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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

11 CENTER FOR BIOLOGICAL )  
DIVERSITY, )  
12 )  
Plaintiff )  
13 v. )  
14 KEN SALAZAR, in his official capacity as )  
Secretary of the Interior; and UNITED )  
15 STATES FISH AND WILDLIFE )  
16 SERVICE, an agency of the United States )  
Department of the Interior, )  
17 Defendants. )  
18 )

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Case No.:

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

## I. INTRODUCTION

1. In this action Plaintiff, CENTER FOR BIOLOGICAL DIVERSITY (“the Center”), challenges the failure of Defendants, KEN SALAZAR, Secretary of the Interior, and the UNITED STATES FISH AND WILDLIFE SERVICE (the “Service”) (collectively “Defendants”) to take required action on seven separate petitions (collectively “Petitions”) to list species found in the western United States: 1) the Mount Charleston blue butterfly (*Icaricia shata charlestonensis*); 2) the California golden trout (*Oncorhynchus mykiss aguabonita*); 3) the Mojave fringe-toed lizard (*Uma scoparia*); 4) the Amargosa Toad (*Bufo nelsoni*); 5) 42 species of Great Basin springsnails (*Pyrgulopsis sp. and Tryonia sp.*); 6) the Tehachapi slender salamander (*Batrachoseps stebbinsi*); and 7) the Mohave ground squirrel (*Spermophilus mohavensis*) (collectively “Petitioned Species”) as endangered or threatened under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”). Plaintiff asks this Court to order Defendants to comply with the mandatory, non-discretionary deadlines set forth by the ESA for the processing of citizen petitions to list species and afford them the protection they deserve.

2. Through this action, Plaintiff seeks an order declaring that Defendants’ failure to complete their statutorily-mandated duty to process the Petitions is a violation of the ESA and the Administrative Procedures Act (“APA”), 5 U.S.C. § 706. Plaintiff further seeks an order requiring Defendants to make the required findings on the Petitions by a date certain.

## II. JURISDICTION AND VENUE

3. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief); 16 U.S.C. § 1540(c) and (g) (action arising under the ESA and citizen suit provision); and 5 U.S.C. § 702 (Administrative Procedure Act). As required by the ESA, 16 U.S.C. § 1540(g), Plaintiff furnished Defendants with written notice regarding the violations alleged in this Complaint more than sixty days ago. Defendants have failed to remedy the alleged violations in that time. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

4. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) as Defendant Service maintains an office in this judicial district.

### III. PARTIES

5. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3) corporation with offices in California, Nevada and elsewhere in the United States. The Center works through science, law and policy to secure a future for all species hovering on the brink of extinction. The Center's members and staff are actively involved in species and habitat protection throughout the United States, including protection of the Petitioned Species. The Center has over 42,000 members throughout the United States and the world. The Center brings this action on its own behalf and on behalf of its adversely affected members and staff.

6. The Center's members and staff include numerous individuals with a broad range of scientific, professional, educational, recreational, aesthetic, moral and spiritual interests in the Petitioned Species. In addition, the Center's members and staff continuously enjoy the biological, scientific, research, educational, conservational, recreational and aesthetic values of the Petitioned Species. Activities of Center members and staff include observing and attempting to observe the Petitioned Species. Use and enjoyment by Center members and staff of the Petitioned Species and their habitat is entirely dependent upon the existence of healthy and sustainable populations in the wild.

7. Defendants' failure to take required action regarding the Petitions has prevented the implementation of protective measures for the Petitioned Species and their habitat. Plaintiff's members and staff spend time in the habitat of the Petitioned Species and are adversely affected by Defendants' refusal to protect these species. Plaintiff's members and staff have been, are being, and unless the specific relief requested is granted, will continue to be adversely affected and injured by Defendants' refusal to take action on the Petitions. Plaintiff has no other adequate remedy at law.

1           8. Defendant KEN SALAZAR is the Secretary of the Interior and is sued in his  
2 official capacity. Mr. Salazar has the ultimate responsibility to enforce and implement the ESA  
3 provisions.

4           9. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency  
5 of the United States government, and is an agency within and under the jurisdiction of the  
6 Department of the Interior. Through delegation of authority from the Secretary, the Service  
7 administers and implements the ESA, and is legally responsible for the protection and  
8 management of the fish, wildlife and native plant resources of the United States through  
9 enforcement of the ESA. The Service has responsibility under the ESA over the species which  
10 are the subject of this action. The Service has failed to take required action with regard to the  
11 Petitions, and has failed to meet the statutorily-mandated deadline for processing the Petitions.

