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Center for Biological Diversity  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
TUCSON DIVISION

Center for Biological Diversity and  
Maricopa Audubon Society,  
  
Plaintiffs;  
  
v.  
  
United States Fish and Wildlife Service,  
  
Defendant.

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

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

**INTRODUCTION**

1. The Arizona eryngo (*Eryngium sparganophyllum*) is an extremely rare and critically imperiled plant species with only two small populations remaining in the United

States. The eryngo serves as a critical pollinator and benchmark for habitat health. It displays cream-colored spherical flower heads situated within open inflorescences and can grow to more than five feet tall. Botanists regard it as an enigma due to its unique morphology.



2. The eryngo is adapted to live only in groundwater-fed desert wetland habitats, which have been nearly eradicated by unsustainable groundwater pumping in the Southwest. Seeking to prevent the eryngo's extinction, Plaintiffs Center for Biological

Diversity (“Center”) and Maricopa Audubon Society (“Maricopa Audubon”) petitioned the Fish and Wildlife Service (“Service”) to list the plant as “threatened” or “endangered” under the Endangered Species Act (“ESA”). Although the Service determined that listing the eryngo “may be warranted,” it has failed to make a final determination on the petition within 12 months of receiving it, as the ESA requires. This action seeks to compel the Service’s compliance with the strict deadline imposed by the ESA.

### **JURISDICTION AND VENUE**

3. Plaintiffs bring this lawsuit pursuant to 5 U.S.C. §§ 701–06 (Administrative Procedure Act) (“APA”), and 16 U.S.C. § 1540(g) (ESA citizen suits), which waive the United States’ sovereign immunity. The Center provided the Service 60 days’ advance notice of its intent to sue on May 3, 2019, satisfying the notification requirements of 16 U.S.C. § 1540(g)(2).

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), *id.* § 2201 (declaratory judgments).

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c) & (e) and 16 U.S.C. § 1540(g)(3)(A). The Center and Maricopa Audubon are headquartered in Arizona. The Arizona eryngo is found in southern Arizona, with one population in Tucson and another in the San Pedro Riparian National Conservation Area (“SPRNCA”). The Service maintains a field office in Arizona.

6. This case should be assigned to the Tucson Division of this Court because the Service’s failure to act implicates critically imperiled plant species located in Pima

and Cochise Counties, which are within the Tucson Division. *See* L.R.Civ 77.1(a), (c). Additionally, the Center is headquartered in Tucson.

### **PARTIES**

7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national nonprofit conservation organization with more than 1.6 million members and supporters. The Center is dedicated to the preservation of native plant and animal species. Through scientific research, grassroots activism, creative media, and legal action, the Center works to protect plant species facing extinction, such as the Arizona eryngo. Center founders, staff, and members have been actively involved in working to protect and preserve the San Pedro River ecosystem for more than three decades. The Center's founders and staff monitor and study the eryngo and its habitat, as well as threats to its continued existence. The Center's founders, staff, and members regularly use eryngo habitat for observation, research, and aesthetic enjoyment. They derive scientific and aesthetic benefits from the eryngo's existence and from the ecosystem in which it survives.

8. Plaintiff MARICOPA AUDUBON SOCIETY is a nonprofit organization with over 3,000 members dedicated to the study and enjoyment of birds and other wildlife, and to the protection and restoration of habitat in the Southwest. Maricopa Audubon is run by volunteers and strives to protect and restore wildlife habitat through education and community involvement.

9. Maricopa Audubon has worked to protect the San Pedro River since 1977, when it helped stop construction of the proposed Charleston Dam, which would have inundated the southern half of the Upper San Pedro River into Mexico. Maricopa

Audubon members also monitor and study the eryngo and its habitat, as well as threats to its continued existence. Maricopa Audubon members regularly use eryngo habitat for observation, research, and aesthetic enjoyment. They derive scientific and aesthetic benefits from the eryngo's existence and from the ecosystem it supports.

