

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY,	)
1333 N. Oracle Road	)
Tucson, AZ 85705	)
	)
Plaintiff,	) Case No: _____
	)
v.	) COMPLAINT FOR DECLARTORY
	) AND INJUNCTIVE RELIEF
	)
KEN SALAZAR,	)
U.S. Department of the Interior	)
1849 C Street NW	)
Washington, DC 20240	)
	)
and	)
	)
U.S. FISH AND WILDLIFE SERVICE,	)
1849 C Street NW	)
Washington, DC 20240	)
	)
Defendants.	)
_____	)

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) brings this action under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544 (“ESA”), to challenge the failure of the Secretary of the Interior (“Secretary”) and the U.S. Fish and Wildlife Service (“FWS”) (collectively, “Defendants”) to make a required finding as to whether the Big Sandy crayfish (*Cambarus veteranus*) – a freshwater animal pictured below that has declined by 70 percent over the past 40 years due to pollution from surface coal mining in Appalachia – warrants protection as an “endangered” or “threatened” species under the ESA.



2. Concerned that the Big Sandy crayfish is facing extinction as a result of the destruction of its habitat, on April 20, 2010 the Center submitted to FWS a petition to list the crayfish as an endangered or threatened species pursuant to the ESA. On September 27, 2011, FWS issued a “90-day finding” in response to the Center’s petition, which concluded that the petition presented substantial information indicating that the listing of the Big Sandy crayfish “may be warranted.” 76 Fed. Reg. 59,836 (Sep. 27, 2011). To date, however, FWS has failed to make the mandatory 12-month finding as to whether the listing of the Big Sandy crayfish is warranted. The Secretary and FWS are therefore in violation of the ESA.

3. Thus, by this action the Center seeks declaratory and injunctive relief to enforce the ESA’s mandatory deadline for the required “12-month finding” in response to the Center’s petition to list the Big Sandy crayfish, and to compel Defendants to determine whether listing the

Big Sandy crayfish as endangered or threatened under the Act is warranted. 16 U.S.C. § 1533(b)(3)(B).

#### JURISDICTION

4. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) and (g) (action arising under ESA citizen suit provision), 5 U.S.C. § 702 (review of agency action under the Administrative Procedure Act (“APA”)), and 28 U.S.C. §§ 1331 (federal question jurisdiction).

5. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g), the APA, 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

6. The Center provided 60 days notice of its intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to the Secretary dated March 23, 2012. Defendants have not remedied the alleged violations.

#### VENUE

7. Venue is proper in the District Court for the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because the Department of the Interior and FWS are headquartered within this district, and a substantial part of the events giving rise to the Center’s claim occurred in this district.

#### PARTIES

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation incorporated in New Mexico and headquartered in Tucson, Arizona, with field offices throughout the United States, including Arizona, New Mexico, California, Nevada, Oregon, Washington, Alaska, Minnesota, Vermont, Florida, Washington, and Washington, D.C. The Center works through science, law, and creative media to secure a future for all species, great or

small, hovering on the brink of extinction. The Center has almost 37,000 members.

9. The Center's members and staff include persons with educational, conservation, scientific, moral, and aesthetic interests in the Big Sandy crayfish. They regularly use these areas for educational, conservation, scientific, moral, and aesthetic purposes, including, but not limited to, aesthetic enjoyment, photography, nature study, and wildlife observation, and intend to continue these uses in the future. The Center and its members further derive educational, conservation, scientific, moral, and aesthetic benefit and enjoyment from the existence of the Big Sandy crayfish in the wild.

10. The Center and its members have participated in efforts to conserve the Big Sandy crayfish and to protect the species' habitat. Since 2007, the Center has worked to stop the destruction of Big Sandy crayfish habitat caused by mountaintop-removal coal mining in Appalachia. To address this threat to the crayfish's existence and to reverse its trend toward extinction, the Center submitted a petition to list the Big Sandy crayfish as an endangered or threatened species on April 20, 2010.

11. The Center's conservation efforts are prompted by the concern that the Big Sandy crayfish is at serious risk of extinction. The Secretary's failure to comply with the ESA's non-discretionary deadline for issuing a 12-month finding on the Big Sandy crayfish listing petition deprives this species of statutory protections that are vitally necessary to its survival and recovery. Unless and until the Big Sandy crayfish is protected under the ESA as an endangered or threatened species, the Center's interest in the conservation and recovery of this species is impaired. Therefore, the Center's members and staff are injured by the Secretary's failure to make a timely determination as to whether listing the Big Sandy crayfish is warranted, as is required by the ESA. This injury caused by the Secretary's failure to comply with the ESA is

actual, concrete, and imminent. The declaratory and injunctive relief requested will fully redress the injury. The Center has no adequate remedy at law.