#### 12                                   **IV. LEGAL BACKGROUND**

13           10. The ESA is a federal statute whose purpose is to conserve endangered and  
14 threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b).  
15 To this end, the ESA requires the Secretary to list as “threatened” or “endangered” those  
16 species of plants and animals that are facing extinction. 16 U.S.C. § 1533. A species is  
17 “endangered” if it “is in danger of extinction throughout all or a significant portion of its  
18 range.” 16 U.S.C. § 1532(6). A species is “threatened” if it “is likely to become an endangered  
19 species within the foreseeable future throughout all or a significant portion of its range.” 16  
20 U.S.C. § 1532(20).

21           11. Before the ESA can protect a species that is facing extinction, or that species’  
22 habitat, the species must be “listed” as either “threatened” or “endangered” under the Act. 16  
23 U.S.C. § 1533(d). The “listing” process is the essential first step in the ESA’s system of  
24 species protection and recovery.

25           12. The listing process can begin either by citizen petition or by internal Service  
26 processes. In either case, a strict timeline applies once the process is initiated.

1           13. To the maximum extent practicable, within ninety days of receiving a petition to  
2 list a species, the Service must make a determination as to whether the petition “presents  
3 substantial scientific or commercial information indicating that the petitioned action may be  
4 warranted,” and publish that finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

5           14. Within one year of receiving a petition, the Secretary must issue a “twelve-  
6 month finding” making one of three determinations: (1) that the listing is “warranted,” in which  
7 case the Service must also publish a proposed rule to list the species; (2) that the listing is “not  
8 warranted,” in which case no further action is taken; or (3) that the listing is “warranted but  
9 precluded” by other listing actions of higher priority. 16 U.S.C. § 1533(b)(3)(B). The one-year  
10 finding is mandatory; there is no mechanism by which the deadline to make the finding may be  
11 extended. So while the ESA provides the Secretary with some very limited flexibility as to the  
12 making of the initial 90-day finding on the petition, the Secretary must comply with the  
13 mandatory twelve-month deadline for making one of the above listed determinations.

14           15. Within one year of the publication of a proposed rule to list a species, the ESA  
15 requires the Secretary to render a final determination on the proposal. 16 U.S.C. §  
16 1533(b)(6)(A)(i). At this point, the Secretary may list the species, withdraw the proposal, or, if  
17 there is substantial disagreement about the scientific data involved, delay a final determination  
18 for up to six months to solicit more scientific information. 16 U.S.C. § 1533(b)(6)(A)(i) &  
19 (B)(i). In any case, the Secretary must make a formal finding within one year of the initial  
20 twelve-month finding. 16 U.S.C. § 1533(b)(6)(A).

21           16. Where the Secretary has made a final determination to list a species as  
22 threatened or endangered, it must, to the maximum extent determinable, concurrently render a  
23 final decision concerning the designation of critical habitat for the species. 16 U.S.C. §  
24 1533(a)(3) & (b)(6)(C).

25           17. In addition to these mandated procedures, the Secretary has discretion to issue a  
26 regulation at any time to prevent an “emergency posing a significant risk to the well being of  
27  
28

any species.” 16 U.S.C. § 1533(b)(7). Such an emergency regulation remains in effect for up to 240 days, at which time the Secretary must issue a final rule to continue the protection. Id.

18. It is critical for the Service, which has been delegated the Secretary’s responsibilities for listing under the ESA, to scrupulously follow the listing procedures and deadlines set forth by the ESA if species are to be protected in a timely manner; none of the ESA’s protections operate to protect a species until the species is formally listed as threatened or endangered by the publication of a final rule in the Federal Register.

## **V. FACTUAL BACKGROUND**

### **A. Mount Charleston blue butterfly**

19. A petition to the Secretary requesting listing of the Mount Charleston blue butterfly as threatened or endangered under the ESA was received by the Secretary on October 20, 2005. The Mount Charleston blue butterfly is a distinctive subspecies of the wider ranging Shasta blue butterfly and is observed only at high elevations in the Spring Mountains, located approximately 25 miles (40 kilometers (km)) west of Las Vegas in Clark County, Nevada. Habitat destruction and modification are primarily threats to the Mount Charleston blue butterfly.

