

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

CENTER FOR BIOLOGICAL )  
DIVERSITY )  
 ) Civil Action No.  
Plaintiff, )  
 )  
v. )  
 )  
SAM HAMILTON, in his official capacity )  
as Southeast Regional Director of the )  
United States Fish and Wildlife Service; )  
H. DALE HALL, in his official capacity as )  
Director of the United States Fish and )  
Wildlife Service; DIRK KEMPTHONRE, )  
in his official capacity as )  
Secretary of the Interior )  
 )  
Defendants. )  
\_\_\_\_\_ )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiff, Center for Biological Diversity (“Center”), challenges the failure of Defendants, Sam Hamilton, Southeast Regional Director of the U.S. States Fish and Wildlife Service, H. Dale Hall, Director of the U.S. Fish and Wildlife Service, and Dirk Kempthorne, Secretary of the Interior (collectively “FWS”), to protect *Agave eggersiana* and *Solanum conocarpum* by listing the species as threatened or endangered under the Endangered Species Act (“ESA”).

16 U.S.C. § 1533.

## **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 16 U.S.C. § 1540(c) and (g) (action arising under the ESA and citizen suit provision).

3. This Court may grant the relief requested under 28 U.S.C. § 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. § 701-706 (Administrative Procedure Act) (“APA”).

4. As required by 16 U.S.C. § 1540(g)(2), Plaintiff furnished Defendants with written notice of their intent to sue more than 60 days ago. Defendants have failed to respond to Plaintiff’s notice, and have not corrected their violations of the law. Therefore, an actual controversy currently exists between the parties within the meaning of the Declaratory Judgment Act.

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

## **PARTIES**

6. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) sues on behalf of itself and its more than 40,000 members. The Center is a non-profit corporation dedicated to the preservation, protection and restoration of biodiversity, native species, ecosystems, and public lands. The Center previously sued to compel FWS to make a 12-month finding for *Agave eggersiana* and

*Solanum conocarpum*. Members of the Center derive scientific, recreational, educational, and aesthetic benefits from *Agave eggersiana* and *Solanum conocarpum* and their habitat. Center members have undertaken extensive efforts to protect and recover the *Agave eggersiana* and *Solanum conocarpum*. They have produced scientific reports about the species and are invested in the recovery of the species. Center members have visited the habitat and potential habitat of *Agave eggersiana* and *Solanum conocarpum* and viewed the plant species in the wild and under cultivation. The Center's members have plans to return to these areas in the future. The Center's members also have a desire to see the species recover in previously inhabited areas within the Virgin Islands. Defendants' arbitrary decision not to list these species leaves them in an unprotected state that reduces opportunities to increase their numbers and may lead to their extinction. As such, Defendants' action under the ESA has adversely affected and continues to adversely affect and irreparably harm the Center and its members' educational, scientific, aesthetic, conservation, professional, and recreational interests in these plants and their habitat. The Center's injuries would be redressed by the relief sought.

7. Defendant DIRK KEMPTHORNE is sued in his official capacity as the Secretary of the Interior. The Secretary is the federal official responsible for complying with the statutory requirements of the ESA for terrestrial species.

8. Defendant H. DALE HALL is sued in his official capacity as the Director of FWS. The Secretary has delegated his ESA responsibilities to the Director of FWS.

9. Defendant Sam Hamilton is sued in his official capacity as the Southeast Regional Director of FWS. The Director has delegated certain ESA responsibilities to the Regional Direction, and Mr. Hamilton was responsible for overseeing decisions under the ESA related to species on the U.S. Virgin Islands.

### **STATUTORY FRAMEWORK OF THE ESA**

10. The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b). The ESA's ultimate goal is to recover listed species to the point where they no longer need legal protection. *Id.* §§ 1531(b)-(c), 1532(3), 1533(f).

11. Before the ESA can protect a species facing extinction or that species' habitat, the species must be listed as either endangered or threatened. *Id.* § 1533(d). 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 an endangered species within the foreseeable future." *Id.* § 1532(20). The listing process is the essential first step in the ESA's system of species protection and recovery.

12. FWS must list a species if it is threatened or endangered due to any one or a combination of the following 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). In making this decision, FWS must conduct a thorough “review of the status of the species” and base its conclusions “solely on the . . . best scientific and commercial data available.” Id. § 1533(b)(1)(A).

13. Under FWS policy, the agency must obtain independent peer review of proposed listings to ensure it is utilizing the best scientific and commercial data available. 59 Fed. Reg. 34270 (Jul. 1, 1994).

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

15. Upon receipt of a petition to list a species, FWS has 90 days to make a finding as to 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 determination is known as a “90-day finding” and must be published in the Federal Register. 16 U.S.C. § 1533(b)(3)(A).

16. After issuing a positive 90-day finding, FWS must commence a status review of the species. Within twelve months from the date FWS received the petition, it must make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by work on other pending proposals for listing species. Id. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). This second determination is known as a “12-month finding” and must be published in the Federal Register.

17. If FWS finds the listing of the species is warranted, then FWS must publish a proposed rule to list such species as either endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5).

