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19 Attorneys for Plaintiffs

20 **UNITED STATES DISTRICT COURT**  
21 **DISTRICT OF ARIZONA**

22 \_\_\_\_\_ )  
23 CENTER FOR BIOLOGICAL DIVERSITY )  
24 1333 N. Oracle Road )  
25 Tucson, AZ 85705, )

26 DEFENDERS OF WILDLIFE )  
27 1130 Seventeenth Street, NW )  
28 Washington, DC 20036, )

Plaintiffs, )

v. )

29 KEN SALAZAR )  
30 Secretary, )  
31 U.S. Department of the Interior )  
32 1849 C Street, NW )  
33 Washington, D.C. 20240, )

34 DANIEL M. ASHE )  
35 Director )  
36 U.S. Fish & Wildlife Service )  
37 \_\_\_\_\_ )

Case No.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

1 1849 C Street, NW )  
2 Washington, D.C. 20240, )  
3 Defendants. )  
4 )

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5 **INTRODUCTION**

6 1. Under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-44, the U.S.  
7 Department of the Interior (“DOI”) and the U.S. Fish and Wildlife Service (“FWS” or  
8 “Service”) must list a species if it is endangered or threatened throughout “all or a significant  
9 portion of its range.” *Id.* §§ 1532(6) (definition of “endangered species”), 1532(20) (definition  
10 of “threatened species”), 1533(a)-(b) (describing the listing process). This case challenges the  
11 decision by DOI and FWS not to list the cactus ferruginous pygmy-owl (*Glaucidium*  
12 *barasilianum cactorum*) as a threatened or endangered species based on threats facing the  
13 species in all or a significant portion of its range pursuant to the ESA. *See* 12-Month Finding on  
14 a Petition to List the Cactus Ferruginous Pygmy Owl at Threatened or Endangered with Critical  
15 Habitat, 76 Fed. Reg. 61,856 (October 5, 2011) (“Final Rule”).

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17  
18 2. In Arizona and Sonora, Mexico, the pygmy-owl is indisputably imperiled by  
19 habitat degradation and destruction related to urban and agricultural sprawl, livestock grazing,  
20 wood cutting, invasive species and border issues. *See* 76 Fed. Reg. at 61,878. Fewer than 50  
21 pygmy-owls are believed to occur in Arizona and the species’ range has undergone a substantial  
22 contraction. *Id.* at 61,864. Likewise, in Sonora, the species is known to be uncommon and  
23 declining. *Id.* Together, the Arizona and Sonora portion of the pygmy-owl’s range comprise a  
24 significant portion of the species’ remaining habitat.

25  
26 3. In 2007, plaintiffs petitioned the Service to list the pygmy-owl as a threatened or  
27 endangered species and requested that the Service consider not only the Arizona population but  
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1 also the greater Sonoran Desert population as part of its listing process pursuant to section 4 of  
2 the ESA. In addition, the petition urged consideration of a newly-described Western subspecies  
3 ranging from Arizona, through Sonora and Sinaloa (*Glaucidium ridgwayi cactorum*).

4 4. In response, the Service determined that: a) the Arizona population did not  
5 qualify as a listable entity; b) the Sonoran Desert population did not qualify as distinct because it  
6 was not discrete from pygmy-owls in Sinaloa; and c) there was not sufficient information to  
7 recognize a new subspecies of pygmy-owl. 76 Fed. Reg. at 61,856 and 61,886. The Service  
8 did, however, recognize that the western and eastern portions of the pygmy-owl's range could  
9 be considered distinct population segments ("DPS") under the ESA, *see* 16 U.S.C. § 1533  
10 (authorizing the Service to list species), *id.* § 1532(16) (defining "species" to include "distinct  
11 population segments"), but ultimately concluded that neither the pygmy-owl as a whole, nor any  
12 DPS, qualified for ESA listing. *Id.* at 61,887-89. Instead, the Service concluded, based on a  
13 new interpretation of the ESA, that there existed no "significant portion of the range" satisfying  
14 any of the listing factors to warrant protection for the species as threatened or endangered. *Id.*  
15 at 61,887-93.