12. Defendant KEN SALAZAR is the Secretary 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 and critical habitat decisions. Secretary Salazar is sued in his official capacity.

13. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for most terrestrial species, including the Big Sandy crayfish, as well as ensuring prompt compliance with the ESA's mandatory listing deadlines.

#### LEGAL BACKGROUND

14. The ESA is a comprehensive federal statute that was enacted to conserve both species in danger of extinction and the ecosystems upon which they depend. 16 U.S.C. § 1531(b).

15. Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species ... .” 16 U.S.C. § 1531(b). To this end, ESA section 4 requires the Secretary of the Interior to protect such species by listing them as either “threatened” or “endangered,” and by designating “critical habitat” for each species at the time the species is listed. *Id.* § 1533(a). The Secretary has delegated this authority to FWS. 50 C.F.R. § 402.01(b).

16. According to the ESA, a species is “endangered” if it is in “danger of extinction throughout all or a significant portion of its range” and “threatened” if it is “likely to become an endangered species within the foreseeable future ... .” *Id.* §§ 1532(6) and (20).

17. The ESA’s conservation measures apply only after FWS lists a species as threatened or endangered. For example, section 7 of the ESA requires all federal agencies to ensure that their actions neither “jeopardize the continued existence” of any listed species nor “result in the destruction or adverse modification” of a species’ critical habitat. *Id.* § 1536(a)(2). Section 9 of the ESA prohibits, among other things, “any person” from intentionally taking listed species or incidentally taking listed species without a lawful authorization from FWS. *Id.* §§ 1538(a)(1)(B) and 1539. Concurrently with listing to the maximum extent practicable, FWS must designate the species’ critical habitat, which includes areas that are essential to the conservation of the species. *Id.* §§ 1532(5)(A) and 1533(a)(3)(A). Other provisions of the ESA require FWS to “develop and implement” recovery plans for listed species, *id.* § 1533(f), authorize FWS to acquire land for the protection of listed species, *id.* § 1534, and make federal funds available to states to assist in their efforts to preserve and protect threatened and endangered species, *id.* § 1535(d).

18. To ensure the timely protection of imperiled species, Congress set forth a detailed process whereby citizens may petition to list a species as endangered or threatened. The process includes mandatory, non-discretionary deadlines that FWS must meet, so that species in need of protection receive the ESA’s substantive protections in a timely fashion. The three required findings, described below, are the 90-day finding, the 12-month finding, and the final listing determination.

19. Upon receipt of a listing petition, FWS must “to the maximum extent practicable, within 90-days” 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). If FWS finds that the petition does not present substantial information indicating that listing may be warranted, the petition is rejected and the process ends.

20. If FWS determines that a petition does present substantial information indicating that listing may be warranted, the Secretary must then conduct a full scientific review of the species’ status. *Id.* § 1533(b)(3)(A). Upon completion of this status review, and within 12-months from the date that he received the petition, FWS must make one of three findings: (1) listing is not warranted; (2) listing is warranted; or (3) listing is warranted, but precluded by other pending proposals for listing species, provided certain circumstances are present. *Id.* § 1533(b)(3)(B).

21. If FWS’s 12-month finding concludes that listing is warranted, it must publish notice of the proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. *Id.* § 1533(b)(3)(B)(ii). Within one year of the publication of the proposed regulation, the ESA requires FWS to render his final determination on the proposal. *Id.* § 1533(b)(6)(A). At such time, FWS must either list the species or withdraw the proposed listing rule, or if there is substantial disagreement about scientific data, may delay a final determination for up to six months to solicit more scientific information. *Id.* §§ 1533(b)(6)(A)(i) and 1533(b)(6)(B)(i).

22. It is critical that FWS follow scrupulously the ESA’s listing procedures and deadlines if species are to be protected in a timely manner, because the ESA does not protect a species facing extinction until it is formally listed as endangered or threatened. Defendants have,

as a regular course of business, ignored statutory procedures and missed statutory listing deadlines, leading to litigation to correct these deficiencies.

