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*Pro Hac Vice Application Pending*

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

Center for Biological Diversity, a  
non-profit organization; Maricopa  
Audubon Society, a non-profit  
organization,

Plaintiffs,

v.

U.S. Fish and Wildlife Service; Deb  
Haaland, in her official capacity as  
Secretary of the Interior,

Defendants.

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

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiffs Center for Biological Diversity (“Center”) and Maricopa Audubon Society challenge, pursuant to the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”), the U.S. Fish and Wildlife Service’s (“FWS”) unreasonable delay in proceeding with a proposed rule to revise existing critical habitat for the endangered Mount Graham red squirrel (*Tamiasciurus hudsonicus grahamensis*).

2. Mount Graham red squirrels are a native species found only in the Pinaleno Mountains of southeast Arizona. They are a sub-species of the North American

1 red squirrel, distinguished by a smaller body and narrower head, but sharing the same  
2 brownish-red sides and white belly. Believed to be extinct in the 1960s, the Mount  
3 Graham red squirrel was “rediscovered” in the 1970s and listed as endangered in 1987.

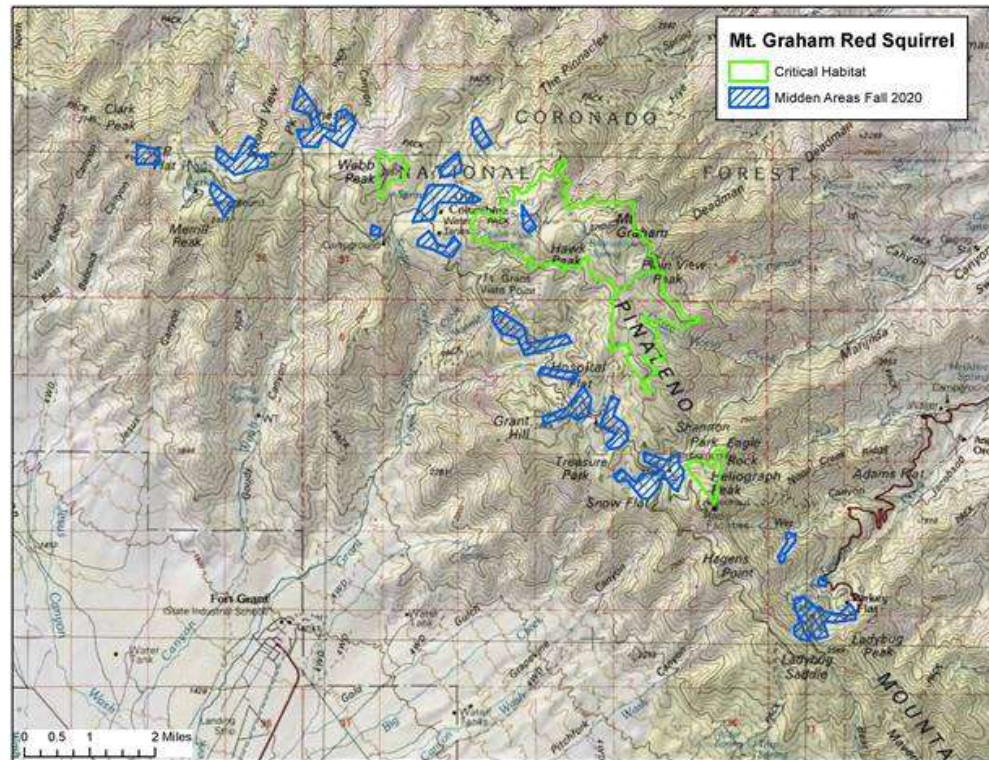
4 3. FWS designated critical habitat for the Mount Graham red squirrel on  
5 January 5, 1990. 55 Fed. Reg. 425. This designation is limited to high elevation spruce-  
6 fir forests in the Pinaleno Mountains within the Coronado National Forest (centered  
7 around Hawk Peak-Mount Graham, Heliograph Peak, and Webb Peak). However, since  
8 that time nearly all the upper elevation spruce-fir habitat has been degraded or destroyed  
9 by telescope construction, wildfire (and related intentional “back burning” to protect the  
10 telescopes), drought, insect outbreaks, and other ecological changes influenced by  
11 climate change.

