

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

COLORADO RIVER CUTTHROAT TROUT )  
Upper Colorado River System, )  
)  
CENTER FOR BIOLOGICAL DIVERSITY )  
213 North Second Avenue )  
Tucson, Arizona 85705, )  
)  
and )  
)  
NOAH GREENWALD )  
2106 NE Junior Street )  
Portland, Oregon 97211, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
)  
KEN SALAZAR )  
Secretary, Department of the Interior )  
1849 C Street, N.W. )  
Washington, D.C. 20240, )  
)  
and )  
)  
)  
U.S. FISH AND WILDLIFE SERVICE, )  
1849 C Street, N.W. )  
Washington, D.C. 20240, )  
)  
Defendants. )  
)  
)  
\_\_\_\_\_)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Colorado River Cutthroat Trout, Center for Biological Diversity, and Noah Greenwald challenge Defendants Secretary Ken Salazar and U.S. Fish and Wildlife Service's (FWS) "Not Warranted Finding" on listing the Colorado River cutthroat trout as an endangered or threatened species under the Endangered Species Act (ESA), 16 U.S.C. § 1533. Contrary to FWS's determination, the Colorado River cutthroat trout warrants ESA listing due to a drastic reduction in its range and because there are numerous threats to its continued existence.

Eighty-seven percent (87%) of the Colorado River cutthroat trout's range has been lost. Fifty-eight percent (58%) of the Colorado River cutthroat trout's remaining range is known to be degraded. In the challenged Not Warranted Finding, FWS failed to evaluate the Colorado River cutthroat trout's lost range as well as the new and ongoing threats to its remaining habitat. FWS's Not Warranted Finding violated ESA requirements, was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. § 706, and should be vacated and remanded to FWS for a new finding under the ESA.

### JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 16 U.S.C. § 1540(g)(1)(C) (ESA citizen suit provision), and 5 U.S.C. §§ 551, 701 et seq. (APA). In accordance with the ESA citizen suit provision, on January 19, 2009, Plaintiff sent a letter to Defendants notifying them of the ESA violations associated with the Not Warranted Finding and the Solicitor's Opinion. Defendants' March 16, 2007 Solicitor's Opinion is also final agency action. Plaintiffs' request for declaratory and injunctive relief is proper under 28 U.S.C. §§ 2201-2202 (declaratory judgment and injunctive relief), and because there exists an actual, justiciable controversy between the parties that is continuing and has not been remedied.

3. Venue is proper before this District Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g).

### PARTIES

4. Plaintiff Colorado River cutthroat trout is the only indigenous trout in the Upper Colorado River system. The Colorado River cutthroat trout currently lives primarily in isolated high elevation headwater streams that include, among others, the upper Colorado River and Yampa River in Colorado, the Little Snake River in Wyoming, and tributaries of the Green River in Wyoming and Utah. The Colorado River cutthroat trout and its habitat have been, and are being, severely adversely affected by numerous human-induced problems, including habitat loss and degradation related to livestock grazing, dams and water diversions, and logging, and the presence of introduced non-native trout that prey on, compete, and hybridize with the Colorado

River cutthroat trout. The above-described interests of the Colorado River cutthroat trout have been, are being, and unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by FWS's Not Warranted Finding.

5. Plaintiff Center For Biological Diversity ("Center") is a non-profit corporation with offices in San Francisco and Joshua Tree California, Arizona, New Mexico, Oregon, and Washington, D.C. The Center combines conservation biology with litigation and public advocacy to secure a future for all species, great or small, hovering on the brink of extinction, including the Colorado River cutthroat trout. The Center is actively involved in species and habitat protection issues throughout the United States and the world. The Center has over 44,000 members. The Center educates its members and online activists as well as the general public regarding the numerous threats facing endangered species and their habitats, including the Colorado River cutthroat trout. The Center and its members have a substantial and concrete interest in the Colorado River cutthroat trout and its habitat. The Center petitioned FWS to list under the ESA the Colorado River cutthroat trout. The Center filed suit against FWS over its negative 90-day finding on its petition. The Center submitted detailed comments on January 8, 2007 concerning the Colorado River cutthroat trout. Members of the Center observe, study, and otherwise enjoy the Colorado River cutthroat trout in its environment. The Center and its member's interests are adversely affected and aggrieved by FWS's Not Warranted Finding. The actual and concrete injuries to the Center and its member's interests are traceable to FWS's Not Warranted Finding and conduct in issuing the Not Warranted Finding. The requested relief will redress the Center and its members' injuries.

