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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

WILDWEST INSTITUTE, ALLIANCE FOR THE WILD ROCKIES Plaintiffs, vs. DAN ASHE, in his official capacity as Director of the U.S. Fish and Wildlife Service, an agency of the U.S. Department of Interior, and KEN SALAZAR, in his official capacity as Secretary of the Department of the Interior. Defendants.	CV- **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

I. INTRODUCTION

1. This is a civil action for judicial review of the U.S. Fish and Wildlife Service's (FWS) July 2011 decision that the listing of whitebark pine *(Pinus albicaulis)* as a threatened or endangered species under the Endangered Species Act (ESA) is "precluded." 76 Fed. Reg. 42632 (July 19, 2011). The ESA explicitly provides that such "warranted but precluded" findings are subject to judicial review. 16 U.S.C. §1533(b)(3)(C)(ii).

2. Plaintiffs attest that the agency's decision is arbitrary and capricious, an abuse of discretion, and/or otherwise not in accordance with law.

3. Plaintiffs request that the Court declare that the agency's decision is contrary to law, set aside or remand the agency's decision, and compel the agency to promptly set a reasonable date to issue a proposed listing rule for whitebark pine.

4. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs and expenses of suit, including attorney and expert witness fees, and such other relief as this Court deems just and proper.

II. JURISDICTION

5. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 (federal question) because this action arises under the laws of the United States, including the ESA, 16 U.S.C. §§ 1531 et seq.; the Administrative Procedure Act (APA), 5

U.S.C. §§ 701 et seq.; the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq.; and the Equal Access to Justice Act, 28 U.S.C. §§ 2412 et seq. An actual, justiciable controversy now exists between Plaintiffs and Defendant, and the requested relief is therefore proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-06.

6. The federal government has waived sovereign immunity in this action pursuant to the APA, 5 U.S.C. § 701, and the ESA, 16 U.S.C. §1540(g). FWS's "precluded" determination, as challenged here, is a final agency action which is subject to judicial review by the Court pursuant to the APA, 5 U.S.C. §§ 701 et seq., and which the ESA expressly states is "subject to judicial review," 16 U.S.C. § 1533(b)(3)(C)(ii). In addition, the federal government has waived sovereign immunity pursuant to the ESA, 16 U.S.C. § 1540(g), and has been provided with a sixty-day notice as required by that section.

7. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' staff, members, and supporters derive scientific, aesthetic, and spiritual benefits from whitebark pine's continued existence in the wild and from the ecosystems upon which it depends. They use and enjoy lands throughout the range of whitebark pine, including regular and consistent use and enjoyment of federal public lands in the Northern Rockies, including National Parks and

National Forests in Montana, Idaho, and Wyoming. The majority of whitebark pine in the U.S. occurs on National Forest and National Park lands. Plaintiff Alliance for the Wild Rockies is already involved in other federal litigation in this Court to protect whitebark pine on National Forest lands in Montana. *See e.g. Alliance for the Wild Rockies v Krueger*, CV-12-150-DLC (D. Mont.) (Challenging the Cabin Gulch Project on Montana's Helena National Forest, in part for approving clearcutting of hundreds of acres of whitebark pine habitat without first considering the best available science on whitebark pine habitat management). Plaintiffs' staff, members, and supporters use whitebark pine habitat for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiffs' staff, members, and supporters observe, study, and enjoy whitebark pine, and intend to continue to observe, study, and enjoy whitebark pine frequently and on an ongoing basis in the future.

8. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' staff, members, and supporters have been and will be adversely affected and irreparably injured if Defendants fail to list the whitebark pine under the ESA. These are actual, specific, and concrete injuries caused by Defendants' failure to comply with mandatory duties under the ESA because a

failure to list will result in continued threats to the existence of whitebark pine. The requested relief would redress these injuries and this Court has the authority to grant Plaintiffs' requested relief.

III. VENUE

9. Venue in this District is proper under 28 U.S.C. § 1391(e). Whitebark pine is found on federal public lands throughout the District of Montana, thus land affected by the challenged decision is found within this judicial district. Whitebark pine habitat is also found in every county within the District of Montana, Missoula Division and is affected by the challenged action. Additionally, Plaintiffs' members reside throughout the District of Montana, including in the Missoula Division, and FWS has offices throughout the District of Montana, including in the Missoula Division. The District of Montana, Missoula Division has previously addressed the plight of whitebark pine in the context of its decision to set aside FWS's delisting decision for the Yellowstone grizzly bear. *Greater Yellowstone Coalition, Inc. v. Servheen,* 672 F.Supp.2d 1105 (D.Mont. 2009). Thus, this District and Division contain affected lands, Plaintiffs' members, and representatives of Defendants, and the Court is already familiar with some of the facts and issues.

IV. PARTIES

10. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) is a non-profit

public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Helena, Montana. The Alliance has over 2,000 individual and organizational members, many of whom are located in Montana. Members of the Alliance observe, enjoy, and appreciate Montana's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including throughout the range of whitebark pine habitat. Alliance's members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect and conserve whitebark pine by issuing a proposed listing rule. Alliance brings this action on its own behalf and on behalf of its adversely affected members.

