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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

CENTER FOR BIOLOGICAL
DIVERSITY, a non-profit corporation,

Plaintiff,

v.

DAVID BERNHARDT, in his official
capacity as Secretary of the Interior; U.S.
FISH AND WILDLIFE SERVICE, an
agency of the U.S. Department of
Commerce,

Defendants.

Case No.:

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

INTRODUCTION

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

against the Secretary of the Interior and the U.S. Fish and Wildlife Service (collectively, “the Service”) for failing to designate critical habitat for 14 endangered species of plants and animals from the island of Hawai‘i. The Service’s failure to timely designate critical habitat violates its mandatory duty under section 4 of the ESA, 16 U.S.C. § 1533, and deprives these imperiled species of vitally important protections in their most essential habitat areas.

2. On October 29, 2013, the Service listed 15 species from the island of Hawai‘i as endangered, including 13 plants and 2 animals: *Bidens hillebrandiana* ssp. *Hillebrandiana* (ko‘oko‘olau); *Bidens micrantha* ssp. *Ctenophylla* (ko‘oko‘olau); *Cyanea marksii* (hāhā); *Cyanea tritomantha* (‘aku); *Cyrtandra nanawaleensis* (ha‘iwale); *Cyrtandra wagneri* (ha‘iwale); *Phyllostegia floribunda*; *Pittosporum hawaiiense* (hō‘awa and hā‘awa); *Platydesma remyi*; *Pritchardia lanigera* (lo‘ulu); *Schiedea diffusa* ssp. *Macraei*; *Schiedea hawaiiensis*; *Stenogyne cranwelliae*; *Drosophila digressa* (picture-wing fly); *Vetericaris chaceorum* (anchialine pool shrimp). 78 Fed. Reg. 64,638 (Oct. 29, 2013). It also recognized a taxonomic change for *Mezoneuron kawaiense* (‘uhi ‘uhi), which had been formerly listed as *Caesalpinia kawaiense*. *Id.* at 64,639.

3. When the Service lists a species as endangered or threatened, it must designate critical habitat for that species concurrently with listing. 16 U.S.C. §

1533(a)(3)(A)(i). Under certain limited circumstances, the Service may extend that deadline no more than one additional year. *Id.* § 1533(b)(6)(C)(ii).

4. Regardless of this nondiscretionary statutory requirement, to date, the Service has designated critical habitat for only two of the above listed Hawai‘i Island species, *Bidens micrantha ssp. Ctenophylla* and *Mezoneuron kavaiense*. 83 Fed. Reg. 42,362 (Aug. 21, 2018).

5. Time is of the essence in protecting the remaining 14 endangered Hawaiian species (12 plants, 1 anchialine pool shrimp, and 1 picture-wing fly), all of which only occur on the island of Hawai‘i. As the Service noted in its 2013 final rule, each of these vulnerable endemic species is presently in danger of extinction throughout its entire range due to “serious and ongoing threats” that include “[h]abitat degradation and destruction by agriculture and urbanization, nonnative ungulates and plants, fire, natural disasters, sedimentation, and potentially climate change, and the interaction of these threats.” 78 Fed. Reg. at 64,670.

6. Despite these “serious and ongoing threats” to these species’ survival, the Service has failed to designate critical habitat as required by section 4 of the ESA.

7. These species' very existence remains at risk until the Service fulfills its statutory duty to designate the critical habitats necessary to support survival and recovery.

8. Accordingly, Plaintiff seeks an order from this Court declaring the Service to be in violation of section 4 of the ESA and establishing prompt deadlines for the Service's issuance of proposed and final rules designating critical habitat for these 14 endangered species of plants and animals from the island of Hawai'i.

JURISDICTION AND VENUE

9. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g) (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (Administrative Procedure Act or "APA"), and 28 U.S.C. § 1361 (mandamus).

10. The relief sought is authorized by 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), 16 U.S.C. § 1540(g) (citizen suit provision of the ESA), and 5 U.S.C. §§ 701-706 (APA).

11. By written notice sent on August 27, 2019, the Center informed Defendants of their violation more than sixty days prior to the filing of this Complaint, as required by the ESA. 16 U.S.C. § 1540(g)(2)(C). Despite receipt of the Center's notice letter, the Service has failed to remedy its violation of the ESA.

