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11 **UNITED STATES DISTRICT COURT FOR THE**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 CENTER FOR BIOLOGICAL DIVERSITY,  
14 a non-profit organization,

15 Plaintiff,

16 v.

17 GINA RAIMONDO, Secretary of Commerce,  
18 and NATIONAL MARINE FISHERIES  
19 SERVICE,

20 Defendants.

Case No. 22- 6566

**COMPLAINT FOR DECLARATORY  
AND OTHER RELIEF**

## INTRODUCTION

1  
2 1. Plaintiff Center for Biological Diversity brings this action under the Endangered  
3 Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, against Secretary of Commerce Gina Raimondo  
4 and the National Marine Fisheries Service (collectively, “the Fisheries Service”) for causing the  
5 illegal “take” of threatened and endangered humpback whales and failing to ensure that the  
6 California drift gillnet fishery does not jeopardize the continued existence of these whales.  
7 Specifically, Plaintiff challenges the Fisheries Service’s authorization of the drift gillnet fishery,  
8 which is entangling, injuring, and killing humpback whales, in violation of Section 9 of the ESA,  
9 *id.* § 1538(a)(1)(B), and its failure to complete the consultation required under the ESA on the  
10 effects of the continued authorization of the drift gillnet fishery on the endangered Central  
11 America distinct population segment (“DPS”) and threatened Mexico DPS of humpback whales.  
12 *Id.* § 1536(a)(2).

13 2. Commercial fishing gear entanglement is a primary threat to the recovery of  
14 imperiled humpback whales. The most recent annual estimates of mortality and serious injury of  
15 humpback whales off California, Oregon, and Washington are 48 from human activities, of  
16 which 25 are from fisheries. This represents a *400 percent increase* in humpback whale mortality  
17 and serious injury from human activities since 2018 estimates.

18 3. The drift gillnet fishery is responsible for some of these entanglements, serious  
19 injuries, and deaths. The drift gillnet fishery deploys nets about a mile long that catch shark,  
20 swordfish, and tuna—the target fish—and also incidentally entangle whales, dolphins, sea lions,  
21 and sea turtles. The drift gill net fishery on average discards over half of all fish caught, kills  
22 over 70 different marine species as bycatch, and has among the highest rates of marine mammal  
23 and sea turtle interactions across all West Coast fisheries.

24 4. Large-scale pelagic drift gill nets targeting swordfish and sharks have been  
25 banned on the high seas and in ocean waters of many countries, and they are banned or no longer  
26 permitted by any state besides California because of the unavoidable impacts to marine wildlife.

27 5. When humpback whales get tangled in drift gillnets, they can drown in the net or  
28 swim away with pieces of the nets wrapped around them. The lines can constrict—causing

1 injuries and infections—and drag behind after the whale swims away. Gear remaining on the  
2 whale saps it of strength, causes significant stress, and interferes with breathing, feeding, and  
3 reproduction.

4 6. In the absence of a valid incidental take statement, each entanglement of a  
5 humpback whale in drift gillnet gear constitutes an unlawful “take” under the ESA.

6 7. The Fisheries Services completed an ESA consultation in 2013 and anticipated a  
7 take of one observed humpback whale during a five-year period. In 2021, observers on drift  
8 gillnet fishery vessels separately recorded two humpback whales caught. This exceeded the  
9 incidental take statement’s threshold in the 2013 consultation.

10 8. The Fisheries Service has continued to authorize, permit, oversee, and manage the  
11 drift gillnet fishery in the same manner the agency acknowledges will cause humpback whale  
12 entanglement, injury, and death. The Fisheries Service’s authorization, permitting, oversight, and  
13 management of the drift gillnet fishery has caused, and will likely continue to cause, the  
14 entanglement, injury, and death of threatened and endangered humpback whales.

15 9. The Fisheries Service no longer has a valid incidental take statement authorizing  
16 takes of ESA-listed humpback whales incidental to operation of the drift gillnet fishery because  
17 the fishery has entangled more humpback whales than anticipated in the 2013 incidental take  
18 statement.

19 10. Further, the Fisheries Service has failed to reinitiate and complete ESA  
20 consultation on the impacts of the drift gillnet fishery on the Central America humpback whale  
21 DPS, the Mexico humpback whale DPS, or their critical habitat, which were listed and  
22 designated after the 2013 consultation. Additional information indicates that the drift gillnet  
23 fishery affects humpback whales and their critical habitat in a manner that the 2013 consultation  
24 did not consider.

