

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

WILDEARTH GUARDIANS, )  
301 N. Guadalupe Street, Ste. 201 )  
Santa Fe, NM 87501 )

Plaintiff, )

v. )

Case No. 1:20-cv-1035

DAVID BERNHARDT, )  
Secretary U.S. Department of the Interior, )  
1849 C Street, N.W. )  
Washington, DC 20240, )

AURELIA SKIPWITH, )  
Director, U.S. Fish and Wildlife Service, )  
1849 C Street, N.W. )  
Washington, DC 20240, and )

U.S. FISH AND WILDLIFE SERVICE )  
1849 C Street, N.W. )  
Washington, DC 20240, )

Defendants. )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiff WildEarth Guardians (“Guardians”) hereby challenges the ongoing failure of the U.S. Fish and Wildlife Service (“Service”) to meet its mandatory deadlines for determining whether the following five aquatic species warrant protection under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”): Rio Grande Chub (*Gila pandora*); Rio Grande Sucker (*Catostomus plebeius*); Sturgeon Chub (*Macrhybopsis gelida*); Sicklefin Chub (*Macrhybopsis meeki*); and Narrow-foot Hygrotus Diving Beetle (*Hygrotus diversipes*).

2. The Service's failure to timely address imperiled species is a persistent problem that has only dramatically worsened under the Trump administration. To date, the current administration has afforded the fewest species federal protection under the Act than any prior administration at this point in their term. Now the Service faces a backlog of more than 500 species waiting for decisions about their protection, all of which exceed the ESA's statutory deadlines.

3. Since the ESA was passed in 1973, at least 47 species have gone extinct while awaiting the Act's protections. Not only do the agency's delays in listing decisions and critical habitat designations violate the ESA's statutory deadlines, but the Service has also consistently failed to adhere to its own National Listing Workplan ("Workplan"), which was purported to be Defendants' plan for eliminating the backlog. Under the Trump administration, the Service has continued to consistently fail to make the findings required in the Workplan. The Service failed to make findings for 30 such species in fiscal year 2017, 78 species in fiscal year 2018, and 46 species in fiscal year 2019.

4. This chronic agency foot-dragging comes at a time when modern science is increasingly pointing toward mass extinctions from climate instability, prolonged droughts, dewatering of our rivers and tributaries, and the proliferation of harmful invasive species. The Service's decisions on whether or not to list the freshwater species at issue in this lawsuit as either threatened or endangered are now between three- and six-plus years overdue.

5. Consequently, Guardians brings this action under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(C), to remedy Defendants' failure to adhere to the Act's mandatory deadlines. Guardians requests an order declaring Defendants have violated the ESA and that the Service be ordered to make the statutorily required 12-month findings on Guardians' petitions to

list the species named above as endangered or threatened by a date certain, *id.* §§ 1533(b)(3)(B); 1540(g)(1).

### **JURISDICTION AND VENUE**

6. The Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g)(1)(C) (action arising under ESA citizen suit provision), 5 U.S.C. § 702 (review of agency action under the Administrative Procedure Act (“APA”)), and 28 U.S.C. § 1331 (federal question jurisdiction).

7. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g), the APA, 5 U.S.C. §§ 701-706, and 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief). Guardians provided sixty days’ notice of its intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to Defendants dated December 4, 2019. Defendants received a copy of Guardians’ notice letter via certified mail on December 9, 2019. Defendants have not remedied their continuing ESA violations by the date of this Complaint’s filing.

8. Venue is proper in the United States District Court for the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because Defendants reside in the district and a substantial part of the events giving rise to Guardians’ claims occurred in this district.

### **PARTIES**

9. Plaintiff WILDEARTH GUARDIANS (“Guardians”) is a non-profit, 501(c)(3) membership organization based in Santa Fe, New Mexico, with offices throughout the West. Guardians has approximately 275,000 members and supporters in the United States, with a substantial number of members who live and recreate across the West. Guardians and its

members are dedicated to protecting and restoring the wildlife, wild places, and wild rivers, and health of the American West. Towards this end, Guardians and its members work to protect all species native to the West, with emphasis on protecting threatened and endangered species and their habitat.