12. Venue is proper in the U.S. District Court for the District of Hawai‘i pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district as all 14 endangered species of plants and animals occur in this judicial district.

13. An actual, justiciable controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

14. The Center has no adequate remedy at law. The Service’s continuing failure to comply with the ESA will result in irreparable harm to these 14 endangered species of plants and animals, to the Center and the Center’s members, and to the public. No monetary damages or other legal remedy can adequately compensate the Center, its members, or the public for this harm.

15. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

PARTIES

16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a non-profit 501(c)(3) membership corporation with offices throughout the United States, including Hawai‘i. Through science, policy, and environmental law, the Center is actively involved in species and habitat protection issues throughout the United States and abroad, including efforts related to Hawai‘i Island’s imperiled plant and animal species, and the effective implementation of the ESA.

The Center has more than 67,000 members throughout the United States, including Hawai‘i, with a direct interest in ensuring the survival and recovery of endangered species. The Center is highly invested in conserving fragile and impacted ecosystems and the species that depend on them. The Center’s members and staff have researched, studied, observed, and sought protection for these 14 endangered species of plants and animals from the island of Hawai‘i. In addition, the Center’s members and staff have visited and enjoyed Hawai‘i Island where these 14 species occur, and they have sought out and observed these species in Hawai‘i. The Center’s members and staff have plans to continue to visit and observe, or attempt to observe, these species in the near future. The Center’s members and staff derive scientific, recreational, cultural, conservation, and aesthetic benefits from these species’ existence in the wild. The Center’s members’ and staff’s enjoyment of these species is dependent on the continued existence of healthy, sustainable populations in the wild. The Service’s failure to designate critical habitat for these 14 species directly harms these interests. The Center brings this action on behalf of itself and its adversely affected members.

17. The Center and its members are adversely affected or aggrieved by the Service’s inaction and are entitled to judicial review of such inaction within the meaning of the ESA and the APA. The Service’s failure to comply with the ESA’s nondiscretionary deadlines to designate critical habitat for these 14 Hawai‘i Island

species denies them vital protections that are necessary for their survival and recovery. The Service's protracted failure to act diminishes the aesthetic, recreational, cultural, scientific, and other interests of the Center and its members because these 14 endangered Hawai'i Island species are more vulnerable to harm and less likely to recover absent the critical habitat protections. In the time the critical habitat rule has been languishing, these 14 species have remained vulnerable to injury, death, and ultimately extinction. The Center's members and staff are therefore injured because their use and enjoyment of these 14 endangered species of plants and animals from the island of Hawai'i are threatened by the Service's violation of the ESA.

18. The above-described cultural, aesthetic, recreational, scientific, educational and other interests of the Plaintiff and its members have been, are being and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by Defendants' continued refusal to comply with their obligations under the ESA. The relief sought in this case will redress these injuries.

19. Defendant David Bernhardt is the Secretary of the United States Department of the Interior and is the federal official with final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA, including timely designation critical habitat, and to comply with all other

federal laws applicable to the Department of the Interior. Secretary Bernhardt is sued in his official capacity.

20. Defendant U.S. Fish and Wildlife Service is an agency of the United States Government, within and under the jurisdiction of the Department of the Interior. Through delegation of authority from the Secretary of the Interior, the Service administers and implements the ESA for non-marine wildlife. 50 C.F.R. § 402.01(b). This authority encompasses timely compliance with the ESA's mandatory deadlines to designate critical habitat.

LEGAL BACKGROUND

21. The Endangered Species Act is a federal statute enacted to conserve threatened and endangered species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA is the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The United States Supreme Court has concluded the ESA requires that endangered species be afforded the highest of priorities. *Id.* At 174. Congress's intent, reflected in the plain language of the ESA, was to prevent extinction and promote the recovery of imperiled species, regardless of the cost. *Id.* at 184.

22. The ESA's primary purposes are to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be

conserved . . . [and] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

23. The ESA defines a “species” to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

24. Section 4 of the ESA requires the Service to list species as “endangered” or “threatened” when they meet the statutory listing criteria. *Id.* § 1533. An “endangered” species is “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20).

25. Concurrent with listing a species, the ESA requires the designation of critical habitat. 16 U.S.C. § 1533(a)(3)(A)(i) (“The Secretary . . . shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.”); *see also id.* § 1533(b)(6)(C).

