

1 Justin Augustine (SBN 235561)
1095 Market Street, Suite 511
2 San Francisco, CA 94103
Telephone: (415) 436-9682
3 Facsimile: (415) 436-9683
jaugustine@biologicaldiversity.org
4

5 John Buse (SBN 163156)
CENTER FOR BIOLOGICAL DIVERSITY
5656 S. Dorchester Ave., No. 3
6 Chicago, IL 60637
Telephone: (312) 237-1443
7 jbuse@biologicaldiversity.org

8 Attorneys for Plaintiff

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10 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 **CENTER FOR BIOLOGICAL DIVERSITY,**

12 **Plaintiff,**

13 v.

14 **GALE NORTON**, Secretary of the Interior,
15 U.S. Department of the Interior,

16 **DALE HALL**, Director,
17 U.S. Fish and Wildlife Service,

18 **Defendants.**

Civil Action No.:

**COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

19 **INTRODUCTION**

20 1. This is an action for declaratory and injunctive relief in which Plaintiff, Center for
21 Biological Diversity, challenges Defendants' continued failure to fulfill its mandatory duty to issue a
22 90-day finding for the Thorne's hairstreak and Hermes copper butterflies pursuant to the Endangered
23 Species Act.

24 2. In danger of imminent extinction, the Thorne's hairstreak and Hermes copper butterflies
25 are currently threatened by excessive wildfire and urban development.

26 3. In 2003, fires raged through the habitat of both species burning at least 68% of the
27 Thorne's hairstreak's habitat and 39% of the Hermes copper's habitat. Moreover, the recent October
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1 4,100 acre "Border Fire No. 50" through the butterflies' habitat demonstrates that the fire threat has not
2 abated whatsoever and instead, could eliminate either species at any time.

3 4. To try and save the butterflies from extinction, Plaintiff, Center for Biological Diversity,
4 petitioned Defendants, Gale Norton (Secretary of the Interior), and the U.S. Fish and Wildlife Service,
5 to list both species as "endangered" pursuant to the Endangered Species Act ("ESA"). ESA §§ 2-18, 16
6 U.S.C. §§ 1531-1544. Plaintiff also petitioned Defendants to provide "emergency" endangered listing
7 protections for Thorne's hairstreak and to designate critical habitat for both species concurrent with
8 listing.

9 5. Under the ESA, the Secretary of the Interior has a non-discretionary duty to determine
10 within 90 days, to the maximum extent practicable, whether a petition presents substantial information
11 indicating that the listing of a species may be warranted. If the Secretary makes a positive 90-day
12 finding, she must then determine whether the listing is or is not warranted within 12 months of
13 receiving the petition.

14 6. In the present case, the Secretary has violated her duties under the ESA by failing to
15 make a 90-day finding within the statutory deadlines. This action seeks to compel the Secretary to rule
16 on the Center's petitions.

17 JURISDICTION AND VENUE

18 7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
19 question), 28 U.S.C. § 1346 (United States as a defendant), and 16 U.S.C. §§ 1540(c) & (g) (action
20 arising under the Endangered Species Act and citizen suit provision).

21 8. This Court has authority to grant the requested relief pursuant to 28 U.S.C. §§ 2201-
22 2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

23 9. As required by the Endangered Species Act ("ESA"), the Center provided the Secretary
24 with written notice of its intent to sue more than 60 days ago. ESA § 11(g)(2), 16 U.S.C. § 1540(g)(2).
25 Because the Secretary has not remedied her violations of law, there exists an actual controversy
26 between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.
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1 21. After issuing a positive 90-day finding, the Secretary has 12 months from the date that
2 she received the petition to make one of three findings: (1) the petitioned action is not warranted; (2) the
3 petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by work
4 on other pending proposals for listing species of higher priority. ESA § 4(b)(3)(B), 16 § 1533(b)(3)(B);
5 50 C.F.R. § 424.14(b)(3).

6 22. If the Secretary finds that listing the species is warranted, she must publish a proposed
7 rule to list the species as endangered or threatened in the Federal Register. ESA § 4(b)(5), 16 U.S.C. §
8 1533(b)(5).

9 23. Within one year of the publication of a proposed rule to list a species, the Secretary must
10 make a final decision on the proposal. ESA § 4(b)(6)(A), 16 U.S.C. § 1533(b)(6)(A).

