

FOREST GUARDIANS,  
CENTER FOR BIOLOGICAL DIVERSITY,  
and SAVE OUR SPRINGS ALLIANCE,  
  
Plaintiffs,  
  
v.  
  
H. DALE HALL, Director of the Southwest  
Region of the United States Fish and Wildlife  
Service; MATTHEW HOGAN, Acting Director  
of the United States Fish and Wildlife Service; and  
GALE NORTON, Secretary of the Interior;  
  
Defendants.

1. Plaintiffs, Forest Guardians, the Center for Biological Diversity, and Save Our Springs Alliance, challenge the failure of Defendants H. Dale Hall, Matthew Hogan, and Gale Norton, to protect the Devils River minnow as an endangered species and to designate critical habitat for the minnow under the Endangered Species Act (“ESA”). 16 U.S.C. § 1533. Within the United States, the Devils River minnow currently lives in only three locations in Texas and is highly endangered due to declining water levels, habitat modification and destruction, and predation by non-native fish.

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failed to fully protect the Devils River minnow by listing it as “threatened” rather than “endangered.” In doing so, FWS unlawfully relied on unenforceable commitments for future actions to protect the species by the City of Del Rio and the Texas Parks and Wildlife Department. The majority of these actions have not taken place; nor has FWS demonstrated that any actions that have taken place have benefited the Devils River minnow.

3. The ESA also requires FWS to protect a listed species’ critical habitat—habitat essential for their survival and recovery—concurrently with listing. FWS has failed to do so for the Devils River minnow. Plaintiffs have filed this lawsuit to force Defendants to comply with these mandatory requirements of the ESA.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c), (g) (ESA’s citizen suit provision) and 28 U.S.C. § 1331 (federal question).

5. This Court may grant the relief requested under 28 U.S.C. § 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. § 701-706 (Administrative Procedure Act).

6. As required by 16 U.S.C. § 1540(g)(2), Defendants were provided with written notice of their violations of the ESA more than 60 days ago, and they have not remedied their legal violations. Therefore, an actual and present controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

7. Venue is proper in this court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A). Defendant H. Dale Hall officially resides in Albuquerque, and Plaintiff Forest Guardians resides in Santa Fe.

## **PARTIES**

8. Plaintiff FOREST GUARDIANS sues on behalf of itself and its adversely affected members. Forest Guardians is a non-profit environmental organization located in Santa Fe, New Mexico and has over 1,400 members. Forest Guardians is committed to protecting flora, fauna, natural processes, and native habitats in Colorado, New Mexico, Arizona, Utah, and Texas. Forest Guardians has an active endangered species protection campaign, with a geographic focus on the southern Great Plains and the Southwest. As part of this campaign, Forest Guardians has repeatedly urged Defendants to change the listing status of the Devils River minnow from threatened to endangered and to designate a critical habitat for the minnow.

9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“CBD”) sues on behalf of itself and its adversely affected members. CBD is a non-profit corporation with over 14,000 members dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands. CBD filed a petition to list the Devils River minnow under the ESA, and when Defendants failed to respond, filed a lawsuit that resulted in the 1999 final rule listing the Devils River minnow as threatened.

10. Plaintiff Save Our Springs Alliance (“SOS Alliance”) sues on behalf of itself and its adversely affected members. SOS Alliance is a non-profit organization with approximately 3,000 members dedicated to protecting the Edwards Aquifer, which feeds the springs and creeks that supply water to the Devils River. The vast majority of SOS Alliance members live in Texas, including members who live on or own property in the geographic range of the Devils River minnow. SOS Alliance is a member of the Greater Edwards Aquifer Alliance, a coalition of local organizations from Austin south to San Antonio and west to Del Rio.

11. Plaintiffs' members and staff have educational, scientific, moral, spiritual, and recreational interests in the Devils River minnow and its habitat. They use and enjoy, and intend to continue to use and enjoy, the current and historical habitat of these fish. Plaintiffs' members and staff have visited the streams that are home to the Devils River minnow to recreate and view the species in its natural habitat. They have also visited areas where the minnow has been extirpated and observed the degraded habitat. These members and staff have plans to return to these areas in the future. Defendants' failure to list the Devils River minnow as endangered and designate critical habitat has adversely affected and continues to adversely affect and irreparably harm Plaintiffs' interests in the species. Defendants' failure to comply with the law subjects the minnow to greater threats and prevents recovery of the species in the wild. Plaintiffs' injuries would be redressed by the relief sought.

12. Defendant H. DALE HALL is sued in his official capacity as Regional Director of the Southwest Region (Region 2) of FWS. As Regional Director, Hall is the official responsible for listing and designating critical habitat for species within the Southwest Region, including the Devils River minnow.

13. Defendant MATTHEW HOGAN is sued in his official capacity as Acting Director of FWS. The Secretary has designated her responsibilities under the ESA to the Director of FWS.

14. Defendant GALE NORTON is sued in her official capacity as the Secretary of the Interior ("Secretary"). The Secretary is the federal official whom the ESA vests with responsibility for listing species and designating critical habitat. Hereinafter Defendants will be referred to collectively as FWS.