11. Plaintiff WILDWEST INSTITUTE (WildWest) is a member organization of the Alliance. WildWest is non-profit public interest organization whose mission is to protect and restore forests, wildlands, watersheds and wildlife in the Northern Rockies. WildWest empowers citizens to effectively participate in the public land management decision processes on nearly 20 national forests. WildWest works to help craft positive solutions that promote sustainability in its communities through restoring naturally functioning ecosystems. Its geographic area of focus is the Northern Rockies Bioregion,

which is defined as the U.S. Northern Rocky Mountains proper, plus adjacent and/or ecologically-related wildlands. WildWest also actively participates in larger national policy efforts as they have implications in the Northern Rockies. WildWest's registered office is in Missoula, Montana.

12. Defendant DAN ASHE is the Director of the U.S. Fish and Wildlife Service and is sued in his official capacity. Ashe is responsible for lawful administration of the Endangered Species Act.

13. Defendant KEN SALAZAR is the Secretary of the U.S. Department of the Interior and is sued in his official capacity. Salazar is responsible for lawful administration of the Endangered Species Act.

V. PROCEDURAL BACKGROUND

14. On February 5, 1991, the Great Bear Foundation of Missoula, Montana, petitioned FWS to list whitebark pine under the ESA, stating the species was rapidly declining due to impacts from mountain pine beetles, white pine blister rust, and fire suppression.

15. On January 27, 1994, FWS issued a finding that the Great Bear Foundation had not presented substantial information indicating that listing whitebark pine may be warranted. 59 Fed Reg 3824 (Jan. 27, 1994).

16. On December 9, 2008, FWS received a petition from the Natural Resources Defense Council requesting that FWS list whitebark pine as endangered

throughout its range and designate critical habitat.

17. The 2008 petition included supporting information regarding the species' natural history, biology, taxonomy, lifecycle, distribution, and reasons for decline.

18. The 2008 petition included climate change and successional replacement as additional threats to whitebark pine.

19. On January 13, 2009, FWS sent a letter to Natural Resource Defense Council stating that it would not temporarily list whitebark pine with an emergency regulation. FWS also stated that it would not promptly address the petition because of alleged staffing and budget limitations.

20. On December 23, 2009, FWS received a notice of intent to sue under the ESA from Natural Resource Defense Council for FWS's failure to respond to its listing petition within 90 days with a finding of whether or not the petition presented substantial information indicating that listing may be warranted for whitebark pine.

21. On January 12, 2010, FWS responded that other actions had priority but that it intended to publish the 90 day finding for whitebark pine during the 2010 fiscal year.

22. On February 24, 2010, FWS received the complaint filed in federal court by Natural Resource Defense Council. The complaint alleged that FWS failed to

comply with the ESA's statutory 90 day deadline for a finding on whether substantial information indicates that listing whitebark pine may be warranted. *Natural Resource Defense Council v Salazar*, CV-10-299-RMC (D. D.C.).

23. On May 7, 2010, FWS filed an answer to the complaint.

24. Despite FWS's previous allegations that it could not address the petition because of staffing and budget limitations, on June 18, 2010, FWS voluntarily signed and filed a settlement agreement to provide a 90 day finding to the Office of the Federal Register by July 15, 2010.

25. FWS further agreed in the court-supervised settlement agreement that if it issued a positive 90 day finding, it would also deliver a 12 month finding to the Office of the Federal Register by July 15, 2011.

26. FWS published its positive 90 day finding on July 20, 2010. 75 Fed Reg 42033 (July 20, 2010).

27. In its 90 day finding, FWS held that the petition presented substantial information that listing whitebark pine may be warranted, and announced that it would be conducting a status review of the species.

28. FWS opened a 60-day information collection period to allow interested parties an opportunity to provide information on the status of whitebark pine.

29. In order to comply with the court-ordered requirement to produce a 12 month

finding by July 20, 2011, "[f]unding was made available during the 2010 and 2011 Fiscal Years for work on the status review." 76 Fed. Reg. 42632 (July 19, 2011).

30. On July 19, 2011, FWS published its 12 month finding that whitebark pine is warranted but precluded from listing. 76 Fed. Reg. 42632 (July 19, 2011).

31. The FWS's 12 month finding states: "After review of all available scientific and commercial information, we find that listing *P. albicaulis* as threatened or endangered is warranted. However, currently listing *P. albicaulis* is precluded *by higher priority actions* to amend the Lists of Endangered and Threatened Wildlife and Plants." 76 Fed. Reg. 42632 (July 19, 2011)(emphasis added).

32. On November 15, 2013, FWS received Alliance's November 8, 2013 notice of intent to sue under the ESA to challenge the warranted but precluded decision unless the agency listed whitebark pine under the ESA within 60 days.

33. On December 21, 2013, FWS sent Alliance a response letter indicating that it would not list whitebark pine within the 60 day period.

34. In its letter, FWS asserts that listing "continues to be precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and final listing determination for those species that were

previously proposed."

35. In the letter sent to Alliance, FWS does not disclose the names of the species that allegedly have a higher listing priority than whitebark pine.

VI. FACTUAL ALLEGATIONS

A. WHITEBARK PINE LIFE HISTORY

36. Whitebark pine (*Pinus albicaulis*) is a 5-needled conifer species in the subgenus *Strobus*.

37. Whitebark pine is a slow-growing, long-lived tree with a typical life span of up to 500 years, and sometimes more than 1,000 years.

38. Whitebark pine tolerates poor soils, steep slopes, and windy exposures and is found at alpine tree line and subalpine elevations throughout its range.

39. Whitebark pine is typically 5 to 20 meters (m) (16 to 66 feet (ft)) tall with a rounded or irregularly spreading crown shape.