20. The Secretary has missed each deadline provided by the ESA for processing the petition. On May 30, 2007, nineteen months after the petition for listing on the Mount Charleston blue butterfly was submitted, the Secretary issued a 90-day finding. Notice of 90-day Petition Finding, 72 Fed. Reg. 29933 (May 30, 2007). The 90-day finding determined that “the petition presents substantial scientific or commercial information indicating that listing the Mr. Charleston blue butterfly may be warranted.” Id.

21. On October 20, 2006, the deadline for a 12-month finding for the petition passed. By letter dated December 14, 2009, the Center notified the Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to make a 12-month finding on the petition as required by the ESA. The Center advised the Secretary that it intended to file suit to force the ESA’s mandatory listing deadlines.

1           22.     The Secretary has yet to issue a 12-month finding for the petition to list the  
2 Mount Charleston blue butterfly as threatened or endangered under the ESA.

3           23.     If Defendants do not act to process the petition and protect the Mount Charleston  
4 blue butterfly, the species will continue its spiral towards extinction. Although this tragedy is  
5 entirely preventable, Defendants inexplicably refuse to act.

6 **B.     California Golden Trout**

7           24.     A petition to the Secretary requesting listing of the California golden trout as  
8 threatened or endangered under the ESA was received by the Secretary on October 23, 2000.  
9 Notice of 90-day Petition Finding and Initiation of Status Review, 67 Fed. Reg. 59241, 59241  
10 (Sept. 20, 2002). The California golden trout is the State Fish of California and native only to  
11 two high-altitude watersheds in California's rugged Sierra Nevada Mountains. Threats to the  
12 California golden trout include habitat degradation and hybridization with non-native rainbow  
13 trout.

14           25.     The Secretary has missed each deadline provided by the ESA for processing the  
15 California golden trout listing petition. On September 20, 2002, close to two years after the  
16 petition was submitted, the Secretary issued a 90-day finding. Id. The 90-day finding  
17 determined that "the petition presents substantial information indicating that the listing of the  
18 California golden trout may be warranted." Id.

19           26.     On October 16, 2001 the deadline for a 12-month finding for the petition to list  
20 the California golden trout passed. By letter dated December 14, 2009, the Center notified the  
21 Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to  
22 make a 12-month finding on the petition as required by the ESA. The Center advised the  
23 Secretary that it intended to file suit to force the ESA's mandatory listing deadlines.

24           27.     The Secretary has yet to issue a 12-month finding for the petition to list the  
25 California golden trout as threatened or endangered under the ESA.

1           28. If Defendants do not act to process the petition and protect the petitioned  
2 species, the California golden trout will continue its spiral towards extinction. Although this  
3 tragedy is entirely preventable, Defendants inexplicably refuse to act.

4 **C. Mojave fringe-toed lizard**

5           29. A petition to the Secretary requesting listing of the Armargosa River population  
6 of the Mojave fringe-toed lizard as threatened or endangered under the ESA was received by  
7 the Secretary on April 10, 2006. Notice of 90-day Petition Finding and Initiation of a Status  
8 Review, 73 Fed. Reg. 1855, 1856 (Jan. 10, 2008). Threats to the Mojave fringe-toed lizard  
9 include habitat destruction and modification by extensive Off-Highway Vehicle use.

10           30. The Secretary has missed each deadline provided by the ESA for processing the  
11 petition to list the Amargosa River population of the Mojave fringe-toed lizard. On January 10,  
12 2008, seventeen months after the petition was submitted, the Secretary issued a 90-day finding.  
13 Id. The 90-day finding determined that “the petition presents substantial scientific or  
14 commercial information indicating that listing [the Amargosa River population of the Mojave  
15 fringe-toed lizard] may be warranted.” Id.

16           31. On August 10, 2007, the deadline for a 12-month finding for the petition passed.  
17 By letter dated December 14, 2009, the Center notified the Secretary that he had violated  
18 section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to make a 12-month finding on the  
19 petition as required by the ESA. The Center advised the Secretary that it intended to file suit to  
20 force the ESA’s mandatory listing deadlines.

21           32. The Secretary has yet to issue a 12-month finding for the petition to list the  
22 Armargosa River population of the Mojave fringe-toed lizard as threatened or endangered  
23 under the ESA.