26. In limited circumstances, the Service may extend the designation of critical habitat for no more than one year. If the Secretary finds that critical habitat is “not determinable” at the time of listing, then it “may extend the one-year period . . . by not more than one additional year, but not later than the close of such

additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.” 16 U.S.C. § 1533(b)(6)(C)(ii).

27. Critical habitat means “the specific areas within the geographical area occupied by the species . . . 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 unoccupied areas “essential for the conservation of the species.” 16 U.S.C. § 1532(5).

28. Congress recognized the importance of habitat protections to the conservation and recovery of endangered species. The legislative history of the ESA clearly demonstrates Congress understood the importance of timely critical habitat designation in conserving listed species:

[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence. . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then *the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*

H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

29. Time has proven the wisdom of Congress’ requirement that the Service designate critical habitat for listed species. Studies show that species with critical habitat are more than twice as likely to be in recovery than those without it.

FACTUAL BACKGROUND

30. On October 29, 2013, the Service listed the following 14 Hawaiian species as endangered: *Bidens hillebrandiana ssp. Hillebrandiana* (ko‘oko‘olau); *Cyanea marksii* (hāhā); *Cyanea tritomantha* (‘aku); *Cyrtandra nanawaleensis* (ha‘iwale); *Cyrtandra wagneri* (ha‘iwale); *Phyllostegia floribunda*; *Pittosporum hawaiiense* (hō‘awa and hā‘awa); *Platydesma remyi*; *Pritchardia lanigera* (lo‘ulu); *Schiedea diffusa ssp. Macraei*; *Schiedea hawaiiensis*; *Stenogyne cranwelliae*; *Drosophila digressa* (picture-wing fly); *Vetericaris chaceorum* (anchialine pool shrimp). 78 Fed. Reg. 64,638. The ESA requires critical habitat designation concurrently with this listing determination, except under specific circumstances. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(A); *see also id.* § 1533(b)(6)(C)(i-ii)

31. The Service failed to designate critical habitat concurrently with its October 29, 2013 rule listing these species as endangered. 78 Fed. Reg. 64,638. Furthermore, the Service did not find critical habitat to not be determinable at that time. *Id.*

32. The Service did, however, find in its October 17, 2012 proposed rule that critical habitat was not determinable at that time. 77 Fed. Reg. 63,928 (Oct. 17, 2012).

33. Regardless, even if the Service had found critical habitat to be undeterminable in its final rule, the Service would have been required to designate

critical habitat for those species by October 29, 2014. 16 U.S.C. § 1533(b)(6)(C)(i-ii).

34. The Service's failure is inexcusable as it has recognized that these species' habitats are being devastated "by agriculture and urbanization, nonnative ungulates and plants, fire, natural disasters, environmental changes resulting from climate change, sedimentation, and the interaction of these threats." 78 Fed. Reg. at 64,670.

35. The threat of habitat destruction is further "exacerbated by small population sizes, the loss of redundancy and resiliency of these species, and the continued inadequacy of existing protective regulations." *Id.* at 64,686.

36. This ongoing habitat destruction, in addition to other serious threats, has left these highly endemic species in danger of extinction throughout their entire range. *Id.* at 64,638.

37. The Service's failure to designate critical habitat for these 14 Hawaiian species deprives these endangered plants and animals of protections to which they are legally entitled, and inexcusably leaves them at increased risk of extinction.

CLAIM FOR RELIEF

(Violation of Endangered Species Act and Administrative Procedure Act)

38. The Center re-alleges and incorporates by reference all allegations set forth in this Complaint, as though fully set forth below.

39. The Service's failure to designate critical habitat for the 14 Hawai'i Island species violates the ESA, 16 U.S.C. § 1533, and constitutes an agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

For the reasons stated above, the Center respectfully requests that the Court grant the following relief.

1. Declare that Defendants violated the Endangered Species Act and Administrative Procedure Act by failing to designate critical habitat for 14 Hawai'i Island species;
2. Direct the Defendants to propose and finalize critical habitat rules by dates certain;
3. Award Plaintiff its costs of litigation, including reasonable attorney fees; and
4. Grant Plaintiff such other relief as the Court deems just and proper.

DATE: October 28, 2019

Respectfully Submitted,

/s/ Maxx Phillips

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