40. On higher density conifer sites, whitebark pine tends to grow as tall, single-stemmed trees, whereas on open, more exposed sites, it tends to have multiple stems.

41. When whitebark pine grows above tree line, it grows in a krummholz form, which is a stunted, shrub-like growth.

42. Whitebark pines have dark brown to purple seed cones 5 to 8 cm long.

43. Whitebark pine is monoecious, which means that both male pollen and female

seed cones are on the same tree.

44. Whitebark pine is the only "stone pine" that occurs in North America.

45. Stone pines have five needles per cluster, indehiscent seed cones (scales remain essentially closed at maturity) that stay on the tree, and wingless seeds that remain fixed to the cone and cannot be dislodged and dispersed by the wind.

46. Whitebark pine seeds are dispersed almost exclusively by a bird called the Clark's nutcracker, which is in the same family (Corvidae) as ravens, crows, and jays.

47. Clark's nutcrackers have specially developed throat pouches that can carry more than 100 whitebark pine seeds at a time. After breaking open pine cones, the birds will extract the seeds and store them in their throat pouches.

48. Clark's nutcrackers cache the seeds in many small piles in shallow holes throughout the forest; the bird may or may not return to eat all of the cached seeds. The seeds that are not consumed sprout and allow whitebark pine regeneration.

49. A single Clark's nutcracker can cache up to an estimated 98,000 seeds during good seed crop years. They may bury seeds near parent trees or travel up to 22 kilometers (km) (14 miles (mi)) away at varying elevations.

50. Accordingly, Clark's nutcrackers have a strong influence on whitebark pine

regeneration and distribution.

51. Whitebark pine is a keystone, or foundation, species in western North America, where it increases biodiversity and contributes to critical ecosystem functions.

52. For example, it may be the first conifer to become established after disturbance, and thus begins to stabilize soils and regulate runoff.

53. At higher elevations, snow drifts form around whitebark pine trees, thereby increasing soil moisture, modifying soil temperatures, and holding soil moisture later into the season.

54. By shading, protecting, and slowing the progression of snowmelt, whitebark pine also plays an important role reducing spring flooding at lower elevations.

55. Finally, whitebark pine provides highly nutritious seeds for more than 20 species of vertebrates including Clark's nutcracker, pine squirrels , grizzly bears, black bears, Steller's Jay, and Pine Grosbeak.

56. In particular, the 30-50% fat content from pine seeds is efficiently converted to adipose tissue, or body fat, and promotes survival and reproduction of female grizzly bears that rely on adipose reserves not only to hibernate, but also to support lactation.

57. Grizzly bears in the Yellowstone area obtain one-quarter to two-thirds of their net digested energy from pine seeds, depending on the relative abundance of

pine seeds and alternative high-quality foods such as meat from ungulates or trout. When grizzly bears feed on pine seeds in the Yellowstone area, they feed on virtually nothing else.

58. There is a strong relationship between whitebark pine seed crop size and grizzly bear demographics and survival in the Greater Yellowstone Area. Adult female grizzlies that eat more pine seeds have more surviving cubs than females who eat fewer pine seeds.

59. Additionally, when pine seed crops are large, bears are found in whitebark pine stands – far from most humans. When seed crops are small, bears tend to forage for alternative natural foods such as clover or yampa roots that occur at lower elevations closer to human facilities.

60. During the years when pine seeds are scarce, conflicts with humans escalate dramatically, as does the death rate among bears. As a result, during the years when Yellowstone's grizzly bears are intensively using pine seeds, the population increases, whereas during the years when they are not, the population declines. In this way the availability of whitebark pine seeds is closely linked to the survival of grizzly bears in the Greater Yellowstone Area.

61. This Court has previously addressed the importance of whitebark pine as a food for Yellowstone grizzly bears:

> The agency has not articulated a rational connection between the best available science and its conclusion that bears will not be affected by declines in whitebark pine because they are omnivorous. While the Final Rule emphasizes that grizzly bears will be able to adapt to the decline of whitebark pines, the record contains scant evidence for this proposition. . . . .the Service's assurances in the Final Rule that it will continue to monitor whitebark pine declines and the impacts on grizzlies, while laudable, fails to support the conclusion that bears will not be negatively impacted by the loss of whitebark pines.

Greater Yellowstone Coalition, Inc. v. Servheen, 672 F.Supp.2d 1105, 1119 (D.Mont. 2009), *affirmed in relevant part by Greater Yellowstone Coalition, Inc. v. Servheen,* 665 F.3d 1015 (9th Cir. 2011).

62. The Ninth Circuit Court of Appeals has also addressed the importance of whitebark pine as food for grizzly bears:

> On the basis of the information the Service presents in the Rule, it cannot reasonably be denied that whitebark pine loss presents at least a potential threat to the Yellowstone grizzly population. First, whitebark pine seeds are identified as one of four food sources important to grizzly bear survival and reproductive success in the [Greater Yellowstone Area], along with winter-killed ungulates (hoofed mammals), spawning cutthroat trout, and army cutworm moths. The pine seeds serve as an important fall food due to their high fat content and abundance as a pre-hibernation food, and the bears consume them extensively and even predominantly when they are available. This food source permits the bears to efficiently add weight and store fat before they hibernate for the winter.
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> . . .
>
> As to climate change, the Rule refers to a general consensus

