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11 *Attorneys for Plaintiffs*

12 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 OAKLAND DIVISION

14 CENTER FOR BIOLOGICAL DIVERSITY,)
15 and ENVIRONMENTAL PROTECTION)
INFORMATION CENTER,)

16 Plaintiffs,)

17 v.)

18 DAVID BERNHARDT, U.S. Secretary of the)
19 Interior, AURELIA SKIPWITH, Director, U.S.)
20 Fish and Wildlife Service, and U.S. FISH AND)
WILDLIFE SERVICE,)

21 Defendants.)
22 _____)

Case No: _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

(Endangered Species Act)

INTRODUCTION

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2 1. Plaintiffs Center for Biological Diversity (the “Center”) and the Environmental
3 Protection Information Center (“EPIC”) (collectively “Plaintiffs”) challenge the failure of
4 Secretary of the Interior David Bernhardt (“Secretary”), Director of the U.S. Fish and Wildlife
5 Service Aurelia Skipwith (“Director”), and the U.S. Fish and Wildlife Service (“Service”)
6 (collectively “Defendants” or the “Service”) to issue a timely final determination on the
7 proposed listing of the coastal distinct population segment (“DPS”) of Pacific marten (*Martes*
8 *caurina*) (hereinafter referred to as the “Humboldt marten”) as a threatened species under the
9 Endangered Species Act (“ESA” or Act).

10 2. The Humboldt marten is a medium-sized carnivore in the weasel family with a
11 long, narrow body covered in glossy brown fur, lighter coloration of cream or yellow on the
12 throat and upper chest, and a long, bushy tail. The Humboldt marten occurs in old-growth forest
13 stands in coastal Oregon and coastal northern California in four small, fragmented populations.
14 The sub-species is absent throughout much of its historic range.

15 3. The Humboldt marten is at high risk of extinction due to loss and fragmentation
16 of its forest habitat by logging and fire. Logging continues in much of the Humboldt marten’s
17 remaining habitat, and climate change is expected to increase the severity and frequency of fire
18 events. Predation and disease pose additional threats to the survival of the species. As habitat is
19 lost, the Humboldt marten loses crucial cover and protection, making it vulnerable to increased
20 predation. The Humboldt marten is also threatened by rodenticide poisoning from marijuana
21 cultivation and vehicle strikes.

22 4. Recognizing the serious threats to Humboldt martens, on September 28, 2010,
23 Plaintiffs petitioned to list either the Humboldt marten subspecies or the Humboldt marten DPS
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1 of the Pacific marten under the ESA. The Service issued a finding that listing was not warranted
2 on April 7, 2015. Plaintiffs challenged the finding and the court remanded the not-warranted
3 finding on May 3, 2017. The Service subsequently published a proposed rule on October 9, 2018
4 proposing the listing of the coastal DPS of Pacific marten as a threatened species under the ESA.
5 83 Fed. Reg. 50,574 (Oct. 9, 2018).

6 5. The Service's proposed rule triggered a requirement that the Secretary make a
7 final determination on the proposed listing within one year of publication of the proposed
8 regulation, no later than October 9, 2019. 16 U.S.C. § 1533(b)(6)(A). The Secretary has failed to
9 do so.

10 6. After the October 9, 2019 deadline for the final determination lapsed, Plaintiffs
11 notified Defendants by letter dated October 31, 2019 that they violated section 4 of the ESA by
12 failing to make a timely final listing determination for the species. Plaintiffs advised Defendants
13 that they intended to file suit to enforce the ESA's mandatory listing deadlines. In a letter
14 received by Plaintiffs on December 27, 2019, Defendants indicated that the final listing
15 determination would be submitted by the end of March 2020. To date, Defendants have failed to
16 make a final listing determination on the Humboldt marten's status.

17 7. Until Defendants make a final listing determination, the Humboldt marten will
18 continue to decline toward extinction. There is no legal excuse for Defendants' failure to act.
19 Accordingly, Defendants are in violation of the ESA.

20 8. To remedy Defendants' violations of the ESA, Plaintiffs seek a declaratory
21 judgment and injunctive relief to compel the Service to make a final listing determination for the
22 Humboldt marten by a date certain.

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JURISDICTION AND VENUE

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2 9. Plaintiffs bring this action under the Endangered Species Act, 16 U.S.C. §§ 1531-
3 1544.

