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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
TUCSON DIVISION**

Center for Biological Diversity,

Plaintiff,

v.

U.S. Fish and Wildlife Service; Brian  
Nesvik, in his official capacity as  
Director of the U.S. Fish and Wildlife  
Service; and Doug Burgum, in his  
official capacity as Secretary of the  
U.S. Department of the Interior,

Defendants.

Case No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

## INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) challenges the U.S. Fish and Wildlife Service’s (“Service”) failure to issue an initial determination (“90-day finding”) on the Center’s petition to list the Ellett Valley millipede, in violation of the Endangered Species Act’s (“ESA” or “Act”) deadline. The Service’s failure to meet the deadline delays lifesaving protections for the millipede, increasing the Ellett Valley millipede’s risk of extinction.

2. The Ellett Valley millipede, pictured below in its unique cave ecosystem, is primarily threatened by rapidly expanding urban development and a recently built pipeline that runs through the species’ habitat.



*Photo Credit: Tom Malabad  
Virginia DCR, Division of Natural Heritage*



1 millipede's range. The Center is headquartered in Tucson, Arizona, with offices  
2 throughout the United States.

3 9. The Center brings this action on behalf of its staff and members who  
4 derive recreational, aesthetic, educational, scientific, professional, and other benefits  
5 from the Ellett Valley millipede and its habitat. The interests of the Center's members in  
6 protecting and recovering the millipede and its habitat are directly harmed by the  
7 Service's failure to comply with the ESA and APA in making a listing determination for  
8 the millipede.  
9

10 10. For example, Center member Dr. Donald Linzey, is a wildlife biologist  
11 based in Blacksburg, Virginia. In 1981, Dr. Linzey and his sons located a previously  
12 unknown cave. This previously undescribed dry cave (now known as Dave's Cave,  
13 named after one of Dr. Linzey's sons) is home to the Ellett Valley millipede. Dr. Linzey  
14 has worked to protect Dave's Cave and the entire surrounding area since 1977.  
15 Subsequent investigations revealed three other caves where the millipede occurs, all near  
16 Dave's Cave. Dr. Linzey frequently visits these sites for recreational and educational  
17 purposes (every few months), and he intends to continue returning to the millipede's  
18 habitat for the remainder of his life. Dr. Linzey is harmed by the Service's delay  
19 because it lessens his experience in nature and impedes protections to the millipede and  
20 its habitat that Dr. Linzey has spent most of the last 50 years working to protect.  
21

22 11. Center member Nico Hazlett is a trained horticulturist and regularly hikes  
23 in the millipede's range. She visits the Ellett Valley Recreational Area and Nellie's Cave  
24 Park to catalog native plant species, insects, and to bird watch around the millipede's  
25 habitat. Ms. Hazlett has concrete plans to visit the millipede's habitat and search for the  
26  
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1 species in a newly established preserve which includes Dave's Cave and 24 acres of  
2 surrounding forest. She has a spiritual, aesthetic, and recreational interest in the  
3 millipede. Her aesthetic and spiritual interests in the species survival are harmed by the  
4 agency's delay as well as her recreational interests. Because the millipede is a  
5 detritivore, it plays a large role in balancing the ecosystem and without it, there is less  
6 organic matter for plants to grow and food for bird species, harming Ms. Hazlett's  
7 recreational interest in horticulture and birdwatching when exploring in the Ellett Valley.  
8

9       12. The Service's violation of the ESA's deadline has delayed protections to  
10 the millipede. This inaction harms Plaintiff's members' interests in the millipede by  
11 decreasing the likelihood that members will encounter the species as part of their  
12 personal excursions. These injuries are actual, concrete injuries that are presently  
13 suffered by the Center's members, are directly caused by Defendants' acts and  
14 omissions, and will continue unless the Court grants relief. The relief sought would  
15 redress these injuries. The Center and its members have no other adequate remedy at  
16 law.  
17

18       13. Defendant U.S. Fish and Wildlife Service is the agency within the  
19 Department of the Interior charged with implementing the ESA for the Ellet Valley  
20 millipede. The Secretary of the Interior has delegated administration of the ESA to the  
21 Service. 50 C.F.R. § 402.01(b).  
22

23       14. Defendant Brian Nesvik is the Director of the U.S. Fish and Wildlife  
24 Service and is charged with ensuring agency decisions comply with the law. Plaintiff  
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sues Defendant Nesvik in his official capacity.