11 24. The Secretary may provide emergency ESA listing protections to any species where
12 there exists an "... emergency posing a significant risk to the well-being of any species of fish or
13 wildlife or plants ..." if the Secretary publishes detailed reasons for this action and notifies the affected
14 State. Emergency listing protections expire after 240 days in the event the Secretary has not conducted
15 the normal listing process. ESA § 4(b)(7), 16 U.S.C. § 1533(b)(7).

16 **THE THORNE'S HAIRSTREAK AND HERMES COPPER BUTTERFLIES**

17 25. The Thorne's hairstreak butterfly is only found in the San Ysidro Mountains of
18 southwest San Diego County. It has been recognized as unique and imperiled for over twenty years.

19 26. Unfortunately, the status of the Thorne's hairstreak butterfly continues to deteriorate. As
20 a result of the 2003 Mine Fire in the San Ysidro Mountains, which destroyed approximately 68% of the
21 butterfly's habitat, only five small populations of the Thorne's hairstreak are known to still exist in
22 close proximity with one another. As a result, one single new fire could wipe out the entire species.

23 27. Fire is also a major threat to the Thorne's hairstreak butterfly's host species, the Tecate
24 cypress. Although fire plays an important role in the life cycle of Tecate cypress, the excessive
25 frequency of accidental fires in the San Ysidro Mountains has significantly limited the distribution and
26 amount of mature cypress, and has prevented many trees from reaching a mature stage thus further
27 inhibiting the recovery of the Thorne's hairstreak. In fact, the 4,100 acre Border Fire No. 50 burned
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1 through several stands of Tecate cypress in early October, 2005, just a few miles to the east of the last
2 known Thorne's hairstreak colonies, highlighting the significant threat that fire poses to the species.

3 28. The Hermes copper butterfly is found in San Diego County as well and is endemic to
4 San Diego County and northern Baja California, west of the Peninsular mountain ranges.

5 29. After the San Diego County fires of 2003, only fifteen populations of Hermes copper
6 were known to remain in existence in the United States.

7 30. While fire alone could eliminate the species, loss of habitat due to urban development
8 also plagues the Hermes copper--several populations in areas like Jamul and Fallbrook in San Diego
9 County face serious threats to their continued existence from urban development.

10 31. Despite 20 years of official knowledge of both the Thorne's hairstreak and Hermes
11 copper butterflies imperiled status, and despite the heightened level of concern due to recent losses from
12 fire, neither butterfly has been provided the protections of the ESA by the U.S. Fish and Wildlife
13 Service.

14 32. The Center filed the petitions to list the Thorne's hairstreak and Hermes copper
15 butterflies in October of 2004. The petitions, which are supported by substantial information, requested
16 ESA protection for the remaining butterflies.

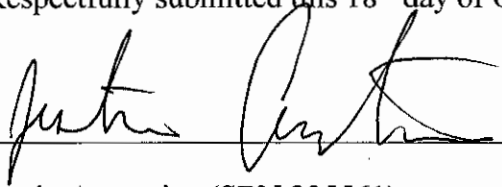
17 33. The Service's refusal to take action on the Center's petitions to protect the species leaves
18 the butterflies unprotected in the face of increasing impacts from fire, loss of habitat, and a well
19 documented and significant trend toward extinction.

20 34. ESA listing of the Thorne's hairstreak and Hermes copper butterflies would increase
21 conservation resources for the species, would provide greater awareness of the species status, and would
22 result in the preparation of a recovery plan.

23 **THE PETITIONS TO LIST THE THORNE'S HAIRSTREAK AND HERMES COPPER**
24 **BUTTERFLIES**

25 35. In May of 1991, the San Diego Biodiversity Project submitted petitions to list the
26 Thorne's hairstreak and Hermes copper butterflies. The petitions were denied on a technicality for
27 lacking information that the Service already possessed.

1 Respectfully submitted this 18th day of October, 2005,

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4 Justin Augustine (SBN 235561)
5 1095 Market Street, Suite 511
6 San Francisco, CA 94103
7 Telephone: (415) 436-9682
8 Facsimile: (415) 436-9683
9 jaugustine@biologicaldiversity.org

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16 Attorneys for Plaintiff
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