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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CENTER FOR BIOLOGICAL DIVERSITY;)	Case No. 18-1628
TURTLE ISLAND RESTORATION NETWORK;)	
WISHTOYO FOUNDATION;)	
)	
Plaintiffs,)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF
v.)	
)	
NATIONAL MARINE FISHERIES SERVICE;)	
WILBUR ROSS, Secretary of Commerce;)	
)	
Defendants.)	
)	
)	
)	
)	

INTRODUCTION

1. Plaintiffs Center for Biological Diversity, Turtle Island Restoration Network, and Wishtoyo Foundation bring this action under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, against the Secretary of Commerce and the National Marine Fisheries Service (collectively, “the Service”) for failing to designate critical habitat for threatened and endangered humpback whales. The Service’s failure to designate critical habitat violates its mandatory duty

1 under section 4 of the ESA, 16 U.S.C. § 1533, and deprives these imperiled animals of vitally
2 important protections in their most essential habitat areas.

3 2. Humpback whales are large baleen whales that can reach up to 60 feet in length.
4 They migrate long distances traveling thousands of miles though the ocean. Humpback whales
5 are known for their playful behavior at the surface of the water, frequently jumping out of the
6 water or slapping their tails or fins on the surface. They are also vital sacred and cultural
7 resources to Chumash Native American maritime tribes, band, clans, and Peoples.

8 3. During their breeding, calving, feeding, and migration, humpback whales
9 encounter numerous threats in their habitat. For example, humpback whales are frequently
10 entangled in commercial fishing gear, which can injure or drown them. Ship traffic and offshore
11 oil and gas drilling also threaten the whales with vessel collisions and water and noise pollution.

12 4. Despite these ongoing threats to their survival, the Service has failed to designate
13 critical habitat for humpback whales as required by section 4 of the ESA. On September 8, 2016,
14 the Service classified humpback whales into 14 distinct population segments and promulgated a
15 rule listing four of those populations as endangered and one as threatened. For populations
16 occurring in U.S. waters – Central America, Mexico, and Western North Pacific population – the
17 ESA mandates that the Service designate critical habitat concurrently with listing. Under certain
18 limited circumstances, the Service may extend that deadline no more than one additional year.

19 5. To date, more than one year since the rule listing the humpback whale
20 populations, the Service has not proposed or finalized a rule to designate critical habitat for the
21 Central America, Mexico, or Western North Pacific populations of humpback whales.

22 6. Accordingly, Plaintiffs seek an order from this Court declaring the Service to be
23 in violation of section 4 of the ESA and establishing prompt deadlines for the Service’s issuance
24 of proposed and final rules establishing critical habitat for the Central America, Mexico, and
25 Western North Pacific populations of humpback whales.

1 **JURISDICTION AND VENUE**

2 7. The Court has jurisdiction over this matter under 28 U.S.C. § 1331 because this
3 action arises under the laws of the United States and under the ESA’s citizen-suit provision, 16
4 U.S.C. § 1540(c). An actual, justiciable controversy now exists between Plaintiffs and
5 Defendants, and the requested relief is proper under 28 U.S.C. § 2201 (declaratory relief), 28
6 U.S.C. § 2202 (injunctive relief), 16 U.S.C. § 1540(g) (citizen suit provision of the ESA), and 5
7 U.S.C. § 706(1) (unlawfully withheld agency action).

8 8. As required by the ESA, 16 U.S.C. § 1540(g)(2)(A), Plaintiffs provided
9 Defendants with notice of their intent to sue over the violations of law alleged in this Complaint
10 more than sixty (60) days ago. Defendants have not remedied these violations of law.

11 9. Venue is proper in this district pursuant to 16 U.S.C. § 1540(g)(3)(A) because the
12 violations of the Endangered Species Act are occurring in this district, and pursuant to 28 U.S.C.
13 § 1391(e) because some of the plaintiffs reside in this district.

14 **INTRADISTRICT ASSIGNMENT**

15 10. Pursuant to Civil Local Rules 3-2(c) and 3-2(d), this action is properly assigned to
16 the San Francisco, Oakland, San Jose or Eureka Divisions of this Court because a substantial part
17 of the events or omissions giving rise to Plaintiff’s claim occurred in counties in these Divisions.

