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8	Attorneys for Plaintiff			
9	IN THE UNITED STATES DISTRICT COURT			
11	FOR THE SOUTHERN DISTRICT OF CALIFORNIA			
12	CENTER FOR BIOLOGICAL DIV	ERSITY,) }	
13	Plaintiff,		Civil Action No.:	
14	v. .))	
15	GALE NORTON, Secretary of the Interio		OMPLAINT FOR OUTPUT OUT	
16 17	DALE HALL, Director, U.S. Fish and Wildlife Service,)	
18	Defendants.		·	
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 butterflie			
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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COMPLAINT

to list both species as "endangered" pursuant to the Endangered Species Act ("ESA"). ESA §§ 2-18, 16 U.S.C. §§ 1531-1544. Plaintiff also petitioned Defendants to provide "emergency" endangered listing

petitioned Defendants, Gale Norton (Secretary of the Interior), and the U.S. Fish and Wildlife Service,

4.100 acre "Border Fire No. 50" through the butterflies' habitat demonstrates that the fire threat has not

To try and save the butterflies from extinction, Plaintiff, Center for Biological Diversity,

abated whatsoever and instead, could eliminate either species at any time.

protections for Thorne's hairstreak and to designate critical habitat for both species concurrent with

listing.

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

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

JURISDICTION AND VENUE

- 7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as a defendant), and 16 U.S.C. §§ 1540(c) & (g) (action arising under the Endangered Species Act and citizen suit provision).
- 8. This Court has authority to grant the requested relief pursuant to 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).
- 9. As required by the Endangered Species Act ("ESA"), the Center provided the Secretary with written notice of its intent to sue more than 60 days ago. ESA § 11(g)(2), 16 U.S.C. § 1540(g)(2). Because the Secretary has not remedied her violations of law, there exists an actual controversy between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e) and ESA § 11(g)(3)(A), 16 U.S.C. § 1540(g)(3)(A). The Thorne's hairstreak and Hermes copper butterflies live in this judicial district, a substantial part of the events giving rise to the cause of action occurred in this judicial district, and Defendant, United States Fish and Wildlife Service maintains an office in this judicial district.

PARTIES

- 11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center) is a non-profit corporation with over 14,000 members and offices in San Diego, Joshua Tree, and San Francisco, California; Washington, D.C.; Portland, Oregon; Tucson and Phoenix, Arizona; and Silver City, New Mexico. The Center is dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands. The Center's members and/or staff use and enjoy, and intend to continue to use and enjoy, lands where the Thorne's hairstreak and Hermes copper butterflies are found for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center's members and/or staff have researched, studied, and observed the Thorne's hairstreak and Hermes copper butterflies and intend to research, study, and observe both species in the future. The Center's members and/or staff are being adversely affected and irreparably injured by the Service's continued violations of the Endangered Species Act. The Center brings this suit on its own behalf and on behalf of its adversely affected members and staff.
- 12. Defendant GALE NORTON is the Secretary of the Interior ("Secretary"). The Secretary is the federal official charged with listing species as endangered or threatened under the ESA. She is sued in her official capacity. The Secretary has delegated her obligation to review listing petitions under the ESA to the U.S. Fish and Wildlife Service.
- 13. Defendant DALE HALL is sued in his official capacity as the Director of the U.S. Fish and Wildlife Service ("the Service"). The Service has been delegated responsibility for implementing the ESA.

THE ENDANGERED SPECIES ACT

14. The ESA is a federal statute designed to conserve endangered and threatened species and the ecosystems upon which those species depend. ESA § 2(b), 16 U.S.C. § 1531(b).

- 15. To achieve these objectives, the Service is required to protect such imperiled species by listing them as either "threatened" or "endangered" if they are facing extinction due to any one, or any combination of, the following factors:
 - (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
 - (B) over-utilization 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. ESA § 4(a)(1), 16 U.S.C. § 1533(a)(1).
- 16. A species is "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." ESA § 3(6), 16 U.S.C. § 1532(6). A species is "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." ESA § 3(20), 16 U.S.C. § 1532(20).
- 17. A species receives mandatory substantive protections under the Endangered Species Act if and only if it is listed as endangered or threatened. Thus, the listing process is the essential first step in the ESA's system of species protection and recovery.
- 18. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a)(2005).
- 19. Upon receipt of a petition to list a species, the Secretary has 90 days to the maximum extent practicable to make a finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). This determination is known as a 90-day finding.
- 20. If the Secretary makes a positive 90-day finding, she must promptly publish it in the Federal Register and commence a "status review" of the species. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A).

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petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by work on other pending proposals for listing species of higher priority. ESA § 4(b)(3)(B), 16 § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3).

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

she received the petition to make one of three findings: (1) the petitioned action is not warranted; (2) the

After issuing a positive 90-day finding, the Secretary has 12 months from the date that

- 23. Within one year of the publication of a proposed rule to list a species, the Secretary must make a final decision on the proposal. ESA § 4(b)(6)(A), 16 U.S.C. § 1533(b)(6)(A).
- 24. The Secretary may provide emergency ESA listing protections to any species where there exists an "... emergency posing a significant risk to the well-being of any species of fish or wildlife or plants ..." if the Secretary publishes detailed reasons for this action and notifies the affected State. Emergency listing protections expire after 240 days in the event the Secretary has not conducted the normal listing process. ESA § 4(b)(7), 16 U.S.C. § 1533(b)(7).