12 4. Due to this habitat loss of old-growth canopied habitat, the Mount Graham  
13 red squirrel population is now isolated in the tiny islands of remnant canopied forest that  
14 are widely separated from each other, and has become critically endangered,  
15 plummeting to as few as 35 animals in 2017. In 2021, 156 animals were located, with  
16 the increase largely attributed to a new, more accurate survey method. However, the  
17 most recent 2023 fall survey only detected 144 individuals. Even with this slight  
18 population increase, the Mount Graham red squirrel is the most endangered terrestrial  
19 mammal in the United States.

20 5. Lower elevation mixed-conifer forests, long recognized as important to the  
21 species, now serve as refugia from the destruction of spruce-fir habitat and, for the  
22 foreseeable future, are essential to the species’ continued survival. Today, surviving  
23 squirrels are found primarily in four areas (Grant Hill, Riggs Lake, Turkey Flat, and  
24 Columbine), all outside of the upper elevation spruce-fir forests currently designated as  
25 critical habitat.

26 6. To address these changing circumstances and the dire status of the Mount  
27 Graham red squirrel, on December 14, 2017, Plaintiffs petitioned for revision of the  
28 existing critical habitat to include these lower elevation mixed-conifer forests and other

essential areas. The following map shows the currently designated Critical Habitat outlined in green with the currently occupied Mount Graham red squirrel areas found outside of the currently designated Critical Habitat in 2020 where the locations of the current squirrels and middens have not changed substantively:



7. Despite the squirrel’s highly imperiled status, FWS has failed to timely respond to the petition, which was submitted more than six years ago, at every turn.

8. FWS first delayed its initial response to the petition, the “90-day finding,” which was required in March of 2018. When FWS had still not issued the 90-day finding more than a year later, on April 16, 2019, Plaintiffs sued in this Court to compel the decision. *Center for Biological Diversity, et al. v. Bernhardt, et al.*, Case No.: 4:19-cv-00218-RCC. FWS finally published the required initial determination on September 6, 2019, finding that Plaintiffs’ petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. 84 Fed. Reg. 46,927.

1           9.       Once FWS makes a positive 90-day finding, it must then make a  
2 subsequent determination as to how “to proceed with the requested revision” and publish  
3 that determination in the Federal Register within 12 months. 16 U.S.C. §  
4 1533(b)(3)(D)(ii).

5           10.      After more than an additional year had passed without action, on  
6 November 30, 2020, Plaintiffs again sued in this Court. *Center for Biological Diversity,*  
7 *et al. v. Bernhardt, et al.*, Case No.: 4:20-cv-00525-LCK. On April 12, 2021, the parties  
8 entered into a Stipulated Settlement Agreement requiring FWS to submit the well-  
9 overdue 12-month finding to the Office of the Federal Register for publication no later  
10 than July 29, 2021. Dkt. No. 18.

11           11.      The required 12-month finding was published on August 3, 2021. 84 Fed.  
12 Reg. 46,927. In that finding, FWS stated that it “intend[s] that any revisions to critical  
13 habitat ... be as accurate and comprehensive as possible,” and that first completing a  
14 Species Status Assessment (“SSA”) and revised recovery plan “will inform” such  
15 revisions. The finding further states that “[o]nce that SSA and revised recovery plan are  
16 complete, a rulemaking process will be initiated if revisions to the subspecies’ critical  
17 habitat are determined to be appropriate.”

18           12.      More than 2 ½ years of additional time have now passed, again without  
19 any voluntary action by FWS to conclude its action on Plaintiffs’ petition. During this  
20 time, FWS has made no discernible progress in finalizing an SSA or revising the  
21 recovery plan. Despite the already lengthy delay, critical habitat revision for the squirrel  
22 is not included on the FWS’s most recent five-year section 4 workplan for 2023-2027.

23           13.      The APA requires administrative agencies to conclude matters presented to  
24 them “within a reasonable time” and empowers reviewing courts to “compel agency  
25 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. §§ 555(b), 706(1).  
26 FWS’s ongoing failure to initiate rulemaking to revise critical habitat for the Mount  
27 Graham red squirrel constitutes unreasonable delay, and Plaintiffs accordingly seek  
28 declaratory and injunctive relief requiring FWS to conclude action on Plaintiffs’ petition

1 by publishing a proposed critical habitat revision rule within six months of the Court's  
2 Order.

### 3 JURISDICTION AND VENUE

4 14. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 702  
5 (APA review); and 28 U.S.C. § 1331 (federal question jurisdiction).

6 15. The Court may grant the relief requested under the APA, 5 U.S.C. §§ 701–  
7 706; and 28 U.S.C. §§ 2201 and 2002 (declaratory and injunctive relief).

