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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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**E-filing**

17 IN THE UNITED STATES DISTRICT COURT  
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
19 SAN FRANCISCO DIVISION

**JCS**

20 **CENTER FOR BIOLOGICAL  
21 DIVERSITY; JEFF MILLER;**

Case No. **CV 12 1767**

22 Plaintiffs,

23 v.

24 **KEN SALAZAR, Secretary of the Interior;**  
25 **U.S. FISH AND WILDLIFE SERVICE; and**  
26 **DAN ASHE, U.S. Fish and Wildlife Service**  
27 **Director;**

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Administrative Procedure Act Case

28 Defendants.

**INTRODUCTION**

1. Plaintiffs Center for Biological Diversity and Jeff Miller (collectively, “the Center”) bring this action against defendants Ken Salazar, Secretary of the Interior; the U.S. Fish and Wildlife Service; and its Director, Dan Ashe, (collectively, “FWS”) for failing to comply



1 implementing recovery plans for the California tiger salamander or making findings that such  
2 plans would not promote conservation of the species. Accordingly, an actual controversy exists  
3 between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

4 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. §  
5 1540(g)(3)(A). The Center for Biological Diversity maintains an office within this judicial  
6 district and Jeff Miller resides in this district. In addition, this district includes counties currently  
7 occupied by the California tiger salamander. These are areas where recovery of the salamanders  
8 would likely take place, and as such, a substantial part of FWS's violations of law occurred and  
9 continue to occur in this judicial district.

10 **INTRADISTRICT ASSIGNMENT**

11 7. Pursuant to Civil Local Rules 3-2(c) to (e), the appropriate intradistrict  
12 assignment of this case is to the San Francisco, Oakland, or San Jose divisions because a  
13 substantial part of the events or omissions occurred and continue to occur in the counties of  
14 Alameda, Contra Costa, Madera, Marin, Merced, Monterey, San Benito, San Francisco, Santa  
15 Clara, and Santa Cruz.

16 **PARTIES**

17 8. Plaintiff Center For Biological Diversity is a non-profit 501(c)(3) organization  
18 with approximately 37,000 active members and with offices in San Francisco, California and  
19 elsewhere across the country. The Center and its members are concerned with the conservation  
20 of imperiled species, including the California tiger salamander, and the effective implementation  
21 of the ESA.

22 9. Plaintiff Jeff Miller is a member and employee of the Center for Biological  
23 Diversity. He works as a Conservation Advocate, writing outreach materials and doing  
24 community organizing and media work for numerous campaigns, including those involving the  
25 California tiger salamander. He regularly visits habitat of the California tiger salamander,  
26 including habitats in Alameda, Sonoma, and Solano counties. He has enjoyed opportunities to  
27 see California tiger salamanders at Jepson Preserve in Dixon, California (Solano County) and in  
28 Sunol, California (Alameda County). He has concrete plans to continue to travel to and recreate

1 in areas where he can observe the California tiger salamander and will continue to maintain an  
2 interest in the salamander and its habitats in the future.

3 10. The Center for Biological Diversity has members (in addition to Jeff Miller), who  
4 have visited areas where California tiger salamanders are known to occur. The Center's  
5 members use these areas for observation of the salamander and other wildlife, research, nature  
6 photography, aesthetic enjoyment, recreational, educational, and other activities. The Center's  
7 members derive professional, aesthetic, spiritual, recreational, economic, and educational  
8 benefits from the California tiger salamander and its habitats. Those members have concrete  
9 plans to continue to travel to and recreate in areas where they can observe the California tiger  
10 salamander and will continue to maintain an interest in the salamander and its habitats in the  
11 future.

12 11. The above-described interests of the Center and its members, including Jeff  
13 Miller, have been and are being adversely affected by FWS's failure to develop recovery plans  
14 for the California tiger salamander. The agency's inaction is hurting the prospects of recovery  
15 for this imperiled species, as recovery plans for the California tiger salamander would outline  
16 actions needed to conserve the species. The Center's members' interests in viewing or otherwise  
17 enjoying the species are being and will continue to be harmed as the species continues to suffer  
18 population declines.