> among the world's best scientists that climate change is occurring and points out that the magnitude of warming in the northern Rocky Mountains has been particularly great. According to the Rule, the most substantial way in which changing climate conditions may affect whitebark pine is through outbreaks of native mountain pine beetles that might not continue to be regulated by extremely cold winters, and an increased prevalence of white pine blister rust. Thus, a changing climate may shift the overall distribution of whitebark pine north and higher in elevation, resulting in local extinction and reduced overall distribution in the [Greater Yellowstone Area]. While the Service does not anticipate that whitebark pine will disappear entirely from the [Greater Yellowstone Area] in the foreseeable future, one of the studies upon which it relies concludes that as long as climate warming continues, whitebark pine as a species and ecosystem is at high risk for loss over much of its geographic distribution, including the Yellowstone area.
>
> Finally, of critical importance here, the Rule repeatedly acknowledges a well-documented association between reduced whitebark pine seed abundance and increased grizzly mortality. . . .. In short, when whitebark pine seeds are scarce, grizzlies range more widely in search of food, and contacts between bears and humans increase substantially. Numerous scientific studies and reports cited in the Rule document this connection. The Rule also reports that pine seed unavailability can result in reduced female reproductive success.

Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015, 1024 -1026 (9th Cir. 2011)(citations and internal quotation marks omitted).

63. A whitebark pine generation is roughly 60 years: although they may begin reproduction at 20-30 years old, whitebark pines usually do not produce large cone crops until they are 60-80 years old.

B. WHITEBARK PINE DISTRIBUTION

64. Whitebark pine typically occurs on cold and windy high-elevation or high-altitude sites in western North America.

65. The range of whitebark pine extends longitudinally between 107 and 128 degrees west and latitudinally between 27 and 55 degrees north.

66. Its distribution includes coastal and Rocky Mountain ranges, and scattered populations in northeastern Washington and southeastern British Columbia.

67. The coastal distribution extends from the Bulkley Mountains in British Columbia to the northeastern Olympic Mountains and Cascade Range of Washington and Oregon, to the Kern River of the Sierra Nevada Range of east-central California. Isolated stands are known from the Blue and Wallowa Mountains in northeastern Oregon and the subalpine and montane zones of mountains in northeastern California, south-central Oregon, and northern Nevada.

68. The Rocky Mountain distribution ranges from northern British Columbia and Alberta to Idaho, Montana, and Wyoming.

69. Whitebark pine upper elevational limits decrease with increasing latitudes: ranging from approximately 900 m (2,950 ft) at its northern limit in British Columbia up to 3,660 m (12,000 ft) in the Sierra Nevada.

70. Whitebark pine is typically found growing at alpine timberline or with other

high-mountain conifers just below the timberline and upper montane zone. In the Rocky Mountains, common associated tree species include lodgepole pine, Engelmann spruce, subalpine fir, and mountain hemlock.

71. Approximately 44% of whitebark pine range occurs in the U.S.

72. In the U.S., approximately 96% of whitebark pine habitat is on federally-owned public lands: 81% on National Forests; 13% on National Park lands; 2% on Bureau of Land Management lands; and 4% on non-federal lands.

C. POPULATION TREND

73. Whitebark pine is in a range-wide decline.

74. FWS finds that the "preponderance of data . . . provides evidence of a substantial and pervasive decline throughout almost the entire range of the species."

75. The U.S. Forest Service estimates that, as a result of climate change, the whitebark pine population will diminish to less than 3% of its current U.S. distribution by the end of the century (Warwell et al. 2007; Figure 10).

D. THREAT - CLIMATE CHANGE

76. The Intergovernmental Panel on Climate Change has concluded that warming of the climate is unequivocal, and that continued greenhouse gas emissions at or above current rates will cause further warming.

77. Climate change scenarios estimate that the mean air temperature could

increase by over 3 °C (5.4 °F) by 2100.

78. The Panel also projects that there will very likely be regional increases in the frequency of extreme weather conditions, such as hot extremes, heat waves, and heavy precipitation, as well as increases in atmospheric carbon dioxide.

79. Cumulatively, climate change is the most significant threat to whitebark pine survival.

80. Climate change will result in direct habitat loss to whitebark pine. Habitat loss is expected because (1) temperatures become so warm that they exceed the thermal tolerance of whitebark pine and the species is unable to survive or (2) warmer temperatures favor other species of conifer that currently cannot compete with whitebark pine in cold high-elevation habitats.

81. Whitebark pine is not likely to successfully adapt or migrate in response to a warming climate.

82. Climate change is expected to significantly decrease the probability of rangewide persistence of whitebark pine: at the end of the century, less than 3% of currently suitable habitat is expected to remain based on climate change alone.

83. In other words, in less than two generations, whitebark pine will be reduced to less than 3% of currently suitable habitat due to climate change.

84. Whitebark pine is predicted to be nearly extirpated under a scenario of

warming only, and warming with a concomitant increase in precipitation.

85. In addition to causing direct habitat loss, climate change may also alter environmental conditions that affect whitebark pine.

86. For example, although whitebark pine has evolved with fire, climate change may alter fire regimes to act in ways that whitebark pine cannot survive.

87. Additionally, although whitebark pine has also evolved with the mountain pine beetle, the life cycle of the beetle is temperature-dependent and warming temperatures are currently resulting in unprecedented beetle epidemics that whitebark pine may not be able to withstand. The beetles are now moving into areas previously climatically inhospitable for epidemic-level growth.