6. Plaintiff Noah Greenwald prepared and submitted to FWS on behalf of himself and the Center the Colorado River cutthroat trout listing petition after spending a full year researching the Colorado River cutthroat trout and its habitat. Mr. Greenwald researched and studied riparian ecology for his master's degree and incorporates his acquired knowledge in monitoring the Colorado River cutthroat trout and its habitat. Mr. Greenwald continues to monitor the status of the Colorado River cutthroat trout and its habitat. Mr. Greenwald has a

personal, educational, and scientific interest in the Colorado River cutthroat trout's survival and recovery. Mr. Greenwald regularly visits the range of the Colorado River cutthroat trout to enjoy this species in the wild and has plans to continue to do so again in 2010 and in subsequent years. The above-described educational, scientific research, aesthetic, and conservation interest of Mr. Greenwald have been, are being and, unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by FWS's Not Warranted Finding.

7. Defendant Ken Salazar is the United States Secretary of the Interior. In this capacity, Secretary Salazar has supervisory responsibility over FWS and has ultimate authority over FWS's compliance with the ESA, including FWS's Not Warranted Finding. Defendant Salazar is sued in his official capacity.

8. Defendant United States Fish & Wildlife Service is an agency within the Department of the Interior. FWS has a Regional Office in Lakewood, Colorado. FWS is a federal agency that must comply with the ESA. FWS responded to Plaintiff's petition to list the Colorado River cutthroat trout.

#### LEGAL BACKGROUND

9. The ESA is a federal statute that "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To achieve its objectives and goals, FWS determines which species of plants and animals are "threatened" or "endangered," within the meaning of the ESA. 16 U.S.C. § 1533. FWS must list a species as "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). FWS must list a species as "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

10. Not until FWS formally lists a species does the ESA afford that species any substantive protections. The ESA provides listed species with several procedural and substantive protections designed to recover imperiled species and prevent their extinction. *See, e.g., id.* §§

1533(f) (recovery plans), 1536(a)(2) (consultations), and 1538(a)(1)(B) and (G) (prohibition against takings).

11. FWS has a mandatory duty to list a species upon finding it is endangered or threatened. 16 U.S.C. § 1533(a)(1). FWS determines if a species is endangered or threatened based on five listing factors:

- (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)(A)-(E); 50 C.F.R. § 424.11(c). FWS must analyze these listing factors and make listing decisions "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).

12. The ESA listing process can begin with either (1) a citizen's petition, or (2) FWS's internal candidate review process. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a); 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c). Upon receipt of a petition, FWS must determine whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). This finding is commonly called the "90-day finding."

13. If FWS concludes in its 90-day finding that the petition does not present substantial information indicating that listing may be warranted, the listing process concludes with a notice published in the Federal Register. If FWS concludes in its 90-day finding that the petition does present substantial information indicating listing may be warranted, FWS must then provide notice of such a finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(A). Thereafter, FWS must commence and complete a "status review" of the species and then make a formal "warranted" or "not warranted" listing determination within 12 months of receipt of the petition.

40 C.F.R. § 424.14(b)(3). This is commonly referred to as a "12-month finding." A "warranted" 12-month finding must be accompanied by a proposed rule to list the species as endangered or threatened. 16 U.S.C. § 1533(b)(5). A final listing decision is due 12 months after a proposed rule. Id. § 1533(b)(6)(A)(i); 50 C.F.R. § 424.17(a).

### FACTUAL BACKGROUND

#### A. The Colorado River Cutthroat Trout, Its Status, and the Petition To List

14. The Colorado River cutthroat trout lives and thrives in clean, cool mountain streams. It requires water with high dissolved oxygen content, low water temperatures in the summer, and clean gravel for spawning. Streamside vegetation is needed by the trout to provide shade, cover, and insects for food. The Colorado River cutthroat trout also needs deep pools for summer rest and to survive the winter.

15. The Colorado River cutthroat trout is the only cutthroat trout native to the upper Colorado River system. Its historic range included areas west of the Continental Divide in Colorado, southern Wyoming, eastern Utah, and extreme northwestern New Mexico and northeastern Arizona. The original distribution of the trout included approximately 21,386 miles of perennial streams.

16. The distribution of the Colorado River cutthroat trout within its range has declined significantly from known historic levels. Currently, the Colorado River cutthroat trout occupies approximately 3,000 miles of its range. Conservation Populations -- a term used and defined in the Not Warranted Finding -- occupy a portion of this current range. The Colorado River cutthroat trout no longer exists in New Mexico or Arizona. The Colorado River cutthroat trout no longer occurs in most large rivers and streams within its range. The number of individuals and populations of Colorado River cutthroat trout has also decreased substantially.