19 12. Unless the requested relief is granted, the Center's interests and the interests of its  
20 members, including Jeff Miller, will continue to be adversely affected and injured by the  
21 agencies' failure to develop the recovery plans, as well as by the ongoing harm to the salamander  
22 and its habitats in the absence of such recovery planning. The injuries described above are  
23 actual, concrete injuries presently suffered by the Center and its members and they will continue  
24 to occur unless this Court grants relief. These injuries are directly caused by FWS's inaction.  
25 The relief sought herein, an order compelling completion of recovery plans for the salamanders,  
26 would redress these injuries. The Center and its members have no other adequate remedy at law.

27 13. Defendant Ken Salazar is the Secretary of the U.S. Department of the Interior.  
28 The Secretary of the Interior is charged with administering and enforcing the ESA, including the



1 mandatory duty to develop and implement recovery plans for listed species. He is sued in his  
2 official capacity.

3 14. Defendant U.S. Fish and Wildlife Service is a federal agency within the U.S.  
4 Department of the Interior. The Secretary of the Interior has delegated the responsibility of  
5 administering and enforcing the ESA to FWS.

6 15. Defendant Dan Ashe is the Director of the U.S. Fish and Wildlife Service. He is  
7 sued in his official capacity.

### 8 LEGAL BACKGROUND

9 16. The ESA declares that endangered and threatened species are of “esthetic,  
10 ecological, educational, historical, recreational, and scientific value to the Nation and its people.”  
11 16 U.S.C. § 1531(a)(3). Accordingly, the purpose of the ESA is to “provide a means whereby  
12 the ecosystems upon which endangered species and threatened species depend may be  
13 conserved, [and] to provide a program for the conservation of such endangered species and  
14 threatened species . . . .” 16 U.S.C. § 1531 (b). The ESA defines “conservation” to mean “the  
15 use of all methods and procedures which are necessary to bring any endangered species or  
16 threatened species to the point at which the measures provided pursuant to this Act are no longer  
17 necessary.” *Id.* § 1532(3). Accordingly, the ultimate goal of the ESA is not only to temporarily  
18 save endangered and threatened species from extinction, but also to recover these species to the  
19 point where they no longer need ESA protection.

20 17. As part of the statutory scheme to conserve endangered and threatened species,  
21 Section 4(f) the ESA provides that FWS “shall develop and implement . . . recovery plans . . . for  
22 the conservation and survival of endangered species and threatened species listed pursuant to  
23 [the ESA], unless [FWS] finds that such a plan will not promote the conservation of the species.”  
24 16 U.S.C. § 1533(f)(1).

25 18. In developing and implementing recovery plans, FWS “shall, to the maximum  
26 extent practicable . . . give priority to those endangered species or threatened species, without  
27 regard to taxonomic classification, that are most likely to benefit from such plans, particularly  
28

1 those species that are, or may be, in conflict with construction or other development projects or  
2 other forms of economic activity.” 16 U.S.C. § 1533(f)(1)(A).

3 19. In all such recovery plans, FWS “shall, to the maximum extent practicable . . .  
4 incorporate in each plan—

5 (i) a description of such site-specific management actions as may be necessary to  
6 achieve the plan’s goal for the conservation and survival of the species;

7 (ii) objective, measurable criteria which, when met, would result in a determination,  
8 in accordance with the provisions of this section, that the species be removed from the  
9 list; and

10 (iii) estimates of the time required and the cost to carry out those measures needed to  
11 achieve the plan’s goal and to achieve intermediate steps toward that goal.” 16 U.S.C. §  
12 1533(f)(1)(B).

13 20. The ESA further provides that in developing and implementing recovery plans,  
14 FWS may procure the services of appropriate public and private agencies and institutions, and  
15 other qualified persons. 16 U.S.C. § 1533(f)(2). That FWS shall report to Congress every two  
16 years on the status of efforts to develop and implement recovery plans for all listed species and  
17 on the status of all species for which plans have been developed. 16 U.S.C. § 1533(f)(3). That  
18 FWS shall provide for public notice of, and comment on, any new or revised recovery plan prior  
19 to its final approval and shall consider all information presented during the public comment  
20 period prior to final approval of the new or revised recovery plan. 16 U.S.C. § 1533(f)(4). And  
21 that each federal agency, prior to implementation of a new or revised recovery plan, shall  
22 consider all information presented during the public comment period. 16 U.S.C. § 1533(f)(5).