88. Moreover, although whitebark pine is already suffering from white pine blister rust, a disease caused by a non-native fungus, climate change may exacerbate this problem too. The blister rust requires two hosts to complete its life cycle: whitebark pine and another host, generally a species in the *Ribes* genus. Earlier thaws and later frosts caused by warming temperatures provide a longer growing period for *Ribes* and other second hosts, thus making it easier for blister rust to complete its life cycle.

89. Climate change is also a primary threat to other ESA species, including the polar bear, the bearded seal, the ringed seal, and the wolverine.

90. In the wolverine "warranted but precluded" rule, FWS states "we have

identified one primary threat to the wolverine DPS: climate change." 75 Fed. Reg. 78030, 78042 (December 14, 2010).

91. [T]he primary impact of climate change on wolverines is expected to be through changes to the availability and distribution of wolverine habitat." *Id*.

92. "Composite projections for the time interval centered on 2045 predict that 23 percent of current wolverine habitat in the contiguous United States will be lost due to climate warming []. That loss expands to 63 percent of wolverine habitat by the time interval between 2070 and 2099." *Id*. at 78045.

93. The polar bear, bearded seal, and ringed seal are also threatened primarily due to climate change because of the threat of range-wide sea ice habitat loss.

E. THREAT- WHITE PINE BLISTER RUST

94. White pine blister rust was introduced into western North America around 1910.

95. White pine blister rust alternates between living primary hosts, which are five-needle pines, and alternate hosts.

96. Alternate hosts in western North America are typically woody shrubs in the genus *Ribes,* such as gooseberries and currants, but also may include herbaceous species of the genus *Pedicularis* and the genus *Castilleja*.

97. White pine blister rust progresses through five spore stages to complete each generation: two spore stages occur on the primary host and three stages occur

on the alternate host.

98. Blister rust spores enter pine trees through openings in the needle surface, called stomates, and move into the twigs, branches, and tree trunk, causing swelling and cankers to form.

99. White pine blister rust attacks seedlings and mature trees. Initially damaging upper canopy and cone-bearing branches and restricting nutrient flows, it eventually girdles branches and trunks, leading to the death of branches or the entire tree.

100. White pine blister rust can kill small trees within 3 years, and even one canker can be lethal.

101. While some infected mature trees can continue to live for decades, their cone-bearing branches typically die, thereby eliminating the seed source required for reproduction.

102. Even if a blister rust infection only reduces cone production, as opposed to eliminating cone production, even when cone production is low there could be a loss of regeneration for two reasons: (1) Clark's nutcrackers abandon sites with low seed production; and (2) the proportion of seeds taken by predators becomes so high that no seeds remain for regeneration.

103. Infected live trees produce spores every year. A wave of new blister rust infections into new areas, or intensification from a cumulative buildup in

already-infected stands, will occur where the second/alternative hosts are abundant and when summer weather is favorable to spore production and dispersal.

104. White pine blister rust occurs throughout almost all of whitebark pine's range, but not all trees are infected and infection rates vary widely.

105. White pine blister rust results in the mortality of an overwhelming majority of infected individuals, and all age classes of trees are susceptible. Seedlings are killed rapidly, and while some mature individuals may persist on the landscape for decades following infection, white pine blister rust typically kills seedcone-bearing branches.

106. White pine blister rust has impacted millions of acres of whitebark pine.

107. Currently, colder, drier areas of the range that were originally thought to be less susceptible to the disease are now showing considerable rates of infection.

108. The estimated population decline attributed to blister rust in Canada is expected to be 57 percent within 100 years, and FWS expects a similar rate of decline in the U.S.

109. Efforts at effective blister rust-resistant breeding programs for whitebark pine are in early stages, but will likely take decades, and their outcomes are uncertain.

F. THREAT - MOUNTAIN PINE BEETLE

110. Mountain pine beetles are a native species, and are the principal insect predator of whitebark pine.

111. Mountain pine beetles locate a tree with a large enough diameter to support beetle reproduction.

112. Upon finding a suitable host tree, the adult female beetles emit pheromones that attract adult males and other adult females to the host tree.

113. The beetles bore into the tree and mate in the phloem tissue under the outer tree bark.

114. Once a tree has been fully colonized, the beetles produce an anti-aggregation pheromone that signals to incoming beetles to pass on to nearby unoccupied trees.

115. Females subsequently excavate vertical galleries into the phloem where they lay eggs. Larvae hatched from these eggs feed on the phloem, pupate, and emerge as adults to repeat the process.

116. Eventually, the excavation and consumption of the phloem, as well as the introduction of a blue-stain fungi brought in on the beetles, inhibits the ability of the tree to receive water and nutrients, and/or girdles the tree, which kills the tree.

117. Almost all host trees will mount a chemical defense against beetle attacks but

that defense can be overwhelmed.

118. Mountain pine beetle development is directly controlled by temperature. The entire mountain pine beetle life cycle (from egg to adult) can take between 1 and 2 years depending on ambient temperatures.

119. Warmer temperatures promote a more rapid development that facilitates a 1-year life cycle.

120. Additionally, sufficiently low temperatures can kill larvae and adults.

121. Mountain pine beetles are a native and natural force and cause of disturbance and regeneration in western forests, with a regenerative thinning effect similar to wildfires. As with wildfire, the size of disturbance patches and the percentage mortality within those patches varies. As with wildfire, some live trees remain after disturbance, and the dead trees provide important wildlife habitat as standing dead trees (snags) or fallen dead trees (coarse woody debris). Eventually, the nutrients from dead trees are recycled back into the soil.