25 11. The Fisheries Service’s continued authorization, permitting, oversight, and  
26 management of the drift gillnet fishery without completing the required consultation violates the  
27 agency’s procedural duty to complete consultation and its substantive duty to avoid jeopardy to  
28 the continued existence of these species under Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

1           12.     Accordingly, Plaintiff seeks a declaration that the Fisheries Service is in violation  
2 of the ESA’s prohibition on causing take of listed species and that the Fisheries Service’s  
3 ongoing failure to reinitiate and complete a new ESA consultation violates the agency’s duty to  
4 avoid jeopardy to humpback whales and adverse modification to their critical habitat. Plaintiff  
5 also seeks an order requiring the Fisheries Service to issue a new biological opinion on the  
6 fishery by a date certain and mitigation measures that will help protect humpback whales from  
7 injury and death in the fishery.

#### 8                           **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

9           13.     This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
10 question); 28 U.S.C. § 1346 (action against the United States); 28 U.S.C. § 1361 (action to  
11 compel an officer of the United States to perform his or her duty); 28 U.S.C. §§ 2201–02 (power  
12 to issue declaratory judgments and grant relief in cases of actual controversy); 16 U.S.C.  
13 § 1540(g) (ESA citizen suit provision); and 5 U.S.C. § 702 (Administrative Procedure Act).

14           14.     Plaintiff provided Defendants with notice of Plaintiff’s intent to sue over the ESA  
15 violations alleged in this Complaint more than 60 days ago. Defendants have not remedied these  
16 violations of law.

17           15.     Venue is proper in the Northern District of California pursuant to 16 U.S.C.  
18 § 1540(g)(3)(A) because the ESA violations are occurring in this district and pursuant to 28  
19 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claims occurred  
20 here.

21           16.     Pursuant to Civil Local Rule 3-2(c) and 3-2(d), the appropriate intradistrict  
22 assignment of this case is either to the San Francisco Division or the Oakland Division.

#### 23                           **PARTIES**

##### 24                           **Plaintiff**

25           17.     Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a national  
26 nonprofit conservation organization that works through science, law, and policy to secure a  
27 future for all species, great or small, hovering on the brink of extinction. The Center is dedicated  
28

1 to the preservation, protection, and restoration of biodiversity and ecosystems throughout the  
2 world. The Center has more than 89,600 members.

3 18. The Center's Oceans Program focuses specifically on conserving marine  
4 ecosystems and seeks to ensure that imperiled species are properly protected from destructive  
5 practices in our oceans. In pursuit of this mission, the Center has been actively involved in  
6 securing ESA protections for imperiled marine mammals and protecting whales and other  
7 wildlife from deadly and harmful entanglement in commercial fishing gear.

8 19. Center members live in and regularly visit ocean waters, bays, beaches, and other  
9 coastal areas to observe, photograph, study, and otherwise enjoy humpback whales and their  
10 habitat. Center members have an interest in whales, marine mammals, and other wildlife and  
11 their Pacific Ocean habitat, including waters off California, Oregon, and Washington. For  
12 example, Center members frequently sail, kayak, and go on humpback whale-watching tours in  
13 Gulf of the Farallones, Half Moon Bay, Monterey Bay, and the Santa Barbara Channel to look  
14 for and photograph humpback whales and other wildlife. Center members derive recreational,  
15 spiritual, professional, scientific, educational, and aesthetic benefit from the presence of  
16 humpback whales and their habitat. One Center member took her young daughter whale  
17 watching in Monterey Bay in September 2021 and saw many humpbacks. She enjoyed her trip  
18 but felt sad to see multiple humpbacks with entanglement scars. She plans to go whale watching  
19 again in November 2022. Other Center members live in San Francisco Bay Area and regularly  
20 look for humpback whales in walks near or along the ocean. Center members intend to continue  
21 to use and enjoy the habitat of humpback whales frequently and on an ongoing basis in the  
22 future.

