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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **EUREKA DIVISION**

16 CENTER FOR BIOLOGICAL
DIVERSITY,

17 Plaintiff,

18 v.

19 U.S. FISH AND WILDLIFE SERVICE;
20 BRIAN NESVIK, in his official capacity as
Director of the U.S. Fish and Wildlife
21 Service; DOUG BURGUM, in his official
capacity as Secretary of the U.S.
22 Department of the Interior,

23 Defendants.

Case No. 1:26-cv-3333

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

24 **INTRODUCTION**

25 1. Plaintiff Center for Biological Diversity (“Center”) challenges the failure of
26 the U.S. Fish and Wildlife Service (“Service”) to issue a final listing rule for the Clear Lake
27 hitch (*Lavinia exilicauda chi*) (“hitch”) in violation of the Endangered Species Act’s (“ESA”)
28

1 nondiscretionary, congressionally mandated deadline. The Service’s failure to meet the ESA
2 deadline for the Clear Lake hitch delays lifesaving protections for the hitch, thereby
3 increasing its risk of extinction.

4 2. To remedy the Service’s violation of the ESA, the Center seeks a Court order
5 declaring the that the Service violated section 4(b)(6)(A) of the ESA, 16 U.S.C. §
6 1533(b)(6)(A), by failing to issue a timely final listing rule for the Clear Lake hitch, and
7 providing injunctive relief directing the Service to issue the final listing rule by a date certain.

8 **JURISDICTION AND VENUE**

9 3. Plaintiff brings this action under the ESA, 16 U.S.C. §§ 1533, 1540(g), and
10 the Administrative Procedure Act (“APA”), 5 U.S.C. § 706.

11 4. This Court has jurisdiction to review this action under 16 U.S.C. § 1540(c),
12 (g) (ESA citizen suit provision) and 28 U.S.C. §§ 1331 (federal question). This Court has
13 authority to issue declaratory and injunctive relief pursuant to the ESA, 16 U.S.C. § 1540(g),
14 Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and the APA, 5 U.S.C. § 706(2).

15 5. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) and (e), as a
16 substantial part of the acts or omissions giving rise to the claims has occurred in this district,
17 the Clear Lake hitch’s range is located entirely within this District, and Plaintiff maintains a
18 regional office in Oakland, California, located within this District.

19 6. No real property is involved in this action.

20 **INTRADISTRICT ASSIGNMENT**

21 7. Pursuant to Civil Local Rule 3-2(c), the appropriate intradistrict assignment of
22 this case is to the Eureka Division.

23 **PARTIES**

24 8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit
25 conservation organization that works through science, law, policy, and the media to protect
26 imperiled species and their habitats. The Center is incorporated in California and
27 headquartered in Tucson, Arizona, with offices throughout the United States, including in
28 Oakland and Los Angeles. The Center has more than 101,000 active members throughout the

1 country, including many who live in Northern California and in Lake County and who
2 recreate in and around Clear Lake and its tributary creeks.

3 9. The Center brings this action on behalf of its members who derive ecological,
4 cultural, recreational, aesthetic, educational, scientific, professional, and other benefits from
5 the Clear Lake hitch. The Center's members are deeply interested in and committed to the
6 conservation of imperiled biologically and culturally significant species, including the Clear
7 Lake hitch, and to the effective implementation of the ESA to protect those species. The
8 Center's members have observed Clear Lake hitch spawning in the wild and have
9 experienced the heartbreak of attempting to locate spawning hitch—a once-abundant species
10 of biological and cultural significance—but finding few or none. Many of the Center's
11 members live in and have specific intentions to continue to use and enjoy the Clear Lake
12 watershed, including the lakes, tributary streams, and surrounding area within current and
13 historic spawning habitat range for the Clear Lake hitch, frequently and on an ongoing basis
14 in the future.

15 10. The Center's members have been, are being, and will continue to be adversely
16 harmed by the Service's failure to issue a timely final listing rule protecting the Clear Lake
17 hitch as a threatened species under the ESA. The injuries that the Center and its members
18 have suffered are actual, concrete injuries, which are presently suffered by the Center and its
19 members, and they will continue to occur unless this Court grants relief. For example, one of
20 the Center's members, Sarah Ryan, who is the Environmental Director of the Big Valley
21 Band of Pomo Indians, has witnessed firsthand the significant decline of Clear Lake hitch
22 over the last fifteen years and has worked alongside state, local, and Tribal partners to study
23 and research the disappearing hitch and the reasons why the hitch's habitat continues to dry
24 prematurely, including by helping to rescue stranded hitch and physically move hitch into
25 Clear Lake to prevent them from dying in dry creek beds. Ms. Ryan goes often to look for
26 hitch, both in the creeks and Clear Lake, and has even photographed dead hitch stranded in
27 dry creek beds, and she regularly visits Clear Lake's tributaries to look for hitch as part of
28 her professional responsibilities for the Tribe.