122. Some beetle infestations may only affect small areas, but when conditions are right, infestations can reach stand-replacing levels.

123. In the past, forest managers did not consider whitebark pine to be an important host for mountain pine beetle.

124. The primary hosts for the beetle – lodgepole pine and ponderosa pine – are

found at lower elevations with warmer temperatures. The high-elevation sites occupied by whitebark pine typically have been climatically inhospitable to mountain pine beetle.

125. Unlike previous epidemics, the current mountain pine beetle outbreak is having an increasingly significant impact on whitebark pine across its range.

126. The reported mortality rates of mostly mature trees can be as high as 96%.

127. Trends of environmental effects from climate change have provided the favorable conditions necessary for the current, unprecedented mountain pine beetle epidemic in high-elevation communities across the western United States and Canada.

128. Warming trends have resulted in intensified mountain pine beetle activity in high-elevation whitebark pine forests, as well as mountain pine beetle range expansion into more northern latitudes and higher elevations.

129. Winter temperatures are now warm enough for winter survival for all mountain pine beetle life stages and for maintenance of the 1-year life cycle that promotes epidemic mountain pine beetle population levels.

130. Along with warmer winter conditions, summers have been drier, with droughts occurring through much of the range of whitebark pine. Drought-stressed trees are more vulnerable to mortality from beetles because they are less able to mount an effective defense against mass attacks by mountain pine

beetles.

G. POTENTIAL STRESSORS

131. FWS recognizes that commercial timber harvest is a potential stressor for whitebark pine, though it does not rise to the level of a threat at this time.

132. FWS recognizes that habitat destruction and degradation from road construction is a potential stressor for whitebark pine, though it does not rise to the level of a threat at this time.

H. EXISTING REGULATORY MECHANISMS

133. As noted above, the primary threat to whitebark pine – both individually and cumulatively – is climate change.

134. There are no enforceable regulatory mechanisms in the U.S. that effectively and adequately address and attempt to reverse and/or prevent climate change.

I. LISTING PRIORITY NUMBER

135. Congress drafted the ESA to allow for a "warranted-but-precluded" finding if, in response to a citizen petition, FWS determines that a species warrants listing but such listing is precluded by higher priority listing actions. *See* 16 U.S.C. § 1533(b)(3)(B).

136. The circumstances under which the Secretary may invoke that excuse, however, "are narrowly defined." *Center for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1102 (9th Cir.2006).

137. The listing actions required by Section 4 of the ESA – such as 90 day petition findings, 12 month petition findings, and final determinations once listing has been proposed – all have statutory deadlines.

138. However, there is a loophole/black hole in the statute for "warranted-but-precluded" species. There is no statutory deadline for issuance of a proposed rule to list a species for which FWS has held listing is warranted but precluded by work on other higher priority listings.

139. Thus, FWS frequently issues these "warranted-but-precluded" findings for species, which allow the agency to indefinitely postpone the actual issuance of a proposed listing rule for a species that, in fact and undisputedly, needs such a rule.

140. FWS places species that it has determined warrant listing, but for which listing is precluded by higher priority listing actions, on the "candidate list." Despite placement on the candidate list, "warranted-but-precluded" species are not true "candidate species." True candidate species are those species that the Secretary itself proposes and is considering for listing, but for which there is not yet a proposed rule. *See Center for Biological Diversity v Norton*, 254 F.3d 833 (9th Cir. 2001).

141. FWS states that it treats petitions for species on the candidate list as "resubmitted" each year and makes annual findings on these species in its

"Candidate Notice of Review."

142. Congress requires FWS to establish, in published agency guidelines, "a ranking system to assist in the identification of species that should receive priority review . . . ." 16 U.S.C. § 1533(g).

143. In response, FWS drafted guidelines that create a system for ranking the candidate species. *See* 48 Fed. Reg. 43098 (Sept. 21, 1983). Basically, the FWS assigns a "Listing Priority Number" or "LPN" to each species depending on how seriously it is being threatened.

144. The LPN will determine where in the priority line the species stands, and the agency's resources will then determine how far down the line the agency can go in immediately drafting listing rules—species further down the line must wait and are given a "precluded" designation.

145. The theory behind the listing priority system is that "[i]nasmuch as listing is an identification process it appears to be most appropriate to proceed on a "worst-first" basis and list those species in greatest immediate danger of extinction first." 48 Fed. Reg. at 43099.

146. To be more precise, FWS assigns an LPN to each candidate species according to: (1) the magnitude of threats they face; (2) the immediacy of those threats; and (3) the taxonomic distinctiveness of the entity that may be listed. *See* 48 Fed.Reg. 43098, 43102 (Sept. 21, 1983).

147. An LPN can range from 1 (highest priority) to 12 (lowest priority). *Id*. at 43098, 43102–03.

148. The priority listings were designed to "make the most appropriate use of the limited resources available to implement" the ESA. *Id*. at 43098.

149. The "magnitude" of the threats is evaluated to ensure that species "facing the greatest threats to their continued existence would receive the highest priority." *Id.* at 43103.

150. Under the FWS Guidelines, a threat to a species could be deemed high, moderate, or low. *Id.* at 43104.

151. The high category means "extinction is almost certain in the immediate future because of a rapid population decline or habitat destruction." *Id.*

152. Moderate means "the species will not face extinction if recovery is temporarily held off, although there is continual population decline or threat to its habitat." *Id.*

153. A species in the low category "is rare, or is facing a population decline which may be a short-term, self-correcting fluctuation, or the impacts of threats of the species' habitat are not fully known." *Id.*

154. The "immediacy" of the threats refers not to the imminence of extinction, but rather addresses whether or not the threats are "actual" and "identifiable," as opposed to "only potential" or not known to be presently affecting the

species. *Id.* at 43103.