18 **PARTIES**

19 **Plaintiffs**

20 11. Plaintiff the Center for Biological Diversity is a nonprofit corporation that
21 advocates for the protection of threatened and endangered species and their habitats through
22 science, policy and environmental law. The Center’s Oceans Program focuses specifically on
23 conserving marine ecosystems, and seeks to ensure that imperiled species are properly protected
24 from destructive practices in our oceans. In pursuit of this mission, the Center has been actively
25 involved in securing ESA protections for imperiled marine mammals, and protecting humpback
26 whales from deadly and harmful entanglement in commercial fishing gear and offshore oil and
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1 gas drilling activities. The Center has more than 63,000 members, many of whom live on the
2 Pacific Coast. The Center brings this action on behalf of itself and its members.

3 12. Center members and staff live in and regularly visit ocean waters, bays, beaches
4 and other coastal areas to observe, photograph, study and otherwise enjoy humpback whales and
5 their habitat. Center members have an interest in humpback whales and their Pacific Ocean
6 habitat; including waters off California, Oregon, Washington, and Alaska. For example, Center
7 members frequently sail, kayak and go on whale watching tours in Gulf of the Farallones, Half
8 Moon Bay, Monterey Bay, and Santa Barbara Channel to look for and photograph humpback
9 whales. Center members and staff derive recreational, spiritual, professional, scientific,
10 educational and aesthetic benefit from the presence of humpback whales, and their habitat. The
11 Center's members and staff intend to continue to use and enjoy the habitat of humpback whales
12 frequently and on an ongoing basis in the future.

13 13. Plaintiff Wishtoyo Foundation ("Wishtoyo") is a Native-led California nonprofit
14 public interest organization with over 700 members primarily composed of Chumash Native
15 Americans, and Santa Barbara, Ventura, and Los Angeles County residents. Wishtoyo's mission
16 is to preserve, protect, and restore Chumash culture, the culture of indigenous peoples, and the
17 environment all peoples depend upon through education, outreach, cultural programs, scientific
18 study, restoration projects, advocacy, and legal action. Chumash tribes, bands, and clans have a
19 long history of interaction with the marine waters of the Pacific Ocean and the Santa Barbara
20 Channel from Morro Bay to Malibu and out to and around the Channel Islands, and rely upon
21 these waters and their natural cultural resources to support and maintain Chumash traditional
22 practices, ways of life, and ancestral connections. Members of Wishtoyo use these waters for
23 ceremonial purposes, to connect with and celebrate their ancestors and cultural heritage, to
24 gather natural cultural resources, for educational purposes, recreational use, wildlife viewing,
25 scientific study, and environmental monitoring, and intend to continue this use as permitted.

26 14. Since time immemorial, the humpback whale has played an important role in the
27 culture and lifeways of Chumash maritime tribes, bands, and clans. Wishtoyo's Chumash
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1 members continue to have a strong cultural and spiritual interest in the protection of the species.
2 Wishtoyo's Chumash members navigate on tomols (Chumash plank canoes) and by other means
3 through the Santa Barbara Channel, where encountering humpback whales is essential to their
4 connection with their ancestors and provides them with a spiritual echo through time and
5 connection to the planet as they traverse between the Channel Islands (the origin of the Chumash
6 Peoples) and the mainland. Healthy populations of humpback are thus essential to sacred
7 Chumash journeys between their traditional territories.

8 15. The existence and abundance of humpback whales is also critical to the
9 maintenance of Wishtoyo's Chumash members' cultural practices, lifeways, and ceremony as
10 described below. The species is a critical part of the traditional Chumash coastal landscape, as
11 their sighting from the shore provides the Chumash with important connections to their ancestors
12 and traditional territory. Their very existence and health, even when not sighted, also brings
13 meaning to multiple sacred Chumash ceremonies. Therefore, ensuring proper designation of
14 critical habitat for humpback whales to secure their existence and recovery in the face of threats
15 and impacts from ship strikes, entanglement in fishing gear, and pollution from oil and gas
16 development, is essential to Wishtoyo's Chumash members.