23 20. Entanglements of humpback whales in the drift gillnet fishery kills and harms  
24 animals that Center members enjoy viewing. The Fisheries Service's failure to comply with the  
25 ESA makes it less likely that Center members will be able to observe, study, and enjoy these  
26 animals. Additionally, Center members reasonably fear that they will see a humpback whale  
27 entangled in fishing gear when recreating and visiting California's beaches and ocean waters.  
28

1           21.     An integral aspect of the Center’s members’ use and enjoyment of humpback  
2 whales is the expectation and knowledge that the species are in their native habitat. For this  
3 reason, the Center’s members’ use and enjoyment of humpback whales is entirely dependent on  
4 the continued existence of healthy, sustainable populations in the habitat off the Pacific Coast.  
5 The Fisheries Service’s failure to comply with applicable environmental laws deprives  
6 humpback whales of statutory protections that are vitally important to the species’ survival and  
7 eventual recovery. The Fisheries Service’s failure to comply with the ESA by causing unlawful  
8 take and allowing the fishery to operate under an outdated biological opinion diminishes the  
9 aesthetic, recreational, spiritual, scientific, and other interests of the Center and its members  
10 because humpback whales are more vulnerable to harm and less likely recover absent the  
11 protections that result from those actions. The Center and its members are therefore injured  
12 because the Center’s use and enjoyment of the humpback whales, and those areas inhabited by  
13 them, are threatened by the Fisheries Service’s ongoing authorization of the drift gillnet fishery  
14 without compliance with environmental law.

15           22.     The Center’s members’ above-described cultural, spiritual, aesthetic, recreational,  
16 scientific, educational, and other interests have been, are being, and, unless the relief prayed  
17 herein is granted, will continue to be adversely affected and irreparably injured by the Fisheries  
18 Service’s continued refusal to comply with its obligations under the ESA and other laws. The  
19 relief sought in this case will redress these injuries.

20           23.     In addition, the Center’s members regularly comment on agency actions that  
21 affect wildlife off California and the West Coast, including humpback whales, and regularly  
22 comment on and participate in the Fisheries Service’s decisions affecting threatened and  
23 endangered species. Rules regarding fishing, the management of national marine sanctuaries, and  
24 offshore energy development all have the potential to impact humpback whales. The Fisheries  
25 Service’s failure to comply with the ESA—specifically by failing to adequately assess the impact  
26 of the drift gillnet fishery and complete consultation to ensure against jeopardy—deprives them  
27 of these rights to understand and comment on agency activities’ impacts on humpback whales  
28 and causes them informational injuries that would be redressed by a favorable decision.

**Defendants**

24. Defendant GINA RAIMONDO, U.S. Secretary of Commerce, is the highest-ranking official within the Department of Commerce and, in that capacity, has responsibility for its administration and implementation of the ESA and for compliance with all other federal laws applicable to the Department of Commerce. She is sued in her official capacity.

25. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency within the Department of Commerce. The National Marine Fisheries Service is the agency that implements the ESA for most marine species, including humpback whales.

**LEGAL BACKGROUND****Endangered Species Act**

26. The ESA is the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its primary purposes “are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

27. The ESA defines the term “species” to include “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

28. Section 4 of the ESA requires the Fisheries Service to list species as “endangered” or “threatened” when they meet the statutory listing criteria. 16 U.S.C. § 1533. An “endangered” species is “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20).

29. The Central America distinct population segment (“DPS”) of humpback whales is listed as endangered under the ESA, 50 C.F.R. § 224.101(h) (2016), and the Mexico DPS of humpback whales is listed as threatened, *id.* § 223.102(e) (2016).

30. Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but also its ultimate recovery.

1 Section 9 of the ESA makes it “unlawful for any person” to “take any [endangered] species  
2 within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B).  
3 This prohibition on “take” also applies to certain threatened species, including the Mexico DPS  
4 of humpback whales. 50 C.F.R. § 223.213 (2016). It is also unlawful for “any person,” including  
5 both individual persons and federal agencies, to “cause to be committed” any offense described  
6 in Section 9, including take of threatened or endangered species, or a violation of regulations  
7 pertaining to these species. 16 U.S.C. § 1538(g).

8 31. The term “take” is defined broadly as “to harass, harm, pursue, hunt, shoot,  
9 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C.  
10 § 1532(19). “Harm” means “an act which actually kills or injures wildlife,” including habitat  
11 modification or degradation that “significantly impair[s] essential behavioral patterns, including  
12 breeding, feeding[,] or sheltering.” 50 C.F.R. § 17.3 (1975). “Harass” means “an intentional or  
13 negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such  
14 an extent as to significantly disrupt normal behavioral patterns which include, but are not limited  
15 to, breeding, feeding, or sheltering.” *Id.* “Take” includes both direct and indirect harm and it need  
16 not be deliberate.