16 5. Plaintiffs challenge the Final Rule because it relies on a novel and unprecedented  
17 interpretation of the ESA phrase "significant portion of its range" in the statutory definitions of  
18 "endangered" and "threatened" species, 16 U.S.C. §§ 1532(6), 1532(20), that, as applied here,  
19 is contrary to the plain language and patent purpose of the statute. This definition requires that  
20 a portion of a species' range can only meet the threshold of being "significant" if, without that  
21 portion, the remainder of the species would be in danger of extinction. 76 Fed. Reg. at 61,889-  
22 90. This definition effectively renders the phrase endangered or threatened "in a significant  
23 portion of its range" superfluous because the Service can only list a species under that scenario  
24 where it finds that the species as a whole is at risk of extinction—*i.e.*, the same inquiry the  
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1 Service must undertake when reviewing an alternative listing threshold for whether the species is  
2 endangered or threatened “throughout *all* . . . of its range.” 16 U.S.C. §§ 1532(6), 1532(20)  
3 (emphasis added). The pygmy-owl determination is the first listing decision to rely on this new  
4 proposed definition, which was not the subject of any advance public notice or comment prior to  
5 its adoption by the agency in the decision not to list the pygmy owl.

6           6.       The definition FWS used to deny the pygmy-owl protection was recently  
7 proposed in a new *draft* policy interpreting the term “significant portion of its range” that was  
8 put out for public comment *after* the pygmy-owl decision was published. *See* U.S. Fish &  
9 Wildlife Serv. and National Oceanic and Atmospheric Administration, Draft Policy on  
10 Interpretation of the Phrase “Significant Portion of Its Range,” 76 Fed. Reg. 76994 (Dec. 9,  
11 2011). In response to the proposal, there was an enormous outpouring of opposition to the new  
12 interpretation from conservation organizations and scientists, who contended that it will impede  
13 the listing of imperiled species throughout the country, and otherwise contravene the purposes  
14 of the ESA. To date, the FWS has not announced any final decision on the proposed change in  
15 interpretation. DOI and FWS violated section 4(h) of the ESA – which requires that the  
16 Service’s “criteria” for making listing decisions must be adopted following public notice and  
17 comment proceedings, 16 U.S.C. § 1533(h) – by applying the new, restrictive definition of the  
18 phrase “significant portion of its range” to the pygmy owl decision, without first affording the  
19 interested public any opportunity to comment on it.

20           7.       Additionally, FWS’s decision not to extend ESA protection for the pygmy-owl  
21 violates the ESA because it was not based on the best scientific data available or a reasonable  
22 analysis of the ESA’s five statutory listing factors, 16 U.S.C. § 1533. It also violates the  
23 agency’s overarching obligation under the ESA to “conserve” a listed species and to “utilize [its]  
24 authorities in furtherance of the purposes of [the Act] by carrying out programs for the  
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1 conservation of endangered species and threatened species,” 16 U.S.C. §§ 1531(c), 1536(a)(1).

## 2 **JURISDICTION AND VENUE**

3 8. This action arises under the ESA, 16 U.S.C. §§ 1531-44, and the Administrative  
4 Procedure Act, 5 U.S.C. §§ 551, 701-06 (“APA”). This Court has jurisdiction over this action  
5 pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. §§ 1331 and 1346. Plaintiffs have properly  
6 given notice to Defendants of their claims under the ESA in accordance with 16 U.S.C. §  
7 1540(g)(2).  
8

9 9. Venue is proper in the District of Arizona pursuant to 28 U.S.C. § 1391(e), as  
10 this civil action is brought against an agency of the United States and officers and employees of  
11 the United States acting in their official capacities and under the color of legal authority, a  
12 substantial part of the events giving rise to the claim occurred in Arizona, no real property is  
13 involved in this action, and at least one Plaintiff resides in this judicial district.  
14

## 15 **PARTIES**

16 10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-  
17 profit 501(c)(3) corporation headquartered in Tucson, Arizona, with offices in San Francisco  
18 and Joshua Tree, California, New Mexico, Washington, Oregon, Minnesota, and Washington,  
19 D.C. The Center for Biological Diversity works through science, law, and policy to secure a  
20 future for all species, great or small, hovering on the brink of extinction. The Center is actively  
21 involved in species and habitat protection issues throughout the United States and the world,  
22 including protection of plant and animal species from the impacts of global warming. The  
23 Center has more than 39,000 members throughout the United States and the world, including  
24 1,627 members in Arizona.  
25

26 11. The Center brings this action on its own institutional behalf and on behalf of its  
27 members, many of whom regularly enjoy and will continue to enjoy educational, recreational,  
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1 and scientific activities regarding the pygmy-owl and other species harmed by Defendants' new  
2 definition of "significant portion of its range." The interests of the Center and its members in  
3 observing, studying, and otherwise enjoying the pygmy-owl and other endangered and  
4 threatened species and their critical habitats, and in obtaining and disseminating information  
5 regarding the survival of endangered and threatened species and their critical habitats, have  
6 been harmed by defendants' actions.

