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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

WESTERN WATERSHEDS PROJECT	)	
	)	
Plaintiff,	)	Case No. _____
	)	
vs.	)	
	)	<b>COMPLAINT</b>
DIRK KEMPTHORNE, Secretary of the	)	
Interior, and U.S. FISH AND WILDLIFE	)	
SERVICE	)	
	)	
Defendant.	)	

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**INTRODUCTION**

1. Plaintiff WESTERN WATERSHEDS PROJECT (hereinafter “WWP”) challenges the failure of Defendants, Dirk Kempthorne, Secretary of the Interior, and the U.S. Fish and Wildlife Service (hereinafter collectively “the Secretary”), to issue and publish either a “90-day finding” or a “12-month finding” on WWP’s petition to list the Big Lost River mountain whitefish (*Prosopium williamsoni*) as a threatened or endangered species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”). Over one year has passed since WWP filed its petition, and despite the dire condition of, and ongoing threats to, this unique and isolated whitefish population, the Secretary has failed to act on the petition in a timely manner.

2. WWP thus seeks judicial relief holding that FWS violated the ESA and/or the Administrative Procedure Act (“APA”) by failing to issue the required 90-day and 12-month findings on the listing petition, and ordering the Secretary to promptly issue such findings.

### **JURISDICTION AND VENUE**

3. The Court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal question); 16 U.S.C. § 1540(g) (ESA citizen-suit provision); 5 U.S.C. § 706 (Administrative Procedure Act); and 28 U.S.C. § 1361 (mandamus).

4. WWP provided the Secretary with sixty days’ written notice of the violations alleged herein pursuant to 16 U.S.C. § 1540(g).

5. WWP has formally demanded that the Secretary correct the violations of the ESA alleged herein, but he has failed to comply with these demands and continues to do so. An actual controversy therefore exists between the parties within the meaning of 28 U.S.C. § 2201(a) (Declaratory Judgment).

6. Venue lies in this judicial district by virtue of 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391.

### **PARTIES**

7. Plaintiff WESTERN WATERSHEDS PROJECT (“WWP”) is a non-profit membership organization dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West. WWP’s headquarters are at the Greenfire Preserve near Clayton, Idaho in Custer County. WWP is supported by over 1,400 members, volunteers, and supporters, located in Idaho and around the United States. WWP, as an organization and on behalf of its members, volunteers and supporters is active in seeking to protect and improve the riparian areas, water quality, fisheries and other natural resources and ecological values of western watersheds through land restoration, public education and outreach,

and advocacy efforts to improve public and private lands management within the surrounding region, including the Big Lost River.

8. Thus, WWP, its staff and members have an interest in ensuring the conservation and recovery of the Big Lost River mountain whitefish (hereinafter “Big Lost whitefish”) through its listing under the ESA. WWP, its staff and members regularly use lands and intend to continue to use lands throughout the western United States, including the habitat and potential habitat of the Big Lost whitefish, for observation, research, health, aesthetic enjoyment, and other recreational, scientific, and educational activities. WWP’s members derive scientific, recreational, health and aesthetic benefits from the Big Lost whitefish’s existence in the wild. WWP brings this action on its own behalf and on behalf of their adversely affected members and staff.

9. The above-described aesthetic, recreational, scientific, educational, and conservation interests of WWP, its staff and members, have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by the Secretary’s failure to issue a 90-day and 12-month finding on Plaintiff’s petition to list the Big Lost whitefish as an endangered species. These are actual, concrete injuries to Plaintiff, caused by the Secretary’s failure to comply with the ESA and its implementing regulations. Plaintiff has no adequate remedy at law.

10. Defendant DIRK KEMPTHORNE is the Secretary of the Interior. The Secretary of the Interior is the federal official ultimately vested with responsibility for properly carrying out the ESA and its implementing regulations with respect to terrestrial species. Defendant Kempthorne is sued solely in his official capacity.

11. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (“FWS”) is an agency or instrumentality of the United States, and is the federal agency to which the Secretary of

the Interior has delegated the responsibility of implementing the ESA and its regulations with respect to terrestrial species.

## STATEMENT OF FACTS

### Statutory Framework of the ESA

12. Congress enacted the ESA “to provide a program for the conservation of ... endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” *16 U.S.C. § 1531(b)*. A species is “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” *16 U.S.C. § 1532(6)*. A species is “threatened” if it is likely to become an endangered species within the foreseeable future.” *16 U.S.C. § 1531(20)*.