17 16. Plaintiff Turtle Island Restoration Network is a nonprofit 501(c)(3) corporation
18 with its principal place of business in Olema, California, that works through scientific research,
19 legal and policy advocacy, education, and restoration efforts to protect marine and riparian
20 wildlife globally. Turtle Island's organizational mission is dedicated to the preservation,
21 protection, and restoration of marine biodiversity, native species, and ecosystems. Turtle Island's
22 approximately 160,000 supporters and members throughout the United States and the world
23 share a commitment to the study, protection, enhancement, conservation, and preservation of the
24 world's marine and terrestrial ecosystems, including protection of whales.

25 17. Turtle Island has devoted considerable resources to studying and communicating
26 the threats to a wide range of threatened and endangered marine species. For example, Turtle
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1 Island has actively advocated on all levels to protect humpback whales and other species from
2 both the use of harmful fishing gear and attempts to ramp up fishery effort.

3 18. Turtle Island's members and staff have researched, studied, observed, and sought
4 protection for many federally-listed threatened and endangered species, including humpback
5 whales. Turtle Island's members and staff regularly use, and plan to continue to use, waters of
6 the Pacific Ocean off California and its wildlife for observation, research, aesthetic enjoyment,
7 and other recreational, scientific, and educational activities. Turtle Island's members and staff
8 derive educational, scientific, recreational, conservation, spiritual, commercial, and aesthetic
9 benefits from observing, photographing, producing film documentaries, and providing naturalist-
10 led interpretive activities to view humpback whales and other marine species in the wild. Turtle
11 Island brings this action on behalf of itself and its adversely affected members and staff.

12 19. An integral aspect of the Plaintiffs' members' use and enjoyment of the
13 humpback whales is the expectation and knowledge that the species are in their native habitat.
14 For this reason, Plaintiffs' use and enjoyment of humpback whales is entirely dependent on the
15 continued existence of healthy, sustainable populations in the habitat off the Pacific Coast. The
16 Service's failure to comply with the ESA's mandatory deadlines deprives humpback whales of
17 additional statutory protections that are vitally important to the species survival and eventual
18 recovery. The Service's failure to finalize critical habitat diminishes the aesthetic, recreational,
19 spiritual, scientific, and other interests of Plaintiffs and their members because humpback whales
20 are more vulnerable to harm and less likely recover absent the critical habitat protections.
21 Plaintiffs are therefore injured because Plaintiffs' use and enjoyment of the humpback whales,
22 and those areas inhabited by the whales, are threatened by the Service's failure to designate
23 critical habitat off the Pacific Coast of the United States.

24 20. The above-described cultural, spiritual, aesthetic, recreational, scientific,
25 educational and other interests of Plaintiffs have been, are being and, unless the relief prayed
26 herein is granted, will continue to be adversely affected and irreparably injured by Defendants'
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1 continued refusal to comply with their obligations under the ESA. The relief sought in this case
2 will redress these injuries.

3 **Defendants**

4 21. Defendant Wilbur Ross is named in his official capacity as the Secretary of
5 Commerce. The Secretary is charged with implementation of the ESA for most threatened and
6 endangered marine species (including humpback whales), and is responsible for the violations
7 alleged in this case. The Secretary has the ultimate duty and authority to issue the relief
8 requested in this complaint.

9 22. Defendant National Marine Fisheries Service is an agency within the United
10 States Department of Commerce. The Service is the agency to which the Secretary of Commerce
11 has delegated the authority to implement the ESA for most threatened and endangered marine
12 species (including humpback whales), and it is required to comply with the Act. The Service has
13 the duty, authority, and ability to remedy the injuries alleged in this complaint.

14 **STATUTORY BACKGROUND**

15 **Endangered Species Act**

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17 23. The ESA is the “most comprehensive legislation for the preservation of
18 endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153,
19 180 (1978). Its primary purposes are to provide a “means whereby the ecosystems upon which
20 endangered species and threatened species depend may be conserved . . . [and] a program for the
21 conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

22 24. The ESA defines a “species” to include “any subspecies of fish or wildlife or
23 plants, and any distinct population segment of any species of vertebrate fish or wildlife which
24 interbreeds when mature.” *Id.* § 1532(16).