23 21. FWS has adopted a policy that it will develop a recovery plan in compliance with  
24 16 U.S.C. § 1533(f) within 2.5 years of the final listing of an endangered or threatened species.  
25 *See* 59 Fed. Reg. 34272 (Endangered and Threatened Wildlife and Plants: Notice of Interagency  
26 Cooperative Policy on Recovery Plan Participation and Implementation under the Endangered  
27 Species Act).





1           25.     The salamanders inhabit grasslands and low (typically below 2000 feet/610  
2 meters) foothill regions where lowland aquatic sites are available for breeding. They prefer  
3 natural ephemeral pools or other ponds that mimic them (such as stock ponds that are allowed to  
4 go dry). A typical salamander breeding population in a pond can drop to less than twenty  
5 breeding adults and recruiting juveniles in some years, making these local populations prone to  
6 extinction. California tiger salamanders therefore require large contiguous areas of vernal pools  
7 or comparable aquatic breeding habitat containing multiple breeding ponds to ensure  
8 recolonization of individual ponds.

9           26.     This species is restricted to California and does not overlap with any other native  
10 species of tiger salamander. In the Coastal region, populations are scattered from Sonoma  
11 County in the northern San Francisco Bay Area to Santa Barbara County (up to elevations of  
12 3,500 feet/1067 meters), and in the Central Valley and Sierra Nevada foothills from Yolo to  
13 Kern counties (up to 2,000 feet/610 meters). The Sonoma population appears to have been  
14 geographically isolated from the remainder of the California tiger salamander population by  
15 distance, mountains, and major waterway barriers.

16           27.     The primary cause of the decline of California tiger salamander populations is the  
17 loss and fragmentation of habitat from human activities and the encroachment of nonnative  
18 predators.

19           28.     Federal, State and local laws have not prevented past and ongoing losses of  
20 habitat. All of the remaining populations of this species have been significantly reduced because  
21 of urban and agricultural development, land conversion, and other human-caused factors.

22           29.     A strong negative association between bullfrogs and California tiger salamanders  
23 has been documented. Although bullfrogs are unable to establish permanent breeding  
24 populations in vernal pools, dispersing immature frogs from permanent water bodies take up  
25 residence and prey on adult or larval salamanders in these areas during the rainy season.  
26 Louisiana swamp crayfish, mosquito fish, green sunfish and other introduced fishes also prey on  
27 adult or larval salamanders.  
28



1           30. California tiger salamanders are poor burrowers, so they require refuges provided  
2 by ground squirrels and other burrowing mammals in which to enter a dormant state called  
3 estivation during the dry months. Reduction of ground squirrel populations to low levels through  
4 widespread rodent control programs may reduce availability of burrows and adversely affect the  
5 California tiger salamander. Poison typically used on ground squirrels is likely to have a  
6 disproportionately adverse effect on California tiger salamanders, which are smaller than the  
7 target species and have permeable skins. Use of pesticides, such as methoprene, in mosquito  
8 abatement may have an indirect adverse effect on the California tiger salamander by reducing the  
9 availability of prey.

10           31. Various nonnative subspecies of the tiger salamander complex have been  
11 imported into California for use as fish bait. The introduced salamanders may out-compete the  
12 California tiger salamanders, or interbreed with them to create hybrids that may be less adapted  
13 to the California climate or are not reproductively viable past the first or second generations.

14           32. Other threats include automobiles and off-road vehicles, which kill a significant  
15 number of migrating California tiger salamanders, and contaminated runoff from roads,  
16 highways, and agriculture.

## 17 **II. Listing of Three Distinct Population Segments of the California Tiger Salamander**

18           33. The ESA provides for the listing of distinct population segments (“DPSs”) of  
19 vertebrate species. *See* 61 Fed. Reg. 4725 (Feb. 7, 1996) (“Policy Regarding the Recognition of  
20 Distinct Vertebrate Segments Under the Endangered Species Act”). Three populations of  
21 California tiger salamander are protected under the ESA: Santa Barbara, Sonoma, and Central  
22 California.