10. Guardians has a long-standing, active endangered species protection campaign that seeks to add all deserving species to the ESA's list of protected species. Guardians also has worked for more than 25 years to protect and restore flows and native aquatic and riparian species in western rivers, including its long-time focus on the iconic Rio Grande in New Mexico. In 2020, Guardians launched an integrated campaign between its wild rivers and wildlife programs to stop extinction in western rivers. This campaign seeks to obtain heightened protections for imperiled species and to reform western water policy to ensure living rivers and healthy riparian ecosystems throughout the western U.S. The problems caused by the mismanagement of our western rivers over the last century—including creating barriers to migration due to dams, unsustainable diversions, creating conditions that favor non-native species, and narrowing and dewatering the floodplain with levees—are being amplified by climate change and threatening the vital biodiversity associated with these aquatic and riparian ecosystems.

11. Guardians brings this action on its own behalf and on behalf of its members, who derive scientific, aesthetic, recreational, and spiritual benefit from endangered and threatened species and their native habitats. Guardians' and its members' interests in these species and their habitats are dependent upon the persistence of healthy and sustainable populations of—and ultimately the recovery of—those species in the wild. Yet, unless these species are promptly protected under the ESA, they will continue to decline and may even go extinct. Even if

imperiled species do not go extinct while awaiting ESA protection, their continued deterioration significantly reduces the potential for their recovery and therefore Defendants' failure to make 12-month findings as required by the ESA, 16 U.S.C. § 1533(b)(3)(B) harms Guardians' and its members' concrete interests in these species.

12. Guardians' staff and its members visit, study and enjoy western river and riparian ecosystems and the species that inhabit them, including the species at issue in this Complaint. Guardians' staff and members have educational, scientific, moral, spiritual, cultural, aesthetic and recreational interest in the Rio Grande and Missouri River Basins including its many and varied tributary streams, creeks and wetlands. Guardians' staff and its members have visited and observed or attempted to observe the imperiled species at issue in this Complaint in the wild. The interests of Guardians and its members—in observing, studying, and otherwise enjoying the imperiled species and their habitats at issue in this Complaint, and in obtaining and disseminating information regarding the survival of all of these species—have been and continue to be harmed by Defendants' actions and Defendants' failure to make 12-month findings for the species at issue in this Complaint as required by the ESA, 16 U.S.C. § 1533(b)(3)(B). Guardians' injuries would be remedied by an order from this Court compelling compliance with the statute.

13. Defendant DAVID BERNHARDT is sued in his official capacity as Secretary of the Department of the Interior. Secretary Bernhardt has the ultimate responsibility for implementation of the ESA.

14. Defendant AURELIA SKIPWITH is sued in her official capacity as the Director of the U.S. Fish and Wildlife Service.

15. Defendant U.S. FISH AND WILDLIFE SERVICE is an agency of the federal government located within the U.S. Department of the Interior. The Secretary of the Interior has charged the Service with implementing and enforcing the ESA. 50 C.F.R. § 402.01(b).

16. Unless the requested relief is granted, the interests of Guardians and its members will continue to be injured by Defendants' failure to comply with their statutory obligation. The injuries described above are actual and imminent and are caused by Defendants' failure to complete a 12-month finding for each of the species discussed in this Complaint. The relief sought herein would redress Guardians' injuries. Guardians has no other adequate remedy at law.

### **STATUTORY AND REGULATORY BACKGROUND**

17. Congress enacted the Endangered Species Act in 1973 to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The statute contains an array of provisions designed to afford imperiled species "the highest of priorities," so that they can recover to the point where federal protection is no longer needed. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978). To benefit from these provisions, however, the Secretary of Interior, acting through the Service, must first list the species as either "threatened" or "endangered" pursuant to Section 4 of the ESA, 16 U.S.C. § 1533.

18. An endangered species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

19. A threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

20. The ESA provides for a species to be listed at the Secretary of the Interior's own initiative, or the public may submit a petition to the Secretary of the Interior to list a species which requires the Secretary to respond. 16 U.S.C. § 1533(b)(3). Upon receiving a petition to determine a species' status, the Secretary has 90 days to determine whether the petition presents substantial evidence indicating that the requested action may be warranted. 16 U.S.C. § 1533(b)(3)(A).

21. If the Service makes a positive 90-day finding it then has one year to determine whether the species warrants federal protection. 16 U.S.C. § 1533(b)(3)(B) ("Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings [that listing is not warranted, warranted, or warranted but precluded]."); *see also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) (holding that 16 U.S.C. § 1533(b)(3)(B) imposes a mandatory duty on the Service to determine the conservation status of a petitioned species within 12 months).

22. If in the 12-month finding the Service concludes that listing is warranted, the agency must publish notice in the Federal Register of a proposed regulation to list the species as endangered or threatened and take public comment on the proposed listing determination. *Id.* § 1533(b)(3)(B)(ii).