17 32. Section 7(a)(2), 16 U.S.C. § 1536(a)(2), is a critical component of the statutory  
18 and regulatory scheme to conserve endangered and threatened species. It requires that every  
19 federal agency must determine whether its actions “may affect” any endangered or threatened  
20 species. 50 C.F.R. § 402.14(a) (1986). If so, the action agency must formally consult with the  
21 Fisheries Service as part of its duty to “insure that [its] action is . . . not likely to jeopardize the  
22 continued existence” of that species. *Id.* § 1536(a)(2); *see id.* § 1536(a)(1); 50 C.F.R. § 402.14.  
23 The term “jeopardize” is defined as an action that “reasonably would be expected . . . to reduce  
24 appreciably the likelihood of both the survival and recovery of a listed species in the wild by  
25 reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (1986).  
26 Here the Fisheries Service is both the action agency and the consulting agency and undertakes  
27 intra-agency consultation.  
28



1           33.     At the completion of formal consultation, the Fisheries Service issues a biological  
2 opinion that determines if the agency action is likely to jeopardize a species. 16 U.S.C.  
3 §1536(b)(3)–(4); 50 C.F.R. § 402.14(h). In formulating the biological opinion, the Fisheries  
4 Service must use only “the best scientific and commercial data available.” 16 U.S.C.  
5 § 1536(a)(2).

6           34.     If the Fisheries Service determines in its biological opinion that the action is likely  
7 to jeopardize the continued existence of a listed species, the biological opinion must include  
8 “reasonable and prudent alternatives” to the action that will avoid jeopardy. 16 U.S.C.  
9 § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2).

10          35.     A biological opinion that concludes that the agency action is not likely to  
11 jeopardize the continued existence of a listed species but will result in take incidental to the  
12 agency action must include an incidental take statement. 16 U.S.C. § 1536(b)(4).

13          36.     The incidental take statement must specify (1) the amount or extent of incidental  
14 taking on such listed species; (2) “reasonable and prudent measures” the Fisheries Service  
15 considers necessary or appropriate to minimize such impact; and (3) “terms and conditions” with  
16 which the action agency must comply to implement the reasonable and prudent measures. 16  
17 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). Additionally, when the listed species to be  
18 incidentally taken are marine mammals, the Fisheries Service must first authorize such take  
19 under the Marine Mammal Protection Act (“MMPA”), and the incidental take statement must  
20 include any additional measures necessary to comply with the MMPA take authorization. 16  
21 U.S.C. § 1536(b)(4)(iii).

22          37.     A valid incidental take statement and compliance with its terms exempts the take  
23 of a listed species that is otherwise prohibited under Section 9 of the ESA. 16 U.S.C.  
24 § 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5). Where take specified in the incidental take  
25 statement is exceeded, the ESA exemption against take no longer applies. *See* 16 U.S.C  
26 § 1536(b)(4)(i), (o)(2); 50 C.F.R. § 402.14(i)(4)–(5).

1 38. Regardless of the conclusion reached in a biological opinion, the agency  
2 undertaking the federal action has an independent duty to ensure that its actions are not likely to  
3 jeopardize the continued existence of listed species. 16 U.S.C. § 1536(a)(2).

4 39. The ESA specifies that Section 7 consultation must typically be completed within  
5 ninety days after initiation. 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e). The substantive duty  
6 to ensure against jeopardy of listed species remains in effect regardless of the status of the  
7 consultation.

8 40. The duty to consult is ongoing. Federal agencies are required to “reinitiate”  
9 consultation under Section 7 of the ESA in four circumstances:

10 (1) If the amount or extent of taking specified in the incidental take statement is  
11 exceeded;

12 (2) If new information reveals effects of the action that may affect listed species or  
13 critical habitat in a manner or to an extent not previously considered;

14 (3) If the identified action is subsequently modified in a manner that causes an effect to  
15 the listed species or critical habitat that was not considered in the biological opinion . . . ;  
or

16 (4) If a new species is listed or critical habitat designated that may be affected by the  
17 identified action.

18 50 C.F.R. § 402.16(a).

