

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

**CENTER FOR BIOLOGICAL  
DIVERSITY and HEALTHY GULF**

*Plaintiffs,*

v.

**DAVID BERNHARDT, in his official  
capacity as Secretary of the U.S. Department  
of the Interior, and  
U.S. FISH AND WILDLIFE SERVICE**

*Defendants.*

Case No. 2:20-cv-943

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiffs Center for Biological Diversity and Healthy Gulf (collectively “Plaintiffs”) challenge the failure of Secretary of the Interior David Bernhardt (“Secretary”) and the U.S. Fish and Wildlife Service (“Service”) (collectively “the Service” or “Defendants”) to make a timely final determination on the proposed listing of the eastern black rail (*Laterallus jamaicensis jamaicensis*) as either an endangered or threatened species under the Endangered Species Act (“ESA” or “Act”).

2. The eastern black rail is a small, elusive marsh bird with speckled black plumage, a rufous nape, and scarlet eyes. The bird is found in a variety of salt, brackish, and freshwater marsh habitats in the eastern United States, Mexico, Central America, and the Caribbean. In the United States, eastern black rails occur in both coastal and inland areas, but the majority of detections are from coastal sites. Throughout this range, the species is irregular and rare.

3. The eastern black rail stands on the brink of extinction due primarily to the loss,

degradation and fragmentation of its wetland habitat due to urban and agricultural sprawl, sea-level rise along the coast, and ground- and surface-water withdrawals. Incompatible land management techniques, such as application of poorly timed and planned prescribed fires, intense grazing, or haying, as well as stochastic (random) events, such as flood events and hurricanes, also have significant negative impacts on the eastern black rail and its habitat.

4. Recognizing the serious threats eastern black rails face, on April 20, 2010, Plaintiff Center for Biological Diversity petitioned to list the bird under the ESA. After over eight years had passed, the Service proposed listing the eastern black rail as a threatened species under the Act on October 9, 2018 in response to the Center's petition and in recognition of the grave threats facing the species. 83 Fed. Reg. 50,610 (Oct. 9, 2018).

5. The Service's proposal triggered a requirement that the Secretary make a final determination on the proposed listing within one year of publication of the proposed regulation, i.e., by October 9, 2019. 16 U.S.C. § 1533(b)(6)(A). The Secretary has failed to do so.

6. After the October 9, 2019 deadline for the final determination lapsed, by letter dated November 20, 2019, the Center notified Defendants that they have violated section 4 of the ESA by failing to make a timely final listing determination for the species. The Center advised Defendants that the Center intended to file suit to enforce the ESA's mandatory listing deadlines. To date, Defendants have failed to make a final listing determination on the eastern black rail's status.

7. Until Defendants act and make a final listing determination, the eastern black rail will continue to decline toward extinction. There is no legal excuse for Defendants' failure to act.

8. As such, Defendants are violating the Act. Through this Complaint, Plaintiffs seek a declaratory judgment and injunctive relief to compel the Service to make a final listing

determination for the eastern black rail by a date certain.

### **JURISDICTION AND VENUE**

9. Plaintiffs bring this action under the Endangered Species Act, 16 U.S.C. §§ 1531-1544.

10. This Court has subject matter jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g)(1)(C) (actions arising under the ESA's citizen suit provision), 28 U.S.C. § 1331 (actions arising under the laws of the United States), and 28 U.S.C. § 1346 (actions against the United States).

11. The requested relief is authorized under 28 U.S.C. § 2201 (declaratory relief), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. § 1540(g).

12. Plaintiffs provided formal notice of their intent to file suit under the ESA on November 20, 2019, more than 60 days prior to filing this Complaint, consistent with the ESA's statutory requirements. 16 U.S.C. § 1540(g)(2).

13. Defendants have not remedied their continuing ESA violation as of the date of this Complaint. Therefore, an actual controversy exists between the parties under 28 U.S.C. § 2201.

14. Venue in this Court is proper under 15 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(1)(C) because this action is brought against a federal agency and an officer and employee of the United States in his official capacity; Plaintiff Healthy Gulf's principal place of business is in the eastern district of Louisiana; and no real property is involved in this action.