23. Within one year of publication of the proposed listing rule, the Service must publish in the Federal Register the "final listing determination." *Id.* § 1533(b)(6)(A).

24. With limited exceptions, if the Service concludes listing a species as threatened or endangered is warranted, it is also required to concurrently designate "critical habitat." *Id.* § 1533(a)(3)(A).

25. Listing a species as either threatened or endangered triggers the substantive and procedural requirements of other parts of the Act. *See* 16 U.S.C. § 1536 (consultation and substantive conservation requirement imposed on federal agencies); *id.* § 1538 (prohibition on take by public and private entities).

## FACTUAL ALLEGATIONS

### I. Rio Grande Basin

26. The Rio Grande is a western icon and lifeblood of the desert Southwest. It originates in the San Juan Mountains of Colorado and travels 1900 miles to the Gulf of Mexico.

The river meanders through Colorado and New Mexico and serves as the international border between the United States and Mexico along the southern border of Texas. It is the third-longest river in the United States and the watershed includes more than 336,000 square miles of arid land. Although the Rio Grande basin is larger than the state of Texas, only half of that area contributes to the river's flow. While the Rio Grande is central to the ecology,



and culture and economy of the region, it is also one of the world's most imperiled rivers. The Rio Grande is stretched well beyond its means due to a century of water mismanagement, over allocation, concrete infrastructure, and lack of historic dynamic spring flows. Today, less than



one-fifth of the Rio Grande's historic flows actually reach the sea.<sup>1</sup>

**A. The Rio Grande Chub**

27. Reaching up to 9.8 inches in length but averaging about five, the Rio Grande chub (*Gila pandora*) is a small fish native to the Rio Grande Basin in Colorado, New Mexico, and Texas. The species was thought entirely



extirpated from the mainstem of the Rio Grande river (last sighted in the late 1800s), until a small mainstem population was discovered in 2016 in Rio Grande County, Colorado. Today, the chub persists only in a few isolated populations in select tributaries of the Rio Grande.<sup>2</sup>

28. Most commonly found in pools at higher elevations where water temperatures are cooler, the Rio Grande chub prefers a river channel that is braided, sandy, and wide, with shading and canopy cover provided by ample bank vegetation.

29. During spawning, chubs change color and exhibit brighter orange-red coloration along their lower fins, mouth, and the lower sides of their head and body. Spawning runs from spring to early summer. Chubs spawn in riffle habitat, which is marked by a shallow, relatively fast-moving stream with mild turbulence.

30. Once one of the most common fish in the Rio Grande basin, the Rio Grande chub has now disappeared from as much as 75% of its historic range.

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<sup>1</sup> Rio Grande Basin, Photo Credit: [Kmusser](#), Creative Commons license.

<sup>2</sup> Photo credit: Matt Filsinger (USFWS).

31. Habitat destruction and modification, predation from nonnative species, and climate change are the primary threats to the Rio Grande chub's continued existence. Timber harvesting, road construction, livestock grazing, and stream diversions contribute substantially to the loss and degradation of their habitat. Diversions and dams result in lower stream flows, which causes population fragmentation and reduced genetic exchange, as well as higher water temperatures. Climate change is exacerbating these threats, with water temperatures projected to continue rising over the foreseeable future. Logging and livestock grazing can also decrease streamside vegetation that provides canopy cover and shading, increase sedimentation, and destabilize riverbanks.

32. The Rio Grande chub's small, isolated populations are highly susceptible to catastrophic events because recolonization from nearby populations is unlikely. This limiting factor, coupled with threats to the chub's habitat, puts this species at high risk for future population declines.

33. In light of these concerns, Guardians petitioned to list the Rio Grande chub as either endangered or threatened on September 27, 2013. On March 16, 2016, well after the Service's mandatory deadline for issuing a 12-month finding had passed, the agency made its initial 90-day finding that Guardians' petition presented substantial scientific and commercial evidence indicating that the species may warrant protection under the ESA. 81 Fed. Reg. 14,058, at 14,069 (March 16, 2016).

34. The Service has failed to issue a timely 12-month finding for the Rio Grande chub, which is now over six years late.

**B. The Rio Grande Sucker**

35. Also known as the Rio Grande mountain-sucker or the matelote del bravo, the Rio Grande sucker (*Catostomus plebeius*) is a small fish native to the Rio Grande basin in Colorado, New Mexico, and



Mexico. Populations once abundant, widespread, and stable are now significantly reduced.<sup>3</sup>

36. The Rio Grande sucker has a cylindrical body with a deeply forked tail, reaching maximum lengths of about eight inches. It has brownish-green coloration, dark spots and a pale underside, with a striking orange line running along both sides of its body. The sucker's broad snout, thick and fleshy lower lip with edges on its jaw help it scrape algae, their primary food source, off of hard substrates in the river.