### 19 **Magnuson-Stevens Fishery Conservation and Management Act**

20 41. The Magnuson-Stevens Fishery Conservation and Management Act established a  
21 national program for the management and conservation of fishery resources. 16 U.S.C.  
22 § 1801(a)(6). Through management plans and implementing regulations under this statute, the  
23 Fisheries Service sets forth requirements for most fisheries operating in federal waters of the  
24 United States, specifying what species may be targeted, what gear may be used, and when and  
25 where fishermen may operate. Where necessary, the Fisheries Service promulgates regulations  
26 designed to protect imperiled species and ensure compliance with the ESA.

### 27 **Administrative Procedure Act**

28 42. The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551–706, provides for

1 judicial review of final agency action. Under the APA, a person may seek judicial review to  
2 “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1). The APA  
3 also requires that a reviewing court “hold unlawful and set aside agency action, findings, and  
4 conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in  
5 accordance with law.” *Id.* § 706(2)(A).

6 43. The APA directs an agency “to conclude a matter presented to it” “within a  
7 reasonable time.” 5 U.S.C. § 555(b).

8 44. A reviewing court may compel action if the agency has a duty to act and it has  
9 “unreasonably delayed” fulfilling that duty. *Id.* § 706(1).

10 **THE FISHERIES SERVICE HAS UNDERESTIMATED AND IGNORED THE**  
11 **FISHERY’S CONTINUING HARM TO HUMPBACK WHALES**

12 45. The Central America humpback whale DPS and Mexico humpback whale DPS  
13 are ESA-listed species that have been and are being taken by the Fisheries Service’s  
14 authorization and management of the drift gillnet fishery.

15 **Imperiled West Coast Humpback Whales Have Not Recovered**

16 46. Humpback whales (*Megaptera novaeangliae*) were listed as endangered in 1970  
17 under the Endangered Species Conservation Act—the precursor to the ESA—and as endangered  
18 under the ESA upon its enactment in 1973. 35 Fed. Reg. 18,319 (Dec. 2, 1970). Entanglement in  
19 fishing gear is the most frequently identified source of human-caused injury and mortality to the  
20 species.

21 47. The Fisheries Service reclassified the globally listed humpback whale species into  
22 14 different DPSs in 2016. 81 Fed. Reg. 62,260 (Sept. 8, 2016). Two of those populations are  
23 found in waters off California and Oregon: the Central America DPS and Mexico DPS. *Id.* at  
24 62,305, 62,306. The Fisheries Service listed the Central America DPS as endangered and the  
25 Mexico DPS as threatened. *Id.* at 62,305–08; 50 C.F.R. § 17.11(h) (2022).

26 48. Humpback whales in the Central America DPS generally migrate from their  
27 winter breeding grounds off Central America to feed almost exclusively off California and  
28 Oregon in spring and summer. 81 Fed. Reg. at 62,306. The Fisheries Service determined the

1 Central America DPS is a discrete population—based on sightings data and significant genetic  
2 differentiation between it and other North Pacific populations—and is in danger of extinction. *Id.*  
3 at 62,306–08.

4 49. In 2022 Fisheries Service scientists updated the abundance estimate of the Central  
5 America DPS and concluded it contained about 1,500 individuals. Loss of the Central America  
6 DPS would result in a significant gap in the range of humpback whales as a species.

7 50. The Mexico DPS is threatened and consists of whales that breed along the Pacific  
8 coast of mainland Mexico in winter, migrate through the Baja California Peninsula coast and  
9 feed across a broad geographic range from California to the Aleutian Islands in the summer and  
10 spring, with concentrations in California and Oregon. 81 Fed. Reg. at 62,305.

11 51. In 2021 a Fisheries Service scientist updated the abundance estimate of the  
12 Mexico DPS and concluded it contained about 2,900 individuals.

13 52. The Fisheries Service determined the Central America DPS is endangered—has  
14 high extinction risk—based, in part, on the continuing, ongoing threat of entanglement in fishing  
15 gear. 81 Fed. Reg. at 62,307. Vessel strikes and entanglement in fishing gear “are considered  
16 likely to moderately reduce the population size or growth rate of the Central America DPS.” *Id.*  
17 The Fisheries Service determined the Mexico DPS is at a moderate risk of extinction—finding  
18 “fishing gear entanglement poses *at least* a moderate risk”—and thus listed it as threatened. *Id.* at  
19 62,307–08 (emphasis added).