13. Not until a species is listed as either threatened or endangered does it receive the array of statutory protections provided by the ESA. For example, Section 7 of the ESA requires all federal agencies to “insure” that their actions neither “jeopardize the continued existence” of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” *16 U.S.C. § 1536(a)(2)*. Section 9 prohibits, among other things, “any person” from “taking” listed species without a permit from FWS. *16 U.S.C. §§ 1538(a)(1)(B), 1539*. Section 4 requires FWS to designate “critical habitat” and to develop and implement recovery plans for listed species. *16 U.S.C. §§ 1533(a)(3), (f)*. Other provisions authorize FWS to acquire land for the protection of listed species and to make federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species. *Id.*, §§ 1534, 1535(d).

14. Yet, none of these protections come into force until a species is officially listed as threatened or endangered under the ESA. Thus, in order to ensure the timely protection of species and their habitats, Congress set forth a listing process that includes mandatory, non-discretionary deadlines for the three required findings that the Secretary must make. These mandatory

timelines were enacted to prevent species in need of protection from languishing, without ESA protection, in administrative purgatory. The three required findings are the 90-day finding, the 12-month finding, and the final listing determination.

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

16. Upon receipt of such a petition, 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." *16 U.S.C. §1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1)*. If the Secretary finds that the petition presents substantial information indicating that the listing may be warranted, he then publishes in the Federal Register a "90 day finding and commencement of status review." *Id., § 1533(b)(3)(A)*.

17. Upon issuing a positive 90-day finding, the Secretary must then conduct a full review of the status of the species. *50 C.F.R. § 424.14*. Upon completion of this status review, and within 12 months from the date that he received the petition, the Secretary must then make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals for listing species, provided certain circumstances are present. *16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3)*. This second determination is known as the "12-month finding," and pursuant to the ESA and 9<sup>th</sup> Circuit case law, the deadline is mandatory.

18. Although Congress intended the Secretary to issue 90-day findings within ninety days of receiving a petition to list a species, the language "to the maximum extent practicable" provides the Secretary with some limited flexibility. Nonetheless, because the deadline for the 12-month finding is firm, the 90-day finding must be issued in sufficient time that the Secretary can still comply with the 12-month finding deadline. *See Biodiversity Legal Foundation v. Badgley*, 309

F.3d 1166, 1176 (9<sup>th</sup> Cir. 2002) (holding that both the 90-day finding and the 12-month finding must be made within one year of receipt of the listing petition).

19. If the Secretary finds in the 12-month finding that listing the species is warranted, he must then publish in the Federal Register a proposed rule, for public comment, to list the species as threatened or endangered. *16 U.S.C. § 1533(b)(5)*.

20. Within one year of the publication of a proposed rule to list a species, the ESA requires the Secretary to render a final determination on the proposal. *16 U.S.C. § 1533(b)(6)(A)*.

21. At such time, the Secretary must either list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. *16 U.S.C. §§ 1533(b)(6)(A)(1)(III) and (b)(6)(B)(i)*.

22. Concurrently with a final determination to list a species, the Secretary must render a final decision concerning the designation of critical habitat for the species to the maximum extent prudent and determinable. *16 U.S.C. §§ 1533(a)(3) and (b)(6)(C)*. If the Secretary finds that designation of critical habitat is prudent, but is not currently determinable, then the Secretary may extend the deadline to issue a final regulation concerning critical habitat by no more than one additional year. *16 U.S.C. § 1533(b)(6)(C)(ii)*.

### **Big Lost River Mountain Whitefish**

23. The Big Lost River in southcentral Idaho is one of the Sinks Drainages – a collection of five closed surface drainage basins. The Sinks Drainages are different from other adjacent drainages in that they do not have any surface connection to the Snake River basin. Instead, their flow sinks into the Snake River Plain and becomes part of the Snake River Plain Aquifer.

24. The Big Lost River is bounded by the mountains of the Lost River Range to the northeast, the Boulder Mountains to the northwest, and the Pioneer Mountains to the southwest,

and tributaries of the Big Lost River flow from these mountains towards the mainstem, which flows southeast past the town of Arco, then turns northeast before sinking into the Snake River Plain.

25. In the past, during cooler and wetter times, whitefish from the Snake River system were able to migrate through the Big Lost River Basin. Today, due to the terminal nature of the Big Lost River, whitefish are isolated to the Big Lost River Basin. Millennia of isolation have allowed these isolated whitefish to evolve with features and adaptations that separate Big Lost River whitefish from other whitefish. The Big Lost River is the only “lost” stream to have sufficient habitat for mountain whitefish.

