than most chipmunks. They eat wild strawberries and
11 gooseberries. A 2020 survey found an estimate of only 44 Peñasco least chipmunks left
12 in the wild.

13 37. The chipmunk is threatened by habitat loss and degradation from historic
14 logging and livestock grazing of its forest and meadow habitat. It is also threatened by the
15 loss and degradation of mature ponderosa pine forests due to logging, recreational
16 development, predation, competition, inbreeding because of its low numbers, and climate
17 change events including drought and wildfires. The chipmunk has been waiting for
18 protection since 1982.

19 **Texas fatmucket**

20 38. Texas fatmucket is a freshwater mussel found in the upper reaches of major
21 tributaries within the Colorado River basin in Texas. It is about 4 inches in length and has
22 a yellow, green, and tan shell.

23 39. Mussel populations are indicators of the health of aquatic environments.
24 Like the other Texas mussels in this complaint, it requires free-flowing rivers and streams
25 that are free of contaminants. The fatmucket can't live in reservoirs and is thus threatened
26 by dams. Other threats include sedimentation, habitat destruction, predation, and drought
27 fueled by climate change.

28

1 **Guadalupe fatmucket**

2 40. Guadalupe fatmucket is a freshwater mussel that was recently discovered to
3 be a separate and distinct species from the Texas fatmucket. The mussel is found in just
4 one population along 54 miles of the Guadalupe River basin in Kerr and Kendall
5 Counties in Texas. It faces many threats, including contamination of its habitat by
6 pollutants, predation, and climate change.

7 41. Like the Texas fatmucket, the Guadalupe fatmucket requires free-flowing
8 rivers and streams and is threatened by dams, pollution, and drought driven by climate
9 change.

10 **Texas fawnsfoot**

11 42. Texas fawnsfoot is a freshwater mussel found in the lower reaches of the
12 Colorado and Brazos Rivers, and in the Trinity River. It was first described in 1859. It is
13 a small to medium-sized mussel, about 2.4 inches long, with an oval shell.

14 43. Texas fawnsfoot was historically distributed throughout the Colorado and
15 Brazos River basins. It is extirpated from the Leon River. It faces many threats, including
16 contamination of its habitat by pollutants, predation, and drought driven by climate
17 change.

18 **Texas pimpleback**

19 44. Texas pimpleback is a freshwater mussel found in the Colorado River basin
20 in five isolated populations. It was first documented in 1855. Only the Lower San Saba
21 and Llano River populations are known to be successfully reproducing. It is a small to
22 medium-sized mussel, about 4 inches long, and has a yellow, brown, or black shell that
23 occasionally has green rays or circular spots. It faces many threats, including
24 contamination of its habitat by pollutants, predation, and drought driven by climate
25 change.

26 **Guadalupe orb**

27 45. Guadalupe orb is a freshwater mussel found in just two populations in the
28 Guadalupe River basin. It was recently discovered to be a unique species, separate from

1 the Texas pimpleback. It occurs in the Guadalupe River basin in two isolated populations.
2 It is a small-sized mussel with a shell length that reaches up to about 2.5 inches in length.
3 It is similar to the Texas pimpleback, but its shell is thinner and more compressed. It
4 faces many threats, including contamination of its habitat by pollutants, predation, and
5 drought induced by climate change.

6 **False spike**

7 46. False spike is a freshwater mussel that was once common in Texas. It is
8 native to the Brazos, Colorado, and Guadalupe basins in central Texas. It was first
9 documented in 1895 and was considered extinct until a single specimen was discovered
10 in 2011 near Gonzales in the Guadalupe River. The species is now known in four
11 populations: the Little River and some tributaries; the lower San Saba and Llano Rivers;
12 and the lower Guadalupe River.

13 47. The false spike is a medium-sized freshwater mussel, about 5.2 inches in
14 length. It has a yellow-green to brown or black elongated shell, sometimes with greenish
15 rays. It faces many threats, including contamination of its habitat by pollutants, predation,
16 and climate change.