23. On July 12, 2011, the Center and Defendants entered into a comprehensive stipulated settlement agreement, approved by the Court on September 9, 2011, that defines Defendants' responsibilities regarding future ESA statutory deadline litigation between the parties. *In Re Endangered Species Act Section 4 Deadline Litigation*, 1:10-mc-00377-EGS (D.D.C.). This action is a "deadline suit" as defined in the settlement.

24. Pursuant to the settlement, the Center may file deadline suits addressing up to 10 species, and obtain remedies from up to three deadline suits, in each fiscal year from 2012 through 2016, without triggering certain other provisions in the agreement. Under the terms of the settlement, a "remedy" means "a stipulated settlement agreement or judicially enforceable order requiring [FWS] to make any finding, listing determination, or critical habitat determination for a species."

#### FACTUAL BACKGROUND

25. The Big Sandy crayfish is a species of freshwater crustacean traditionally found in rivers and streams in Virginia, West Virginia, and Kentucky. This large crayfish prefers fast-flowing streams and rivers with relatively unpolluted waters with a low sediment load. As the Big Sandy crayfish is the only large river secondary burrowing crayfish species in its range, it serves the important purpose of creating burrow habitat for numerous other aquatic species.

26. The Big Sandy crayfish has undergone widespread and significant decline of 50 to 70 percent. It is near extirpation in West Virginia, has lost nearly half its range in Virginia, and has been extirpated from more than half of its range in Kentucky. The species' remaining occupied habitat comprises just a few rivers and creeks, where populations are small and under

severe threat from mountaintop-removal coal mining activities, interstate highway construction, and logging. The crayfish cannot survive in areas with impaired water quality and is threatened by pollution from coal fines, septic overflow, and other sources. The crayfish is also threatened by competition from generalist crayfish species that are more tolerant of degraded water quality.

27. Based on these threats and the inadequacy of existing regulatory mechanisms, the Center submitted a petition to FWS on April 20, 2010 to list the Big Sandy crayfish as an endangered or threatened species under the ESA.

28. On September 27, 2011, FWS issued a 90-day finding on the Big Sandy crayfish. This finding concluded that the Center's petition presented substantial scientific or commercial information indicating that listing the Big Sandy crayfish may be warranted.

29. To date, more than two years after receiving the Center's petition, FWS has failed to issue the required 12-month finding as to whether listing the Big Sandy crayfish is warranted. As of the time of this filing, during fiscal year 2012, the Center has not yet filed any other "deadline suit" and has not yet received any remedy under a "deadline suit," as defined by the 2011 settlement between parties discussed above. Fiscal year 2012 ends September 30, 2012.

CLAIM FOR RELIEF:

Violation of the ESA: Failure to Make a Timely 12-Month Finding on the Big Sandy Crayfish

30. Plaintiff hereby incorporates all preceding paragraphs.

31. Defendants' failure to make a timely 12-month finding on the Center's petition to list the Big Sandy crayfish as an endangered or threatened species violates the ESA. 16 U.S.C. §§ 1533(b)(3)(B) and 1540(g). FWS's failure to perform its mandatory, non-discretionary duty also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1). FWS's failure to comply with the ESA is also 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).

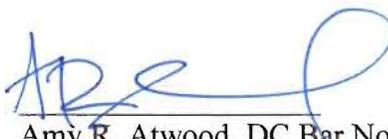
REQUEST FOR RELIEF

Plaintiff respectfully requests that the Court enter Judgment for Plaintiff providing the following relief:

- A. Declare that Defendants have violated the ESA and APA by failing to issue a timely 12-month finding as to whether listing the Big Sandy crayfish is warranted;
- B. Order FWS to issue a finding forthwith as to whether listing the Big Sandy crayfish is warranted. 16 U.S.C. § 1533(b)(3)(B);
- C. Grant Plaintiff's costs of litigation, including reasonable attorney fees; and
- D. Provide such other relief as the Court deems just and proper.

DATED: May 30, 2012

Respectfully submitted,



Amy R. Atwood, DC Bar No. 470258  
CENTER FOR BIOLOGICAL DIVERSITY  
P.O. Box 11374  
Portland, OR 97211-0374  
Telephone: (503) 283-5474  
Facsimile: (503) 283-5528  
Email: atwood@biologicaldiversity.org

*Attorney for Plaintiff*