

1 Christopher W. Mixson, Esq.  
2 Nevada Bar No. 10685  
3 Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP  
4 5594-B Longley Lane  
5 Reno, Nevada 89511  
6 775-853-6787  
7 cmixson@wrslawyers.com

8 Jennifer L. Loda (*pro hac vice applied for*)  
9 California Bar No. 284889  
10 Center for Biological Diversity  
11 1212 Broadway, Suite 800  
12 Oakland, CA 94612-1810  
13 510- 844-7136  
14 jloda@biologicaldiversity.org

15 *Attorneys for Plaintiff Center for Biological Diversity*

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

29 **CENTER FOR BIOLOGICAL**  
30 **DIVERSITY;**

31 Plaintiff,

32 v.

33 **DAVID BERHNHARDT**, in his official  
34 capacity as Secretary of the United States  
35 Department of the Interior; **AURELIA**  
36 **SKIPWITH**, in her official capacity as  
37 Director of the U.S. Fish and Wildlife Service;  
38 **U.S. FISH AND WILDLIFE SERVICE;**

39 Defendants.

40 )  
41 ) Case No. \_\_\_\_\_  
42 )  
43 )  
44 )  
45 )  
46 )  
47 )  
48 )  
49 )  
50 )  
51 )  
52 )  
53 )  
54 )  
55 )  
56 )  
57 )  
58 )  
59 )  
60 )

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiff Center for Biological Diversity (“Center”) brings this action under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, to challenge the Secretary of the

1 Interior’s (“Secretary”) and the U.S. Fish and Wildlife Service’s (“FWS”) (collectively  
2 “Defendants” or “FWS”) failure to make a mandatory finding on whether the highly-imperiled  
3 distinct population segment of relict dace (*Relictus solitarius*) at Johnson Springs Wetland  
4 Complex (“JSWC”) should be listed as threatened or endangered under the ESA. 16 U.S.C. §  
5 1533(b)(3)(B). The JSWC relict dace population is experiencing ongoing threats to its existence.

6 2. To obtain federal safeguards and habitat protections, Forest Service Employees  
7 for Environmental Ethics submitted to FWS a petition to list a distinct population segment of the  
8 relict dace, located at the Johnson Springs Wetland Complex in Goshute Valley, Nevada  
9 (hereinafter “relict dace JSWC DPS”), as “endangered” or “threatened” pursuant to the ESA, on  
10 June 27, 2014. Although described as the Big Spring population in the petition, the population of  
11 relict dace referenced in the petition also includes individuals that inhabit other areas of the  
12 JSWC.

13 3. FWS made an initial, 90-day finding that the petition presented substantial  
14 information showing that listing the species “may be warranted.” 16 U.S.C. § 1533(b)(3)(A); *see*  
15 *also* 80 Fed. Reg. 19259 (April 10, 2015). FWS was therefore required to determine whether  
16 listing this species as “endangered” or “threatened” is “warranted” within 12 months of receiving  
17 the petitions, yet it has failed to make the requisite finding to date. 16 U.S.C. § 1533(b)(3)(B).  
18 Defendants are therefore in violation of the ESA. *Id.*

19 4. To remedy these violations, Plaintiffs seek declaratory relief to affirm that  
20 Defendants are in violation of the ESA by failing to make the required 12-month finding on the  
21 petition, along with injunctive relief that establishes dates certain for Defendants to determine if  
22 listing this species as endangered or threatened is warranted. Compliance with the  
23 nondiscretionary deadlines of the ESA is necessary to ensure the continued existence and  
24 recovery of this species in the wild.

1 **JURISDICTION**

2 5. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) and  
3 (g)(1)(C) (action arising under the ESA’s citizen suit provision), 5 U.S.C. § 702 (review of  
4 agency action under the APA), and 28 U.S.C. § 1331 (federal question jurisdiction).

5 6. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g); the  
6 APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

7 7. The Center provided 60 days’ notice of its intent to file this suit pursuant to the  
8 citizen-suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter dated November 20, 2019.  
9 Defendants have not remedied the violations to date; thus, an actual controversy exists between  
10 the parties within the meaning of 28 U.S.C. § 2201.

11 8. Venue is proper in the U.S. District Court for the District of Nevada pursuant to  
12 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because this action is brought against a  
13 federal agency and officers of the United States in their official capacity; because a substantial  
14 part of the events giving rise to the Center’s claim occurred in this district; and because the  
15 Center maintains an office in this district.