24           33. If Defendants do not act to process the petition and protect the petitioned  
25 species, the species will continue its spiral towards extinction. Although this tragedy is entirely  
26 preventable, Defendants inexplicably refuse to act.

27 **D. Amargosa Toad**



1           34.     A petition to the Secretary requesting listing of the Amargosa toad as threatened  
2 or endangered under the ESA was received by the Secretary on February 27, 2008. The  
3 Amargosa toad is endemic to Oasis Valley in southern Nye County, Nevada. Threats to the  
4 Amargosa toad include present or threatened destruction, modification, or curtailment of the  
5 Amargosa toad's habitat or range, including threats to habitat by proposed Federal land sales  
6 and development projects on private land.

7           35.     The Secretary has missed each deadline provided by the ESA for processing the  
8 petition to list the Amargosa toad. On September 10, 2009, nineteen months after the petition  
9 was submitted, the Secretary issued a 90-day finding. Notice of 90-day Petition Finding and  
10 Initiation of Status Review, 74 Fed. Reg. 46551 (Sept. 10, 2009). The 90-day finding  
11 determined that “the petition presents substantial scientific or commercial information  
12 indicating that listing [the Amargosa toad] may be warranted.” Id.

13           36.     On February 27, 2009, the deadline for a 12-month finding for the petition  
14 passed. By letter dated December 14, 2009, the Center notified the Secretary that he had  
15 violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to make a 12-month  
16 finding on the petition as required by the ESA. The Center advised the Secretary that it  
17 intended to file suit to force the ESA’s mandatory listing deadlines.

18           37.     The Secretary has yet to issue a 12-month finding for the petition to list the  
19 Amargosa toad as threatened or endangered under the ESA.

20           38.     If Defendants do not act to process the petition and protect the petitioned  
21 species, the Amargosa toad will continue its spiral towards extinction. Although this tragedy is  
22 entirely preventable, Defendants inexplicably refuse to act.

23 **E.     42 Species of Great Basin Springsnails**

24           39.     A petition to the Secretary requesting listing of 42 species of Great Basin  
25 Springsnails as threatened or endangered under the ESA was received by the Secretary on  
26 February 17, 2009. This springsnails, which depend on desert springs in California, Nevada  
27  
28

1 and Utah for survival, are threatened by groundwater withdrawal, spring diversion, and  
2 livestock grazing.

3 40. The Secretary has missed the deadlines provided by the ESA for processing the  
4 petition to list 42 species of Great Basin springsnails. On May 17, 2009 the deadline for a 90-  
5 day finding for the petition passed. By letter dated December 14, 2009, the Center notified the  
6 Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to  
7 make a 90-day finding on the petition as required by the ESA. The Center advised the  
8 Secretary that it intended to file suit to force the ESA's mandatory listing deadlines.

9 41. The Secretary has yet to issue a 90-day finding for the petition to list 42 species  
10 of Great Basin Springsnails as threatened or endangered under the ESA.

11 42. If Defendants do not act to process the petition and protect the petitioned  
12 species, the species will continue its spiral towards extinction. Although this tragedy is entirely  
13 preventable, Defendants inexplicably refuse to act.

14 **F. Tehachapi slender salamander**

15 43. A petition to the Secretary requesting listing of the Tehachapi slender  
16 salamander as threatened or endangered under the ESA was received by the Secretary on  
17 February 28, 2006. The Tehachapi slender salamander is believe to have only two populations,  
18 one in Caliente Canyon in the southern Sierras and the other in the Tehachapi Mountains of  
19 California. The salamander is threatened by development, road construction, mining, livestock  
20 grazing, and flood-control projects.

21 44. The Secretary has missed each deadline provided by the ESA for processing the  
22 petition to list the Tehachapi slender salamander. On April 22, 2009, almost three years after  
23 the petition was submitted, the Secretary issued a 90-day finding. Notice of 90-day Petition  
24 Finding and Initiation of Status Review, 74 Fed. Reg. 18336 (Apr. 22, 2009). The 90-day  
25 finding determined that "the petition presents substantial scientific or commercial information  
26 indicating that listing the Tehachapi slender salamander may be warranted." Id.

1           45.     On February 28, 2007, the deadline for a 12-month finding for the petition to list  
2 the Tehachapi slender salamander passed. By letter dated December 14, 2009, the Center  
3 notified the Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by  
4 failing to make a 12-month finding on the petition as required by the ESA. The Center advised  
5 the Secretary that it intended to file suit to force the ESA's mandatory listing deadlines.