8 16. Although not required by law, Plaintiffs provided sixty (60) days' Notice  
9 of their intent ("NOI") to file this suit as a courtesy, by letter to FWS dated July 19,  
10 2023. FWS has not responded to or acknowledged Plaintiffs' NOI.

11 17. An actual controversy exists between the parties under 28 U.S.C. § 2201.

12 18. Venue is proper in the United States District Court for the District of  
13 Arizona pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or  
14 omissions giving rise to the Center's claims occurred in this District. Additionally, the  
15 Center resides in Tucson, Arizona.

### 16 PARTIES

17 19. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit  
18 environmental organization dedicated to the protection of native species and their  
19 habitats through science, policy, and environmental law. The Center is headquartered in  
20 Tucson, Arizona, with offices throughout the United States, as well as an office in  
21 Mexico. The Center currently has 79,143 members. The Center and its members are  
22 dedicated to the conservation of imperiled species, including the Mount Graham red  
23 squirrel, and with the full and effective implementation of the Endangered Species Act.  
24 The continuing decline and near extinction of the Mount Graham red squirrel has  
25 prompted the Center to act for the species by, among other actions, submitting the  
26 petition to revise critical habitat.

27 20. Plaintiff MARICOPA AUDUBON SOCIETY, a chapter of the National  
28 Audubon Society located in the Phoenix metropolitan area, is a non-profit environmental



1 organization of volunteers dedicated to the enjoyment of birds and other wildlife with a  
2 primary focus on the protection and restoration of the habitat of the Southwest through  
3 fellowship, education, and community involvement. Maricopa Audubon has over 2,300  
4 members, primarily in central Arizona. Maricopa Audubon has been actively involved in  
5 efforts to protect the Mount Graham red squirrel and its habitat since 1988.

6 21. Plaintiffs' members have been involved in Mount Graham red squirrel  
7 protection efforts for more than thirty years and include individuals who regularly visit  
8 areas within the Pinaleno Mountains which are occupied or formerly occupied by the  
9 Mount Graham red squirrel, and who seek to observe or study the squirrel in its natural  
10 habitat. Plaintiffs' members and staff derive recreational, spiritual, professional,  
11 scientific, educational, and aesthetic benefit from these activities, and intend to continue  
12 to use and enjoy these areas in the future.

13 22. Robin Silver is a co-founder and Board member of the Center for  
14 Biological Diversity, and a member of the Center and the Maricopa Audubon Society.  
15 Dr. Silver has been centrally involved in the effort to protect the squirrel since May  
16 1989, when he spent an extended period observing and photographing the species  
17 alongside the Arizona Game and Fish Department and FWS. He subsequently spent time  
18 on Mt. Graham documenting the real-time impacts on the squirrel from the construction  
19 of the University of Arizona's International Observatory. During the past four decades,  
20 he has frequently visited Mt. Graham to observe and photograph the squirrel, including  
21 recent trips on November 10, 2022, April 16, 2023, June 28, 2023, and November 1,  
22 2023. His ability to observe and photograph the squirrel has become increasingly  
23 difficult during that time, as the squirrel's spruce-fir habitat has been progressively  
24 destroyed and the species' population has significantly declined. Dr. Silver authored the  
25 petition to revise the squirrel's critical habitat. Dr. Silver has concrete plans to visit the  
26 Coronado National Forest to observe and photograph Mount Graham red squirrels in the  
27 near future, including this coming summer in July 2024.

28 23. The above-described aesthetic, recreational, professional, and other



1           28. FWS is, with limited exceptions, required to designate “critical habitat”  
2 concurrently with listing a species as threatened or endangered. *Id.* § 1533(a)(3)(A).

3           29. Critical habitat includes the specific areas occupied by the species with  
4 “physical or biological features (I) essential to the conservation of the species and (II)  
5 which may require special management considerations or protection.” *Id.* § 1532(5)(A).  
6 It also includes specific areas unoccupied by the species at the time of listing “upon a  
7 determination by the Secretary that such areas are essential for the conservation of the  
8 species.” *Id.* In turn, “conservation” means “the use of all methods and procedures which  
9 are necessary to bring endangered species or threatened species to the point at which the  
10 measures provided pursuant to [the ESA] are no longer necessary.” *Id.* § 1532(3).

11           30. Protecting a species’ critical habitat is crucial for the protection and  
12 recovery of listed species, particularly those that have become endangered or threatened  
13 due to historic and ongoing habitat loss and/or degradation. When critical habitat is  
14 designated, federal agencies must ensure that their actions do not “result in the  
15 destruction or adverse modification” of a species’ critical habitat. *Id.* § 1536(a)(2).