7  
8 12. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a non-profit 501(c)(3)  
9 organization headquartered in Washington, D.C. with field offices in Arizona, Alaska,  
10 California, Florida, Idaho, Montana, Oregon, and Mexico. Founded in 1947, Defenders is a  
11 science-based conservation organization with more than 1.2 million members and supporters  
12 nationwide, and approximately 25,000 members and activists in Arizona. Defenders is  
13 dedicated to the protection of all native wild animals and plants in their natural communities,  
14 and the preservation of the habitat on which they depend. Defenders advocates new  
15 approaches to wildlife conservation that will help keep species from becoming endangered, and  
16 it employs education, litigation, research, legislation, and advocacy to defend wildlife and their  
17 habitat. Defenders is one of the nation's leading advocates for endangered species and has  
18 been involved in issues of ESA implementation for more than 30 years.

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21 13. Defenders brings this action on its own institutional behalf and on behalf of its  
22 members who derive scientific, aesthetic, recreational, and spiritual benefit from the endangered  
23 and threatened species and their habitats that will be impacted by Defendants' new definition of  
24 "significant portion of its range." The interests of Defenders' members in observing, studying,  
25 and otherwise enjoying pygmy-owls and other imperiled species and their critical habitats, and  
26 in obtaining and disseminating information regarding the survival of endangered and threatened  
27 species and their critical habitats have been harmed by defendants' actions. In particular, these  
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1 regulations will increase the likelihood that the pygmy-owl and other endangered and  
2 threatened species and critical habitat that Defenders' members observe, study, photograph,  
3 and otherwise enjoy will be adversely affected.

4 14. Defendant KEN SALAZAR, United States Secretary of the Interior, is the  
5 highest ranking official within the U.S. Department of the Interior and, in that capacity, has  
6 ultimate responsibility for the administration and implementation of the ESA with regard to  
7 terrestrial endangered and threatened species, and for compliance with all other federal laws  
8 applicable to the Department of the Interior. He is sued in his official capacity.

10 15. Defendant DANIEL M. ASHE is Director of the U.S. Fish and Wildlife Service,  
11 a federal agency within the Department of the Interior authorized and required by law to  
12 protect and manage the fish, wildlife, and native plant resources of the United States, including  
13 enforcing and implementing the ESA. The Service has been delegated primary authority for  
14 day-to-day administration of the ESA with respect to terrestrial species.

#### 16 **FACTUAL ALLEGATIONS**

17 16. The cactus ferruginous pygmy-owl is a small diurnal owl, approximately 6.75  
18 inches long, that is generally reddish brown, with a cream-colored belly streaked with reddish  
19 brown. The crown is streaked and a pair of dark brown or black spots outlined in white appear  
20 on its nape suggesting "eyes," leading to the name "Cuatro Ojos" or four eyes as it is sometimes  
21 called in Mexico. Pygmy-owls have large feet and talons relative to their body size. In Arizona  
22 and northern Sonora, pygmy-owls are found in Sonoran desertscrub, but were historically found  
23 in riparian habitats. 76 Fed. Reg. 61,862. The pygmy-owl is a generalist with respect to diet,  
24 and is thought to eat lizards, large insects, rodents, and birds. Their lifespan in the wild is  
25 thought to be 7 to 9 years.

28 17. The Center for Biological Diversity and others first petitioned for protection of

1 the pygmy-owl in 1992. In response, FWS listed the pygmy-owl as an endangered species in  
2 Arizona on the grounds that the Arizona population constituted a DPS that was at risk of  
3 extinction, observing that the “pygmy-owl has declined throughout Arizona to the degree that  
4 it is now extremely limited in distribution in the State,” 62 Fed. Reg. 10,740 (March 10, 1997).  
5 Litigation challenging the listing resulted in a remand of the listing decision on the grounds that  
6 the Service had not adequately explained why the Arizona population constituted a DPS. On  
7 April 14, 2006, the Service published a final rule removing the pygmy-owl in Arizona from the  
8 list of protected species and withdrawing its critical habitat. 71 Fed. Reg. 19,452. The rule  
9 took effect on May 15, 2006.

11 18. On the basis of new, credible scientific evidence, the Center and Defenders in  
12 2007 filed another petition to list the pygmy-owl. The petition requested that FWS consider  
13 alternatively listing the species as a whole, listing a DPS of the pygmy-owl in Arizona and  
14 Sonora, or, based on new genetic information, recognizing a new subspecies and listing the  
15 pygmy-owl throughout its western range in Arizona, Sonora, and Sinaloa.