18. Within one year of the publication of a proposed rule to list a species, FWS must render a final decision on the proposed rule. Id. § 1533(b)(6)(A).

19. If FWS finds the petition action is not warranted, it must publish such a finding in the Federal Register. Id. § 1533(b)(3)(B)(i). The decision to not list a species is subject to judicial review. Id. § 1533(b)(3)(C)(ii).

20. Once a species is listed, ESA safeguards apply. Federal agencies cannot engage in any action that will jeopardize the survival or recovery of threatened or endangered species or adversely modify their critical habitat. Id. § 1536.

21. The ESA also prohibits any person from importing and exporting; removing or reducing to possession; maliciously damaging or destroying; or removing or cutting a listed plant species in knowing violation of any law or regulation of any State. Id. § 1538(a)(2).

## **FACTUAL BACKGROUND**

### Agave eggersiana

22. *Agave eggersiana*, pictured below, is a robust, perennial herb that can grow from 16 to 23 feet tall. Its flowers are large and funnel or tubular shaped.



23. *Agave eggersiana* is native only to the island of St. Croix in the U.S. Virgin Islands. *Agave eggersiana* is extremely rare and its survival may be dependent on captive propagation and reintroduction.

24. The exact status of *Agave eggersiana* in the wild is unknown; however, local scientists believe the *Agave eggersiana* is nearly extinct. The plant

has been cultivated and planted on private lands on the island of St. Croix and is under cultivation in Florida and on St. John, U.S. Virgin Islands.

25. The decline of *Agave eggersiana* is due to habitat loss from historical deforestation and cultivation of sugar cane and cotton. Close to 100% of the suitable habitat for *Agave eggersiana* is found on privately-owned land currently slated for subdivision and residential development. Suitable habitat includes dry scrub thicket, most of which has been degraded severely by arson and goat grazing.

26. *Agave eggersiana* has a restricted distribution on St. Croix that renders the species vulnerable to natural and human threats. *Agave eggersiana* also faces threats from feral donkeys, pigs, and goats on the island that may uproot juveniles or destroy the root system.

#### Solanum conocarpum

27. *Solanum conocarpum*, pictured below, is a thornless flowering shrub that may reach more than 9 feet in height. It is native only to the island of St. John.

28. Of all the endemic plant species on the Virgin Islands, *Solanum conocarpum* is likely one of the most in danger of extinction.

29. *Solanum conocarpum* is one of only two vascular plants known to be endemic to the island of St. John.



30. Its restricted geographic range and narrow habitat specificity, its low level of natural recruitment in the wild, and its limited number of subpopulations are key threats to its continued existence.



31. The total population size of *Solanum conocarpum* is approximately 220 individuals from 6 subpopulations on St. John.

32. Of the approximately 220 individuals, there are approximately 160 *Solanum conocarpum* plants from 3 populations located within the Virgin Islands National Park (“VINP”). All except four of these individuals are from a single population in the VINP.

33. The largest known population, 186 plants, is located at Nanny Point. Approximately 156 individuals from the Nanny Point population are located on lands recently donated to the VINP; the remaining 30 individuals from this

population grow on adjoining privately-owned land. An additional 30 individuals are located at John's Folly, also on private land.

34. *Solanum conocarpum* in VINP are at risk from management practices such as trail and facility maintenance, as well as from feral pigs, feral goats, Key deer, and donkeys. The plants on private land are at risk from residential and tourism development.

35. The small number of remaining *Solanum conocarpum* is particularly problematic because scientific information suggests the plant is functionally dioecious (meaning it has male and female flowers on different plants). Thus, the species may require higher numbers in order to reproduce effectively.

36. Of the remaining individuals of *Solanum conocarpum* that occur in the wild, 156 of them occur on the land Mr. Michael Carper recently donated to the Virgin Islands National Park. After the land transfer, about 30 individuals remain on Mr. Carper's land. Mr. Carper retains the right to develop his property and subdivide it once.

37. Furthermore, about 20 individuals of *Solanum conocarpum* on the land VINP acquired from Mr. Carper are on an easement that provides the only access to Mr. Carper's property.

38. The combination of the impacts from development of Mr. Carper's land and access to Mr. Carper's land could destroy up to 52 individuals, almost one-fourth of all known individuals.

39. *Solanum conocarpum* is also threatened by terrestrial crabs and free-roaming land mammals. Terrestrial crabs consume fallen fruit of *Solanum conocarpum*. At least one local expert believes that they act as seed predators crushing the embryos as they feed. *Solanum conocarpum* is also impacted by the rooting of feral hogs.

40. Enforcement of local regulations by the local government is difficult and limited because of personnel shortage. A lack of manpower to patrol the VINP boundaries to prevent illegal activities that may affect the species could result in mortality of individuals of *Solanum conocarpum*.

41. *Solanum conocarpum* also faces threats because of its restricted range. The known global range of *Solanum conocarpum* is restricted to St. John. The coastal areas in St. Thomas where *Solanum conocarpum* could have been found have been built-up for tourism or residential developments, and the remaining potential areas are under private ownership, thereby leaving the only suitable habitat on St. John.