37. Some suckers reach sexual maturity just after their first year, but most do not mature until they are two years old. Water temperature influences the age at which they reach maturity and is also a controlling factor for spawning.

38. Suckers spawn in areas where the river bottom is covered with clean gravel, during the spring and sometimes again in the fall. During spawning, both sexes exhibit color changes, but chiefly males. Males show a more striking coloration during the breeding season and develop a jet-black band along the sides of their bodies which is paralleled by a golden stripe and a red stripe on either side.

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<sup>3</sup> Photo credit: Colorado Department of Natural Resources.

39. Suckers prefer to live in low-velocity streams that have aquatic vegetation and overstory canopy. A suitable sucker habitat has gravel or rubble substrates covering the streambed, which provides an ideal place for their favorite algae to grow.

40. Though historically abundant in many areas of the Rio Grande basin from Colorado into Mexico, the sucker is now considered rare in Colorado and has mostly disappeared from the mainstem of the Rio Grande in New Mexico. Habitat loss is the primary driver of their decline. Logging, livestock grazing, water diversion and dams, and large-scale agricultural practices all contribute to destroying the Rio Grande sucker's habitat and fragmenting its populations. The sucker's remaining, intact habitat is threatened by continued human land and water uses. Climate change is projected to exacerbate current threats as well as further tax the already-strained river.

41. Because little undisturbed habitat remains for the sucker, opportunities for reintroduction efforts are low.

42. Diversions and dams along the Rio Grande reduce and degrade sucker habitat by lowering water levels, increasing water temperatures, changing water flow, and changing channel morphology. This combination of stressors impacts sucker populations in the majority of the Rio Grande. Additionally, much of their historic range receives substantial sediment loads from human activities, which buries their primary food source.

43. Sucker populations are also declining because of predation from nonnative species and inadequate existing regulatory mechanisms.

44. The Rio Grande sucker's population declines have been evident for decades, prompting Guardians to submit a petition to list the species as threatened or endangered on September 29, 2014. Along with its positive 90-day finding for the Rio Grande chub, on March

16, 2016, the Service also issued a 90-day finding that listing the Rio Grande sucker may be warranted. 81 Fed. Reg. 14058, at 14069 (March 16, 2016).

45. The Service has failed to issue a timely 12-month finding for this species, which is now over 5 years late.

## II. Missouri River Basin

46. The Missouri River is the heart of the Great Plains. The nearly 2,500-mile river is the longest river in the United States. The river and its tributaries originate in the mountains of

Montana, Wyoming and Colorado and flow to its confluence with the Mississippi River near St. Louis, Missouri. The watershed includes more than



500,000 square miles, including portions of 10 states and one Canadian province. The Missouri River and its tributaries are vital for both people and ecosystems; however, the river lacks its once dynamic seasonal flows, is burdened by more than 40 dams, and harnessed by extensive infrastructure from Montana to Missouri. The loss of free-flowing river segments in the Great



Plains region and the lack of natural seasonal flows threatens the health of the river and its dependent river species.<sup>4</sup>

**A. Sturgeon Chub and Sicklefin Chub**

47. Native to the Yellowstone, Missouri, and Mississippi rivers, sicklefin (*Macrhybopsis meeki*) and sturgeon chub (*Macrhybopsis gelida*) are small fish that inhabit large, free-flowing riverine systems, characterized by swift flows, highly variable flow regimes, braided channels, high turbidity, and sand/fine gravel substrates. Both species are in decline due to severe habitat changes. In particular, the



construction and operation of mainstem dams has fragmented the habitat of the sicklefin and sturgeon chub.<sup>5</sup>

48. The sicklefin and sturgeon chub are highly dependent on unobstructed rivers and tributaries for completing their life cycles. They are pelagic-spawning cyprinids—small-bodied fish that produce semi-buoyant eggs that require flowing water for downstream transport and for recolonizing areas as adults. The availability of miles of unfragmented, large flowing rivers and streams is particularly important for these pelagic-spawning fish because high mortality rates occur among ichthyoplankton (drifting eggs and larvae) deposited within downstream reservoirs, due to suffocation from high sediment loads and predation by other aquatic species.

<sup>4</sup> Missouri River Basin, Photo Credit: [Shannon1](#), Creative Commons license.