25 25. Section 4 of the ESA requires the Service to list species as “endangered” or
26 “threatened” when they meet the statutory listing criteria. *Id.* § 1533. An “endangered” species is
27 “in danger of extinction throughout all or a significant portion of its range,” and a “threatened”
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1 species is “likely to become an endangered species within the foreseeable future throughout all
2 or a significant portion of its range.” *Id.* § 1532(6), (20).

3 26. Concurrent with listing a species, the ESA requires the designation of critical
4 habitat. “The Secretary . . . shall, concurrently with making a determination . . . that a species is
5 an endangered species or a threatened species, designate any habitat of such species which is
6 then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A)(i); *see also id.* § 1533(b)(6)(C).

7 27. In limited circumstances, the Service may extend the designation of critical
8 habitat for no more than one year. If the Secretary finds that critical habitat is “not determinable”
9 at the time of listing, then it “may extend the one-year period . . . by not more than one additional
10 year, but not later than the close of such additional year the Secretary must publish a final
11 regulation, based on such data as may be available at that time, designating, to the maximum
12 extent prudent, such habitat.” 16 U.S.C. § 1533(b)(6)(C)(ii).

13 28. Critical habitat means “the specific areas within the geographical area occupied
14 by the species . . . on which are found those physical or biological features (I) essential to the
15 conservation of the species and (II) which may require special management considerations or
16 protection;” and unoccupied areas “essential for the conservation of the species.” 16 U.S.C.
17 § 1532(5).

18 29. Congress recognized the importance of habitat protections to the conservation and
19 recovery of endangered species. The legislative history of the Act shows Congress clearly
20 recognized the importance of timely critical habitat designation in conserving listed species:

21 [C]lassifying a species as endangered or threatened is only the first step in
22 insuring its survival. Of equal or more importance is the determination of the
23 habitat necessary for that species’ continued existence. . . . If the protection of
24 endangered and threatened species depends in large measure on the preservation
25 of the species’ habitat, then *the ultimate effectiveness of the Endangered Species
Act will depend on the designation of critical habitat.*

26 H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

1 a broad geographic range from California to the Aleutian Islands in the summer and spring, with
2 concentrations in California and Oregon. *Id.* at 62,305. The Mexico population is estimated to
3 have 3,264 whales. *Id.* The Service determined the Mexico population is threatened by fishing
4 gear entanglements, which are likely to have reduced the population or its growth. *Id.* at 62,277,
5 62,306.

6 35. The Western North Pacific population breeds in waters off Okinawa, Japan and
7 the Philippines, as well as an unknown area; and they migrate to feeding grounds in the northern
8 Pacific, off the Russian and Alaskan coasts. *Id.* at 62,302. The population is estimated to have
9 about 1,059 whales. *Id.* at 62,303. The Service found that energy development, competition and
10 gear entanglements in fisheries, and shipping traffic are a threat to this population. *Id.* With the
11 low abundance and threats continuing and increasing, the Service listed the Western North
12 Pacific population as endangered. *Id.* at 62,304.

13 36. Humpback whales are loyal to their feeding and wintering areas, and they migrate
14 large distances. Scientists have identified seven biologically important feeding areas for
15 humpback whales off the West Coast. These areas include waters off northern Washington, two
16 locations on the Oregon coast, from San Francisco Bay to Monterey Bay, Morro Bay and parts of
17 the Santa Barbara Channel. Humpback whales are generally present in these areas during the
18 spring, summer and fall, but humpbacks can be found off the West Coast in every month of the
19 year. There are several humpback feeding areas off Alaska, including in the Aleutian Islands,
20 where the Western North Pacific population occurs.

21 37. Habitat threats continue to imperil these threatened and endangered humpback
22 populations.

23 38. Commercial fishing gear poses an impediment to passage and feeding in
24 humpback whale habitat. In 2016, 54 humpback whales were reported entangled in fishing gear
25 off the West Coast, an increase from 35 reports in 2015. Thousands of fishing traps and lost gear
26 are present in areas occupied by humpback whales. When whales encounter fishing gear in their
27 habitat, they may become tangled in the ropes. Whales can drown in the gear or drag it around,
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1 which can interfere with their swimming and feeding. Entanglement in fishing gear can also
2 cause cuts and infections or sever fins and flukes. Each year numerous humpback whales are
3 injured, harmed, killed, or captured in commercial fishing gear.