17 **Pyramid pigtoe**

18 48. Pyramid pigtoe, also known as the pink pigtoe, is a freshwater mussel
19 found in Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Ohio, Oklahoma,
20 Tennessee, and Virginia. It is reddish to chestnut brown with a smooth, thick triangular
21 shell that can grow to almost four inches in length. The mussel has disappeared from
22 Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Pennsylvania, West Virginia, and
23 Wisconsin. It has lost nearly 80% of its range. It declined because of the historical
24 collection of its shell to make buttons on an industrial scale followed by widespread
25 damming of rivers, which cuts off the flowing water the pigtoe needs to survive.
26 Historically there were 151 known populations. Today there are only 35.

27 49. This mussel is threatened by pollution from suburban development,
28 agriculture, mining, and dredging, which have reduced water quality throughout its range.

1 The pigtoe is also threatened by a novel virus that is causing a die-off of mussels, and by
2 the spread of zebra mussels and other invasive species.

3 **Mt. Rainier white-tailed ptarmigan**

4 50. The Mt. Rainier white-tailed ptarmigan is the smallest bird in the grouse
5 family. It is one of the few animals that lives on alpine mountaintops throughout its
6 entire life. Every part of this bird is adapted to help it thrive in a frigid climate, from its
7 feathered, snowshoe-like talons to its seasonally changing plumage to its remarkable
8 metabolic ability to gain body mass throughout harsh winters.

9 51. The ptarmigan's range is severely limited by its sole dependence on alpine
10 habitat, which is shrinking due to climate change. Other threats to the bird and its habitat
11 include inadequately regulated recreational activities, such as hiking and skiing; the use
12 of off-road vehicles; mining; and livestock grazing. Although there has already been
13 much damage to the alpine habitats of the ptarmigan, climate change is the gravest threat
14 to this species. Climatic warming not only promises to directly affect the white-tailed
15 ptarmigan's breeding success and metabolic stability but will also exacerbate the
16 ecological instabilities caused by previous habitat degradation.

17 **Foothill yellow-legged frog: Central Coast DPS**

18 52. The foothill yellow-legged frog is a striking stream-dwelling amphibian
19 with a distinctive lemon-yellow color under its legs.

20 53. The Central Coast DPS of the foothill yellow-legged frog occurs in the San
21 Francisco Bay through the Diablo Range and Coast Range east of Salinas Valley. Like
22 the other yellow-legged frogs at issue in this complaint, it is threatened by alterations of
23 its habitat, including dams, surface-water diversions, and channel modifications. It is also
24 threatened by nonnative species like the bullfrog, which is a competitor, predator, and
25 disease carrier. Other threats include parasites, sedimentation, agriculture, mining,
26 urbanization, drought, extreme flooding, wildfires, and climate change.

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1 **Foothill yellow-legged frog: North Feather DPS**

2 54. The North Feather DPS of the foothill yellow-legged frog occurs primarily
3 in Plumas and Butte counties in California. It faces many threats, including dams,
4 urbanization, and climate change.

5 **Foothill yellow-legged frog: South Sierra DPS**

6 55. The South Sierra DPS of the foothill yellow-legged frog occurs in the
7 southern Sierra Nevada Mountains, from the South Fork American River subbasin
8 southward to the transition zone between the Sierra Nevada and the Tehachapi Mountains
9 that border the California Central Valley. It faces many threats, including dams,
10 urbanization, and climate change.

11 **Foothill yellow-legged frog: South Coast DPS**

12 56. The South Coast DPS of the foothill yellow-legged frog occurs along the
13 coastal Santa Lucia Range and the Sierra Madre Mountains in California. It faces many
14 threats, including dams, urbanization, and climate change.

15 **Tall western penstemon**

16 57. Tall western penstemon is a flower found in the Pacific Northwest that is
17 part of a genus of plants commonly known as “beardtongues.” It is one of the rarest
18 vascular plants in the Pacific Northwest. The penstemon was first recognized as a distinct
19 species in 1932. However, for nearly 75 years there were no field observations of the
20 species, and it was presumed extinct. In 2008, the tall western penstemon was
21 rediscovered in Oregon.

22 58. It lives today in just five known populations, narrowly distributed from
23 southwestern Washington to northwestern Oregon. The plant is endemic to the northern
24 Willamette Valley in Oregon and the greater Vancouver area in Washington, as well as
25 the western Columbia River Gorge. It is adapted to cool silty clay loam soils in
26 seasonally wet lowland meadows and streambanks, restricted to floodplain habitats below
27 500 feet west of the Cascade Range, and occurs in both brushy meadows and open
28 riparian forests.