26. At one time, prior to the European settlement of North America, whitefish were the most common salmonid of the Big Lost River Basin. It is estimated that 500 whitefish per mile existed. Today, the Big Lost whitefish population has declined to approximately 22% of its historical range, and 15% of historical numbers, due to the introduction of non-native sport fisheries, livestock grazing, water diversions and irrigated agriculture.

27. It is estimated that Big Lost whitefish were once found in about 216 miles of stream in the Big Lost River drainage. Recent surveys show that today they exist in only about 76 kilometers and have been extirpated from many key tributaries. Much of the riverine area previously occupied by Big Lost whitefish is now dry due to agriculture water demand.

28. On June 14, 2006, WWP submitted a petition requesting that the Secretary list the Big Lost whitefish as threatened or endangered under the ESA and that critical habitat be designated for the Big Lost whitefish concurrently with the listing. The petition was supported by a status report, prepared by an environmental research and consulting firm, which detailed the history of, current status and ongoing threats to the Big Lost whitefish’s continued existence.

The petition and status report included comprehensive scientific data, bibliographic references, and other documentation to support WWP's claims.

29. On August 21, 2006, FWS's Acting Regional Director wrote to Plaintiff's attorney, Judith M. Brawer, acknowledging receipt of WWP's petition to list the Big Lost whitefish on June 15, 2006. The letter stated that the agency was "not able to further address your petition to list the mountain whitefish as endangered (or, alternatively, as threatened) and to designate critical habitat" during fiscal year 2006 due to other listing and critical habitat actions required by court order and settlement agreements.

30. On July 2, 2007, over one year after WWP filed its listing petition, WWP filed a 60-day notice of intent to sue the Secretary, alleging violations of the ESA and its implementing regulations by failing to issue either a 90-day or 12-month finding on the listing petition.

31. To date, the Secretary has still not issued either the 90-day or 12-month finding on the Big Lost whitefish listing petition. Without the legal protections afforded the Big Lost whitefish by its listing under the ESA, this unique and isolated whitefish population will continue to spiral towards extinction.

**FIRST CLAIM FOR RELIEF:**

**VIOLATION OF ESA AND/OR APA FOR  
FAILURE TO MAKE 90-DAY FINDING**

32. Plaintiffs reallege and incorporate by reference the allegations of all preceding paragraphs.

33. Nearly 16 months have passed since Plaintiff submitted its petition to list the Big Lost River mountain whitefish as a threatened or endangered species. The Secretary's failure to perform his non-discretionary duty to issue and publish a 90-day finding on Plaintiff's petition violates the ESA and its implementing regulations. *See 16 U.S.C. §§ 1533(b)(3)(A), 1540(g).*

The Secretary's failure to perform his mandatory, non-discretionary duty also constitutes agency action unlawfully withheld or unreasonably delayed, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

**SECOND CLAIM FOR RELIEF:**

**VIOLATION OF ESA AND/OR APA FOR  
FAILURE TO MAKE A 12-MONTH FINDING**

34. Plaintiffs reallege and incorporate by reference the allegations of all preceding paragraphs.

35. The Secretary's failure to perform his non-discretionary duty to issue and publish a 12-month finding on Plaintiff's petition violates the ESA and its implementing regulations. *See 16 U.S.C. § 1533(b)(3)(B); 1540(g)*. The Secretary's failure to perform his mandatory, non-discretionary duty also constitutes agency action unlawfully withheld or unreasonably delayed, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

WHEREFORE, Plaintiff prays for relief as set forth below.

**REQUEST FOR RELIEF**

By way of relief, Plaintiff requests that this Court:

A. Enter a declaratory judgment that Defendants' failure to issue and publish a 90-day finding and a 12-month finding on Plaintiff's listing petition are violations of the Endangered Species Act and/or the APA;

B. Issue declaratory, injunctive, and/or mandamus relief, requiring Defendants to promptly issue and publish a 90-day finding and a 12-month finding on Plaintiff's listing petition;

C. Award Plaintiff its reasonable litigation expenses pursuant to the citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g)(4), the Equal Access to Justice Act, and/or other applicable provisions of law; and

D. Grant Plaintiff such further relief as may be appropriate.

Dated: October 2, 2007

Respectfully submitted,

/s/  
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Judith M. Brawer  
Attorney for Plaintiff