1 16. The Act directs the Secretary of the Interior, through the Service, to determine
2 which species of plants and animals are “endangered” and “threatened” and place them on
3 the list of protected species—otherwise known as “listing” a species. *Id.* § 1533.

4 17. The Secretary has delegated its administration of the Act to the Service for
5 freshwater aquatic species, including the Clear Lake hitch. 50 C.F.R. § 402.01(b).

6 18. ESA Section 4 requires the Service to protect imperiled species by listing
7 them as “endangered” or “threatened.” 16 U.S.C. § 1533(a)(1). A species is “endangered”
8 when it is “in danger of extinction throughout all or a significant portion of its range.” 16
9 U.S.C. § 1532(6). A species is “threatened” when it is “likely to become an endangered
10 species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §
11 1532(20).

12 19. The Act defines “species” to include “any distinct population segment of any
13 species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

14 20. The ESA requires the Service to determine whether any species is endangered
15 or threatened because of any one of, or combination of, the following factors: (A) the present
16 or threatened destruction, modification, or curtailment of its habitat or range; (B)
17 overutilization for commercial, recreational, scientific, or educational purposes; (C) disease
18 or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or
19 manmade factors affecting its continued existence. *Id.* § 1533(a)(1).

20 21. The Service must list a species if the species meets the definition of
21 “endangered” or “threatened” due to “any one or a combination of” these five listing factors.
22 50 C.F.R. § 424.11(c); *see* 16 U.S.C. § 1533(a)(1).

23 22. If the Service determines that the species is not endangered throughout all its
24 range, the ESA requires the agency to examine whether it is endangered or threatened
25 throughout any “significant portion” of its range. *Id.* §§ 1532(6), (20).

26 23. The Service must make listing determinations “solely on the basis of the best
27 scientific and commercial data available,” *id.* § 1533(b)(1)(A), and may not allow for
28

1 “economic considerations” when making “determinations regarding the status of species.”
2 H.R. Rep. No. 97-835, at 20 (1982).

3 24. The ESA allows any interested person to formally petition the Service to list a
4 species as endangered or threatened. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

5 25. To ensure the timely protection of species at risk of extinction, Congress set
6 forth a detailed process whereby interested persons may petition the Service to list a species
7 as endangered or threatened. 16 U.S.C. § 1533(b)(3). In response, the Service must publish a
8 series of three decisions according to statutory deadlines.

9 26. First, within 90 days of receipt of a listing petition, the Service must, “to the
10 maximum extent practicable,” publish an initial finding as to whether the petition, “presents
11 substantial scientific or commercial information indicating that the petitioned action may be
12 warranted.” *Id.* § 1533(b)(3)(A). This is known as the “90-day finding.” If the Service
13 determines in the 90-day finding that the petition does not present substantial information
14 indicating that listing may be warranted, the petition is rejected, and the process concludes.

15 27. If the Service determines that a petition presents substantial information
16 indicating that listing “may be warranted,” the agency must publish that finding and proceed
17 with a scientific review of the species’ status, known as a “status review.” *Id.*

18 28. Upon completing the status review, and within 12 months of receiving the
19 petition, the Service must publish a “12-month finding” with one of three listing
20 determinations: (1) listing is “warranted”; (2) listing is “not warranted”; or (3) listing is
21 “warranted but precluded” by other proposals for listing species, provided certain
22 circumstances are met. *Id.* § 1533(b)(3)(B).

23 29. If the Service determines that listing is “warranted,” the agency must publish
24 that finding in the Federal Register along with the text of a proposed regulation to list the
25 species as endangered or threatened and to designate critical habitat for the species. *Id.* §
26 1533(a)(3)(A), (b)(3)(B)(ii). Within one year of publishing the proposed listing rule, the
27 Service must publish the final rule in the Federal Register, implementing its determination to
28 list the species and designate critical habitat. *Id.* § 1533(b)(6)(A).

1 30. If the Service instead issues a finding that listing the species is “not
2 warranted,” the process concludes, and that finding is a final agency action subject to judicial
3 review. *Id.* § 1533(b)(3)(C)(ii).

4 31. A species does not receive substantive protections under the Act until it is
5 listed as endangered or threatened. Without these protections, endangered and threatened
6 species continue to decline toward extinction and become more difficult to protect from the
7 threat of extinction as their situations become even more dire.