17. Habitat destruction and the presence of non-native species are the greatest threats to the Colorado River cutthroat trout's continued existence. Continued livestock grazing, logging, road building, mining, and oil and gas extraction are destroying and adversely impacting the Colorado River cutthroat trout's remaining habitat areas.

18. For years, natural resources managers introduced non-native sport fish into the Colorado River cutthroat trout's habitat areas. Non-native trout continue to be stocked in many portions of this species' historic range. Although introduction efforts have been curtailed in areas where Colorado River cutthroat trout currently occur, reproducing populations of non-native trout remain in much of the Colorado River cutthroat trout's current range. Consequently, predation, competition for food and shelter, and hybridization continue to threaten the Colorado River cutthroat trout. When Colorado River cutthroat trout mate with non-native salmonids, its genetic integrity is reduced. Scientific studies show that such hybridized populations of trout lose their fitness to adapt to their environment.

19. Both habitat destruction and the presence of non-natives fragment the Colorado River cutthroat trout's remaining habitat areas and result in isolated populations. Current Colorado River cutthroat trout populations are found in small headwater streams above 7,000 feet in elevation. Most of these headwater streams are isolated from one another. Most remaining populations of Colorado River cutthroat trout occur in small numbers. These headwater streams are prone to catastrophic disturbance due to drought, flood, hard winter freezes, and fire. Habitat fragmentation and isolation populations thus pose an additional threat to the Colorado River cutthroat trout's survival.

20. The Colorado River cutthroat trout is extremely susceptible to whirling disease. Some populations of Colorado River cutthroat trout are infected with whirling disease. Some populations of Colorado River cutthroat trout exist in conditions that facilitate the spread of whirling disease.

21. Under the ESA, any interested person may file a petition with FWS to list a species as threatened or endangered. 16 U.S.C. § 1533(b)(3)(A). Due to the loss of almost 90 percent of the Colorado River cutthroat trout's range and ongoing significant threats to remaining populations and habitat areas, Plaintiffs submitted an ESA petition to list the Colorado River cutthroat trout as an endangered or threatened species on December 9, 1999. Under the ESA, FWS was required to respond to this ESA listing petition within 90 days to the maximum extent

practicable and make a finding as to whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted." Id.; 50 C.F.R. § 424.14(b)(1).

B. FWS's 2004 Negative 90-Day Finding On The Petition

22. FWS's initial response to Plaintiffs' petition was to convene the affected state and federal land managers. The states of Colorado, Wyoming, and Utah, along with the U.S. Forest Service and U.S. Bureau of Land Management, began developing a "Conservation Agreement and Strategy" for the Colorado River cutthroat trout. The Conservation Agreement and Strategy was finalized and signed in 2001. Through the Conservation Agreement and Strategy, it was hoped that ESA listing of the Colorado River cutthroat trout could be avoided. The Conservation Agreement and Strategy contained several deadlines and target goals for conserving the Colorado River cutthroat trout.

23. Five years after receiving the petition, on April 20, 2004, FWS made the required 90-day finding on the Colorado River cutthroat trout. 69 Fed. Reg. 21151. FWS determined that the petition did not present substantial information that listing the trout may be warranted. Id. Notwithstanding its conclusion, FWS found the range of the Colorado River cutthroat trout has been "greatly reduced from historic levels." FWS also determined that (1) predation, competition, and hybridization from non-native species, (2) habitat loss and ongoing habitat threats, and (3) small population size and habitat fragmentation are all threats to remaining populations of Colorado River cutthroat trout.

24. The Center sued over FWS's negative 90-day finding. This Court found that the negative 90-day finding violated the ESA. Colorado River Cutthroat Trout v. Norton, 448 F.Supp.2d 170 (D.D.C. 2006) (Friedman, J). The Court agreed with plaintiffs that FWS acted unlawfully by selectively inviting input on the listing petition from states and federal agencies -- the same entities participating in the Conservation Agreement and Strategy. At the preliminary 90-day finding stage of the listing process, the ESA requires FWS to review solely the data in the

petition and information available in its existing files. The Court recognized that FWS illegally expanded the review process to rebut the petition's evidence.

25. The Court also found that FWS had implicitly made a positive 90-day finding on the petition to list the Colorado River cutthroat trout. A 12-month finding requires FWS to conduct a status review of the species and then issue a second finding as to whether the species listing is "warranted" or "not warranted." 16 U.S.C. § 1533(b)(3)(B); 40 C.F.R. § 424.14(b)(3). The Court thus ordered FWS to proceed to the next step in the ESA listing process and (1) conduct a status review and (2) make the required 12-month finding.