6           46.     The Secretary has yet to issue a 12-month finding for the petition to list the  
7 Tehachapi slender salamander as threatened or endangered under the ESA.

8           47.     If Defendants do not act to process the petition and protect the petitioned  
9 species, the Tehachapi slender salamander will continue its spiral towards extinction. Although  
10 this tragedy is entirely preventable, Defendants inexplicably refuse to act.

11 **G.     Mohave ground squirrel**

12           48.     A petition to the Secretary requesting listing of the Mohave ground squirrel as  
13 threatened or endangered under the ESA was received by the Secretary on September 19, 2005.  
14 The Mohave ground squirrel is threatened by destruction and degradation of habitat and  
15 degradation from development, military activities, livestock grazing and Off-Highway Vehicle  
16 use.

17           49.     The Secretary has missed the deadlines provided by the ESA for processing the  
18 petition to list the Mohave ground squirrel. On December 19, 2005 the deadline for a 90-day  
19 finding for the petition passed. By letter dated December 14, 2009, the Center notified the  
20 Secretary that he had violated section 4 of the ESA, 15 U.S.C. § 1533(b)(3)(B), by failing to  
21 make a 90-day finding on the petition as required by the ESA. The Center advised the  
22 Secretary that it intended to file suit to force the ESA's mandatory listing deadlines.

23           50.     The Secretary has yet to issue a 90-day finding for the petition to list the  
24 Mohave ground squirrel as threatened or endangered under the ESA. Because of Defendants'  
25 failure to make the required 90-day finding in a timely manner, it is now impossible for  
26 Defendants to comply with the mandatory 12-month finding deadline for the petition.

51. If Defendants do not act to process the petition and protect the petitioned species, the Mohave ground squirrel will continue its spiral towards extinction. Although this tragedy is entirely preventable, Defendants inexplicably refuse to act.

## VI. CLAIM FOR RELIEF

### First Claim for Relief

**(Failure to Make a Timely 12-Month Finding)**

52. Each and every allegation set forth in this Complaint is incorporated herein by reference as if set forth in full.

53. The Secretary's failure to make a timely 12-month finding on the petition to list the Mount Charleston blue butterfly as threatened or endangered violates the ESA. 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" within the meaning of the 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

**(Failure to Make a Timely 12-Month Finding)**

54. Each and every allegation set forth in this Complaint is incorporated herein by reference as if set forth in full.

55. The Secretary's failure to make a timely 12-month finding on the petition to list the California golden trout as threatened or endangered violates the ESA. 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" within the meaning of the 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

1 accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. §  
2 706(2).

3 **Third Claim for Relief**

4 **(Failure to Make a Timely 12-Month Finding)**

5 56. Each and every allegation set forth in this Complaint is incorporated herein by  
6 reference as if set forth in full.

7 57. The Secretary's failure to make a timely 12-month finding on the petition to list  
8 the Mojave fringe-toed lizard as threatened or endangered violates the ESA. 16 U.S.C. §§  
9 1533(b)(3)(B) & 1540(g). The Secretary's failure to perform his mandatory, non-discretionary  
10 duty also constitutes agency action "unlawfully withheld or unreasonably delayed" within the  
11 meaning of the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's  
12 failure to comply with this provision is arbitrary and capricious, an abuse of discretion, not in  
13 accordance with law, and a failure to observe proper procedure under the APA, 5 U.S.C. §  
14 706(2).

15 **Fourth Claim for Relief**

16 **(Failure to Make a Timely 12-Month Finding)**

17 58. Each and every allegation set forth in this Complaint is incorporated herein by  
18 reference as if set forth in full.

19 59. The Secretary's failure to make a timely 12-month finding on the petition to list  
20 the Amargosa toad as threatened or endangered violates the ESA. 16 U.S.C. §§ 1533(b)(3)(B)  
21 & 1540(g). The Secretary's failure to perform his mandatory, non-discretionary duty also  
22 constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of  
23 the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary's failure to  
24 comply with this provision is arbitrary and capricious, an abuse of discretion, not in accordance  
25 with law, and a failure to observe proper procedure under the APA, 5 U.S.C. § 706(2).