8 32. Once a species is listed, the Act provides both procedural and substantive
9 protections to ensure not only the species’ continued survival, but also its ultimate recovery.
10 For example, Section 4(a)(3) of the Act requires the Service to designate areas that are
11 “essential to the conservation of the species” as “critical habitat,” and to develop and
12 implement recovery plans. *Id.* §§ 1533(a)(3), (f); 1532(5). In addition, Section 7(a)(2) of the
13 Act requires all federal agencies to consult with the Service to ensure their actions do not
14 “jeopardize the continued existence” of listed species or “result in the destruction or adverse
15 modification” of their critical habitat. *Id.* § 1536(a)(2). ESA Section 9(a)(1)(B) makes it
16 unlawful to “take” any endangered species, which means no person can “harass, harm,
17 pursue, hunt, shoot, wound, kill, trap, capture, or collect” an endangered species without first
18 receiving authorization from the Service. *Id.* §§ 1532(19), 1538. Thus, listing is the crucial
19 first step in the ESA’s system of species conservation and recovery.

20 **FACTUAL BACKGROUND**

21 **The Clear Lake Hitch**

22 33. The Clear Lake hitch (*Lavinia exilicauda chi*) is a large, lake-adapted minnow
23 that lives only in the Clear Lake watershed in Lake County, California. Adult Clear Lake
24 hitch average approximately 13 inches in length and 15.5 ounces in weight, with large scales,
25 prominent eyes, a small head, and an upturned mouth.

26 34. Hitch generally live four to six years and spawn annually.

27 35. Clear Lake, located about 100 km north of San Francisco Bay, is the largest
28 freshwater lake entirely within California. The lake is fed by several tributary streams, which

1 are generally dry for much of the year but become seasonally inundated during winter and
2 spring rains characteristic of the region's Mediterranean climate.

3 36. The entire population of Clear Lake hitch is confined to Clear Lake and its
4 tributaries, where the species spends most of the year in the lake's lacustrine environment.

5 37. Between February and May, when seasonal rains increase stream flows, adult
6 hitch migrate upstream into low-gradient tributaries to spawn. This migration depends on a
7 narrow seasonal window during which flows are sufficient to allow upstream passage,
8 successful spawning, and the downstream return of both adults and juveniles before the
9 streams dry again during the summer months.

10 38. Although hitch are capable swimmers, they rarely jump, making them
11 particularly vulnerable to migration barriers; any obstruction requiring jumping, as well as
12 dewatered stream segments, can prevent successful passage.

13 39. Hitch spawning occurs in riffles with fine to medium gravel substrate, where
14 fertilized eggs remain for several days before hatching.

15 40. Adequate instream flows, water depth, and suitable water quality and
16 temperature are necessary for proper egg development.

17 41. Eggs typically hatch within 7 to 10 days, and fry become free-swimming
18 within an additional 7 to 10 days.

19 42. Juvenile hitch must return to the lake within approximately one month,
20 requiring sufficient flows to avoid stranding and to reduce predation risk from birds and non-
21 native fish.

22 43. Once in the lake, juveniles rear in nearshore emergent wetland habitats,
23 relying on stands of tule (*Schoenoplectus acutus*) and other aquatic vegetation for cover and
24 food.

25 44. In the fall, juveniles move into open water, where survival depends on clean,
26 well-oxygenated conditions and adequate food availability.

27 45. Historically, Clear Lake hitch were abundant throughout the watershed,
28 inhabiting Clear Lake as well as Thurston Lake, Upper Blue Lake, Lower Blue Lake, and

1 Lampson Pond, and undertaking large spawning runs that numbered in the hundreds of
2 thousands as recently as the 1970s.

3 46. Hitch likely once spawned in most or all of Clear Lake’s tributaries, including
4 Adobe, Canyon, Cole, Cooper, Kelsey, Manning, Middle, Morrison, Scott, Schindler, and
5 Seigler Creeks.

6 47. The species, known as “chi” by local Tribes, is an important traditional food
7 source, while tule provides essential cultural and ecological functions for the Tribes and
8 hitch.

9 48. Today, the hitch’s range and abundance have dramatically declined. The
10 species is now found only in Clear Lake, Thurston Lake, and their associated tributaries
11 during spawning season, and populations in the Blue Lakes and in Lampson Pond are
12 uncertain.

13 49. Overall hitch abundance has declined by approximately 100-fold from
14 historical levels, with only a few thousand spawning individuals remaining annually. Over
15 the past two decades, consistent spawning activity in significant numbers has been observed
16 in only five tributaries—Adobe, Cooper, Kelsey, Manning, and Middle Creeks—and only
17 Kelsey and Adobe Creeks regularly support more than 1,000 spawning fish. From 2013 to
18 2020, the average annual maximum number of observed spawners was approximately 1,237
19 in Kelsey Creek and 433 in Adobe Creek.