16 **PARTIES**

17 9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit  
18 conservation organization incorporated in California and headquartered in Tucson, Arizona, with  
19 field offices throughout the United States and Mexico, including Arizona; California; Florida;  
20 Hawaii; Idaho; Minnesota; Nevada; New Mexico; New York; North Carolina; Oregon;  
21 Washington; Washington, D.C.; and La Paz, Baja California Sur, Mexico. The Center works  
22 through science, law, and creative media to secure a future for all species, great or small,  
23 hovering on the brink of extinction. The Center has more than 74,000 members. The Center and  
24 its members are concerned with the conservation of imperiled species – including the relict dace  
25 – and with the effective implementation of the ESA.

1           10. Plaintiffs have members who visit areas where relict dace are known to still occur,  
2 including JSWC. Plaintiffs' members use this area for observation of these species and other  
3 wildlife; for research; nature photography; aesthetic enjoyment; and recreational, educational,  
4 and other activities. Plaintiffs' members derive professional, spiritual, and economic benefits  
5 from these species and their habitats. Those members have concrete plans to continue to travel to  
6 and recreate in areas where they can observe these species and will continue to maintain an  
7 interest in these species and their habitats in the future.

8           11. The Center and its members have participated in conservation efforts for the relict  
9 dace and its habitat. The Center has campaigns to protect biodiversity and to raise awareness  
10 about the environmental impacts from human activities, including impacts to imperiled species.  
11 Likewise, the Center is actively engaged in efforts to protect native plants and animals from the  
12 effects of climate change. Protecting the species at issue under the ESA would further these  
13 campaigns.

14           12. Plaintiff's conservation efforts are prompted by the concern that the relict dace  
15 JSWC DPS is at serious risk of extinction. Defendants' failure to comply with the ESA's  
16 nondiscretionary deadline for issuing a listing determination for this species deprives it of  
17 statutory protections that are vitally necessary to its survival and recovery. Until this species is  
18 protected under the ESA, Plaintiff's interest in its conservation and recovery is impaired.  
19 Therefore, Plaintiff's members and staff are injured by Defendants' failure to make a timely  
20 determination as to whether listing this species is warranted, as well as by the ongoing harm to  
21 the species and its habitat in the absence of such protections. The injuries described above are  
22 actual, concrete injuries presently suffered by the Plaintiff and its members, and they will  
23 continue to occur unless this Court grants relief. These injuries are directly caused by  
24 Defendants' inaction, and the relief sought herein – an order compelling a listing decision for this  
25 species – would redress these injuries. The Plaintiff and its members have no other adequate  
26 remedy at law.

1 13. Defendant DAVID BERNHARDT is the Secretary of the United States  
2 Department of the Interior and is the federal official in whom the ESA vests final responsibility  
3 for making decisions and promulgating regulations required by and in accordance with the ESA,  
4 including listing decisions and critical habitat designations. Secretary Bernhardt is sued in his  
5 official capacity.

6 14. Defendant AURELIA SKIPWITH is the Director of the United States Fish and  
7 Wildlife Service, the agency within the Department of the Interior that is charged with  
8 implementing the ESA for the species at issue in this suit, including through prompt compliance  
9 with the ESA’s mandatory listing and critical habitat deadlines. *See* 50 C.F.R. § 402.01(b).  
10 Director Skipwith is sued in her official capacity.

11 15. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency  
12 within the Department of the Interior that is charged with implementing the ESA for the species  
13 at issue in this suit, including through prompt compliance with the ESA’s mandatory listing and  
14 critical habitat deadlines.

15 **LEGAL BACKGROUND**

16 16. The ESA is a comprehensive federal statute declaring that endangered and  
17 threatened species are of “esthetic, ecological, educational, historical, recreational, and scientific  
18 value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). Accordingly, the purpose of the ESA  
19 is to “provide a means whereby the ecosystems upon which endangered species and threatened  
20 species depend may be conserved, [and] to provide a program for the conservation of such  
21 endangered species and threatened species ....” *Id.* § 1531(b).

22 17. To this end, section 4 of the ESA requires the Secretary to protect imperiled  
23 species by listing them as either “endangered” or “threatened.” *Id.* § 1533(a). A “species”  
24 includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any  
25 species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

1           18.     The ESA’s substantive protections apply; however, only after the Secretary lists a  
2 species as threatened or endangered. For example, section 7 of the ESA requires all federal  
3 agencies to ensure that their actions do not “jeopardize the continued existence” of any listed  
4 species or “result in the destruction or adverse modification” of a listed species’ “critical  
5 habitat.” *Id.* § 1536(a)(2). Section 9 of the ESA prohibits, among other things, “any person” from  
6 intentionally taking listed species or incidentally taking listed species without a lawful  
7 authorization from the Secretary. *Id.* §§ 1538(a)(1)(B) and 1539. Concurrently with listing, the  
8 Secretary must designate the species’ critical habitat, which includes areas that are essential to  
9 the conservation of the species. *Id.* §§ 1532(5)(A) and 1533(a)(3)(A). Other provisions include  
10 the requirement that the Secretary “develop and implement” recovery plans for listed species,  
11 authorize the Secretary to acquire land for the protection of listed species, and make federal  
12 funds available to states to assist in their efforts to preserve and protect listed species. *Id.* §  
13 1533(f), § 1534, and § 1535(d).