### **PARTIES**

#### **Plaintiffs**

15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, nonprofit

conservation organization incorporated in California and headquartered in Tucson, Arizona, with offices throughout the United States, including California, Florida, Hawai'i, North Carolina, and Washington, D.C., and in Mexico. The Center works through science, law, and policy to secure a future for all species, great and small, hovering on the brink of extinction. The Center has 74,504 members across the country. The Center and its members are concerned with the conservation of imperiled species, including the eastern black rail, and the effective implementation of the Endangered Species Act. The Center brings this action on behalf of itself and its members.

16. Plaintiff HEALTHY GULF is a regional nonprofit group incorporated in Louisiana and headquartered in New Orleans, with offices in Florida and Mississippi. Healthy Gulf is committed to empowering people to protect the natural resources of the Gulf of Mexico for future generations. Healthy Gulf, its members, and supporters work to protect imperiled species, including the eastern black rail, and their habitat in the Gulf of Mexico region. Healthy Gulf brings this action on behalf of itself and its members and supporters.

17. Plaintiff organizations and their members derive professional, scientific, educational, recreational, conservational, aesthetic, and other benefits from eastern black rails in the wild. Plaintiffs have members who visited and have concrete plans to return to eastern black rail habitat.

18. For example, Mr. Brett Hartl is a Center member who looks for, photographs, and records videos of wildlife both in the United States and around the world. Thus far, Mr. Hartl has observed 400 species of mammals and 3,400 species of birds. He has a life goal of observing 1,000 species of mammals and at least one representative species from every family of birds in the world, of which there are approximately 230 families. To that end, Mr. Hartl goes birdwatching around the United States almost every week of the year, and more so during key

migration periods in the spring and fall.

19. Mr. Hartl has taken several trips to observe eastern black rails in eastern Maryland in and around Blackwater National Wildlife Refuge with the goal of trying to see an eastern black rail. On one occasion, he heard the distinct “ki-ki-derr” sound that breeding rails make, but eastern black rails are one of the most difficult rail species to observe in the wild. In addition, Mr. Hartl has gone birdwatching numerous times in coastal areas in Texas, Louisiana, Florida, Virginia, Delaware and New Jersey to see coastal waterbird species, including eastern black rails. For example, in March 2019 he visited Texas and went to Aransas National Wildlife Refuge, Brazoria National Wildlife Refuge, and Anahuac National Wildlife Refuge to observe birds, including the eastern black rail.

20. Mr. Hartl has concrete plans to return to eastern black rail habitat. In June 2020, he will try again to observe eastern black rails in eastern Maryland. In addition to the Maryland trip, he will also go birdwatching in Delaware and New Jersey with the goal of observing the eastern black rail and other waterbird species.

21. Defendants’ failure to comply with their nondiscretionary duties under the ESA deprives the eastern black rail of statutory protections that are vitally necessary to its survival and recovery. Until it is protected under the ESA, Plaintiffs and their members’ interests in the species are being impaired.

22. Therefore, Plaintiffs and their members are injured by Defendants’ failure to make a final listing decision under the ESA, as Defendants’ failure to timely act prevents the application of the ESA’s substantive protections to these species. These injuries are actual, concrete injuries that are presently suffered by Plaintiffs and their members, are directly caused by Defendants’ acts and omissions, and will continue to occur unless the Court grants relief. The

relief sought herein would redress these injuries. Plaintiffs and their members have no adequate remedy at law.

### **Defendants**

23. Defendant DAVID BERNHARDT is the Secretary of the Department of the Interior and is the federal official in whom the ESA vests final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA, including listing decisions and critical habitat designations. Secretary Bernhardt is sued in his official capacity.

24. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for the species at issue in this suit, including through prompt compliance with the ESA's mandatory listing and critical habitat deadlines. The Secretary has delegated administration of the ESA to the Service. 50 C.F.R. § 402.01(b).

### **STATUTORY BACKGROUND**

#### **THE ENDANGERED SPECIES ACT**

25. Recognizing that endangered and threatened species are of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,” Congress enacted the ESA in 1973 “to provide a program for the conservation of” these species and “a means whereby the ecosystems upon which [these] species depend may be conserved.” 16 U.S.C. § 1531(a)(3), (b).

26. To this end, section 4 of the ESA requires the Secretary to determine whether any species is “endangered” or “threatened,” and if so, list the species under the ESA. *Id.* § 1533(a), (c). The Secretary has delegated its administration of the ESA to the Service. 50 C.F.R.

