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NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, a
non-profit corporation,

C 06 0928 1
Civil Action No.:

Plaintiff,

v.

GALE NORTON, Secretary of the Interior,
U.S. Department of the Interior, and
DALE HALL, Director, U.S. Fish and Wildlife
Service,

COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

Defendants.

INTRODUCTION

1. This is an action for declaratory and injunctive relief in which Plaintiff, Center for Biological Diversity (hereinafter "the Center"), challenges Defendants' continued failure to fulfill their mandatory duty to issue a 90-day finding on the Center's citizen petition to protect the Tricolored Blackbird, *Agelaius tricolor*, as an endangered species as required by the Endangered Species Act (hereinafter "ESA" or "the Act"). 16 U.S.C. §§ 1531-1544.

1 2. The Tricolored Blackbird is a visually distinctive blackbird, quickly identified by the
2 unique white patch on the bird's upper wing. Ornithologists (scientists who study birds) have
3 discovered that Tricolored Blackbirds are a "colonial" species, which means the species flocks in
4 massive groups and congregates in a small number of large nesting colonies to breed. The Tricolored
5 Blackbird currently forms the largest nesting colonies of any North American landbird; the passenger
6 pigeon once formed even larger nesting colonies than the Tricolored Blackbird, but it is now extinct.

7 3. Not unlike the passenger pigeon, the Tricolored Blackbird's colonial nature makes it
8 susceptible to extinction. Because Tricolored Blackbirds instinctively congregate into enormous
9 breeding colonies, a small number of individual colonies can contain large proportions of the overall
10 population. In fact, in recent surveys approximately half the entire global population nested in just two
11 colonies. Thus, the loss of even a single colony's reproductive effort every year would have severe
12 detrimental effect to the species as a whole.

13 4. Unfortunately, the Tricolored Blackbird's population is declining precipitously. The
14 Tricolored Blackbird once numbered in the millions; one biologist in the 1930s found about 1,105,000
15 individuals in the Sacramento Valley alone. By 1994 the best available science indicated that the
16 Tricolored Blackbird's global population dropped to about 370,000, and 6 years later the population
17 declined by another 50% to 162,000 individual birds.

18 5. Loss of habitat is the primary cause of the bird's decline. Freshwater marshes and
19 perennial grasslands—the Tricolored Blackbird's natural habitats—have largely disappeared from
20 California's Central Valley. Forced from its native habitats, the Tricolored Blackbird now nests largely
21 in croplands planted for silage (fermented plant matter fed to cattle, sheep, and other farm animals).
22 Unfortunately, significant numbers of Tricolored Blackbird nests, eggs, and/or hatched birds are wiped
23 out when silage is harvested during the bird's nesting season. For example, in 2003, approximately half
24 of the Tricolored Blackbird's current population nested in two colonies, and the vast majority of these
25 colonies' eggs and baby birds were destroyed by harvest that conflicted with the Blackbird's breeding
26 season.

1 6. In order to prevent the Tricolored Blackbird from suffering the same fate as the
2 passenger pigeon, the Center petitioned Defendants Gale Norton, Dale Hall and the United States Fish
3 and Wildlife Service to list the species as "endangered" pursuant to the ESA. The Center also requested
4 that the Defendants provide "emergency" protections for the species.

5 7. Under the ESA, the Defendants have a non-discretionary duty to determine within 90
6 days, to the maximum extent practicable, whether a petition presents substantial information indicating
7 that the listing of a species may be warranted. If the Defendants make a positive 90-day finding, they
8 must then determine whether the listing is or is not warranted within 12 months of receiving the
9 petition.

10 8. In the present case, Defendants have violated their duties under the ESA by failing to
11 make a 90-day finding within the statutory deadlines. This action seeks to compel the Defendants to
12 make this required finding on the Center's petition.

13 **JURISDICTION AND VENUE**

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

17 10. This Court has authority to grant the requested relief pursuant to 28 U.S.C. §§ 2201-
18 2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

19 11. As required by the ESA, the Center provided the Secretary with written notice of its
20 intent to sue more than 60 days ago. 16 U.S.C. § 1540(g)(2). Because Defendants have not remedied
21 their legal violations, there exists an actual controversy between the parties within the meaning of the
22 Declaratory Judgment Act. 28 U.S.C. § 2201.