THE THORNE'S HAIRSTREAK AND HERMES COPPER BUTTERFLIES

- 25. The Thorne's hairstreak butterfly is only found in the San Ysidro Mountains of southwest San Diego County. It has been recognized as unique and imperiled for over twenty years.
- 26. Unfortunately, the status of the Thorne's hairstreak butterfly continues to deteriorate. As a result of the 2003 Mine Fire in the San Ysidro Mountains, which destroyed approximately 68% of the butterfly's habitat, only five small populations of the Thorne's hairstreak are known to still exist in close proximity with one another. As a result, one single new fire could wipe out the entire species.
- 27. Fire is also a major threat to the Thorne's hairstreak butterfly's host species, the Tecate cypress. Although fire plays an important role in the life cycle of Tecate cypress, the excessive frequency of accidental fires in the San Ysidro Mountains has significantly limited the distribution and amount of mature cypress, and has prevented many trees from reaching a mature stage thus further inhibiting the recovery of the Thorne's hairstreak. In fact, the 4,100 acre Border Fire No. 50 burned

through several stands of Tecate cypress in early October, 2005, just a few miles to the east of the last known Thorne's hairstreak colonies, highlighting the significant threat that fire poses to the species.

- 28. The Hermes copper butterfly is found in San Diego County as well and is endemic to San Diego County and northern Baja California, west of the Peninsular mountain ranges.
- 29. After the San Diego County fires of 2003, only fifteen populations of Hermes copper were known to remain in existence in the United States.
- 30. While fire alone could eliminate the species, loss of habitat due to urban development also plagues the Hermes copper--several populations in areas like Jamul and Fallbrook in San Diego County face serious threats to their continued existence from urban development.
- 31. Despite 20 years of official knowledge of both the Thorne's hairstreak and Hermes copper butterflies imperiled status, and despite the heightened level of concern due to recent losses from fire, neither butterfly has been provided the protections of the ESA by the U.S. Fish and Wildlife Service.
- 32. The Center filed the petitions to list the Thorne's hairstreak and Hermes copper butterflies in October of 2004. The petitions, which are supported by substantial information, requested ESA protection for the remaining butterflies.
- 33. The Service's refusal to take action on the Center's petitions to protect the species leaves the butterflies unprotected in the face of increasing impacts from fire, loss of habitat, and a well documented and significant trend toward extinction.
- 34. ESA listing of the Thorne's hairstreak and Hermes copper butterflies would increase conservation resources for the species, would provide greater awareness of the species status, and would result in the preparation of a recovery plan.

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

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

- 36. Despite its denial of the 1991 petitions, the Service did promise to conduct a status review of both butterflies, but as of 2004, no evidence of such a review existed.
- 37. Consequently, on October 25, 2004, the Center filed its Petitions to list the Thorne's hairstreak and Hermes copper butterflies as endangered species under the ESA, to provide "emergency" endangered listing protections for Thorne's hairstreak, and to designate critical habitat for both species concurrently with listing.
- 38. The ESA mandates that the Secretary of the Interior issue a 90-day finding in response to a listing petition. Thus, the Thorne's hairstreak and Hermes copper butterflies 90-day finding was due on or about January 23, 2005.
- 39. The Secretary has failed to take any action on the Petitions and has not made a 90-day finding. The 90-day finding on the Petitions is now almost 9 months overdue.
- 40. The Center sent a sixty-day notice of intent to sue to the Secretary on March 15, 2005, satisfying its statutory notice requirements. The Secretary did not respond.

CLAIM FOR RELIEF

(Violation of Section 4 of the ESA)

- 41. Paragraphs 1-40 are incorporated herein, by reference.
- 42. Under the ESA, the Secretary must determine whether a petition to list a species "presents substantial scientific or commercial information indicating that the petitioned action may be warranted" within 90 days of receiving the petition, to the maximum extent practicable. ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A). The Secretary must publish the finding in the Federal Register.
- 43. The Secretary has failed to make and publish in the Federal Register a 90-day finding concerning Plaintiff's Petitions to list the Thorne's hairstreak and Hermes copper butterflies.
- 44. By failing to make 90-day finding on Plaintiff's Petitions to list the Thorne's hairstreak and Hermes copper butterflies, the Secretary has failed to perform non-discretionary acts or duties within the meaning of the ESA's citizen suit provision. ESA § 4(g)(1)(c), 16 U.S.C. § 1540(g)(1)(c).

45. By failing to render a 90-day finding on Plaintiff's Petitions to list the Thorne's hairstreak and Hermes copper butterflies, the Secretary has also unlawfully withheld and unreasonably delayed compliance with Section 4(b)(3)(A) of the ESA, 16 U.S.C. § 1533(b)(3)(A), within the meaning of the APA, 5 U.S.C. § 706.

PRAYER FOR RELIEF

Plaintiff requests that this Court enter judgment providing the following relief:

- 1. Declaratory judgment that the Secretary failed to comply with her non-discretionary duty under ESA Section 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A)to make and publish in the Federal Register a 90-day finding regarding the Petitions to list the Thorne's hairstreak and Hermes copper butterflies;
- 2. Declaratory judgment that the Secretary has unlawfully withheld and unreasonably delayed compliance with Section 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A) by not rendering a 90-day finding on the Petitions to list the Thorne's hairstreak and Hermes copper butterflies;
- 3. Injunctive relief compelling the Secretary to make and publish in the Federal Register a 90-day finding on Plaintiff's Petitions to list the Thorne's hairstreak and Hermes copper butterflies within a reasonable period of time;
- 4. An order awarding Plaintiff its costs of litigation, including reasonable attorneys' fees; and
- 5. Any other such relief as the Court deems just and proper.

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