C. FWS's 2007 Not Warranted Finding

26. Prepared in accordance with the 2001 Conservation Agreement and Strategy, a Rangewide Status Report for the Colorado River cutthroat trout was completed in 2006. This Status Report was prepared prior to the Court's ruling in Colorado River Cutthroat Trout v. Norton. The Rangewide Status Report assessed habitat quality in the Colorado River cutthroat trout's remaining habitat areas, finding only 42 percent were in excellent or good condition. The Rangewide Status Report found non-native trout were present in 63 percent of habitat areas currently occupied by the Colorado River cutthroat trout. The Rangewide Status Report did not assess the causes of the trout's current status. The Rangewide Status Report did not evaluate the impact of ongoing threats to the trout. The Rangewide Status Report did not evaluate the trout's ability to survive in the near- or long-term future.

27. Data collected since adoption of the Conservation Agreement and Strategy in 2001 indicated that several of its deadlines and target specific goals were not being achieved. In 2006, the signatory states and federal agencies revised the Conservation Agreement and Strategy. The 2006 version of the Conservation Agreement and Strategy removed the deadlines and target specific goals. The Conservation Agreement and Strategy now lacks deadlines and target goals.

28. On March 16, 2007, the Solicitor for the Department of the Interior issued a memorandum opinion detailing his interpretation of the ESA's phrase "significant portion of range." The Solicitor's Opinion concludes that the lost portions of a species' range need not be

considered when making ESA listing decisions. Since its adoption, FWS has applied the Solicitor's Opinion in making several decisions not to list imperiled species. FWS applied the interpretation offered in the Solicitor's Opinion of the "significant portion of range" phrase to the Not Warranted Finding.

29. On June 13, 2007, FWS determined that listing the Colorado River cutthroat trout was not warranted. 72 Fed. Reg. 32589. FWS's Not Warranted Finding relies on the existence of 285 "Conservation Populations" in the Colorado River cutthroat trout's remaining range. Previously, there were thousands of Colorado River cutthroat trout populations. Conservation Populations are those that are genetically pure or "are less than 10 percent introgressed with other subspecies of cutthroat trout." 72 Fed. Reg. at 32591. 153 of the 285 Conservation Populations are genetically pure populations. Many of the 132 other populations had not been genetically tested at the time of the Not Warranted Finding. Many of the 285 Conservation Populations occur in habitat areas with non-native trout species.

#### FIRST CLAIM FOR RELIEF

(Violation of the Endangered Species Act against FWS)

30. Each and every allegation set forth in the Complaint is incorporated herein by reference.

31. Although the Colorado River cutthroat trout is threatened by one or more of the ESA listing factors in accordance with the best scientific information available, FWS failed to list this species, in violation of the ESA.

32. The ESA mandates that FWS conduct a status review of species considered for listing prior to a 12-month finding. 16 U.S.C. § 1533(b)(1)(A). On September 7, 2006, the Court in Colorado River Cutthroat Trout ordered FWS to conduct a status review of the trout. On October 17, 2006, ruling on a FWS Motion to Amend/Alter, the Court reiterated the requirement for FWS to conduct a status review. On November 7, 2006, FWS announced its initiation of a status review and opened a public comment period on the status review. 75 Fed. Reg. 60564. FWS did not conduct or complete a status review prior to issuing the Not Warranted Finding.

33. In applying the ESA's "significant portion of range" listing standard to the Colorado River cutthroat trout, FWS considered only the trout's current range. The lost portion of Colorado River cutthroat trout's habitat range makes up at least 87 percent of its range. FWS ignored the Colorado River cutthroat trout's lost habitat range in its Not Warranted Finding. FWS failed to determine whether the Colorado River cutthroat trout's lost range constitutes a significant portion of range. FWS failed to explain why 87 percent of its range from which it has been lost is not a significant portion of range. The Colorado River cutthroat trout's lost range is biologically significant. The Colorado River cutthroat trout's lost habitat range prevents connectivity between populations. The Colorado River cutthroat trout's lost range prevents genetic exchange between remaining populations.

34. FWS's Not Warranted Finding relied on the existence of 285 Conservation Populations of Colorado River cutthroat trout. These 285 Conservation Populations do not occur throughout the Colorado River cutthroat trout's current range. The 285 Conservation Populations are limited to 66 percent of the Colorado River cutthroat trout's current range. FWS did not assess whether the other 33 percent of the Colorado River cutthroat trout's current range is a significant portion of its range.