4 39. The Central America, Mexico, and Western North Pacific humpback whale
5 populations feed and transit through some of the world's busiest shipping lanes and ports.
6 Vessel traffic is dangerous for whales and harmful to the habitat of humpback whales.
7 Humpback whales are susceptible to injuries and death from collision with vessels. Additionally,
8 noise pollution from vessels disturbs the acoustic habitat of humpback whales. Large whales are
9 dependent on sound for feeding, communication, and reproduction. Shipping noise can mask
10 communications by marine mammals, impairing many essential biological functions.

11 40. Offshore oil and gas activities degrade humpback whale habitat. For example,
12 there are dozens of offshore oil and gas platforms in Southern California, including in the Santa
13 Barbara Channel. These platforms operate in humpback whale habitat, and oil drilling results in
14 oil spills, noise and water pollution. In 2015, a pipeline servicing offshore oil platforms ruptured
15 and spilled more than 100,000 gallons of crude oil near Santa Barbara. At least 21,000 gallons
16 spilled into the ocean, creating a 10-square-mile oil slick that threatened humpback whales and
17 other wildlife. Even during normal operations oil and gas platforms cause water pollution and are
18 permitted to discharge up to 9 billion gallons of wastewater, including toxic chemicals used for
19 hydraulic fracturing, into the marine environment. Moreover, on January 4, 2018, the Trump
20 administration released a proposal to offer federal oil and gas lease sales along the entire West
21 Coast and Alaska. If finalized, this proposal could greatly damage humpback whale habitat with
22 seismic exploration activities, drilling, construction, and pollution.

23 **The Service's Failure to Designate Critical Habitat for Humpback Whales**

24 41. The Service has a mandatory duty to designate critical habitat for the Central
25 America, Western North Pacific, and Mexico populations of humpback whales.
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42. On September 8, 2016, the Service listed the Central America and Western North Pacific populations as endangered and the Mexico population as threatened. 81 Fed. Reg. at 62,269; 50 C.F.R. § 17.11. The Endangered Species Act requires a critical habitat designation concurrently with this listing determination, except under specific circumstances.

43. At the time of listing, the Service made a finding that “critical habitat is not determinable at this time.” 81 Fed. Reg. 62,318. The Service also stated “[w]e will propose critical habitat for the Western North Pacific, Mexico, and Central America [populations] of the humpback whale in a separate rulemaking if we determine that it is prudent to do so.” *Id.*

44. The Service’s “not determinable” finding allows the agency no more than one additional year to finalize a critical habitat designation. “[N]ot later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.” 16 U.S.C. § 1533(b)(6)(C)(ii).

45. The final regulation designating critical habitat for the three populations of humpback whales was due no later than September 8, 2017. To date, the Service has neither issued a proposed or final rule to designate critical habitat for the Western North Pacific, Mexico, or Central America population of humpback whales, nor made a finding that to do so would be “not prudent.”

46. The Service’s failure to designate critical habitat for these distinct population segments of humpback whales deprives these threatened and endangered animals of protections to which they are legally entitled, and leaves them at increased risk of injury and death in their most important habitat areas.

CLAIM FOR RELIEF

Violation of Section 4 of the ESA

47. Plaintiffs re-allege and incorporate, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

1 48. The Service’s failure to designate critical habitat for the Central America,
2 Mexico, and Western North Pacific distinct population segments of humpback whales violates
3 the ESA, 16 U.S.C. § 1533, and constitutes an agency action that has been “unlawfully withheld
4 or unreasonably delayed” within the meaning of the Administrative Procedure Act, 5 U.S.C.
5 § 706(1).

6
7 **REQUEST FOR RELIEF**

8 For the reasons stated above, Plaintiffs respectfully request that this Court:

- 9 1. Declare that Defendants have violated and are violating the Endangered Species Act by
10 failing to designate critical habitat for threatened and endangered humpback whales;
11 2. Direct the Defendants to propose and finalize a critical habitat rule by dates certain;
12 3. Award Plaintiffs the costs of this litigation, including reasonable attorney’s fees; and
13 4. Provide such other relief as may be just and proper.
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16 Respectfully submitted this 15th day of March,
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18 /s/ Catherine Kilduff

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