14           19.     To ensure the timely protection of species that are at risk of extinction, Congress  
15 set forth a detailed process whereby citizens may petition the Secretary to list a species as  
16 endangered or threatened. The process includes mandatory, non-discretionary deadlines that the  
17 Secretary must meet so that imperiled species timely receive the ESA’s substantive protections.  
18 The three required findings, described below, are the 90-day finding, the 12-month finding, and  
19 the final listing determination. The Secretary has delegated responsibility for making these  
20 findings to FWS.

21           20.     Upon receiving a listing petition, FWS must “to the maximum extent practicable,  
22 within 90-days” make an initial finding as to whether the petition “presents substantial scientific  
23 or commercial information indicating that the petitioned action may be warranted.” *Id.* §  
24 1533(b)(3)(A). If FWS finds that the petition does not present substantial information indicating  
25 that listing may be warranted, the petition is denied, and the process ends.



1 chubby, soft-bodied fish with small fins. Its color is highly variable and can be dusky violet,  
2 yellow, or green above, speckled with brown; with yellow fins.

3 25. The relict dace JSWC DPS is genetically distinct from other relict dace  
4 populations, and occurs only in the Goshute Valley, in Elko County, Nevada. Each population of  
5 relict dace has unique genetic variation that may not be represented in any other relict dace  
6 populations. No single population of relict dace represents all the diversity within the complex of  
7 the species; therefore, a loss of one population would result in the loss of the species' unique  
8 diversity. The various populations of relict dace are hydrologically isolated from one another by  
9 dozens of miles of dry desert. The relict dace JSWC DPS appears to have been isolated for  
10 nearly 300,000 years. JSWC contains the most complex system of springs, potholes, ponds, and  
11 outflows encountered within the relict dace's known distribution and thus is the most distinctive  
12 and significant habitat occupied by the species.

13 26. The primary threats to the survival of the relict dace JSWC DPS are Nevada Gold  
14 Mines' Long Canyon Mine, "a multi-million ounce, high-grade oxide, open-pit deposit" of gold  
15 located immediately adjacent to JSWC. Current operations of the Long Canyon mine have  
16 adversely affected the water quality of JSWC. Surfactants used in connection with mining  
17 operations have been detected in the dace's habitat at levels that exceed chronic toxicity levels  
18 for aquatic organisms.

19 27. The biggest threat to the relict dace JSWC DPS is a plan by the Nevada Gold  
20 Mines to extend the depth of the mine to below the water table, which will require extensive  
21 dewatering that will alter the hydrology of the area. This threatens to dry out the springs that are  
22 home to the relict dace JSWC DPS. Pump tests by Nevada Gold Mines resulted in loss of flow at  
23 Big Spring and other springs in JSWC in less than two weeks. And efforts to supplement the  
24 water in the springs during the pump tests resulted in significant changes in the springs'  
25 temperature and chemistry, which can negatively impact the relict dace.





**REQUEST FOR RELIEF**

1  
2 Plaintiffs respectfully request that the Court enter Judgment for Plaintiffs providing the  
3 following relief:

4 A. Declare that Defendants violated the ESA and/or APA by failing to issue timely  
5 12-month findings as to whether listing the relict dace is warranted, 16 U.S.C. § 1533(b)(3)(B), 5  
6 U.S.C. § 706(1).;

7 B. Order Defendants to issue, by dates certain, findings as to whether listing the  
8 relict dace is warranted, 16 U.S.C. § 1533(b)(3)(B);

9 C. Grant Plaintiff their attorneys' fees and costs in this action as provided by the  
10 ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and

11 D. Provide such other and further relief as the Court deems just and proper.  
12

13 Respectfully submitted and dated this 1st day of June, 2020.  
14

15 /s/ Chris Mixson

16 Christopher W. Mixson, Esq.  
17 Nevada Bar No. 10685  
18 Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP  
19 5594-B Longley Lane  
20 Reno, Nevada 89511  
21 775-853-6787  
22 cmixson@wrslawyers.com

23 Jennifer L. Loda (*pro hac vice applied for*)  
24 California Bar No. 284889  
25 Center for Biological Diversity  
26 1212 Broadway, Suite 800  
27 Oakland, CA 94612-1810  
28 510-844-7136  
jloda@biologicaldiversity.org

*Attorneys for Plaintiff Center for Biological  
Diversity*