17 19. On June 2, 2008, the Service issued a 90-day finding indicating that the petition  
18 presented substantial scientific information suggesting that listing may be warranted. 73 Fed.  
19 Reg. 31,418. On December 12, 2009, Plaintiffs filed a 60-day notice of intent to sue, pursuant  
20 to 16 U.S.C. § 1540(g)(2), because FWS had failed to make a determination within 12 months  
21 as required by statute. Plaintiffs filed suit on February 17, 2010 in the U.S. District Court for  
22 the District of Arizona. The case was subsequently consolidated with additional cases related  
23 to petition finding deadlines and the parties reached a global settlement. *In re Endangered*  
24 *Species Act Deadline Litigation*, No. 10-377, MDL Docket No. 2165 (D.D.C. Sept. 9, 2011).  
25 The settlement stipulated that FWS would make a final listing decision on the pygmy-owl by  
26 September 30, 2011.  
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1           20.     During its review of the pygmy-owl's status, FWS biologists initially determined  
2 in 2009 that the pygmy-owl warranted "threatened" status under the ESA based on the threats  
3 facing the species in the Sonoran Desert Ecoregion, which the agency found to constitute a  
4 significant portion of the owl's range because it contributed to the resiliency, redundancy and  
5 representation of the species. Under a then-operative approach to the term "significant portion  
6 of its range," which was issued on March 16, 2007 by the Department of the Interior Solicitor  
7 in Memorandum M-37013, FWS intended to apply the protections of the ESA only to the  
8 pygmy-owl in the Sonoran Desert Ecoregion. Several courts, however, subsequently rejected  
9 the Service's March 16, 2007 approach to the listing of species based on their imperilment in a  
10 "significant portion," but not the entirety, of their range – under which the species would *only*  
11 receive ESA protection in the portion deemed "significant" – as contrary to the plain language  
12 of the ESA because limiting species' protections in that manner runs directly counter to the  
13 statute, which provides for the protection of statutorily-defined "species" (whether full species,  
14 subspecies, or DPS's) throughout the entirety of their ranges. *See* 76 Fed. Reg. at 61,889.  
15 The Service formally withdrew this approach to the listing of species deemed to be imperiled in  
16 a "significant portion of [their] range" on May 4, 2011, in Solicitor's Memorandum M-37024.

17           21.     On October 5, 2011, FWS issued its final determination declining to list the  
18 pygmy-owl in any configuration. FWS declined to list the species as a whole, declined to  
19 recognize and list a new western subspecies, and declined to list based on threats to populations  
20 of the owl in Arizona, in the greater Sonoran DPS, or in the Western DPS. 76 Fed. Reg.  
21 61,856. Moreover, in contrast to its determination in 2009 that the Sonoran Desert Ecoregion  
22 is a significant portion of the pygmy-owl's range where the species is threatened, the Service  
23 found in its Final Rule, without new scientific information concerning the species' imperilment,  
24 that the Sonoran Desert Ecoregion is not a "significant portion of its range" because without  
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1 that portion it could not be demonstrated that the remainder of the range would be in danger of  
2 extinction. *Id.* at 61,889-93.

3 22. In its final determination, FWS again concluded that the pygmy-owl was in fact  
4 endangered in the Sonoran Desert, but asserted that because loss of the species from this portion  
5 would not place the species *as a whole* at risk of extinction, this portion did not qualify as a  
6 significant portion of the species' range. 76 Fed. Reg. 61,889. In doing so, the Service  
7 "acknowledge[d] that the Sonoran Desert ecoregion *represents an important portion of the*  
8 *western DPS, and of the taxon as a whole,*" but stated that "in order to find that the portion of  
9 the western DPS in the Sonoran Desert Ecoregion is significant under our SPR policy, our  
10 position is that its contribution to the viability of the species *must be so important that, without*  
11 *that portion, the pygmy-owl would be in danger of extinction.*" 76 Fed. Reg. at 61,893  
12 (emphasis added).  
13

14 23. Accordingly, to reach the conclusion in 2011 that the pygmy-owl is not  
15 endangered or threatened in a significant portion of its range despite the conceded  
16 "importance" of the area in which the species is imperiled – a conclusion that runs counter to  
17 agency biologists' initial determination only two years earlier – the Service employed an  
18 entirely new interpretation of the statutory phrase "significant portion of its range," 16 U.S.C. §  
19 1532(6), that has never been formally adopted by the Service and, at the time of its application  
20 to the pygmy owl, had not even been the subject of any prior public notice or comment  
21 opportunity.  
22