20 53. Five biologically important feeding areas for humpback whales exist off  
21 California. These areas include waters from San Francisco Bay to Monterey Bay, Morro Bay,  
22 and parts of the Santa Barbara Channel. Humpback whales can be found off California in every  
23 month of the year and in higher numbers during the spring, summer, and fall.

24 54. The Fisheries Service published a final rule designating much of the marine  
25 ecosystem off California as critical habitat for the Central America and Mexico humpback whale  
26 DPSs in 2021. 86 Fed. Reg. 21,082 (Apr. 21, 2021).

27 55. In 2021, NMFS confirmed that 17 humpback whales were reported entangled in  
28 fishing gear off the coasts of California, Oregon, and Washington. As in past years, humpback

1 whales were the most common species entangled. The actual entanglements are likely far higher  
2 because most confirmed reports come from opportunistic sightings of entangled whales.

### 3 **The Drift Gillnet Fishery Indiscriminately Entangles Marine Life**

4 56. The drift gillnet fishery uses nets that are a mile long and set overnight to catch  
5 tuna, swordfish, and sharks by ensnaring them by the gills. Endangered species like large whales  
6 and sea turtles are also entangled, injured, and drowned in drift gillnets. Much of the fishing  
7 effort occurs from August 15 through January 31 and overlaps with biologically important areas  
8 for whales and sea turtles.

9 57. The Fisheries Service implements the Fishery Management Plan for the U.S. West  
10 Coast Fisheries for Highly Migratory Species. 50 C.F.R. Part 660, Subpart K (§§ 660.701–  
11 660.721). Individuals fishing with drift gillnets must obtain a federal drift gillnet permit and  
12 renew it annually and have a vessel permit to fish for highly migratory species. 50 C.F.R.  
13 § 660.707(a)(1), (f)(9)(iii).

14 58. The Fisheries Service has classified the drift gillnet fishery in “category II,” which  
15 means that occasional incidental mortality and serious injury of marine mammals occurs  
16 incidental to fishing. Marine mammals incidentally killed or injured in the fishery include whales  
17 (gray, humpback, minke, sperm, and short-finned pilot), dolphins (bottlenose, long-beaked  
18 common, short-beaked common, Northern right whale, Pacific white-sided, and Risso’s), Dall’s  
19 porpoises, California sea lions, and Northern elephant seals.

20 59. The Fisheries Service issued a Marine Mammal Protection Act (“MMPA”) permit  
21 to take threatened and endangered whales for three years in the drift gillnet fishery on May 11,  
22 2022. 87 Fed. Reg. 28,811. The Fisheries Service estimated humpback whale annual mortality  
23 and serious injury in the drift gillnet fishery to be 0.1, but it did not include the two humpback  
24 whales incidentally caught in 2021. *Id.* at 28,813. The permit included no conditions or  
25 mitigation measures to avoid incidental catch of humpback whales.

26 60. These permits and regulations, and other acts and omissions in permitting,  
27 managing, overseeing, and authorizing the drift gillnet fishery are affirmative acts of control by  
28 the Fisheries Service that make it liable for entangling the threatened and endangered humpback

1 whales.

2 61. The 2013 Biological Opinion analyzed the effects of the drift gillnet fishery on  
3 humpback whales and other ESA-listed species, including fin and sperm whales and leatherback,  
4 loggerhead, green, and olive ridley sea turtles. The 2013 Biological Opinion defined the agency  
5 action as the Fisheries Service's continued management of the drift gillnet fishery under the  
6 Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species.

7 62. The fish targeted in the drift gillnet fishery has changed since the 2013 Biological  
8 Opinion, which identified swordfish and common thresher shark as the two target species. In the  
9 2020–21 and 2021–22 fishing seasons, Pacific bluefin tuna was the largest component the drift  
10 gillnet fisheries' catch. The Fisheries Service has not consulted on the impacts to endangered and  
11 threatened species from the drift gillnet fisheries' targeting of Pacific bluefin tuna.

12 63. Bluefin tuna and marine mammals are often found in the same feeding grounds.  
13 Pacific bluefin tuna eat the same fish as humpback whales, like Pacific sardine and northern  
14 anchovy. Using drift gillnets to fish for tuna feeding on anchovy and sardine increases the risk  
15 that humpback whales will be entangled.