26 **Fifth Claim for Relief**

27 **(Failure to Make a Timely 90-Day Finding)**

60. Each and every allegation set forth in this Complaint is incorporated herein by reference as if set forth in full.

61. The Secretary's failure to make a timely 90-day finding on the petition to list 42 species of Great Basin springsnails as threatened or endangered violates the ESA. 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" within the meaning of the 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).

### Sixth Claim for Relief

**(Failure to Make a Timely 12-Month Finding)**

62. Each and every allegation set forth in this Complaint is incorporated herein by reference as if set forth in full.

63. The Secretary's failure to make a timely 12-month finding on the petition to list the Techachapi slender salamander as threatened or endangered violates the ESA. 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" within the meaning of the 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).

### Seventh Claim for Relief

**(Failure to Make a Timely 90-Day Finding)**

64. Each and every allegation set forth in this Complaint is incorporated herein by reference as if set forth in full.

65. The Secretary's failure to make a timely 90-day finding on the petition to list the Mohave grounds squirrel as threatened or endangered violates the ESA. 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" within the meaning of the 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).

## **VII. PRAYER FOR RELIEF**

FOR THESE REASONS, Plaintiff respectfully request that the Court:

1. Declare that Defendants are in violation of their mandatory duty under the ESA to make, and to publish in the Federal Register, a 12-month finding on the petition to list the Mount Charleston blue butterfly;

2. Provide preliminary and permanent injunctive relief compelling Defendants to publish in the Federal Register a 12-month finding on the petition to list the Mount Charleston blue butterfly by a date certain;

3. Declare that Defendants are in violation of their mandatory duty under the ESA to make, and to publish in the Federal Register, a 12-month finding on the petition to list the California golden trout;

4. Provide preliminary and permanent injunctive relief compelling Defendants to publish in the Federal Register a 12-month finding on the petition to list the California golden trout by a date certain;

5. Declare that Defendants are in violation of their mandatory duty under the ESA to make, and to publish in the Federal Register, a 12-month finding on the petition to list the Mojave fringe-toed lizard;

6. Provide preliminary and permanent injunctive relief compelling Defendants to publish in the Federal Register a 12-month finding on the petition to list the Mojave fringe-toed

1 lizard by a date certain;

2       7.       Declare that Defendants are in violation of their mandatory duty under the ESA  
3 to make, and to publish in the Federal Register, a 12-month finding on the petition to list the  
4 Amargosa toad;

5       8.       Provide preliminary and permanent injunctive relief compelling Defendants to  
6 publish in the Federal Register a 12-month finding on the petition to list the Amargosa toad by  
7 a date certain;

8       9.       Declare that Defendants are in violation of their mandatory duty under the ESA  
9 to make, and to publish in the Federal Register, a 90-day finding on the petition to list 42  
10 species of Great Basin springsnails;

11       10.      Provide preliminary and permanent injunctive relief compelling Defendants to  
12 publish in the Federal Register a 90-day finding on the petition to list 42 species of Great Basin  
13 springsnails by a date certain and a 12-month finding by a date certain thereafter;

14       11.      Declare that Defendants are in violation of their mandatory duty under the ESA  
15 to make, and to publish in the Federal Register, a 12-month finding on the petition to list the  
16 Tehachapi slender salamander;

17       12.      Provide preliminary and permanent injunctive relief compelling Defendants to  
18 publish in the Federal Register a 12-month finding on the petition to list the Tehachapi slender  
19 salamander by a date certain;

20       13.      Declare that Defendants are in violation of their mandatory duty under the ESA  
21 to make, and to publish in the Federal Register, a 90-day finding on the petition to list the  
22 Mojave ground squirrel;

23       14.      Provide preliminary and permanent injunctive relief compelling Defendants to  
24 publish in the Federal Register a 90-day finding on the petition to list the Mohave ground  
25 squirrel by a date certain and a 12-month finding by a date certain thereafter;

26       15.      Retain continuing jurisdiction to review Defendants' compliance with all  
27 judgments and orders herein;



1           16.     Make such additional judicial determinations and enter such additional orders as  
2 may be necessary to effectuate the foregoing;

3           17.     Award Plaintiffs their costs of litigation, including reasonable attorneys' fees;  
4 and

5           18.     Provide such other relief as the Court deems just and proper.

6  
7 Respectfully submitted,

8  
9 DATED: February 18, 2010

10                               /s/ Matthew D. Vespa  
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Attorney for Plaintiff