## ENDANGERED SPECIES ACT

15. The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b). Before the ESA can protect a species facing extinction or that species' habitat, the species must be listed as either "endangered" or "threatened." Id. § 1533(d).

16. A species is endangered if it "is in danger of extinction throughout all or a significant portion of its range." Id. § 1532(6). A species is threatened if it is "likely to become an endangered species within the foreseeable future." Id. § 1532(20). The listing process is the essential first step in the ESA's system of species protection and recovery.

17. FWS must list a species if it is threatened or endangered due to any one or a combination of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1). In making this decision, FWS must conduct a thorough "review of the status of the species" and base its conclusions "solely on the . . . best scientific and commercial data available." Id. § 1533(b)(1)(A).

18. When FWS finds a species is endangered or threatened, it must "concurrently" designate critical habitat. Id. § 1533(a)(3)(B)(i). Critical habitat is defined as:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or

biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5)(A)(i).

19. The ESA provides for only two exceptions to FWS’s duty to designate critical habitat concurrently with listing: (1) where critical habitat is not “determinable”, or (2) where it would not be “prudent” to designate critical habitat. Id. § 1533(a)(3). Under FWS regulations, critical habitat designation is not prudent only when: (1) the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (2) designation of critical habitat would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1).

20. Designation of critical habitat for listed species provides additional protection beyond listing alone because all federal agencies must consult with FWS to “insure that any action authorized, funded, or carried out by [the 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 [its critical habitat].” 16 U.S.C. § 1536(a)(2) (emphasis added).

## **STATEMENT OF FACTS**

### **Devils River Minnow**

21. The Devils River minnow (*Dionda diaboli*) is a small fish with a wedge shaped spot on its tail and a distinct lateral stripe. It lives in streams in south Texas near the Mexico border and in Mexico.

22. Although the Devils River minnow historically lived in nine separate geographical areas in Texas, it is now limited to only three known locations. There are two populations in the Devils River and its tributaries and one in San Felipe Creek in the City of Del Rio.

23. In 1968, the Devils River minnow lost a significant amount of its historic habitat when the Amistad Dam was built, creating a large reservoir on the Devils River. This physical barrier also separates the Devils River populations from populations in other streams, leading to reduced spawning and genetic interaction within the species.

24. The Devils River minnow is threatened by depletion of its streams due to water use for irrigated agriculture and municipal purposes. The City of Del Rio and the Laughlin Air Force Base use the springs of San Felipe Creek that are home to the minnow as their sole source of water. Livestock grazing has also decreased water levels by degrading the top soil, which leads to more runoff and less recharge of aquifers that feed springs that are home to the minnow.

25. Texas does not require any minimum in-stream flows within the habitat of the Devils River minnow. Furthermore, the state does not regulate any groundwater withdrawals impacting streams containing the minnow.

26. Urban development and pollution threaten the population near the City of Del Rio. Studies by the Texas Commission on Environmental Quality show the stream contains excessive levels of nitrates, phosphates, and orthophosphates, which are harmful to the Devils River minnow.

27. The introduction of exotic fish within the range of the Devils River minnow threatens the fish because of the introduction of disease, competition for food and space, predation, and hybridization. Around 1975, non-native smallmouth bass were introduced into

the Amistad Reservoir for sport fishing purposes. Smallmouth bass are aggressive predators and threaten the existence of the minnow in the Devils River. The minnow may also be subject to predation by the armored catfish in San Felipe Creek. In addition, anglers discard live bait fish within the range of the minnow, which can pose a threat to the species. Declines in water levels intensify predation and competition with non-native fish.

### **FWS's Decision to List the Devils River Minnow**

28. In 1978, FWS published a proposed rule to list the Devils River minnow as a threatened species and to designate critical habitat. Twenty years passed, however, without action. In 1998, plaintiff CBD petitioned FWS to list the Devils River Minnow. When FWS failed to respond, CBD sued.

29. As the result of this lawsuit, FWS listed the Devils River Minnow as threatened on October 20, 1999. 50 Fed. Reg. 56596.

30. In determining that the Devils River Minnow should be listed, FWS found that the fish were endangered by: (1) habitat loss due to growth, development, and the building of the Amistad dam, (2) habitat modification from human disturbances, (3) competition with non-native species, and (4) the inadequacy of existing regulatory mechanisms. According to FWS, the effect of these factors coupled with the low number of populations may result in the loss of the entire species.

### **FWS's Failure to List the Devils River Minnow as Endangered**

31. The Devils River minnow satisfies the ESA definition of an endangered species.

32. FWS listed the Devils River minnow as threatened rather than endangered based on a Conservation Agreement signed by FWS, the City of Del Rio, and the Texas Parks and



Wildlife Department. The Conservation Agreement includes a ten point plan to address the decline of the fish.

33. Implementation of the future actions within the Conservation Agreement is entirely voluntary. Moreover, at the time FWS issued the final rule in 1999, only one of the actions in the ten-point plan had been initiated—sampling and collection of the Devils River minnow. FWS provided no evidence that this sampling and collection had reduced the threats to the fish.