16 64. In the 2013 Biological Opinion, the Fisheries Service anticipated that fishery  
17 observers would record only one humpback whale interaction during a 5-year period. In the  
18 2020–2021 fishing season, observers recorded a humpback whale incidentally caught in drift  
19 gillnets. Observers again recorded a humpback whale incidentally caught in drift gillnets in the  
20 2021–2022 fishing season, exceeding the Fisheries Service's anticipated take level in the 2013  
21 Biological Opinion.

22 65. The Fisheries Service's take of humpback whales beyond that allowed in its  
23 incidental take statement constitutes a violation of ESA Section 9. *Nw. Env'tl. Def. Ctr. v. U.S.*  
24 *Army Corps of Eng'rs*, 479 F. Supp. 3d 1003, 1022–23 (D. Or. 2020).

25 66. The Biological Opinion estimated observers cover around of 20 percent of the  
26 drift gillnet fishing trips each year, meaning the actual number of humpback whales caught in the  
27 drift gillnet fishery is around *five times as many as recorded*.

28 67. In the 2020–2021 drift gillnet fishing season, observer coverage was about 15

1 percent. In the 2021–2022 fishing season observer coverage was 19.49 percent. Extrapolating the  
2 observed catch by the observer level each fishing season means that an estimated 12 humpbacks  
3 were caught in these two fishing seasons.

4 68. Yet—based on information and belief—the Fisheries Service has neither  
5 reinitiated nor completed consultation on the impacts of the drift gillnet fishery to the endangered  
6 Central America humpback whale DPS or threatened Mexico humpback whale DPS. While  
7 Fisheries Service documents show it reinitiated consultation in 2018, it withdrew its reinitiation  
8 the same year. Based on information and belief, the Fisheries Service has not subsequently  
9 reinitiated consultation on the drift gillnet fishery.

10 69. The Fisheries Service is thus violating the ESA by continuing to take ESA-listed  
11 humpback whales without a valid authorization, failing to reinitiate and complete consultation,  
12 and relying on the invalid and outdated 2013 Biological Opinion for its continued operation and  
13 authorization of the drift gillnet fishery.

## 14 **CLAIMS FOR RELIEF**

### 15 **FIRST CLAIM FOR RELIEF**

#### 16 **Violation of Section 9 of the ESA**

17 70. Paragraphs 1 through 69 are hereby realleged as though set out in full.

18 71. The Fisheries Service exceeded the 2013 Biological Opinion’s take limit of  
19 humpback whales incidentally caught in the drift gillnet fishery. Thus, the drift gillnet fishery is  
20 no longer covered by a valid incidental take statement for humpback whales.

21 72. The 2013 Biological Opinion includes neither the Central America DPS  
22 humpback whales nor the Mexico DPS humpback whales. Thus, no valid incidental take  
23 statement exists for these species for the drift gillnet fishery.

24 73. The Fisheries Service’s authorization, permitting, licensing, overseeing, and  
25 management of the drift gillnet fishery continues to kill, injure, harm, capture, and otherwise  
26 cause “take” of the Central America DPS and Mexico DPS of humpback whales in violation of  
27 the ESA. 16 U.S.C. § 1538(a)(1)(B), (G), 1538(g); 50 C.F.R. § 223.213.

**SECOND CLAIM FOR RELIEF**

**Violation of ESA Section 7(a)(2) and the APA**

74. Paragraphs 1 through 69 are hereby realleged as though set out in full.

75. Section 7(a)(2) of the ESA imposes a substantive duty on each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of” critical habitat. 16 U.S.C. § 1536(a)(2). The Fisheries Service must complete consultation before taking any action that may affect a listed species. *Id.*; 50 C.F.R. § 402.14(a).

76. The Fisheries Service’s 2013 Biological Opinion contains outdated information. New information and listed species require it to reinitiate consultation, including (1) the designation of the Central America humpback whale DPS, the Mexico humpback whale DPS, and their critical habitat; (2) the elevated humpback whale entanglements since 2014; (3) the change in the drift gillnet fishery’s target catch to Pacific bluefin tuna in the two most recent fishing seasons and the humpback whales caught in those seasons; and (4) the 2022 issuance of the MMPA permit that authorized incidental catch of whales without any measures to minimize or avoid take.

77. Further, the drift gillnet fishery exceeded the anticipated incidental take level of humpback whales contained in the Fisheries Service’s 2013 Biological Opinion.