16           31. FWS maintains ongoing duties with respect to critical habitat. The ESA  
17 provides for critical habitat revision, subject to the same “best available scientific data”  
18 standard as an initial designation. *Id.* § 1533(b)(2).

19           32. The ESA provides the right to petition for critical habitat revision, in  
20 accordance with the APA. 16 U.S.C. § 1533(b)(3)(D)(i)-(ii); 5 U.S.C. § 553(e). The  
21 evaluation of such petitions is governed by ESA implementing regulations. 50 C.F.R. §  
22 424.14(c), (e).

23           33. The ESA requires FWS, within 90 days of receiving the critical habitat  
24 revision petition, to “make a finding as to whether the petition presents substantial  
25 scientific information indicating that the revision may be warranted.” 16 U.S.C. §  
26 1533(b)(3)(D)(i).





40. From 1963 to 1967, researchers were unable to locate any remaining Mt. Graham red squirrels, but some were reported shortly thereafter by Forest Service personnel, and in the early 1970s at least four red squirrels were recorded by Arizona Game and Fish Department and Forest Service personnel.

41. In a 1984-85 status survey funded by FWS, researchers located the Mount Graham red squirrel or its sign at 16 locations in the Pinaleno Mountains and estimated its population to be 300-500 animals. These estimates were later revised downward, to approximately 280 squirrels.

## **II. Listing and Designation of Critical Habitat Under the Endangered Species Act**

42. FWS proposed listing the Mount Graham red squirrel as an endangered species and designating critical habitat on May 21, 1986, 51 Fed. Reg. 18,630, and issued a final listing rule on June 3, 1987. 52 Fed. Reg. 20,994.

43. Like all subspecies of red squirrels, the Mount Graham red squirrel is an arboreal species. At the southern extremity of the red squirrel range, the Mount Graham red squirrel is restricted to canopied montane forests.

44. At the time of its listing, the squirrel was found at highest densities in Engelmann spruce and corkbark fir forests, comprising 86 percent of all middens surveyed, with 48 percent of the species' active middens located above 10,200 feet in elevation. In total, FWS estimated there to be 680 acres of contiguous spruce-fir forest in the Pinaleno Mountains, with an estimated density of one red squirrel per 8 acres.

45. The squirrel was also found below 9,200 feet in elevation at the time of listing, with an estimated density of one red squirrel per 124 acres.

46. In the final listing rule, FWS recognized the proposed construction of a major astrophysical facility on Mount Graham by the University of Arizona ("UA") as a primary threat to the squirrel. 52 Fed. Reg. at 20,997. FWS identified numerous potential negative effects of telescope construction, including removal of vegetation resulting in decreased food sources; increased blow-down of trees caused by the opening of forested

1 areas; changes in the microclimatic conditions necessary for middens; increased  
2 vulnerability to predation; decreased reproductive interaction due to increased habitat  
3 fragmentation and population isolation; and increases in tourism, recreational use, and  
4 traffic. *Id.*

5 47. The final listing rule noted that due to its isolation and restricted  
6 population size and distribution, “the Mount Graham red squirrel is particularly  
7 vulnerable to any disturbance that might bring about further declines in its already  
8 precariously low numbers and weakening of genetic viability.” *Id.* at 20,998.

9 48. FWS designated critical habitat for the Mount Graham red squirrel on  
10 January 5, 1990. 55 Fed. Reg. 425. The designation totals approximately 2,000 acres in  
11 three areas—all located in high elevation, spruce-fir forest—Hawk Peak/Mount Graham,  
12 Heliograph Peak, and Webb Peak. These areas contained about 70 percent of all known  
13 squirrel middens.

14 49. In comments on the draft listing and critical habitat rule, FWS was asked  
15 to enlarge the critical habitat to include additional occupied and unoccupied areas,  
16 including the lower elevation mixed-conifer forests “where red squirrels have been  
17 previously observed and where they appear to have survived their most vulnerable  
18 period in history.” *Id.* In declining the recommendation, FWS reasoned that the “higher  
19 elevations appear[] to be the most important to this squirrel and contains the highest  
20 density of squirrel middens.” *Id.*

21 50. In addition, UA objected to the inclusion of the 150-acre Mt. Graham  
22 International Observatory Site. FWS refused to exclude this area, noting that it was  
23 “composed largely of excellent habitat,” and that “[e]xcellent habitat is in short supply  
24 for this species, totaling only four percent of the total habitat.” *Id.*