1 mechanisms; or (E) other natural or manmade factors affecting its continued existence.

2 16 U.S.C. § 1533(a)(1).

3 20. If the Service determines that the species meets the definition of threatened  
4 or endangered because it is imperiled by any one or a combination of these five factors,  
5 the Service must list the species. *Id.* § 1533(b)(1)(A); 50 C.F.R. § 424.11(c).  
6

7 21. The Service must base all listing determinations “solely on the basis of the  
8 best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).  
9

10 22. A species receives numerous substantive protections once the Service lists  
11 it. For example, section 7 of the ESA requires all federal agencies to ensure that their  
12 actions do not “jeopardize the continued existence” of any listed species or “result in the  
13 destruction or adverse modification” of a listed species’ “critical habitat.” *Id.* §  
14 1536(a)(2). Section 9 of the ESA prohibits, among other things, “any person” from  
15 intentionally or incidentally “taking” listed species without a lawful authorization from  
16 the Service. *Id.* §§ 1538(a)(1)(B), 1539. Other provisions require the Service to  
17 designate “critical habitat” for listed species, *id.* § 1533(a)(3); to “develop and  
18 implement” recovery plans for listed species, *id.* § 1533(f); and authorize the Service to  
19 make federal funds available to states to assist their efforts to preserve and protect  
20 threatened and endangered species. *Id.* § 1535(d).  
21  
22

23 23. Any interested person can petition the Service to add a species to the  
24 Service’s formal list of threatened and endangered species. *Id.* § 1533(b)(3)(A); 50  
25 C.F.R. § 424.14(a).  
26

27 24. The Service must make a preliminary finding on the petition within 90  
28 days of receiving the petition (known as the “90-day finding”). 16 U.S.C. §

1 1533(b)(3)(A); 50 C.F.R. § 424.14(h)(1). If the Service finds “substantial information  
 2 indicating that the petitioned action may be warranted,” it must publish that finding and  
 3 proceed to conduct a full scientific review of the species’ status. 16 U.S.C. §  
 4 1533(b)(3)(A).

5  
 6 25. Upon completing the status review, and within 12 months of receiving the  
 7 petition, the Service must publish one of three findings (known as “12-month findings”):  
 8 (1) listing is “warranted”; (2) listing is “not warranted”; or (3) listing is “warranted but  
 9 precluded” by other proposals for listing species. *Id.* § 1533(b)(3)(B).

10  
 11 26. If the Service issues a finding that listing the species is “warranted,” it  
 12 must publish a proposed rule to list the species as endangered or threatened in the  
 13 Federal Register. *Id.* § 1533(b)(5). Within one year of publishing a proposed rule to list a  
 14 species, the Service must issue a final rule listing the species and designating critical  
 15 habitat, unless the Service finds that there is substantial disagreement regarding the  
 16 sufficiency of the available data or that there is not sufficient evidence to justify the  
 17 proposed action. *Id.* § 1533(a)(3), (b)(6)(A)–(B), (C).

18  
 19 27. If the Service issues a finding that listing the species is “not warranted,”  
 20 that finding is a final agency action subject to judicial review. *Id.* § 1533(b)(3)(C)(ii).