23 24. Pygmy-owls in Arizona and Mexico now receive no federal protection  
24 notwithstanding FWS's finding that that the entire Sonoran Desert Ecoregion is imperiled, that  
25 it is an important part of the Western DPS, and that no adequate regulatory mechanisms exist  
26 to protect owls in the region.  
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1 significant portion of its range.” 16 U.S.C. § 1532(6). A “threatened” species, likewise, is one  
2 that is “likely to become an endangered species within the foreseeable future throughout all or a  
3 significant portion of its range.” 16 U.S.C. § 1532(20).

4         29. In making listing decisions under the ESA, FWS must first assess whether the  
5 candidate at issue is taxonomically a full species, subspecies, or, in the case of vertebrates, a  
6 distinct population segment. Next FWS must determine whether the species is threatened or  
7 endangered in accordance with five listing factors specified in 16 U.S.C. § 1533(a), *see also* 50  
8 C.F.R. § 424.11(c), and in view of the “best available” scientific information concerning the  
9 species. *Id.* If the review concludes that the species is endangered or threatened throughout “all  
10 or a significant portion” of its range, then the *entire* entity must be listed accordingly. Thus, in  
11 enacting the statute, Congress recognized that where a species is endangered or threatened in a  
12 significant portion of its range, although not throughout its entire range, the species nevertheless  
13 warrants protection, thus necessitating a separate and distinct inquiry that FWS must undertake  
14 if it finds that a species is not endangered or threatened in all of its range.

17         30. For the pygmy-owl listing, the Service adopted a novel and unlawful  
18 interpretation of the phrase “significant portion of its range.” The agency’s interpretation, as  
19 applied to the pygmy-owl, led to its determination that the Sonoran Desert Ecoregion, although  
20 concededly imperiled in light of the ESA listing factors and the best scientific information  
21 available and “important” to the survival and conservation of the species, did not meet the level  
22 of significance necessary to constitute a “significant portion of its range.” This finding was  
23 based entirely on the agency’s new interpretation that portions of a range are “significant” only  
24 where their “contribution to the viability of the species is so important that, without that portion,  
25 the pygmy-owl would be in danger of extinction” in *all* of its range. 76 Fed. Reg. at 61,889.  
26 Therefore, applying what even the agency conceded is “a threshold that is relatively high” for  
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1 significance, *see* 76 Fed. Reg. at 61,890, the Service determined that, despite the Sonoran  
2 Desert Ecoregion’s importance to the species and in particular to the Western DPS of pygmy-  
3 owls, that portion did not constitute a “significant portion of its range” because if this portion is  
4 extirpated, the remainder of the species is not likely to become extinct. *Id.* at 61,892-93.

5 31. Defendants’ adoption of this interpretation of the phrase “significant portion of  
6 its range,” and specifically its application here, represents a dramatic reversal of longstanding  
7 agency policy and practice; is contrary to the plain language of the ESA; renders the statutory  
8 phrase “significant portions of its range” redundant and superfluous; undermines the core  
9 conservation purpose of the ESA to afford sufficient species protection to not only stave off  
10 species’ imminent extinction, but to bring about the species’ recovery; and contravenes the ESA  
11 listing factors and obligation that listing decisions be based on the “best available” scientific  
12 information. Consequently, Defendants’ refusal to list the pygmy owl in any portion of its range  
13 violates the ESA and is otherwise arbitrary, capricious, contrary to law, and an abuse of  
14 discretion, in violation of the APA, 5 U.S.C. § 706.

## 17 SECOND CLAIM

### 18 (DOI Failed to Provide Appropriate Public Notice and Comment on its Guidance 19 Relating to the Interpretation of “Significant Portion of Its Range”)

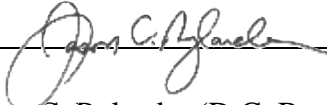
20 32. The ESA requires that the Secretary “establish, and publish in the Federal  
21 Register, agency guidelines” to ensure that the purposes of Section 1533 are “achieved  
22 efficiently and effectively.” 16 U.S.C. § 1533(h). Such guidelines include “criteria for making  
23 the findings required under such subsection with respect to petitions.” *Id.* The Secretary “shall  
24 provide to the public notice of, and opportunity to submit written comments on, any guideline  
25 (including any amendment thereto) proposed to be established under this subsection.” *Id.*



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DATED: August 20, 2012

Respectfully submitted,



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