1 59. It is primarily threatened by urbanization. The plant’s historical wet prairie
2 habitat has been modified by grazing, hydrological alteration, and agricultural and urban
3 development, greatly restricting its occurrence. The conversion of wild spaces to
4 agriculture has been the largest driver of the loss of prairie habitats in the Willamette
5 Valley. Approximately half of the Willamette Valley is in agricultural production. The
6 tall western penstemon is also threatened by climate change and competition from non-
7 native species.

8 **Pacific marten coastal DPS**

9 60. The Pacific marten coastal DPS, also called the Humboldt or coastal
10 marten, is a medium-sized carnivore in the weasel family. It occurs in old-growth forest
11 stands in coastal Oregon and northern California in four small, fragmented populations.
12 The sub-species is absent throughout much of its historic range. Due to the extensive
13 logging of coastal old-growth forests, it has been eliminated from 95% of its historic
14 range. Other threats include wildfires and loss of genetic diversity due to population
15 separation, and a tiny overall population.

16 61. The Pacific marten coastal DPS is at high risk of extinction due to the loss
17 and fragmentation of its forest habitat from logging and fires. Logging continues in much
18 of the marten’s remaining habitat, and climate change is expected to increase the severity
19 and frequency of fire events. Predation and disease pose additional threats to the survival
20 of the species. As habitat is lost, the coastal marten loses crucial cover and protection,
21 making it vulnerable to increased predation. The marten is also threatened by rodenticide
22 poisoning from marijuana cultivation and vehicle strikes.

23 **Listing Petition and Response**

24 62. The Center first petitioned the Service to list the cactus ferruginous pygmy
25 owl in 1992. 62 Fed. Reg. 10732 (Mar. 10, 1997). The owl’s Arizona population was
26 listed as endangered in 1997, but following an industry lawsuit, protections were
27 removed in 2006. 62 Fed. Reg. 10730 (Mar. 10, 1997); 71 Fed. Reg. 19452 (Apr. 14,
28 2006). On March 20, 2007, the Service received the Center and partner’s petition to list

1 the cactus ferruginous pygmy-owl. The Service determined that listing was not
2 warranted. 76 Fed. Reg. 61856 (Oct. 5, 2011). In 2014, the Center challenged the
3 Service’s determination in a lawsuit. 86 Fed. Reg. 72550 (Dec. 22, 2021). The court
4 agreed with the Center and ordered the Service to reconsider its determination. *Id.* The
5 parties reached an agreement that the Service submit a 12-month finding for the owl by
6 August 5, 2021. *Id.* This date was extended until December 16, 2021. *Id.* On December
7 22, 2021, the Service published a proposed rule to list the owl as a threatened species. *Id.*
8 at 72547. The Service determined that designating critical habitat for the owl was
9 “prudent” but not determinable. *Id.* The deadline for finalizing this rule has passed.

10 63. On October 5, 2011, the Service received a petition to list the Peñasco least
11 chipmunk. On November 21, 2012, the Service published a positive 90-day finding, and a
12 warranted but precluded 12-month finding stating that listing was warranted due to the
13 “present or threatened destruction, modification, or curtailment of [the chipmunk’s]
14 habitat or range and the fragmentation and isolation of small populations.” 7 Fed. Reg.
15 69994 (Nov. 21, 2012). The chipmunk was added to the Service’s candidate list and
16 subsequently reaffirmed in the Service’s annual candidate reviews until 2019. 84 Fed.
17 Reg. 54732 (Oct. 10, 2019).

18 64. On September 28, 2021, the Service published a 12-month finding
19 proposing to list the chipmunk as a threatened species with a critical habitat designation
20 of approximately 6,574 acres. The deadline for finalizing this rule has passed.