## Human Impact On The Native Habitat Of The U.S. Virgin Islands

42. Since the European conquest of the Virgin Islands, the Islands have suffered intense deforestation due to cotton and sugar cane cultivation, and more recently due to urban development. As a result, native plants, particularly species with limited distributions, are vulnerable to hurricanes.

43. So few individuals of *Agave eggersiana* and *Solanum conocarpum* are known to occur that the risk of extinction is high because severe natural or human-caused events, such as fires, may dramatically affect their habitat or eliminate the few existing individuals.

### **LISTING HISTORY**

44. On November 20, 1996, the Department of Planning and Natural Resources, Division of Fish and Wildlife of the U.S. Virgin Islands, submitted a petition to FWS to list these two plant species. On November 16, 1998, FWS made a 90-day finding that “the petition presents substantial information that listing these two plant species may be warranted.” 63 Fed. Reg. 63659, 63660 (Nov. 16, 1998). At that time, FWS committed to issuing a finding within nine months as to whether listing these species is warranted.

45. When FWS failed to do so, the Center filed suit challenging FWS’s failure to publish a 12-month finding. The lawsuit resulted in a settlement agreement, and FWS agreed to submit the 12-month finding by February 28, 2006.

46. On March 7, 2006, FWS published a 12-month not warranted finding for *Agave eggersiana* and *Solanum conocarpum* precluding any protection for the species under the ESA.

47. In making its 12-month finding, FWS relied on a pending land transfer as well as voluntary conservation measures. These measures may never happen and have not been demonstrated to protect the species.

48. FWS ignored its own experts in determining *Agave eggersiana* and *Solanum conocarpum* do not warrant ESA protection. For example, FWS relied heavily on the work of Dr. Acevedo in parts of its finding. However, the finding never mentions Dr. Acevedo's conclusion finding that *Solanum conocarpum* is nearly extinct in the wild and is perhaps the most threatened of all the endemic plant species in the Virgin Islands.

49. FWS did not use the best available scientific data in making its 12-month not warranted finding. FWS ignored scientific evidence of Dr. Gary Ray that terrestrial hermit crabs and feral land mammals pose a threat to *Solanum conocarpum*. The agency also ignored its own previous assessments of the species in its Species Assessment and Listing Priority Forms which acknowledge the species face a high risk of extinction.

50. FWS did not have the 90-day finding peer reviewed as is required by its own policy. 59 Fed. Reg. 34270 (Jul. 1, 1994).

51. FWS claimed on several occasions it could not make a warranted finding because the true status is unknown.

**CLAIM FOR RELIEF  
(Violation of the ESA and APA)**

52. Paragraphs 1-51 are incorporated herein by reference.

53. FWS has a mandatory duty to list *Agave eggersiana* and *Solanum conocarpum* if they are endangered or threatened throughout all or a significant portion of their range due to the presence of any of the five listing factors. 16 U.S.C. §§ 1532(6), 1532(20), 1533(a)(1). FWS must consider whether any of the five listing factors pose a threat to the species now or in the “foreseeable future.” Id. § 1532(20). FWS’s decision must be based solely on the best scientific and commercial data available. 16 U.S.C. § 1533(b)(1)(A). FWS cannot base its decision not to list on future, voluntary conservation measures that have not proven to be effective. 68 Fed. Reg. 15100 (Mar. 28, 2003).

54. In finding that listing was not warranted for the *Agave eggersiana* and *Solanum conocarpum*, FWS failed to consider whether the listing factors pose a threat to the species.

55. FWS ignored the best scientific data available, its own findings, and the opinions of its own experts.

56. FWS wrongly claimed it could not make a determination of warranted because the true status of the species is unknown.

57. The agency relied on future, voluntary conservation measures that are too uncertain in terms of their implementation and effectiveness to support the not warranted finding.

58. FWS failed to provide a rational explanation for its abrupt change in position with respect to the threats facing the *Agave eggersiana* and *Solanum conocarpum* and the status of the species.

59. FWS failed to have the finding peer reviewed in violation of its own policy. 59 Fed. Reg. 34270 (Jul. 1, 1994).

60. These actions violate FWS's non-discretionary duties under Section 4 of the ESA within the meaning of 16 U.S.C. § 1540(g)(1)(C) and are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law and/or constitutes agency action unlawfully withheld or unreasonably delayed under the APA. 5 U.S.C. § 706.

### **PRAYER FOR RELIEF**

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

1. Declare Defendants have violated the ESA and APA by not listing as threatened or endangered the *Agave eggersiana* and *Solanum conocarpum*;

2. Order Defendants to vacate the decision to not list the *Agave eggersiana* and *Solanum conocarpum*;
3. Order Defendants to issue a new rulemaking and new finding on the *Agave eggersiana* and *Solanum conocarpum* within 60 days;
4. Award Plaintiffs' costs, including reasonable attorneys' fees and expert witness fees; and
5. Grant Plaintiffs such additional and further relief as the Court may deem just and proper.

Dated: September 9, 2008

Respectfully Submitted,

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