### 21 **FACTUAL BACKGROUND**

22  
 23 28. The Ellett Valley millipede (*Pseudotremia cavernarum*) is a cave dwelling  
 24 millipede with a small geographic range of about four miles long and two miles wide.  
 25 The millipede only occurs in eight caves that are all threatened by development in  
 26 Blacksburg, Virginia. The ninth cave where the millipede occurred was destroyed by a  
 27 quarry.  
 28



1           29.     Millipedes were one of the first animals to breathe atmospheric oxygen on  
2 planet Earth, and they have been on Earth for more than 400 million years. The Ellett  
3 Valley millipede is a troglobitic animal, meaning that it completes its life cycle entirely  
4 in caves. By consuming dead plant material and providing food for other cave-dwelling  
5 animals, the millipede serves important roles in Virginia's sensitive karst cave  
6 environment.  
7

8           30.     The main threat to the millipede is urban development. Several large  
9 parcels of land within the millipede's range have already been purchased by real estate  
10 companies and speculators. Associated harm from urban development include land  
11 conversion, including increases in stormwater runoff which can lead to changes in  
12 riparian areas used by the millipede. This can also lead to drying, harming the  
13 millipede's cave habitat (for instance, the amount of organic matter which enters the  
14 cave).  
15  
16

17           31.     Development infrastructure may isolate populations. Sprawling residential  
18 road systems have been constructed within the range of the Ellett Valley millipede in the  
19 past two decades. These roads are likely barriers to millipede migration and gene flow.  
20 If populations are lost or connections are disrupted, it could place the species at  
21 additional risk of extinction through genetic isolation.  
22

23           32.     In addition to threats from residential and associated development, a  
24 pipeline passes through the Ellett Valley millipede's habitat and near four of the  
25 millipede's cave sites, threatening the millipede's survival. Construction of the pipeline  
26 may have already harmed the millipede's fragile population and cave ecosystems in the  
27 northern portion of the Ellett Valley millipede's range. The pipeline requires permanent  
28

1 and perpetual clearcutting along its route, causing increased landslide risk,  
2 sedimentation, and impacts to the hydrology of the ecosystem.

3 33. In addition, pesticides are perpetually applied to the pipeline route to  
4 control vegetation. These pesticides inevitably seep into surface and groundwater which  
5 is especially concerning in a karst topography.  
6

7 34. The millipede's karst cave landscape is especially sensitive and vulnerable  
8 to water pollution, which it can easily transport from surface sources to groundwater  
9 aquifers, threatening the survival of millipedes and the health of surrounding  
10 communities.  
11

### 12 Listing Petition and Response

13 35. On October 6, 2023, the Center submitted its petition to list the Ellett  
14 Valley millipede as an endangered or threatened species under the ESA. The Center's  
15 petition requested that the Service list the Ellett Valley millipede as threatened or  
16 endangered species under the ESA and concurrently designate critical habitat with  
17 listing.  
18

19 36. It has been over a year since the Service received the Center's petition to  
20 list the Ellett Valley millipede as threatened or endangered under the ESA and to  
21 designate critical habitat concurrently with listing.  
22

23 37. The Service has yet to issue a 90-day finding on the Center's petition to  
24 list the millipede even though the deadline for publication was September 19, 2024  
25 (*Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176 (9th Cir. 2002) (holding  
26 that both 90-day finding and 12-month finding must be made within one year of receipt  
27 of a listing petition).  
28

39. Thus, the Service's 90-day finding on the Center's petition to list the Ellett Valley millipede is past due.

## Violations of the ESA for Failure to Publish a Timely 90-Day Finding for the Ellett Valley millipede

41. The ESA provides the Service with some leeway in publishing its initial finding within 90-days of receipt of the petition “to the maximum extent practicable,” but in no case longer than one year. 16 U.S.C § 1533(b)(3)(A); *Biodiversity Legal Found.*, 309 F.3d at 1176.

43. Defendants failed to perform their nondiscretionary duty to timely publish a timely 90-day finding in violation of the ESA. 16 U.S.C. § 1533(b)(3)(A).

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment providing the following relief:

1. Declare that Defendants violated the ESA by failing to issue a timely 90-day finding in response to the Center's petition to list the Ellett Valley millipede under the ESA;
2. Provide injunctive relief compelling Defendants to issue the 90-day finding by a date certain;
3. Retain continuing jurisdiction to review Defendants' compliance with all judgments and orders herein;
4. Grant Plaintiff its reasonable attorneys' fees and costs as provided by the ESA, 16 U.S.C. § 1540(g)(4); and
5. Provide such other relief as the Court deems just and proper.

Respectfully submitted and dated this 18<sup>th</sup> day of December 2025.

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