23           34. Each of these populations has been listed for many years. In 2000, the FWS  
24 emergency listed the Santa Barbara population as an endangered DPS. 65 Fed. Reg. 3096 (Jan.  
25 19, 2000); *see* 65 Fed. Reg. 57242 (Sept. 21, 2000) (final rule listing the DPS upon expiration of  
26 emergency rule). In 2002, the FWS emergency listed the Sonoma population as an endangered  
27 DPS. 67 Fed. Reg. 47726 (July 22, 2002); *see* 68 Fed. Reg. 13498 (March 19, 2003) (final rule  
28 listing the DPS upon expiration of emergency rule). In 2004, the FWS listed the Central

1 California population of the California tiger salamander as a threatened DPS. 69 Fed. Reg.  
2 47212 (Aug. 4, 2004). (Through that same 2004 rule, FWS removed the Santa Barbara and  
3 Sonoma populations as separately listed endangered DPSs, 69 Fed. Reg. 47241, but litigation  
4 brought by the Center for Biological Diversity restored those endangered listings. *Center for*  
5 *Biological Diversity v. United States Fish and Wildlife Service*, Case No. 3:04-cv-4324 WHA  
6 (N.D. Cal. Aug. 18, 2005).)

7 35. Although FWS did not designate critical habitat for the California tiger  
8 salamander populations at the time of listing as the ESA requires, 16 U.S.C. § 1533(a)(3)(A)(i),  
9 FWS has since designated or proposed critical habitat for the three populations. 70 Fed. Reg.  
10 49380 (Aug. 23, 2005) (designating critical habitat for the Central California DPS); 69 Fed. Reg.  
11 68568 (Nov. 24, 2004) (designating critical habitat for the Santa Barbara DPS); 76 Fed. Reg.  
12 54346 (Aug. 31, 2011) (designating critical habitat for the Sonoma DPS in response to litigation  
13 brought by the Center that challenged the previous designation).

14 36. In addition, in 2010, FWS completed a 5-year review for Santa Barbara DPS and  
15 noticed the initiation of a status review for the Sonoma DPS. 75 Fed. Reg. 28636 (May 21,  
16 2010). In 2011, FWS initiated a status review for the Central DPS. 76 Fed. Reg. 30378 (May  
17 25, 2011).

### 18 **III. Lack of Recovery Planning for the California Tiger Salamander**

19 37. Although the three California tiger salamander populations have been listed for  
20 years with finalized or proposed critical habitat, none have recovery plans.

21 38. A recovery team was appointed in 2001 for the Santa Barbara DPS but has not  
22 met since March 2003. *See* U.S. Fish and Wildlife Service, California tiger salamander - Santa  
23 Barbara County DPS 5-Year Review (Nov. 14, 2009), *available at*  
24 [http://ecos.fws.gov/docs/five\\_year\\_review/doc3223.pdf](http://ecos.fws.gov/docs/five_year_review/doc3223.pdf) (last visited April 6, 2012).

25 39. A recovery plan is a roadmap to how an endangered animal or plant species can  
26 eventually be secure from the risk of extinction and removed from the endangered species list.  
27 Recovery plans for the three populations of California tiger salamanders would provide  
28 blueprints for actions that would promote recovery and identify goals for their conservation.

1 Timely development and implementation of recovery plans is critical to many specific recovery  
2 actions, including designing and funding required studies and securing cooperation from other  
3 federal, state, regional, and local governmental and private entities. Scientific studies show that  
4 species with recovery plans are much more likely to recover than species without.

5 40. The ESA provides that FWS should give priority to those endangered species or  
6 threatened species, without regard to taxonomic classification, that are most likely to benefit  
7 from such plans, particularly those species that are, or may be, in conflict with construction or  
8 other development projects or other forms of economic activity. 16 U.S.C. § 1533(f)(1)(A). To  
9 this end, FWS has assigned each listed species a number, ranging from a high of 1C to a low of  
10 18. The criteria on which the recovery priority number is based are degree of threat, recovery  
11 potential, taxonomic distinctiveness, and presence of an actual or imminent conflict between the  
12 species and development activities. A species' rank may be elevated by adding a "C"  
13 designation to its numerical rank to indicate that it is, or may be, in conflict with construction or  
14 other development projects, or other forms of economic activity. Species with a high priority  
15 rank (1, 1C, 2, 2C, 3, 3C) are those that are the most threatened and have the highest potential for  
16 recovery. Species with a low rank (16, 17, 18) are the least threatened and have low recovery  
17 potentials. *See* 48 Fed. Reg. 43098 (Sept. 21, 1983) (Endangered and Threatened Species  
18 Listing and Recovery Priority Guidelines).