§ 402.01(b).

27. A “species” is “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.” 16 U.S.C. § 1532(16). An “endangered species” is any species that “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A “threatened species” is any species that “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

28. The Service must list a species if it is endangered or threatened due to: “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization 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.” *Id.* § 1533(a)(1). The Service must make listing determinations “solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species.” *Id.* § 1533(b)(1)(A); *accord* 50 C.F.R. § 424.11(b).

29. The ESA has a suite of substantive legal protections that apply once a species is listed as endangered or threatened. For example, ESA section 7(a)(2) requires all federal agencies to ensure that their actions do not “jeopardize the continued existence” of any endangered or threatened species or “result in the destruction or adverse modification” of any listed species’ “critical habitat.” 16 U.S.C. § 1536(a)(2). ESA section 9 prohibits, among other actions, “any person” from “taking” protected animals without lawful authorization from the Service. *Id.* §§ 1538(a)(1)(B), 1539. Other provisions require the Service to designate “critical habitat” for listed species, *id.* § 1533(a)(3); require the Service to “develop and implement”

recovery plans for listed species, *id.* § 1533(f); authorize the Service to acquire land for the protection of listed species, *id.* § 1534; and authorize the Service to make federal funds available to states in order to assist in the conservation of endangered and threatened species, *id.* § 1535(d).

30. To ensure the timely protection of species that are at risk of extinction, Congress established a detailed and time-bound process whereby citizens may petition the Service to list a species as endangered or threatened and the Service must respond.

31. Specifically, “[t]o the maximum extent practicable, within 90-days” of receiving a listing petition, the Service must make an initial “finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* § 1533(b)(3)(A). The finding is referred to as a “90-day finding.”

32. If the Service determines that listing may be warranted, it must conduct a full scientific review of the species’ status, which is known as a “status review.” *Id.* § 1533(b)(3)(A). Then, within 12 months of receiving the petition, the Service must make one of three findings: (1) listing is “warranted;” (2) listing is “not warranted;” or (3) listing is “warranted but . . . precluded” by other pending listing proposals, provided certain requirements are met. *Id.* § 1533(b)(3)(B). The finding is referred to as a “12-month finding.”

33. If the Service’s 12-month finding concludes that listing is warranted and not precluded, the agency must “promptly publish” a proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. *Id.* § 1533(b)(3)(B)(ii).

34. Within one year of publication of the proposed regulation, the ESA requires the Service to render its final determination on the proposal. *Id.* § 1533(b)(6)(A). This is known as a “final listing determination.” At such time, the Service must either list the species, withdraw the

proposed listing rule, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit additional scientific information. *Id.*

§ 1533(b)(6)(A)(i), (B)(i).

35. The ESA's strict protections do not safeguard species at risk of extinction until the Service lists the species as endangered or threatened. Accordingly, it is critical that the Service strictly comply with the Act's listing procedures and deadlines to ensure species are listed in a timely manner.

### **FACTUAL BACKGROUND**

#### **A. Eastern Black Rail**

36. The eastern black rail is a small marsh bird that lives in a variety of salt, brackish, and freshwater marsh habitats in the eastern United States. It is known for being particularly secretive, as it is most active between the hours of midnight and 4 a.m. and most of its activity is hidden from view inside dense marsh grasses that are hard to access. Eastern black rails tend to walk or run rather than fly. During breeding and wintering seasons, eastern black rails fly little and will typically flush only for a short distance when pursued. Instead, the birds remain on the ground, running quickly through dense vegetation likely using the runways of rodents and rabbits. As such, eastern black rails require heavily vegetated cover that allows movement underneath the canopy.

37. While the eastern black rail once occurred across much of the eastern United States, the population has dramatically declined over the last century. In some areas, the population has declined by over 90 percent in less than 25 years. The eastern black rail has likely been extirpated in New England, the Appalachians, and the central lowlands of the Midwest. It still occurs from New Jersey to Florida and across the Gulf Coast to Texas, as well as in

freshwater wetlands of Kansas and Colorado on the Great Plains. Throughout this range, however, the species is irregular and rare.

38. Based on the Service's own assessment, the population of eastern black rails in the Great Plains will likely be extirpated in just 15 to 25 years, and the sole remaining coastal populations of eastern black rails have a high probability of complete extinction by 2068.