23 12. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A).
24 A substantial portion of the Tricolored Blackbird's remaining population is found in this judicial
25 district, a substantial part of the events giving rise to the cause of action occurred in this judicial district,
26 and Defendant, United States Fish and Wildlife Service maintains an office in this judicial district.

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PARTIES

13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation with over 18,000 members and offices in San Diego, Joshua Tree, Los Angeles, 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, and ecosystems. The Center's members and/or staff use and enjoy, and intend to continue to use and enjoy, lands where the Tricolored Blackbird is 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 Tricolored Blackbird and intend to research, study, and observe the 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.

14. 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.

15. 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

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

17. To achieve these objectives, the Defendants are 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;

- 1 (B) over-utilization for commercial, recreational, scientific, or educational
2 purposes;
3 (C) disease or predation;
4 (D) the inadequacy of existing regulatory mechanisms; or
5 (E) other natural or manmade factors affecting its continued existence.

6 16 U.S.C. § 1533(a)(1).

7 18. A species is "endangered" if it is "in danger of extinction throughout all or a significant
8 portion of its range." 16 U.S.C. § 1532(6). A species is "threatened" if it is "likely to become an
9 endangered species within the foreseeable future throughout all or a significant portion of its range." 16
10 U.S.C. § 1532(20).

11 19. A species receives mandatory substantive protections under the ESA if and only if it is
12 listed as endangered or threatened. Thus, the listing process is the essential first step in the ESA's
13 system of species protection and recovery.

14 20. Any interested person can begin the listing process by filing a petition to list a species
15 with the Secretary. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

16 21. Upon receipt of a petition to list a species, the Defendants have 90 days to the maximum
17 extent practicable to make a finding as to whether the petition "presents substantial scientific or
18 commercial information indicating that the petitioned action may be warranted." 16 U.S.C. §
19 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). This determination is known as a 90-day finding.

20 22. If the Defendants make a positive 90-day finding, they must promptly publish it in the
21 Federal Register and commence a "status review" of the species. 16 U.S.C. § 1533(b)(3)(A).

22 23. After issuing a positive 90-day finding, the Defendants have 12 months from the date
23 that they received the petition to make one of three findings: (1) the petitioned action is not warranted;
24 (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded
25 by work on other pending proposals for listing species of higher priority. 16 § 1533(b)(3)(B); 50 C.F.R.
26 § 424.14(b)(3).

1 24. If the Defendants find that listing the species is warranted, they must publish a proposed
2 rule to list the species as endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5).

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

5 26. The Defendants may provide emergency ESA listing protections to any species where
6 there exists an "... emergency posing a significant risk to the well-being of any species of fish or
7 wildlife or plants ..." if the defendants publish detailed reasons for this action and notify the affected
8 State. Emergency listing protections expire after 240 days in the event the Defendants have not
9 conducted the normal listing process. 16 U.S.C. § 1533(b)(7).

10 **THE TRICOLORED BLACKBIRD**

11 27. The Tricolored Blackbird is found almost exclusively in California. The Central Valley
12 and surrounding foothills are particularly important habitat locations for the bird. Since the extinction
13 of the passenger pigeon, the Tricolored Blackbird has been recognized as the landbird with the largest
14 nesting colonies in North America.

15 28. Approximately 18-24 centimeters in length, males of the species are primarily black, but
16 possess distinctive red and white plumage on the upper wing. The white plumage on the upper wing is
17 the primary characteristic distinguishing the Tricolored Blackbird from other blackbird species in the
18 field. Female Tricolored Blackbirds are mostly black with a small reddish patch in the upper wing.

19 29. The Tricolored Blackbirds primarily feeds on insects, especially grasshoppers, as well as
20 grains, snails, and small clams.

21 30. Historically, California's natural marshlands and native perennial grasslands provided
22 the Tricolored Blackbird with abundant breeding and foraging habitat. Millions of acres of Tricolored
23 Blackbird habitats, however, have been destroyed by developers and agricultural industries. Originally
24 numbering approximately 4,000,000 acres, only 243,000 acres of Central Valley marshland still exist
25 today. Perennial grasslands have fared much worse: 99% of these lands have been destroyed in the
26 Central Valley region.