19 41. The Sonoma and Santa Barbara DPSs of California tiger salamander are assigned  
20 a recovery priority number of 3C, which reflects high potential for recovery and threats that are  
21 imminent and high in magnitude. The Central DPS of the California tiger salamander has a  
22 moderate recovery priority number of 9C. *See* U.S. Fish and Wildlife Service, Report to  
23 Congress on the Recovery of Threatened and Endangered Species: Fiscal Years 2007-2008,  
24 *available at* [http://www.fws.gov/endangered/esa-library/pdf/Recovery\\_Report\\_2008.pdf](http://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_2008.pdf) (last  
25 visited July 15, 2011). All of the DPSs of the California tiger salamander are threatened by  
26 construction or other development projects, as indicated by the "C" ranking.

27 42. By letter dated April 28, 2011, the Center provided FWS with notice of the  
28 violations of law alleged in this Complaint and of the Center's intention to sue if FWS continued



1 to fail to develop and implement recovery plans for the California tiger salamander. According  
2 to a certified mail return receipt, the Secretary of the Interior received the Center's written notice  
3 letter on May 4, 2011. FWS has not corrected the violations of law identified in the notice.

4 **FIRST CAUSE OF ACTION**

5 **Violation of ESA, 16 U.S.C. § 1533**

- 6 1. All allegations set forth above in this Complaint are incorporated herein by reference.  
7 2. FWS has violated its mandatory, non-discretionary duty found in Section 4(f) of the  
8 ESA, 16 U.S.C. § 1533(f), to either develop and implement recovery plans for the three listed  
9 populations of California tiger salamander, or make a finding that such plans will not promote  
10 conservation of the species.  
11 3. This violation of law is actionable under the ESA's citizen suit provision. 16 U.S.C.  
12 § 1540(g)(1)(C). The APA provides the standard of review. 5 U.S.C. § 706(2)(A). FWS's  
13 refusal to fulfill its mandatory duty is arbitrary, capricious, an abuse of discretion, or otherwise  
14 not in accordance with law. *Id.*

15 **SECOND CAUSE OF ACTION**

16 **Violation of the APA, 5 U.S.C. § 706**

- 17 4. All allegations set forth above in this Complaint are incorporated herein by reference.  
18 5. FWS has unlawfully withheld or unreasonably delayed its compliance with Section  
19 4(f) of the ESA, 16 U.S.C. § 1533(f), with respect to three populations of California tiger  
20 salamander, for many years. Specifically, the Central DPS of the California tiger salamander has  
21 been listed for over 7 years, the Sonoma DPS for almost 10 years, and the Santa Barbara DPS for  
22 over 12 years. This inaction and delay violates the APA. 5 U.S.C. § 706(1).

23 **REQUEST FOR RELIEF**

24 WHEREFORE, the Center requests that the Court enter judgment providing the  
25 following relief:

- 26 (1) A declaratory judgment that FWS has violated its mandatory duty under Section  
27 4(f) of the ESA, 16 U.S.C. § 1533(f)(1), to develop recovery plans for the three listed distinct  
28 populations of California tiger salamander;

1 (2) A declaratory judgment that FWS has unlawfully withheld or unreasonably  
2 delayed compliance with Section 4(f) of the ESA, 16 U.S.C. § 1533(f)(1), by failing to develop  
3 recovery plans for the three listed distinct populations of California tiger salamander, in violation  
4 of the APA, 5 U.S.C. § 706(1);

5 (3) An injunctive order setting a date by which the FWS must comply with Section  
6 4(f) of the ESA, 16 U.S.C. § 1533(f)(1), with respect to the three listed distinct populations of  
7 California tiger salamander;

8 (4) An order awarding the Center for Biological Diversity its attorneys' fees and costs  
9 in this action as provided by the ESA, 16 U.S.C. § 1540(g)(4), or the Equal Access to Justice  
10 Act, 28 U.S.C. § 2412; and

11 (5) Such other and further relief as the Court deems just and proper.

12  
13 Respectfully submitted this 10th day of April, 2012,

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