21 65. On June 27, 2007, the Service received a petition to list the Texas
22 fatmucket. On October 15, 2008, the Service received an additional petition to list the
23 Texas pimpleback, Texas fawnsfoot, and false spike. On December 15, 2009, the Service
24 published a 90-day finding that the petitions for these mussels presented “substantial
25 scientific or commercial information indicating that the petitioned action may be
26 warranted.” 74 Fed. Reg. 66260 (Dec. 15, 2009). On October 6, 2011, the Service
27 published a 12-month finding that the Texas fatmucket, Texas fawnsfoot, and Texas
28 pimpleback warranted listing but were precluded by higher priority actions. 76 Fed. Reg.

1 62166 (Oct. 6, 2011). These species were added to the candidate list and subsequently
2 reaffirmed in the Service’s annual candidate reviews until 2019. 84 Fed. Reg. 54732
3 (Oct. 10, 2019).

4 66. In 2018, the Service recognized the Guadalupe orb as a separate species
5 distinct from the Texas pimpleback, and the Guadalupe fatmucket was split from the
6 Texas fatmucket. 86 Fed. Reg. 47916 (Aug. 26, 2021). On August 26, 2021, the Service
7 published a 12-month finding proposing to list the Guadalupe fatmucket, Texas
8 fatmucket, Guadalupe Orb, Texas pimpleback, and false spike as threatened species. *Id.*
9 The Service also proposed to list the Texas fawnsfoot as a threatened species. *Id.* All six
10 mussels were proposed with critical habitat designations (a total of 1,944 river miles).
11 The deadlines for finalizing these rules have passed.

12 67. On April 20, 2010, the Service received the Center and partners’ petition to
13 list the pyramid pigtoe. On September 27, 2011, the Service published a positive 90-day
14 finding that the petition presented “substantial scientific or commercial information
15 indicating that the petitioned action may be warranted.” 76 Fed. Reg. 59836 (Sept. 27,
16 2011). On April 17, 2019, the Center filed suit challenging the Service’s failure to
17 complete a 12-month finding for the pyramid pigtoe within the statutory deadline. 86
18 Fed. Reg. 49991 (Sept. 7, 2021). The parties reached an agreement that the Service would
19 publish a 12-month finding by August 31, 2021. *Id.* On September 7, 2021, the Service
20 published a proposed rule to list the pyramid pigtoe. *Id.* at 49989. The Service determined
21 that designating critical habitat for the pigtoe was “prudent” but not determinable. *Id.* at
22 50009. The deadline for finalizing this rule has passed.

23 68. On August 26, 2010, the Service received the Center’s petition to list the
24 Mt. Rainier white-tailed ptarmigan. On June 5, 2012, the Service published a positive 90-
25 day finding that the petition presented “substantial scientific or commercial information
26 indicating that the petitioned action may be warranted.” 77 Fed. Reg. 33143 (June 5,
27 2012). On June 15, 2021, the Service published a 12-month finding proposing to list the
28 Mt. Rainier white-tailed ptarmigan as a threatened species under the Act. The Service

1 specifically determined that “habitat loss and degradation resulting from climate change
2 will affect the Mount Rainier white-tailed ptarmigan within the foreseeable future” and
3 that “[a]vailable information indicates that changing habitat conditions associated with
4 future climate change, such as loss of alpine vegetation and reduced snow quality and
5 quantity ... are expected to cause populations of Mount Rainier white-tailed ptarmigan to
6 decline.” *Id.* The deadline for the Service to finalize this rule has passed.

7 69. On July 11, 2012, the Service received the Center and partners’ petition to
8 list the foothill yellow-legged frog. On July 1, 2015, the Service published a positive 90-
9 day finding that the petition presented “substantial scientific or commercial information
10 indicating that the petitioned action may be warranted.” 80 Fed. Reg. 37568 (July 1,
11 2015). On March 16, 2016, the Center filed suit challenging the Service’s failure to
12 complete a 12-month finding for the foothill yellow-legged frog within the statutory
13 deadline.

14 70. On December 28, 2021, the Service published a 12-month finding
15 proposing to list four distinct population segments of this frog: the South Sierra DPS and
16 South Coast DPS as endangered and the North Feather DPS and Central Coast DPS as
17 threatened. 86 Fed. Reg. 73914 (Dec. 28, 2021). The Service determined that designating
18 critical habitat for these frogs was “prudent” but not determinable. *Id.* at 73914, 73942.
19 On February 28, 2022, the Service published an extension of the comment period for the
20 proposed rule to list these four distinct population segments of the foothill yellow-legged
21 frog. The deadline for finalizing this rule has passed.

