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8 Application for *pro hac vice* submitted concurrently

9  
10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF ARIZONA**

12 \_\_\_\_\_ )  
13 WILDEARTH GUARDIANS; and )  
14 WESTERN WATERSHEDS PROJECT )

15 Plaintiffs, )

16 v. )

17 KEN SALAZAR, Secretary of Interior, )  
18 sued in his official capacity )

19 Defendant. )  
20 \_\_\_\_\_ )

No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

21 **INTRODUCTION**

22 1. Plaintiffs, WildEarth Guardians and Western Watersheds Project, bring this  
23 action against Defendant, Ken Salazar, U.S. Secretary of the Interior (“the Secretary”), in  
24 his official capacity, to force him to carry out his duties under the Endangered Species Act  
25 (“ESA”), 16 U.S.C. §§ 1531 *et seq.* The Secretary has failed to comply with his mandatory  
26 duty under the ESA to make preliminary findings on Plaintiffs' petition to list the Sonoran  
27 Desert Tortoise (*Gopherus agassizii*) (“desert tortoise”) as an endangered or threatened  
28 species under the ESA. This lawsuit seeks to force the Secretary to make the overdue  
finding on Plaintiffs' petition.

**JURISDICTION AND VENUE**

2           2.       This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331  
3 (federal question) and 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and  
4 citizen suit provision).

5           3.       This Court has authority to grant Plaintiffs' requested relief pursuant to 28  
6 U.S.C. §§ 2201-02 (declaratory and injunctive relief).

7           4.       More than 60 days ago, Plaintiffs furnished the Secretary with written notice  
8 of his violation of the ESA and of their intent to sue. See 16 U.S.C. § 1540(g)(2).

9           5.       Because the Secretary has not remedied his violation of the ESA by making  
10 the overdue finding on Plaintiffs' petition, an actual controversy exists between the parties  
11 within the meaning of the Declaratory Judgment Act. See 28 U.S.C. § 2201.

12           6.       Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. §  
13 1540(g)(3)(A). The desert tortoise is found in this judicial district. Guardians, WWP, and  
14 the Secretary maintain major offices in this district.

**PARTIES**

15  
16           7.       Plaintiff WILDEARTH GUARDIANS ("Guardians") sues on behalf of itself  
17 and its adversely affected members. WildEarth Guardians is a non-profit environmental  
18 organization. Guardians' mission is to protect and restore wildlife, wild places, and wild  
19 rivers in the American Southwest. It has over 10,000 members and supporters, many of  
20 which reside in Arizona. WildEarth Guardians has an active endangered species protection  
21 campaign, with a geographic focus on the western United States. As part of this campaign,  
22 Guardians has repeatedly urged the Secretary to list imperiled species, including the desert  
23 tortoise, as threatened or endangered species pursuant to the ESA. Guardians (along with  
24 Western Watersheds Project) filed a petition to list the desert tortoise in October 2008.  
25 Guardians invested substantial organizational resources in preparing this petition.  
26 Guardians' members and staff frequently use and enjoy, and will continue to use and enjoy,  
27 the desert tortoise and its habitat for plant and wildlife viewing and for recreational,  
28 aesthetic, and scientific activities. Guardians and its members are particularly concerned

1 with the conservation of the desert tortoise and the ecosystem on which it depends for its  
2 survival. Guardians and its members have a substantial interest in this matter and are  
3 adversely affected by the Secretary's failure to comply with the ESA. The requested relief  
4 will redress the injuries of Guardians and its members.

5 8. Plaintiff WESTERN WATERSHEDS PROJECT ("WWP") is a regional  
6 conservation organization with offices in Arizona, California, Idaho, Montana, Utah, and  
7 Wyoming. WWP's mission is to protect and restore western watersheds and wildlife  
8 habitats through education, scientific study, public policy initiatives, and litigation. WWP  
9 (along with Guardians) filed the petition to list the desert tortoise in October 2008. WWP  
10 invested substantial organizational resources in preparing this petition. WWP members and  
11 staff frequently use and enjoy, and will continue to use and enjoy, the desert tortoise and its  
12 habitat for plant and wildlife viewing and for recreational, aesthetic, and scientific  
13 activities. WWP and its members are particularly concerned with the conservation of the  
14 desert tortoise and the ecosystem on which it depends for its survival. WWP and its  
15 members have a substantial interest in this matter and are adversely affected by the  
16 Secretary's failure to comply with the ESA. The requested relief will redress the injuries of  
17 WWP and its members.

18 9. Defendant, KEN SALAZAR, is the Secretary of the United States  
19 Department of the Interior. As such, he is responsible for implementing the ESA. The  
20 Secretary is sued in his official capacity. In this case, the Secretary has delegated his  
21 responsibilities under the ESA to the United States Fish and Wildlife Service ("FWS"), an  
22 agency within the United States Department of the Interior.

### 23 LEGAL BACKGROUND

24 10. Congress passed the ESA to "provide a means whereby the ecosystems upon  
25 which endangered species and threatened species depend may be conserved, [and] to  
26 provide a program for the conservation of such endangered species and threatened  
27 species...." 16 U.S.C. 1531(b).

28 11. To this end, the ESA requires the Secretary to list species of plants and

1 animals that are facing extinction as “threatened” or “endangered” and to designate  
2 protected “critical habitat” for each listed threatened or endangered species. 16 U.S.C. §  
3 1533(a). An “endangered species” is “any species which is in danger of extinction  
4 throughout all or a significant portion of its range....” 16 U.S.C. § 1532(6). A “threatened  
5 species” is a species “which is likely to become an endangered species within the  
6 foreseeable future....” 16 U.S.C. § 1532(20).