25  
26  
27  
28

1 The following is a photograph of Mount Graham on October 10, 1989, with its  
 2 summit carpeted by intact canopied spruce-fir forest. © Robin Silver



16  
17 **III. Post-Listing Habitat Destruction and Population Decline**

18 51. In 1988, Congress passed the Arizona-Idaho Conservation Act. Pub. L.  
 19 No. 100-696, 102 Stat. 4571. The Act included a provision exempting telescope  
 20 construction from compliance with section 7 consultation requirements under the ESA.  
 21 *Id.*, Title VI, Mount Graham International Observatory. Subsequently, three telescopes  
 22 and associated roads and infrastructure have been constructed on and near Emerald  
 23 Peak—the UA Columbus or Large Binocular Telescope, the Vatican Advanced  
 24 Technology Telescope, and the German Max Planck Submillimeter Telescope.

25 52. As the Ninth Circuit Court of Appeals held in its decision reluctantly  
 26 finding that the Act exempted telescope construction from ESA requirements:

27 “The possible extinction of an endangered species is not a threat that  
 28 we take lightly. If the Mount Graham Red Squirrel becomes extinct  
 as a result of the astrophysical research project, then the new



1           telescopes will not represent an unqualified step forward in our quest  
2           for greater knowledge. As we expand our horizons by building  
3           bigger and better telescopes, we would do well to remember that we  
4           also have much to learn from the plant and animal life in the world  
5           around us. By contributing to the extinction of an endangered  
6           species, we limit our horizons at least as seriously as we do by  
7           delaying or even disallowing the construction of new telescopes . . .  
8           We can only hope that Congress's decision will prove to be a wise  
9           one."

10          *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1463 (9th Cir. 1992).

11           53.     In addition to the direct and indirect destruction of habitat essential to the  
12           Mount Graham red squirrel resulting from telescope construction, the high elevation  
13           spruce-fir forests of the Pinaleño Mountains have experienced significant ecological  
14           changes, including large, high-severity fires, extended drought, and outbreaks of forest  
15           insects.

16           54.     Firefighting efforts to protect the telescopes have further compounded the  
17           loss of Mount Graham red squirrel habitat. As observed by the Forest Service in 2010,  
18           the telescopes "have precipitated aggressive firefighting techniques, and inhibited the  
19           restoration of natural ecosystem processes." Final Environmental Impact Statement for  
20           the Pinaleño Ecosystem Restoration Project, U.S. Forest Service Southwestern Region  
21           (February 2010).

22           55.     In 1988, approximately 615 suitable acres of the estimated 680 historical  
23           acres of pure spruce-fir forest remained.

24           56.     In 1996, the Clark Peak Fire destroyed 50 percent of squirrel middens  
25           within the burned area.

26           57.     In 2004, a population survey estimated that 550 red squirrels remained, but  
27           later that year the Nuttall-Gibson Complex Fires burned approximately half of the  
28           species' designated critical habitat. On August 4, 2004, 250 acres of spruce-fir critical  
29           habitat was inappropriately and unnecessarily burned by USFS firefighters.  
30           Subsequently, between 2004 and 2017 the population was significantly reduced, but then  
31           remained relatively stable between 200 and 350 squirrels.

32           58.     In 2017, the Frye Fire burned approximately 78 percent of the squirrel's  
33           habitat, resulting in a precipitous drop in the squirrel population to a mere 35 animals.

1           59. Today, it is estimated that only 34.6 acres of high elevation, essential  
2 spruce-fir habitat remains. Consequently, most, if not all, Mount Graham red squirrels  
3 are found in lower elevation, mixed conifer forest outside their designated critical  
4 habitat.

5           60. The latest population survey, conducted in fall 2023, determined that the  
6 Mount Graham red squirrel population currently stands at 144 animals.

7           Below is a photograph of the Mount Graham summit on November 7, 2010, with  
8 most of the historical spruce-fir canopied forest destroyed on with telescopes present.©  
9 Robin Silver.



22           **IV. The Petition to Revise Critical Habitat**

23           61. On December 14, 2017, Plaintiffs petitioned for revision of the existing  
24 critical habitat.

25           62. Even prior to the widespread loss and destruction of the high elevation  
26 spruce-fir forests, the lower elevation, mixed-conifer forests have long been recognized  
27 as important to the continued survival and recovery of the Mount Graham red squirrel.  
28



1 No areas outside of the high elevation, spruce-fir forests were designated as critical  
 2 habitat, however.

3 63. The remaining Mount Graham red squirrels are now primarily located in  
 4 four areas: the Grant Hill area, the Riggs Lake area, Turkey Flat, and Columbine. All  
 5 these areas are outside spruce-fir forests, and are instead located in lower elevation,  
 6 mixed-conifer forests which have not been designated as critical habitat.