10. The Service's failure to make a final determination on the petition to list the eryngo is an abdication of its responsibility to determine promptly whether the species and its habitat warrant critical protections under the ESA. The Service's failure to act on the petition within the statutorily prescribed timeframe harms Plaintiffs' interest in the eryngo. This delay allows threats to the species and its habitat to continue unabated, thereby prolonging and exacerbating the risk of extinction. Moreover, the Center and Maricopa Audubon invested time and resources in petitioning the Service to list the eryngo as endangered or threatened.

11. Defendant U.S. FISH AND WILDLIFE SERVICE is a federal agency within the Department of the Interior, which has the primary responsibility for implementing the ESA for terrestrial plants.

### **LEGAL FRAMEWORK**

12. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its purpose is to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b).

13. The ESA requires the Service to list species of plants and animals found to be facing extinction as "endangered" or "threatened." *Id.* § 1533(a)(1). A species is

“endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is “threatened” if it is likely to become endangered in the foreseeable future. *Id.* § 1532(20).

14. The ESA requires the Service to decide whether to list a species based on five factors: habitat destruction, overharvesting, disease or predation, inadequacy of existing regulatory mechanisms, and “other natural or manmade factors affecting its continued existence.” *Id.* § 1533(a)(1). Concurrent with a listing decision, the ESA directs the Service to designate habitat essential to the species’ conservation as “critical habitat.” *Id.* § 1533(a)(3)(A)(i).

15. Listing a species as endangered or threatened affords it a number of protective measures, including interagency consultation under ESA section 7 to ensure that any proposed activities do not further harm the species. *Id.* § 1536.

16. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. *Id.* § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

17. To the “maximum extent practicable,” within 90 days after receiving a petition to list a species, the ESA directs the Service to 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). If the Service finds that listing “may be” warranted, it must promptly begin status review of the species and publish its findings in the Federal Register. *Id.*

18. Within 12 months of receiving a petition, the Service must make one of three findings: either the petitioned action is (1) not warranted; (2) warranted; or (3)

warranted but presently precluded by other pending proposals for listing species. *Id.* § 1533(b)(3)(B); *see also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1178 (9th Cir. 2002) (holding that the Service must make both the 90-day “initial finding” and the 12-month “final determination” within one year of receiving a petition). The ESA contains a strict one-year deadline to act on a petition because Congress recognized that “timeliness in the listing process is essential.” *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 839 (9th Cir. 2001). To “force action” on listing proposals, *id.*, Congress amended the ESA’s petition process to expressly provide mandatory deadlines by which the Secretary must act on a petition. *See* Pub. L. 97-304 § 2(a)(2), 96 Stat. 1411, 1412 (1982) (amending 16 U.S.C. § 1533(b)(3) to include the 90-day and 12-month finding requirements).

### **FACTUAL BACKGROUND**

19. The eryngo can live only in silty groundwater-fed wetlands unique to the desert Southwest, known as ciénegas. Ciénegas are characterized by organic and saturated reducing soils and stable aquatic climax communities. They are highly productive habitats that provide critical refugia to fish, amphibians, invertebrates, and migratory birds. The surface water present at these biogeographically isolated wetlands is necessary for the survival of the eryngo.

20. Habitat destruction is the greatest threat the eryngo faces. *See* 16 U.S.C. § 1533(a)(1)(A). Ciénegas have been nearly wiped out over the past century by groundwater pumping, overgrazing, altered patterns of water infiltration and runoff, and

reductions in stream baseflows. By 2015, ciénegas had been reduced to 5% of their historic range. Petition at 10 (attached as Exhibit 1).

21. As ciénega habitats have been lost, so too have eryngo populations. While the eryngo was once found throughout Arizona and New Mexico, recent surveys demonstrate that it has been almost entirely extirpated from the United States. The only documented eryngo population in New Mexico, at Las Playas Springs, was recently lost due to habitat degradation caused by groundwater pumping and copper mining. Similarly, at a former habitat site in Tucson called Agua Caliente, the eryngo population disappeared after resort development depleted the spring on which it relied.

22. The eryngo survives at two isolated sites in the United States: the Lewis Springs ciénega within SPRNCA (less than two acres), and La Cebadilla ciénega in Tucson (three acres). There are also two isolated and vulnerable eryngo populations in Mexico—one in Chihuahua and one in Sonora.