7 12. In order for the ESA to protect a species, the Secretary must first officially list  
8 the species as either threatened or endangered. 16 U.S.C. § 1533(d). The listing process is  
9 the critical first step in the ESA’s system of species protection and recovery. The Secretary  
10 must also designate the species’ habitat as “critical habitat,” absent certain exceptions, in  
11 order for the habitat to receive important ESA protections.

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

14 14. Upon receipt of a petition to list a species, the Secretary is required to make  
15 an initial finding known as a “90-day finding.” Specifically, within 90 days, the Secretary  
16 must determine, “to the maximum extent practicable,” whether the petition presents  
17 “substantial scientific or commercial information indicating that the petitioned action may  
18 be warranted.” 16 U.S.C. § 1533(b)(3)(A). The ESA’s implementing regulations define  
19 “substantial information” as “that amount of information that would lead a reasonable  
20 person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. §  
21 424.14(b).

22 15. If the Secretary finds that the petition presents substantial information, he  
23 “shall promptly commence a review of the status of the species concerned,” and must  
24 publish the finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

25 16. If the Secretary makes a positive 90-day finding, he has 12 months from the  
26 date that the petition was received to make one of three findings: (1) the petitioned action is  
27 not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is  
28 warranted but presently precluded by other pending proposals to list species of higher

1 priority, provided that the Secretary is making expeditious progress on listing actions. See  
2 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This is known as the 12-month  
3 finding.

4 17. If the Secretary makes a 12-month finding that the petitioned action is  
5 warranted, then he must publish a proposed rule to list the species as endangered or  
6 threatened in the Federal Register. 16 U.S.C. § 1533(b)(5).

7 18. Unless the Secretary needs an additional six months within which to solicit  
8 and examine new scientific data, he must make a final decision on any proposed rule to list  
9 a species within one year of the proposed rule's publication. See 16 U.S.C. § 1533(b)(6).

10 19. “Concurrently” with listing a species as threatened or endangered, the  
11 Secretary must designate critical habitat for the species “to the maximum extent prudent  
12 and determinable.” 16 U.S.C. §§ 1533(a)(3)(A) and (b)(6)(C).

13 20. Designation of critical habitat for listed species provides additional necessary  
14 protection and aids in the conservation of the species because all federal agencies must  
15 consult with the FWS to “insure that an action authorized, funded, or carried out by [federal  
16 agencies] is not likely to jeopardize the continued existence of any endangered species or  
17 threatened species *or result in the destruction or adverse modification of [its critical*  
18 *habitat].”* 16 U.S.C. § 1536(a)(2) (emphasis added).

#### 19 **FACTUAL BACKGROUND**

20 21. The Sonoran desert tortoise (*Gopherus agassizii*) is found primarily on the  
21 rocky slopes and bajadas of Mojave Desert Scrub communities and within the Arizona  
22 Upland and Lower Colorado River Valley subdivisions of the Sonoran Desert Scrub  
23 community. They are herbivorous and eat a variety of plant materials, including fresh  
24 spring and summer annuals, dried annual plants, and perennial grasses. Desert tortoise life  
25 history traits, such as slow growth, delayed sexual maturity, and low recruitment, require  
26 high adult survival rates to maintain viable populations. A Sonoran desert tortoise is  
27 pictured on the following page.<sup>1</sup>

28 <sup>1</sup>Photo: Mark Salvo.



1 north of Kingman, Arizona.

2 25. In order to comply with the ESA, the Secretary should have made a 90-day  
3 finding on Plaintiffs' petition on or about January 13, 2009. Instead, in a letter dated  
4 January 13, 2009, the Secretary wrote to Guardians requesting 16 of the 200 sources cited  
5 in the petition.

6 26. On or about February 26, 2009, Guardians provided copies of all the  
7 requested sources to the Secretary except for one book that was available at the local  
8 university library.

9 27. To date the Secretary has failed to make the initial 90-day finding on  
10 Plaintiffs' petition.

11 **CLAIM FOR RELIEF**

12 28. Each and every allegation set forth in this Complaint is incorporated herein by  
13 reference.

14 29. The Secretary has failed to make a 90-day finding on Plaintiffs' petition to list  
15 the Sonoran desert tortoise and has failed to publish such a finding in the Federal Register.  
16 See 16 U.S.C. § 1533(b)(3)(A).

17 30. The Secretary has violated his duty under the ESA by failing to make an  
18 initial 90-day finding within 90 days because it is practicable to make such a finding. 16  
19 U.S.C. § 1533(b)(3)(A); 5 U.S.C. § 706(1).

20 31. By failing to render a 90-day finding on Plaintiffs' petition, the Secretary has  
21 unreasonably delayed and unlawfully withheld compliance with section 4(b)(3)(A) of the  
22 ESA within the meaning of the APA. 16 U.S.C. § 1533(b)(3)(A); 5 U.S.C. § 706.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, the Plaintiffs WildEarth Guardians and Western Watersheds Project  
25 request that this Court enter judgment providing the following relief:

26 A. A declaration that the Secretary has violated the ESA by failing to make a 90-  
27 day finding on Plaintiffs' petition to list the Sonoran desert tortoise;

28 B. An injunction compelling the Secretary to make a 90-day finding on

1 Plaintiffs' petition and to publish such finding in the Federal Register;

2 C. An order awarding Plaintiffs their costs of litigation, including reasonable  
3 attorney's fees; and

4 D. Such other and further relief as the court deems just and proper.  
5

6 Respectfully submitted this 1<sup>st</sup> day of June 2009.  
7

8 s/ Samantha Ruscavage-Barz

9 *Attorney for Plaintiffs WildEarth Guardians*  
10 *and Western Watersheds Project*  
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