7 64. The Petition specifically requests revision of critical habitat as follows:

8 In general, we recommend designation of critical habitat in mixed-  
 9 conifer and spruce-fir forest above 7,400 feet . . . [as recommended  
 10 by the 2011 draft Recovery Plan]. What is not general, and most  
 11 important here, is the inclusion of areas currently occupied by the  
 Mount Graham red squirrel. These areas are the Grant Hill area, the  
 Riggs Lake area, Turkey Flat, and Columbine.

12 65. Following Plaintiffs' filing of litigation, FWS published the required 90-  
 13 day finding in the Federal Register on September 6, 2019, announcing that Plaintiffs'  
 14 Petition presents substantial scientific or commercial information indicating that the  
 15 petitioned action may be warranted. 84 Fed. Reg. 46,927.

16 66. After a second lawsuit resulted in settlement requiring FWS to make the  
 17 overdue 12-month finding, that finding was published in the Federal Register on August  
 18 3, 2021. 86 Fed. Reg. 41,743. In that 12-month finding, the FWS stated that "if  
 19 appropriate," it would initiate rulemaking to revise Mount Graham red squirrel critical  
 20 habitat once an SSA and revised recovery plan are complete.

21 67. FWS has taken no further action on the petition since the August 3, 2021,  
 22 12-month finding.

### 23 CLAIM FOR RELIEF

#### 24 Failure to Issue 12-Month Finding on Petition to Revise Critical Habitat 25 in Violation of the ESA and APA

26 68. Plaintiffs incorporate all preceding paragraphs by reference.

27 69. In responding to a petition to revise critical habitat, the ESA requires FWS  
 28 to make a determination as to how the agency intends "to proceed with the requested

revision” and publish that determination in the Federal Register within 12 months. 16 U.S.C. § 1533(b)(3)(D)(ii). On August 3, 2021—nearly 4 years after receiving the petition—FWS stated that “if appropriate” it would proceed with the petitioned critical habitat revision after completing an SSA and revised Recovery Plan. FWS did not explain why it needed to complete these actions before proceeding with any critical habitat revision. Nor did it set forth any timetable for when an SSA and revised Recovery Plan would be completed, let alone when a critical habitat revision might proceed.

70. More than 2 ½ years of additional time have now passed without any action by FWS to finalize an SSA, revise the recovery plan, or conclude its action on plaintiffs’ petition.

71. Despite the already lengthy delay, critical habitat revision for the Mount Graham red squirrel is not included on the FWS’s most recent five-year section 4 workplan for 2023-2027.

72. The APA requires administrative agencies to conclude matters presented to them “within a reasonable time” and empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. §§ 555(b), 706(1).

73. FWS’s ongoing failure to initiate rulemaking to revise critical habitat for the Mount Graham red squirrel, or even to make a final determination on whether it is “appropriate” to revise the critical habitat, constitutes unreasonable delay in concluding the petitioned action presented to it, in violation of the APA.

74. Plaintiffs and their members are injured by FWS’s failure to initiate the petitioned rulemaking to revise critical habitat. An Order of the Court directing FWS to make this required finding by a date-certain would redress Plaintiffs’ injuries.

### **REQUEST FOR RELIEF**

Wherefore, Plaintiffs respectfully request that the Court:

1. Declare that Defendants violated the ESA and APA by unreasonably delaying either initiating rulemaking in response to Plaintiffs’ petition to revise critical

1 habitat for the Mount Graham red squirrel or, alternatively, making a final decision not  
2 to revise the designation,

3 2. Order FWS to conclude action on Plaintiffs' petition by either (1)  
4 publishing a proposed critical habitat revision rule; or (2) issuing a final decision not to  
5 revise the critical habitat, within six months of the Court's Order,

6 3. Grant Plaintiffs their reasonable attorneys' fees and costs associated with  
7 this action, as provided by Equal Access to Justice Act, 28 U.S.C. § 2412; and

8 4. Provide such additional relief as the Court may deem just and proper.

9 Respectfully Submitted this 19th day of March, 2024.

10 s/ Brian Segee  
11 Brian Segee (Cal. Bar No. 200795)  
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17 *Pro Hac Vice Application Pending*

18 Attorney for Plaintiffs  
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