20 50. Multiple factors have contributed to the hitch’s decline. Development, dams,
21 diversions, and other anthropogenic modifications have altered tributary habitats and
22 impeded fish passage, with the California Department of Fish and Wildlife determining in
23 2014 that such barriers have eliminated or reduced access to more than 92 percent of the
24 approximately 180 miles of historically available spawning habitat.

25 51. Additional stressors include municipal and agricultural water diversions,
26 contamination from historical mercury mining, urban and agricultural development,
27 overgrazing, increased frequency of drought and wildfire, and the widespread loss of
28 lakeshore wetlands and tule habitat.

1 59. On April 10, 2015, the Service published a positive 90-day finding that the
2 petition presented substantial evidence that listing the hitch may be warranted and initiated a
3 status review. 80 Fed. Reg. 19259 (Apr. 10, 2015). The Service based its conclusion on: (1)
4 present or threatened destruction or modification of habitat from urban and agricultural
5 development, dams, water diversions, migration barriers, mining activities, and grazing; (2)
6 overutilization for commercial fishing, recreational fishing, and tribal harvest; (3) disease and
7 predation; and (4) other natural or manmade factors affecting its continued existence,
8 including effects from climate change, contaminants, and introduced fish. *Id.* at 19261.

9 60. On December 3, 2020, the Service issued a 12-month finding concluding that
10 listing the Clear Lake hitch as threatened or endangered under the ESA was not warranted.
11 85 Fed. Reg. 78029 (Dec. 3, 2020).

12 61. In 2021, the Center sued the Service, challenging its decision to deny
13 protection to the Clear Lake hitch. In response to the Center's lawsuit, the Service agreed to
14 vacate the not warranted determination, reassess the status of the Clear Lake hitch and issue a
15 new finding on or before January 12, 2025 as to whether listing the Clear Lake hitch as
16 threatened or endangered is (a) not warranted; (b) warranted; or (c) warranted but precluded
17 by other pending proposals, pursuant to the ESA. Stip. Settlement Agreement & Order, *Ctr.*
18 *for Biological Diversity v. U.S. Fish and Wildlife Serv.*, No. 3:21-cv-06323-RS (N.D. Cal.)
19 (Aug. 17, 2021).

20 62. On January 16, 2025, the Service published a proposed rule to list the Clear
21 Lake hitch as a threatened species under the ESA due to various threats, including habitat
22 loss, degradation and modification, predation, competition, and the effects of climate change.
23 90 Fed. Reg. 4916 (Jan. 16, 2025).

24 63. With limited exceptions, the ESA requires the Service to issue a final listing
25 rule within one year of a proposed listing rule. More than one year has now passed since the
26 Service issued its proposed listing rule for the Clear Lake hitch.

27 64. It has now been nearly 14 years since the Center petitioned to list the Clear
28 Lake hitch. During the Service's egregious, unlawful, and inexcusable delay in providing the

1 protections demanded by the ESA, the Clear Lake hitch has continued to suffer significant
2 population declines and loss of habitat.

3 65. Plaintiff provided Defendants with 60-days' notice of their ESA violations, as
4 required by 16 U.S.C. § 1540(g)(2)(C), by a letter to the Service dated February 3, 2026.
5 Defendants have not remedied the violations set out in the notice letter, and an actual
6 controversy exists between the parties within the meaning of the Declaratory Judgment Act,
7 28 U.S.C. § 2201.

8 **CLAIM FOR RELIEF**

9 ***Violation of the ESA in Failing to Publish a Timely Final Listing Rule for the
Clear Lake Hitch***

10 66. Plaintiff realleges and incorporates by reference the preceding paragraphs.

11 67. With limited exceptions, the ESA requires the Service to publish a final listing
12 rule implementing its determination to list the species within 1 year of the proposed listing
13 rule. 16 U.S.C. § 1533(b)(6)(A).

14 68. In response to the Center's 2012 petition to list the Clear Lake hitch, and in
15 response to a lawsuit by the Center, the Service published a proposed rule to list the Clear
16 Lake hitch as a threatened species under the ESA on January 16, 2025. Therefore, the final
17 rule implementing the Service's determination to list the species was due January 16, 2026.

18 69. Defendants have not made the statutorily required final determination for the
19 Clear Lake hitch.

20 70. Defendants failed to perform their nondiscretionary duty to timely publish the
21 final listing rule in violation of the ESA. 16 U.S.C. § 1533(b)(6)(A).

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff respectfully requests that this Court:

24 1. Declare that Defendants violated the ESA by failing to issue a timely final
25 listing rule;

26 2. Provide injunctive relief compelling Defendants to publish a final rule listing
27 the Clear Lake hitch as threatened under the ESA by a date certain;