4 10. The Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and
5 (g)(1)(C) (action arising under ESA citizen suit provision) and 28 U.S.C. § 1331 (federal
6 question jurisdiction).

7 11. This Court has authority to grant Plaintiffs’ requested relief pursuant to 28 U.S.C.
8 § 2201 (declaratory relief), 28 U.S.C. § 2202 (injunctive relief), and 16 U.S.C. § 1540(g).

9 12. Plaintiffs provided formal notice of their intent to file suit under the ESA on
10 October 31, 2019, more than 60 days prior to filing this Complaint, consistent with the ESA’s
11 statutory requirements. 16 U.S.C. § 1540(g)(2).

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

15 14. Venue is proper in the United States District Court for the Northern District of
16 California pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because this action is
17 brought against a federal agency and an officer and employee of the United States in their
18 official capacity; because a substantial portion of the events giving rise to Plaintiffs’ claims
19 occurred in this districts; because EPIC’s headquarters are located within this district; and
20 because the Center maintains an office in this judicial district.

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1 **INTRADISTRICT ASSIGNMENT**

2 15. This case is properly assigned to the Oakland Division under Civil L.R. 3-2(c)
3 because many of the plaintiffs and their members are located in Alameda County, including the
4 Center which maintains an office in Alameda County. L.R. 3-2(d). This action also concerns
5 substantially the same parties and events as a related matter previously before Judge Tigar of the
6 Oakland Division and it is in the interest of judicial efficiency that this action also appears before
7 Judge Tigar.

8 **PARTIES**

9 **Plaintiffs**

10 16. Plaintiff Center for Biological Diversity is a national, nonprofit 501(c)(3)
11 organization that works through science, law, policy, and creative media to secure a future for all
12 species, great or small, hovering on the brink of extinction. The Center is incorporated in
13 California and headquartered in Tucson, Arizona, with field offices throughout the United States
14 and Mexico. The Center has over 74,000 members. The Center and its members are concerned
15 with the conservation of imperiled species, including the Humboldt marten, and the effective
16 implementation of the ESA.

17 17. Plaintiff EPIC is a California-based nonprofit 501(c)(3) organization that strives
18 to forward the science-based management of Northwest California's wild places and wildlife.
19 EPIC is a membership organization with around 700 members and over 15,000 supporters.
20 Conservation of the Humboldt marten is a longstanding priority for the organization and its
21 members since the marten was rediscovered a short distance from EPIC's offices in 1996.

22 18. Plaintiffs brings this action on their own behalf and on behalf of their members,
23 who derive professional, scientific, educational, recreational, conservational, aesthetic, and other
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1 benefits from Humboldt martens in the wild. Plaintiffs' members have visited Humboldt marten
2 habitat to observe and photograph this species and have future plans to visit and observe the
3 Humboldt marten in the wild.

4 19. Defendants' failure to comply with their nondiscretionary duties under the ESA
5 deprives the Humboldt marten of statutory protections vital to its survival and recovery. As a
6 result of Defendants' unlawful delays, Plaintiffs and their members' interests in the species are
7 being, and will continue to be, impaired.

8 20. Therefore, Plaintiffs and their members are injured by Defendants' failure to
9 make a final listing decision for the Humboldt marten because Defendants' failure to timely act
10 prevents the substantive safeguards of the ESA to come into play to benefit this species. These
11 are actual, concrete, and ongoing injuries that are presently suffered by the Plaintiffs and their
12 members, are directly caused by Defendants' acts and omissions, and will continue to occur
13 unless the Court grants relief. The relief sought herein would redress these injuries.

14 **Defendants**

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

19 22. Defendant Aurelia Skipwith is the Director of the U.S. Fish and Wildlife Service,
20 the agency within the Department of the Interior that is charged with implementing the ESA for
21 the species at issue in this suit, including through prompt compliance with the ESA's mandatory
22 listing and critical habitat deadlines. *See* 50 C.F.R. § 402.01(b). Director Skipwith is sued in her
23 official capacity.

1 predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or
2 manmade factors affecting its continued existence.” *Id.* § 1533(a)(1). The Service must make
3 listing determinations “solely on the basis of the best scientific and commercial data available to
4 him after conducting a review of the status of the species.” *Id.* § 1533(b)(1)(A); *accord* 50 C.F.R.
5 § 424.11(b).