155. The intent of the "taxonomic distinctiveness" criterion is to "devote resources on a priority basis to these species representing highly distinctive or isolated gene pools." *Id.*

156. This review of the FWS Guidelines shows that the agency's LPN designations—that is, the agency's findings on magnitude, imminence, and taxonomy—are supposed to be based entirely on science.

157. For example, a finding that a threat is "moderate" because the "species will not face extinction if recovery is temporarily held off, although there is continual population decline or threat to its habitat" is based on science rather than the availability of agency resources and the dire needs of other species.

158. Only after the LPN is designated does the agency start making administrative decisions comparing species and evaluating how many it can help given its resources.

159. Under FWS's own guidelines, setting an LPN is an indispensable first step in the process of making a warranted-but-precluded finding.

160. Congress never intended "to allow the Secretary to delay commencing the rulemaking process for any reason other than the existence of pending or imminent *proposals to list species subject to a greater degree of threat*." H.R.Rep. No. 97–567 (1982) (emphasis added).

161. The ESA requires that if FWS issues a warranted-but-precluded decision, it must concurrently provide reasoning and data in its decision to demonstrate that there are, in fact, other specific imminent/pending proposals for listing that address species subject to a greater degree of threat. *Center for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1099, 1102-1103 (9th Cir.2006).

162. The reasoning and data on higher priority species must be in the decision itself: "it may be that the homework was done, but it has to be turned in to count." Thus, in a warranted-but-precluded decision, the agency cannot incorporate by reference data and reasoning from a Candidate Notice of Review. *Id.*

163. To achieve the legally adequate amount of detail, "[a]t a base level, the ESA requires that FWS itemize pending species listings that preclude listing the [species at issue] and describe the 'reasons' (whatever they may be) why *each* of these species listings has a higher priority than the [species at issue] . . . ." *California Native Plant Society v. Norton,* 2005 WL 768444, *5 -6 (D. D.C. 2005) (emphasis added). This type of detail is especially important in "cases in which the FWS has said that listing [the species at issue] is precluded by listing species *at the same priority level* as [the species at issue]." *Id.* (emphasis added).

164. Pending critical habitat designations cannot preclude listing. *Id.*

165. Additionally, negative 90-day and 12-month findings as well as "warranted-but-precluded" determinations for other species, are not proper bases for preclusion. 16 U.S.C. § 1533(b)(3)(B)(iii)(I);

166. When Congress gave FWS the authority to make warranted-but-precluded findings, it simultaneously warned courts that "[i]n cases challenging the Secretary's claim of inability to propose an otherwise warranted petitioned action, the court will, in essence, be called on to separate justifications grounded in the purposes of the Act from the foot-dragging efforts of a delinquent agency." *See* H.Rep No. 835, 97th Cong., 2d Sess., reprinted in 1982 U.S.C.C.A.N. 2860 (Sept. 17, 1982).

167. The Ninth Circuit has observed that "potentially qualified species may sit on candidate lists for extraordinarily long periods before becoming the subject of protective rules." *Center for Biological Diversity v. Norton*, 254 F.3d 833, 840 (9th Cir.2001).

168. One commentator estimates that species spend an average of 19 years waiting in the warranted-but-precluded category. *See* K. Molly Smith, Abuse of the Warranted But Precluded Designation: A Real or Imagined Purgatory?, 19 Southeastern Envtl. L.J. 119, 131 (2010)

169. As of 2006, at least 42 species had gone extinct during delays in the listing

process. Hundreds more have experienced long delays between the time they were identified as needing protection and the time they were actually protected with an ESA listing. Population declines during these delays makes recovery more difficult, more expensive, and sometimes impossible. Greenwald, et al., *The Listing Record*, in The Endangered Species Act at Thirty at 51 (Dale D. Goble et al. eds., 2006)

170. The federal courts reject the agency's attempt to blame the backlog on Congress and the courts:

> all is not as it seems. The FWS's financial pinch is not being imposed entirely from the outside; much of it is coming from inside the agency's own home. The FWS's parent agency, the Department of the Interior (DOI), has limited its budget requests and asked for spending caps on listing activities. . . . In each year from 1998 to 2003, the DOI asked Congress to cap spending on listing. []. While the FWS itself has estimated that $153 million is necessary to address the backlog, the DOI routinely requests less than $9 million. [].
>
> Obviously, in recent years, the devastating recession has tightened budgets for all agencies. Thus, the Court cannot find that all of the FWS's current funding short-fall stems from a parsimonious parent agency. At the same time, some of it is self-inflicted, making it disingenuous for the FWS to paint itself as a helpless victim of external forces.