34. Six years later, FWS has still not fully implemented the Conservation Agreement. In fact, the parties have only undertaken two of the ten objectives.

35. In listing the Devils River minnow as threatened, FWS failed to rely on the best available science, which shows the species meets the definition of endangered species.

#### **FWS'S Failure to Designate Critical Habitat**

36. In its final rule, FWS found that it would not be prudent to designate a critical habitat for the Devils River minnow because it would not benefit the species.

37. FWS found that because the streams containing the Devils River minnow are largely surrounded by private lands and critical habitat only provides a species with protection from federal actions, there would be no benefit of critical habitat designation.

38. FWS ignored a number of federal actions that may impact the Devils River minnow, including federal water withdrawals, federal permits for development in wetland areas, and federal funding of highway projects. Indeed, Laughlin Air Force Base obtains its entire water supply from the prime habitat of the Devils River minnow.

39. FWS also justifies its failure to designate critical habitat on a finding that designation of critical habitat does not provide any benefits beyond listing. Section 7 of the ESA

requires all federal agencies to ensure that its actions do not jeopardize the continued existence of any species or adversely modify its critical habitat. 16 U.S.C. § 1536. According to FWS, any project that would impact the minnow's critical habitat would also jeopardize the continued existence of the species as a whole. Therefore, FWS improperly argues that critical habitat is irrelevant.

40. There are numerous actions, such as water depletions or diversions that would adversely modify habitat in one area where the Devils River minnow survives, but would not cause the extinction of the species as a whole.

41. FWS also fails to recognize that critical habitat provides protection to areas that are not currently occupied by the species, while listing alone does not.

42. FWS also failed to designate critical habitat based on fears that private landowners would misunderstand what this designation means and would fail to participate in voluntary efforts to restore the species.

43. FWS provided no support for this conclusion. Nor has FWS explained why it could not properly educate the private landowners in order to alleviate this potential problem. Indeed, FWS initiated an extensive public outreach and education effort prior to and following the proposed listing rule and through the recovery planning process. This same approach could be used to correct private individuals' misunderstandings about critical habitat designation.

44. FWS's failure to designate critical habitat results in on-going destruction of the habitat of the Devils River minnow.

**FIRST CLAIM FOR RELIEF**  
**(Failure to list the Devils River Minnow as an Endangered Species)**

45. Paragraphs 1–44 are incorporated herein by reference.

46. Under Section 4 of the ESA, FWS must list any species that is in danger of extinction as either “threatened” or “endangered.” 16 U.S.C. § 1533(a). A species is endangered if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is threatened if it is “likely to become an endangered species within the foreseeable future.” *Id.* § 1532(20). FWS cannot base its failure to designate a species as endangered on future, voluntary conservation measures. FWS must base its decision not to list a species as endangered on the best available scientific evidence. *Id.* § 1533(b)(1)(A).

47. FWS has failed to list the Devils River minnow as endangered, has relied on future, voluntary conservation measures to justify this failure, and has failed to rely on the best available science.

48. These actions violate FWS’s non-discretionary duties under Section 4 of the ESA within the meaning of 16 U.S.C. § 1540(g)(1)(C). These actions are also arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law and/or constitutes agency action unlawfully withheld or unreasonably delayed under the APA. 5 U.S.C. § 706.

**SECOND CLAIM FOR RELIEF**  
**(Failure to Designate Critical Habitat for the Devils River minnow)**

49. Paragraphs 1–44 are incorporated herein by reference.

50. Under section 4 of the ESA, FWS must, to the maximum extent prudent and determinable, designate critical habitat concurrently with listing a species as endangered. 16 U.S.C. § 1533 (a)(3)(A). FWS may only refuse to designate critical habitat concurrently with listing where it is not prudent or determinable. *Id.* Critical habitat designation is not prudent

only when (1) the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (2) designation of critical habitat would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1).

51. FWS has failed to designate critical habitat for the Devils River minnow. The agency has also failed to demonstrate that designation of critical habitat is not prudent.

52. By failing to designate critical habitat, and relying on an improper not prudent finding, FWS has violated a non-discretionary duty under Section 4 of the ESA within the meaning of 16 U.S.C. § 1540(g)(1)(c). FWS's decision not to designate critical habitat is also arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and/or constitutes agency action unlawfully withheld or unreasonably delayed under the APA. 5 U.S.C. § 706.

### **PRAYER FOR RELIEF**

For the above reasons, Plaintiffs respectfully request that this Court enter judgment providing for the following relief:

1. Declaratory judgment that the Defendants violated the ESA and APA by failing to list the Devils River minnow as endangered;
2. Declaratory judgment that the Defendants violated the ESA and APA by failing to designate critical habitat for the Devils River minnow;
3. Injunctive relief requiring FWS to issue a new final rule listing the Devils River minnow as endangered;
4. Injunctive relief requiring the Defendants to designate critical habitat for the Devils River minnow;

5. An order awarding Plaintiff its costs of litigation, including reasonable attorneys' fees as provided in the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and

6. Such other relief as this Court deems just and proper.

Dated: 10/5/05

Respectfully Submitted,

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