6 28. The ESA has a suite of substantive legal protections that apply once a species is
7 listed as endangered or threatened. For example, ESA section 7(a)(2) requires all federal
8 agencies to ensure that their actions do not “jeopardize the continued existence” of any
9 endangered or threatened species or “result in the destruction or adverse modification” of any
10 listed species’ “critical habitat.” 16 U.S.C. § 1536(a)(2). ESA section 9 prohibits, among other
11 actions, “any person” from “taking” protected animals without lawful authorization from the
12 Service. *Id.* §§ 1538(a)(1)(B), 1539. Other provisions require the Service to designate “critical
13 habitat” for listed species, *id.* § 1533(a)(3); require the Service to “develop and implement”
14 recovery plans for listed species, *id.* § 1533(f); authorize the Service to acquire land for the
15 protection of listed species, *id.* § 1534; and authorize the Service to make federal funds available
16 to states in order to assist in the conservation of endangered and threatened species, *id.* §
17 1535(d).

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

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

3 31. If the Service determines that listing may be warranted, it must conduct a full
4 scientific review of the species’ status, which is known as a “status review.” *Id.* § 1533(b)(3)(A).
5 Then, within 12 months of receiving the petition, the Service must make one of three findings:
6 (1) listing is “warranted;” (2) listing is “not warranted;” or (3) listing is “warranted but . . .
7 precluded” by other pending listing proposals, provided certain requirements are met. *Id.*
8 § 1533(b)(3)(B). The finding is referred to as a “12-month finding.”

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

12 33. Within one year of publication of the proposed regulation, the ESA requires the
13 Service to render its final determination on the proposal. *Id.* § 1533(b)(6)(A). This is known as a
14 “final listing determination.” At such time, the Service must either list the species, withdraw the
15 proposed listing rule, or if there is substantial disagreement about scientific data, delay a final
16 determination for up to six months to solicit additional scientific information. *Id.*
17 § 1533(b)(6)(A)(i), (B)(i).

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

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FACTUAL BACKGROUND

A. Humboldt Marten

35. The Humboldt marten is a DPS of the Pacific marten, which includes the coastal Oregon and northern coastal California populations of Pacific marten. Preliminary results of genetic evaluation of these populations indicate that they likely represent a single subspecies—the Humboldt marten (*Martes caurina humboldtensis*). This taxonomic change has not yet been published, but the Service determined on April 7, 2015 that Pacific martens in coastal Oregon and northern coastal California are both discrete and significant and constitute a listable entity as the coastal DPS of the Pacific marten.

36. Martens are strongly associated with closed-canopy, old-growth, structurally complex forests. They avoid younger forests, harvested forest stands, and open or fragmented areas such as clear-cuts. This habitat requirement makes them highly vulnerable to habitat loss and degradation.

37. Historically, the Humboldt marten was abundant in coastal old-growth forests throughout northern California and Oregon. The marten was once so common that it was regularly taken by trappers for its fur. Historic trapping and extensive logging of its old-growth habitat decimated Humboldt marten populations. The Humboldt marten is extirpated throughout most of its historic range and is so rare that it was presumed extinct until 1996.

38. Today, fewer than 400 Humboldt martens exist in less than 10% of their known historic range in four small, isolated populations. There are two populations in Oregon and two populations in California. The Oregon populations are isolated with no functional connectivity to each other or to any other population. Although the California populations have connectivity to

1 one another, they lack connectivity to the Oregon populations. Fragmented habitat and isolated
2 populations severely limit the dispersal by which martens maintain and expand their distribution.

3 39. The Humboldt marten remains at high risk of extinction due to habitat loss from
4 unabated logging in its old-growth forest habitat. It is also threatened by climate change which is
5 anticipated to result in longer fire seasons with more frequent large fires. Any one of the four
6 fragmented populations of Humboldt marten could be lost in a single fire event. The marten is
7 also threatened by disease, increasing predation, poisoning from rodenticides used in marijuana
8 cultivation, and vehicle strikes caused when martens attempt to traverse highly fragmented
9 habitat.