22 71. On December 4, 2020, the Service received the Center and partner’s
23 petition to list tall western penstemon. On October 19, 2022, the Service published a
24 positive 90-day finding that the Center’s petition to list this plant presents “substantial
25 scientific or commercial information indicating that the petitioned actions may be
26 warranted.” 87 Fed. Reg. 63468 (Oct. 19, 2022). Because the Service found that the
27 petition may be warranted, it was required to publish a 12-month finding one year after it
28 received the petition. The deadline for publication of the 12-month finding has passed.

1 76. The ESA requires the Service to publish a final listing determination one
2 year after it publishes a 12-month finding with a proposed listing determination.
3 Defendants have failed to perform their nondiscretionary duty to publish a timely final
4 listing determination, including the concurrent designation of critical habitat designation,
5 for cactus ferruginous pygmy-owl, Peñasco least chipmunk, Texas fatmucket, Guadalupe
6 fatmucket, Texas fawnsfoot, Texas pimpleback, Guadalupe orb, false spike, pyramid
7 pigtoe, Mt. Rainier white-tailed ptarmigan, and the four distinct population segments
8 (“DPS”) of the foothill yellow-legged frog: the Central Coast DPS, North Feather DPS,
9 South Sierra DPS, and the South Coast DPS, in violation of the ESA. § 1533(b)(6)(A),
10 (C).

11 **Violation of the ESA for Failure to Publish a Timely 12-Month Finding for**
12 **tall western penstemon**

13 77. Plaintiff re-alleges and incorporates all allegations set forth in the preceding
14 paragraphs.

15 78. The ESA requires the Service to publish a finding within 12 months of
16 receiving a petition to list a species under the Act when it makes a 90-day finding that
17 listing may be warranted. Defendants failed to perform their nondiscretionary duty to
18 publish a timely 12-month finding for tall western penstemon, in violation of the ESA. 16
19 U.S.C. § 1533(b)(3)(B).

20 **Violation of the ESA for Failure to Publish a Timely Critical Habitat**
21 **Designation for Pacific marten coastal DPS.**

22 79. Plaintiff re-alleges and incorporates all allegations set forth in the preceding
23 paragraphs.

24 80. The ESA requires the Service to publish a critical habitat designation
25 concurrently with listing or provide notice it is extending its designation deadline. If the
26 Service determines that critical habitat is not then determinable, it may extend the one-
27 year period by one additional year. Defendants failed to perform their nondiscretionary
28

1 duty to publish a timely final rule for Pacific marten Coastal DPS in violation of the ESA.
2 16 U.S.C. § 1533(a)(3)(A)(i), § 1533(b)(6)(C)(ii).

3 **REQUEST FOR RELIEF**

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

- 6 1. Declare that Defendants violated the ESA by (1) failing to issue timely final
7 listing determinations for cactus ferruginous pygmy owl, Peñasco least
8 chipmunk, Texas fatmucket, Guadalupe fatmucket, Texas fawnsfoot, Texas
9 pimpleback, Guadalupe orb, false spike, pyramid pigtoe, Mt. Rainier white-
10 tailed ptarmigan, and the four DPS of the foothill yellow-legged frog; (2)
11 failing to issue a timely 12-month listing determination in response to the
12 Center’s petition to list the tall western penstemon; and (3) failing to timely
13 finalize its critical habitat designation for the Pacific marten coastal DPS;
- 14 2. Provide injunctive relief compelling Defendants to issue the final listing
15 determinations, 12-month finding, and publish the critical habitat
16 designation in the Federal Register by a date certain;
- 17 3. Retain continuing jurisdiction to review Defendants’ compliance with all
18 judgments and orders herein;
- 19 4. Grant Plaintiff its reasonable attorneys’ fees and costs as provided by the
20 ESA, 16 U.S.C. § 1540(g)(4); and
- 21 5. Provide such other relief as the Court deems just and proper.

22
23 Respectfully submitted and dated this 22nd day of June, 2023.

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