78. Accordingly, the Fisheries Service is required to reinitiate and complete Section 7 consultation on the drift gillnet fishery’s effects on the Central America DPS and Mexico DPS of humpback whales and their critical habitat. The Fisheries Service has not completed consultation or obtained a biological opinion on the drift gillnet fishery’s effects on either species or their critical habitat.

79. The Fisheries Service is therefore in violation of its duties under the ESA and its implementing regulations to complete the required consultation and ensure its authorizations of the drift gillnet fishery do not jeopardize the continued existence of the Central America DPS or Mexico DPS of humpback whales or adversely modify their critical habitat. 16 U.S.C.



1 § 1536(a)(2); 50 C.F.R. § 402.14.

2 80. In addition, under the APA each federal agency must “conclude a matter  
3 presented to it” “within a reasonable time.” 5 U.S.C. § 555(b). The APA authorizes reviewing  
4 courts to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

5 81. The schedule that Congress prescribed in the ESA for completing consultations  
6 informs the timeline for defining the APA duty to act within a reasonable time. *See* 16 U.S.C.  
7 § 1536(b)(1)(A). The ESA requires that consultation be completed within 90 days of the  
8 initiation of consultation unless the action agency and consulting agency agree to another  
9 timeline. *Id.*; *see also* 50 C.F.R. § 402.14(e).

10 82. The Fisheries Service’s delay in completing the legally required consultation on  
11 the effects of the drift gillnet fishery, including publication of the legally required biological  
12 opinion and incidental take statement, constitutes a failure to conclude a matter presented to it  
13 within a reasonable time and an unreasonable delay under APA. 5 U.S.C. §§ 555(b), 706(1).

14 **THIRD CLAIM FOR RELIEF**

15 **Violation of the ESA and APA**

16 83. Paragraphs 1 through 69 are hereby realleged as though set out in full.

17 84. The Fisheries Service has a duty as the action agency authorizing and managing  
18 the drift gillnet fishery to ensure that its actions are not likely to jeopardize the continued  
19 existence of any ESA-listed species, including humpback whales, or adversely modify critical  
20 habitat. 16 U.S.C. § 1536(a)(2).

21 85. The Fisheries Service cannot rely on the unlawful 2013 Biological Opinion to  
22 meet its duty to ensure that its authorization of the drift gillnet fishery will avoid jeopardizing the  
23 Central America DPS or Mexico DPS of humpback whales.

24 86. The Fisheries Service’s continued authorization and management of the drift  
25 gillnet fishery based on the 2013 Biological Opinion is in violation of section 7(a)(2) of the ESA,  
26 16 U.S.C. § 1536(a)(2), and reliance on the 2013 Biological Opinion is arbitrary, capricious, an  
27 abuse of discretion, and not in accordance with law, contrary to the APA, 5 U.S.C. § 706(2).  
28

**REQUEST FOR RELIEF**

For the reasons stated above, Plaintiff respectfully requests that the Court:

1. Declare that the Fisheries Service has violated and is violating the ESA by taking listed species without a valid incidental take statement;
2. Declare that the failure to reinitiate and complete consultation violates the mandate of ESA Section 7(a)(2) and 50 C.F.R. § 402.16 to ensure that the drift gillnet fishery does not jeopardize the continued existence of the Central America and Mexico DPSs of humpback whales. Alternatively, declare that the Fisheries Service is violating Sections 555(b) and 706(1) of the APA by unreasonably delaying the legally required completion of consultation and publication of the biological opinion;
3. Declare that the Fisheries Service is in violation of its ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), duty to ensure that the agency’s continued authorization and management of the drift gillnet fishery is not likely to jeopardize the continued existence of the Central America DPS or Mexico DPS of humpback whales;
4. Order the Fisheries Service to complete consultation and publish a final biological opinion within 90 days, in accordance with 50 C.F.R. § 402.14(e);
5. Issue any appropriate injunctive relief, such as a closure of the drift gillnet fishery in the areas of highest risk for humpback whale entanglements;
6. Award Plaintiff the costs of this litigation, including reasonable attorneys’ fees, as provided by the ESA, 16 U.S.C. § 1540(g)(4), or other authority; and
7. Provide such other relief as the Court deems just and proper.

DATE: October 27, 2022.

Respectfully Submitted,

/s/ Catherine Kilduff

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