39. The greatest threat to the continued existence of the eastern black rail is the loss, degradation and fragmentation of wetland habitat. Over 100 million acres—or approximately 50 percent—of the wetlands in the conterminous United States have been lost over the past two centuries, primarily due to the conversion of wetlands to agricultural lands or urban areas. Several states that comprise a substantial portion of the eastern black rail's historical range have lost 70 percent or more of their wetlands, and there are no indications that loss of habitat for the eastern black rail has ceased or that extensive areas have been restored.

40. In addition to urban and agricultural sprawl, the eastern black rail is increasingly threatened by sea level rise caused by climate change. Water depth is considered a key habitat component, with eastern black rails selecting high ground areas of coastal marshes with shallow water (less than 6 centimeters) and infrequent tidal inundation or flooding. Because nests are built on the ground, water levels must be lower than nests during egg-laying and incubation in order for nests to be successful. Flooding is a frequent cause of nest failure. It also forces the eastern black rail from their usual dense cover, increasing the risk of predation from larger avian marsh hunters. As sea levels rise, the remaining patches of high marsh required for breeding are projected to be lost or converted to low marsh or open water, making it unsuitable habitat for eastern black rails.

41. Other threats to the eastern black rail include: increasing demand for groundwater

withdrawal, which will reduce soil moisture and surface water and thus negatively impact wetland habitat; climate change increasing the risk of drought, resulting in warmer and drier conditions, and more frequent extreme weather events; incompatible land management practices, such as untimely prescribed fire application and overgrazing; invasive species; and pollution.

42. The ongoing failure of the Service to timely list species has contributed to a growing backlog of over 500 species that are awaiting overdue decisions, including the eastern black rail. To address this backlog, in 2016 the Service developed a National Listing Workplan (“Workplan”), a schedule for publishing the overdue findings that were among the Service’s “highest priorities.”

43. Not only is the eastern black rail listing decision late according to the ESA’s statutory deadlines, but it is also overdue under the Service’s own Workplan.

44. Due to the imminent threats facing the eastern black rail, ESA protections are urgently needed to protect the species from further decline.

#### **B. Plaintiffs’ Petition and Defendants’ Failure to Act**

45. On April 20, 2010, the Center submitted a formal petition to the Service, requesting the agency to list 404 aquatic, riparian, and wetland southeastern United States species, including the eastern black rail, as endangered or threatened under the ESA.

46. The Service issued a positive 90-day finding on September 27, 2011, in which it determined that listing the eastern black rail may be warranted due to factors identified in the petition. *Id.* § 1533(a)(1)(A), (C)-(E); 76 Fed. Reg. 59,836 (Sept. 27, 2011).

47. Despite the ESA’s requirement that the Service issue a 12-month finding within a year of receiving the Center’s petition, over seven years later, on October 9, 2018, the Service finally found that listing the eastern black rail was warranted and proposed listing it as a

threatened species. 83 Fed. Reg. 50,610, 50,624 (Oct. 9, 2018). In doing so, the Service recognized that the species is in danger of extinction in the foreseeable future due to habitat loss, sea level rise, groundwater loss, and incompatible land management practices.

48. Over a year has passed and the Service has failed to meet the October 9, 2019 deadline to make a final determination on the proposed rule listing the eastern black rail as threatened.

### **CLAIMS FOR RELIEF**

#### **Violation of the Endangered Species Act**

49. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Complaint as though fully set forth below.

50. Defendants' protracted and ongoing failure to make the statutorily required final listing determination on the proposed rule to list the eastern black rail as threatened violates the Endangered Species Act. 16 U.S.C. § 1533(b)(6)(A).

### **REQUEST FOR RELIEF**

Plaintiffs respectfully request this Court:

- A. Declare that Defendants have violated and continue to violate the ESA by failing to make a timely final listing determination on the proposed rule to list the eastern black rail as a threatened species;
- B. Order Defendants to issue, by a date certain, a final listing determination for the eastern black rail;
- C. Grant Plaintiffs their reasonable attorneys' fees and costs as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- D. Provide such other relief as the Court deems just and proper.

Dated: March 19, 2020

Respectfully submitted,

/s/ Robert B. Wiygul

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