23. The Lewis Springs ciénega receives water from springs on the east side of the San Pedro River; water from the spring's outlet flows to the west and into the San Pedro River. *Id.* The source of the water at Lewis Springs derives primarily from the deep aquifer, as opposed to the shallow alluvial aquifer from the San Pedro River base flow. *Id.* at 11.

24. The population center and military operations at Sierra Vista and Fort Huachuca are withdrawing more water from this aquifer than is being replenished, which the Service has acknowledged as a threat to the “baseflow of the upper San Pedro River.” *Id.*

25. Although the natural recharge to the aquifer totals roughly 15,000 acre-feet per year (“afy”), in 2012 the Arizona Department of Water Resources (“ADWR”) issued permits to pump a total of 22,751 afy from the local groundwater aquifer. A report by the Upper San Pedro Partnership indicated that the aquifer overdraft in 2014 exceeded 5,100 afy. This deficit will increase even further with the 3,302.35 afy of future use by Castle & Cooke’s “Tribute” development and the 306 additional well permits ADWR issued between 2012 and 2018. *Id.* at 14.

26. Since Plaintiffs submitted their petition, the eryngo has moved closer to extinction. Its habitat is increasingly imperiled as the local groundwater pumping overdraft increases. *Id.*

27. Overgrazing by cattle has also resulted in the degradation of ciénega habitat. The Center and its members have frequently observed illegal trespass cattle at Lewis Springs. *Id.* at 15.

28. Threats to ciénega habitat by overgrazing are likely to continue. Since Plaintiffs filed their petition on April 2, 2018, the Bureau of Land Management (“BLM”) published a proposed Resource Management Plan (May 20, 2019) that would increase grazing in SPRNCA, thereby assuring continued harm to the eryngo and its habitat from trespass cattle.

29. La Cebadilla ciénega is also threatened by groundwater pumping. The spring flows that support La Cebadilla are diverted to support a pond on private property north of the site. *Id.* at 15–16.

30. In addition to habitat modification, anthropogenic climate change constitutes one of the greatest threats to the eryngo and its ciénega habitat. *See* 16 U.S.C. § 1533(a)(1)(E). The Southwest has been getting hotter and drier, and climate models indicate the situation is worsening. For instance, between 2013 and 2018, the average temperature in Tucson was 2.5 degrees Fahrenheit above the 100-year average, and the level of precipitation was more than five inches below the 100-year average. These climatic changes will result in declines in surface water and groundwater on which ciénegas and the eryngo depend. Regional population growth and increased demand for freshwater will place even more pressure on water supplies and groundwater levels, exacerbating this problem.

31. Laws and regulations currently in place have not adequately protected the eryngo from the effects of groundwater pumping. *See id.* § 1533(a)(1)(D). Although legislation directs BLM to manage SPRNCA in a manner that conserves the riparian area, *see id.* § 460xx-1(a), groundwater pumping within the San Pedro basin has resulted in significant depletion of the deep aquifer that sustains Lewis Springs. Moreover, mitigated growth standards or other direct mechanisms to regulate demand on the aquifer supporting La Cebadilla do not exist. The private pond that draws water away from La Cebadilla is not subject to any regulations or conservation measures.

32. In addition, the law currently fails to protect the eryngo and its habitat from trespass cattle in SPRNCA. Although livestock grazing is currently prohibited in Lewis Springs, enforcement is lacking. The Center and the Nature Conservancy have observed trespass cattle grazing throughout SPRNCA, including at Lewis Springs.

33. Experts who have studied and evaluated the status of the eryngo have determined that the species is facing extinction. NatureServe, a conservation organization, ranks the eryngo as critically imperiled globally (G1G2), and the New Mexico Rare Plant List describes the species as “rare and endangered in the United States.” Petition at 8 (Exhibit 1). The Arizona Rare Plant Advisory Group categorizes the Arizona eryngo as a plant of “Very High Concern,” its highest imperilment category used for “the most endangered plants in Arizona.” *Id.* The eryngo is ranked as state historical (SH) in New Mexico, critically imperiled (S1) in Arizona, and nationally imperiled (N1) in the United States. *Id.*

#### **PROCEDURAL BACKGROUND**

34. On April 2, 2018, the Center and Maricopa Audubon filed a petition to list the Arizona eryngo as endangered or threatened under the ESA, and to designate critical habitat for the plant. The Service received all documents on April 9, 2018, and acknowledged that it was required to make its 90-day finding by July 8, 2018.