1 31. The Tricolored Blackbird has valiantly attempted to adapt to the destruction of its habitat
2 by utilizing some agricultural lands for nesting and breeding. Unfortunately, the harvesting of these
3 lands often conflicts with Tricolor Blackbird breeding and nesting months. When these lands are
4 harvested, an entire colony's reproductive efforts can be lost.

5 32. The best available science indicates that there is an urgent need to protect the Tricolor
6 Blackbird. Between 1994 and 2000, the Tricolored Blackbird population has suffered more than a 50%
7 population decline, dropping from an estimated 370,000 birds to 162,000. Moreover, fewer colonies
8 were located, and colonies were smaller on average, in 2000 compared to 1994.

9 33. Because of the Tricolored Blackbird's instinctive desire to nest in large colonies, the
10 annual loss of even a few colonies' breeding efforts puts the species in great danger of extinction. As
11 the remaining population congregates in fewer colonies, each colony becomes increasingly important to
12 the survival of the species. If just one colony's nesting and breeding efforts are thwarted by agricultural
13 activities or development, the species could lose a significant portion of its reproductive effort for the
14 year.

15 34. The current decline strongly suggests that without ESA protection, the Tricolored
16 Blackbird will suffer the same fate as the once numerous passenger pigeon—extinction.

17 **THE PETITION TO LIST TRICOLORED BLACKBIRD**

18 35. On April 8, 2004, the Center filed its Petition to list the Tricolored Blackbird as
19 endangered species under the ESA. The Center also requested that the Service provide "emergency"
20 protections for the species.

21 36. On May 25, 2004, the Defendants sent the Center a letter stating that "the petition does
22 not indicate an emergency situation exists," and that they "are not able to address [the] petition to list
23 the tricolor [sic] blackbird at this time."

24 37. The ESA mandates that the Defendants issue a 90-day finding in response to a listing
25 petition. Thus, the Tricolored Blackbird's 90-day finding was due on or about July 9, 2004.

26 38. The Defendants have failed to take any action on the Petition and have not made a 90-
27 day finding. The 90-day finding on the Petition is now 19 months overdue.

1 39. The Center sent a sixty-day notice of intent to sue to the Defendants on July 12, 2005,
2 satisfying its statutory notice requirements. The Defendants did not respond to this letter.

3 40. The Defendants' refusal to take action on the Center's petition leaves the Tricolored
4 Blackbird unprotected in the face of a well documented and significant trend toward extinction.

5 41. ESA listing of the Tricolored Blackbird would increase conservation resources for the
6 species, would provide greater awareness of the species' status, and would result in the preparation of a
7 recovery plan.

8 CLAIM FOR RELIEF

9 (Violation of Section 4 of the ESA)

10 42. Paragraphs 1-41 are incorporated herein, by reference.

11 43. Under the ESA, the Defendants must determine whether a petition to list a species
12 "presents substantial scientific or commercial information indicating that the petitioned action
13 may be warranted" within 90 days of receiving the petition, to the maximum extent practicable.

14 16 U.S.C. § 1533(b)(3)(A). The Secretary must publish the finding in the Federal Register.

15 44. By failing to make and publish a 90-day finding on the Center's Petition to list the
16 Tricolored Blackbird, the Defendants have failed to perform non-discretionary acts or duties within the
17 meaning of the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(c), and/or is acting in a way that
18 violates the ESA within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

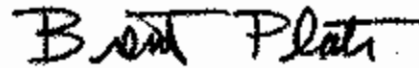
19 PRAYER FOR RELIEF

20 The Center requests that this Court enter judgment providing the following relief:

- 21 1. Declaratory judgment that the Defendants are violating the ESA and APA by failing to
22 comply with the non-discretionary duty under ESA Section 4(b)(3)(A), 16 U.S.C. §
23 1533(b)(3)(A) to make and publish in the Federal Register a 90-day finding regarding
24 the Petition to list the Tricolored Blackbird;
- 25 2. Injunctive relief compelling the Defendants to make and publish in the Federal Register
26 a 90-day finding on the Center's Petition to list the Tricolored Blackbird by a date
27 certain;

- 1 3. An order awarding Plaintiff its costs of litigation, including reasonable attorneys' fees as
2 provided in the ESA, 16 U.S.C. § 1540(g)(4); and
3 4. Any other such relief as the Court deems just and proper.
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6 Respectfully submitted this 13th day of February, 2006,
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