35. FWS failed to comply with the ESA mandate to use the best scientific information available. In the Not Warranted Finding, FWS did not evaluate the known threats to each of these 285 Conservation Populations. In making its Not Warranted Finding, FWS did not assess the "level of impact" to the 285 Conservation Populations. FWS's Not Warranted Finding did not evaluate whether any of the 285 Conservation Populations are viable and will continue to exist. In defining a Conservation Population, FWS did not consider the stream lengths the remaining trout populations occupy or their size. The population trends of these 285 Conservation Populations are unknown. Most of the 285 populations are small populations. Most of the 285 Conservation Populations are located in short stream segments. Many of the 285 Conservation Populations are isolated from one another. FWS never explained the basis for finding that populations with less than 10 percent hybridization are Conservation Populations.

36. The ESA requires FWS to assess the "inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). FWS's Not Warranted Finding relies on management and conservation plans and actions that are not regulatory or mandatory to address known threats to remaining populations of Colorado River cutthroat trout. FWS's reliance on such plans and actions lacks evidence indicating these efforts have been implemented. FWS's reliance on such plans and actions lacks evidence indicating these efforts have been adequate at alleviating known threats to the Colorado River cutthroat trout.

37. In its Not Warranted Finding, FWS evaluated the various threats to the Colorado River cutthroat trout in isolation. FWS dismissed non-native trout as a threat to the Colorado River cutthroat trout by claiming that this factor, alone, does not warrant ESA listing. FWS dismissed the adverse impacts associated with small, fragmented populations by claiming these impacts alone do not warrant ESA listing of the Colorado River cutthroat trout. FWS dismissed the threat of whirling disease by claiming it alone does not warrant listing the Colorado River cutthroat trout. FWS's failure to consider threats to the Colorado River cutthroat trout cumulatively violates the ESA.

38. Accordingly, FWS's Not Warranted Finding on the Colorado River cutthroat trout violates section 4 of the ESA, and is arbitrary and capricious, an abuse of discretion, not in accordance with law -- including ESA section 4 requirements -- within the meaning of the APA. 5 U.S.C. § 706(2)(A).

#### SECOND CLAIM FOR RELIEF

39. Each and every allegation set forth in the Complaint is incorporated herein by reference.

40. Under the ESA, FWS must list as threatened or endangered those species in danger of extinction "throughout all" or in a "significant portion" of its range. 16 U.S.C. §§ 1532(6) & (20). In addition, ESA section 4(a)(1) directs FWS to consider specific factors when

deciding whether to list species, including the "present or threatened destruction, modification or curtailment of its habitat or range." Id. § 1533(a)(1).

41. The March 16, 2007 Solicitor's Opinion does not comply with these ESA requirements, which compel consideration of a species' lost range and a determination of whether such lost range constitutes a significant portion of range. According to the Solicitor's Opinion, FWS can ignore a species' lost range upon determining whether to list imperiled species as endangered or threatened.

42. FWS applied the Solicitor's Opinion to its Not Warranted Finding for the Colorado River cutthroat trout. Based on this Solicitor's Opinion, FWS ignored the Colorado River cutthroat trout lost range. Based on this Solicitor's Opinion, FWS did not consider whether the loss of 87% of the Colorado River cutthroat trout's range constitutes a significant portion of range.

43. Accordingly, the March 16, 2007 Department of the Interior's Solicitor Opinion and FWS's reliance on the Solicitor Opinion in its Not Warranted Finding violate section 4 of the ESA, and are arbitrary and capricious, an abuse of discretion, and not in accordance with law within the meaning of the APA. 5 U.S.C. § 706(2)(A).

#### PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request that the Court enter judgment in their favor providing the following relief:

(1) Declare that FWS violated the ESA by failing to comply with section 4 of the ESA in making its Not Warranted Finding on the Colorado River cutthroat trout;

(2) Declare that FWS's Not Warranted Finding on the Colorado River cutthroat trout is arbitrary and capricious under the APA;

(3) Declare that the March 16, 2007 Department of the Interior's Solicitor Opinion violates section 4 of the ESA and the APA;

(4) Set aside and vacate FWS's June 13, 2007 Not Warranted Finding on the Colorado River cutthroat trout;

- (5) Order FWS on remand to conduct a new rulemaking process, including public notice and an opportunity for comment, and issue a new 12-month finding under the ESA on the Colorado River cutthroat trout within 60 days;
- (6) Set aside and vacate the March 16, 2007 Department of the Interior's Solicitor Opinion;
- (7) Order FWS to immediately cease its use and reliance on the March 16, 2007 Department of the Interior's Solicitor Opinion when determining whether species warrant listing under the ESA;
- (8) Award Plaintiffs their costs, including reasonable attorneys' fees and expert witness fees; and
- (9) Provide such other relief as the Court deems just and proper.

Respectfully submitted,

Dated: November 24, 2009

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