35. The Service failed to make a 90-day initial finding on the petition as required by the ESA. The Center then sent a 60-day notice of intent to sue to correct this violation on March 28, 2019 (attached as Exhibit 2). On April 26, 2019, over a year after receiving the petition to list the eryngo, the Service made an initial 90-day finding that the petition “present[s] substantial scientific or commercial information indicating that the petitioned action[] may be warranted.” 84 Fed. Reg. 17768 (Apr. 26, 2019) (attached as Exhibit 3).

36. The ESA required the Service to make a 12-month final determination by April 9, 2019. While the Service has stated it plans to initiate a status review for the eryngo to determine if listing is warranted, it has not made a final determination in accordance with the April 9, 2019 deadline. Meanwhile, the eryngo has edged closer to extinction.

37. On May 3, 2019, the Center provided the Service with a 60-day notice letter of its intent to sue to compel a final determination on the petition (attached as Exhibit 4).

**FIRST CAUSE OF ACTION**  
*(Violation of the ESA—Failure to make determination)*

38. Plaintiffs incorporate all preceding paragraphs by reference.

39. The Service has failed to publish a final determination concerning the petition to list the Arizona eryngo as endangered or threatened within 12 months of its receipt of the petition, as required by 16 U.S.C. § 1533(b)(3)(B).

40. The Service has failed to perform a nondiscretionary act or duty within the meaning of the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(C).

**SECOND CAUSE OF ACTION**  
*(Violation of the APA—Unlawfully withholding action)*

41. Plaintiffs incorporate all preceding paragraphs by reference.

42. By failing to publish a nondiscretionary 12-month final determination on the petition to list the Arizona eryngo as endangered or threatened, the Service has unlawfully delayed compliance with 16 U.S.C. § 1533(b)(3)(B), which constitutes agency

action unlawfully withheld and unreasonably delayed within the meaning of the APA, 5 U.S.C. § 706(1).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request that this Court enter judgment providing the following relief:

A. Declaratory judgment that the Service has failed to comply with a non-discretionary duty to publish a 12-month final determination regarding the petition to list the Arizona eryngo as endangered or threatened, in violation of the ESA, 16 U.S.C. § 1533(b)(3)(B), and the APA, 5 U.S.C. § 706(1);

B. Injunctive relief compelling the Service to publish in the Federal Register a 12-month final determination on Plaintiffs' petition to list the Arizona eryngo;

C. An order awarding Plaintiffs their costs of litigation, including reasonable attorney's fees; and

D. Any other relief as the Court deems proper.

Respectfully submitted this 12th day of July, 2019.

/s/ Alex J. Hardee

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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

**Civil Cover Sheet**

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**The completed cover sheet must be printed directly to PDF and filed as an attachment to the Complaint or Notice of Removal.**

**Plaintiff(s): Center for Biological Diversity and Maricopa Audubon Society**

**Defendant(s): United States Fish and Wildlife Service**

County of Residence: Pima

County of Residence: Outside the State of Arizona

County Where Claim For Relief Arose: Outside the State of Arizona

Plaintiff's Atty(s):

Defendant's Atty(s):

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II. Basis of Jurisdiction:                    **2. U.S. Government Defendant**

III. Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff:- N/A  
Defendant:- N/A

IV. Origin :                                    **1. Original Proceeding**

V. Nature of Suit: **899 Administrative Procedure Act/Review  
or Appeal of Agency Decision**

VI. Cause of Action: **5 U.S.C. §§ 701-06; 16 U.S.C. § 1540(g)**

VII. Requested in Complaint

Class Action: **No**

Dollar Demand: **None**

Jury Demand: **No**

VIII. This case IS RELATED to Case Number **Not Related.** assigned to Judge.

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**Signature:** s/Alex J. Hardee

**Date:** 7/12/2019

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Revised: 01/2014