10 40. Existing regulatory mechanisms are wholly inadequate to protect the Humboldt
11 marten. More than 50% of the marten's habitat is on private industrial timberlands where
12 survival and reproduction are highly compromised. Heavy logging continues on the
13 approximately 10% of marten habitat occurring on state forest lands. Additionally, the
14 approximately 30% of marten habitat occurring on federal land and overseen by the U.S. Forest
15 Service and Bureau of Land Management is not managed to conserve marten habitat needs.

16 41. Given the ongoing threats facing the Humboldt marten, listing under the ESA is
17 critical to protect the species from further decline.

18 **B. Plaintiffs' Petition and Defendant's Failure to Act**

19 42. Plaintiffs filed a formal petition to the Service on September 28, 2010, requesting
20 that the agency list the Humboldt marten under the ESA. At the time of the petition, ongoing
21 genetic research was expected to revise the taxonomy of martens. Therefore, the petition
22 requested protection of either the then-classified Humboldt marten subspecies (*Martes*
23 *americana humboldtensis*), the now-recognized Humboldt marten subspecies (*Martes caurina*
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1 *humboldtensis*), or the Humboldt marten distinct population segment of the Pacific Marten under
2 the ESA. The petition noted genetic discoveries that Pacific martens in coastal Oregon are more
3 closely related to *Martes americana humboldtensis* populations in northern California than to
4 other subspecies. Accordingly, Plaintiffs requested that the defined range of the Humboldt
5 marten as either a subspecies or a DPS be expanded to include the coastal Oregon populations.

6 43. Despite the ESA's requirement that the Service make a finding, to the maximum
7 extent practicable, within 90 days after receiving a listing petition, the Service did not issue such
8 a 90-day finding until January 12, 2012. The Service found that the petition presented substantial
9 scientific and commercial information indicating that listing the Humboldt marten may be
10 warranted.

11 44. That finding triggered a requirement under the ESA that the Service issue a 12-
12 month finding within one year of receiving the Center's petition. Yet, the Service did not publish
13 a not-warranted 12-month finding on the petition until April 7, 2015. That finding also
14 recognized a DPS of Pacific marten, which included the Humboldt marten subspecies and coastal
15 Oregon populations of coastal marten.

16 45. Plaintiffs filed a complaint challenging the not-warranted finding on December
17 12, 2015, alleging that the Service's determination on the Humboldt marten violated the ESA.
18 *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, Case No. 4:15-cv-05754-
19 JST (N.D. Cal.). In an order on May 3, 2017, the District Court for the Northern District of
20 California remanded the Service's 12-month finding for reconsideration. *See id.* at ECF 71.

21 46. On October 9, 2018, eight years after Plaintiffs filed their original listing petition,
22 the Service issued a proposed rule to list the coastal DPS of Pacific Marten as a threatened
23 species under the ESA. 83 Fed. Reg. 50,574.

1 47. The publication of the proposed rule initiated a one-year timeline under the ESA,
2 requiring the Service to make a final listing determination by October 9, 2019. The Service failed
3 to do so.

4 48. By letter on October 31, 2019, Plaintiffs formally notified the Service that they
5 have violated section 4 of the ESA by failing to timely issue a final listing determination for the
6 Humboldt marten. Plaintiffs notified Defendants that they intended to file suit to enforce the
7 ESA's mandatory listing deadlines.

8 49. In a letter received by Plaintiffs on December 27, 2019, Defendants indicated that
9 the final listing determination would be submitted by the end of March 2020. As of the date of
10 this Complaint, Defendants have failed to make a final listing determination on the Humboldt
11 marten's status as required by the ESA.

12 **CLAIMS FOR RELIEF**

13 **Violation of the Endangered Species Act**

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

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

19 **REQUEST FOR RELIEF**

20 Plaintiffs respectfully request this Court:

21 A. Declare that Defendants have violated and continue to violate the ESA by failing
22 to make a timely final listing determination on the proposed rule to list the Humboldt marten as a
23 threatened species;

1 B. Order Defendants to publish a final listing determination in the Federal Register
2 by a date certain;

3 C. Grant Plaintiffs their reasonable attorneys' fees and costs as provided by the ESA,
4 16 U.S.C. § 1540(g)(4); and

5 D. Provide such other relief as the Court deems just and proper.
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7 Dated this 4th day of May, 2020

Respectfully submitted,

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