<sup>5</sup> Top: Sturgeon chub (*Macrhybopsis gelida*). Bottom: Sicklefin chub (*Macrhybopsis meeki*). Photo credits: David Ostendorf, used with permission.

49. Species belonging to this guild within Great Plains prairie river systems have suffered precipitous declines since at least the 1950s. Recent studies show pelagic-spawning cyprinids represent 25-40% of imperiled species within the Great Plains ecoregions and that this imperilment is a direct consequence of stream fragmentation.

50. The sicklefin and sturgeon chub are also important prey species for juvenile pallid sturgeon, a federally listed endangered species.

51. Given evidence of these species dramatically declining populations, Guardians submitted a petition to list the sicklefin and sturgeon chub as threatened or endangered on August 11, 2016. The Service issued a positive 90-day finding for both species on December 20, 2017. 82 Fed. Reg. 60,362, at 60,364 (Dec. 20, 2017).

52. The Service has failed to issue timely 12-month findings for the sicklefin and sturgeon Chub, which are now over 3 years late.

**B. Narrow-foot Hygrotus Diving Beetle**

53. The narrow-foot hygrotus diving beetle (*Hygrotus diversipes*) is a small oval beetle, about 4.5mm in length, that is pale yellow and black.<sup>6</sup> The diving beetle has an exceptionally narrow range in Eastern Wyoming within the Missouri River basin. Its suitable habitat is extremely patchy along several sub-watersheds to the Missouri River including the South Fork of the Powder River and the Wind River. It seems to exist almost exclusively in small, highly mineralized pools in gulches. The bottoms of the gulches are generally clay with some larger gravel, and often there exists a species of



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<sup>6</sup> Photo credit: Dr. Kelly B. Miller.

sedge or considerable plant debris in the pools. Water flows in these gulches intermittently; often the gulches flood entirely. Thus, the diving beetle's habitat is subject to unpredictable flooding and drying regimes.

54. Regional droughts seriously threaten the species by creating large areas that are entirely unsuitable within its already limited range.

55. The diving beetle has been collected from few locations and in few numbers. A decade ago, the range of this diving beetle was known to extend to only 11 sites in Natrona, Johnson, and Fremont counties in Wyoming, including areas in the Powder River basin (South and Middle Forks, Salt Creek and the main Powder River drainage farther north) and the Wind River basin (Muskrat Creek and Poison Creek drainages). These rivers and creeks that support the beetles habitat are tributary to the Yellowstone River, which is tributary to the Missouri River and a part of the larger Missouri River basin.

56. In 2009, the U.S. Forest Service noted that the natural pool habitat that this beetle requires is in an overall decline. Livestock grazing, stream diversions, and energy development represent significant threats to the species' habitat. Climate change is expected to cause more extreme and frequent weather events in the beetle's habitat that include droughts, heavy rainfall, and heat waves. Temperatures are expected to increase significantly.

57. Concerned that the narrow-foot hygrotus diving beetle will be unable to adapt and keep pace with changing climatic conditions, especially in light of the species' restricted range, Guardians submitted a petition to list the beetle as a threatened or endangered species on July 9, 2013.

58. The Service issued a positive 90-day finding for the species on January 12, 2016. 81 Fed. Reg. 1,368, at 1,373 (Jan. 12, 2016).



59. The Service has failed to issue a timely 12-month finding for the species, which is now over 6 years late.

#### **CLAIM FOR RELIEF**

60. Guardians incorporates by reference each and every allegation set forth in the preceding paragraphs of this Complaint.

61. Defendants' failure to perform their mandatory, non-discretionary duty to make timely 12-month findings for the five species specified in the above paragraphs violates the ESA, 16 U.S.C. § 1533(b)(3)(B). Defendants' failures to make timely 12-month findings also constitute agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1).

#### **REQUEST FOR RELIEF**

WHEREFORE, Guardians respectfully requests that this Court:

- A. Declare that Defendants' ongoing failure to publish 12-month findings on Guardians' petitions to list the five species discussed herein violates the ESA and/or APA;
- B. Provide injunctive relief compelling Defendants to publish in the Federal Register the overdue final listing determinations by a date certain;
- C. Retain continuing jurisdiction to review Defendants' compliance with all judgments and orders herein;
- D. Grant Plaintiff its reasonable attorneys' fees and costs as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- E. Provide such other relief as the Court deems just and proper.

Respectfully submitted on this 21st day of April, 2020,

/s/ Samantha Ruscavage-Barz  
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