Western Watersheds Project v. FWS, 2012 WL 369168 (D. Id. 2012); *see also Center for Biological Diversity v. Norton*, 163 F. Supp. 2d 1297, 1300 (D.N.M. 2001) ("the Secretary's financial predicament may be, in part, the

product of its own making. . . .the Department of Interior admitted that the listing program is not proposed at a level that would allow the Service to meet all of the Act's requirements and deadlines"); *Conservation Council for Hawai'i v. Babbitt*, 24 F. Supp. 2d 1074, 1078 -1079 (D. Haw. 1998) ("Plaintiffs argue that Defendants have created the budgetary crisis to justify delay. For example, during FY 1998, Defendants received all $5.19 million that they requested for the listing budget, and did not request more"); Greenwald, et al., *The Listing Record*, in The Endangered Species Act at Thirty at 61 (Dale D. Goble et al. eds., 2006) ("The Department of the Interior, however, not only failed to request sufficient funds from Congress to keep up with its workload but in 1998 also requested that Congress legislatively limit the amount of money available for listing and critical habitat decisions. That cap has been renewed at the request of the secretary of the interior [sic] in every year from 1999 to 2004.")(citation omitted).

171. The record shows that Congress does provide appropriations if the Department of the Interior asks for them: between 1979 and 2003, Congress has appropriated an average of 97% of the funding requested by the Department of the Interior for the listing program. Greenwald, et al., *The Listing Record*, in The Endangered Species Act at Thirty at 64 (Dale D. Goble et al. eds., 2006)

172. At the request of the Department of the Interior, Congress has dramatically increased funding for consultation and for recovery, but when adjusted for inflation, the requested budget for listing has hardly increased at all. Greenwald, et al., *The Listing Record*, in The Endangered Species Act at Thirty at 64 (Dale D. Goble et al. eds., 2006)

173. Appropriately then, "[f]unding considerations do not repeal or modify FWS's duties under the ESA." *Friends of Wild Swan, Inc. v. U.S. Fish and Wildlife Service,* 945 F. Supp. 1388, 1401 (D. Or.1996)

174. FWS may not "evade the law simply by failing to appropriate enough money to comply with it." *Center for Biological Diversity v. Norton*, 304 F. Supp.2d 1174 (D. Ariz.2003).

175. FWS "may not avoid its mandatory duties under the ESA on the grounds that the budget and staff of the Department of Interior are inadequate." *Id.*

176. Put another way, "[t]he solution of being over-obligated and under-funded rests with Congress, and not with the Court." *Butte Environmental Council v. White*, 145 F. Supp.2d 1180, 1185 (E.D. Cal.2001).

177. "To the extent the agency feels aggrieved by Congress' failure to allocate proper resources in which to comply with its statutory duty, Congress, not the courts, is the proper governmental body to provide relief." *Conservation Council for Hawai'i v. Babbitt*, 24 F. Supp. 2d 1074, 1078 -1079 (D. Haw

1998).

178. Additionally, "[i]n setting a deadline, [case precedent] forbids our consideration of the Secretary's budgetary crisis caused by judicially-imposed deadlines in other cases. . . .The judicially-imposed deadlines in other cases flow from the inadequacy of ESA or NEPA-mandated action or the Secretary's decision not to take action at all. . . .Though one step removed, the deadlines are a product of the Secretary's discretionary actions." *Center for Biological Diversity v. Norton*, 163 F. Supp. 2d 1297, 1299-1300 (D.N.M. 2001).

179. Likewise, "Defendant does not get to delay fulfilling its statutory obligations until a court orders it to do so and then seek relief on the basis that it has too many court orders to satisfy. This would essentially reward Defendant for shirking its duties under the ESA." *Center for Biological Diversity v. Norton* 304 F. Supp. 2d 1174, 1177 (D. Ariz. 2003)

180. In its July 2011 decision, FWS argues that "[w]e cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (see 31 U.S.C. 1341(a)(1)(A))."

181. The federal courts reject this argument:

> FWS does not argue directly that [the Anti-Deficiency] Act trumps the ESA, but at least one court has rejected that argument in dicta. *See Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir.1999) ("the

> Secretary does not press the argument that inadequate [funding] relieved him of ESA duties ... [but][w]e could not accept that argument if it had been raised ..."). Moreover, a court order would be a complete defense to prosecution under the Act. *Clarke v. United States*, 915 F.2d 699, 701 (D.C.Cir.1990). This judicial reading of the Act is confirmed by a ruling of the Comptroller General of the United States, finding that agency spending ordered by a court "would not be viewed as violating the Anti–Deficiency Act." *See* 63 Op. Comp. Gen. 308, *11 (1984) (*quoted in Center for Biological Diversity*, 304 F. Supp. 2d at 1180).

Western Watersheds Project v. FWS, 2012 WL 369168 (D. Id. 2012)

182. Additionally, any action by Congress "to prohibit spending to comply with an existing court-ordered deadline ... would be an unconstitutional violation of the separation of powers doctrine." *Center for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1180 (D. Ariz. 2003).

183. FWS assigns LPN 2 to whitebark pine based on its finding that the species faces threats that are of high magnitude and are imminent.

184. LPN 2 is the highest priority number that FWS provides to a species that is not in a monotypic genus.

185. There are currently no species with LPN 1 waiting to be listed, nor were there any LPN 1 species at the time of the agency's July 2011 decision.

186. In other words, there are no species with a higher priority Listing Priority Number than whitebark pine.

187. Although the agency's July 2011 decision states that LPN 2 species are

ranked for additional priority within their LPN 2 designation, the agency does not disclose and rank all of the LPN 2 species on the candidate list, does not disclose which LPN 2 species allegedly have priority over whitebark pine, and does not disclose the reasons why those LPN 2 species allegedly have priority over whitebark pine.

188. In other words, the agency's decision does not clearly itemize and explain which imminent and pending proposals address species with purportedly greater threats than whitebark pine, and therefore preclude listing whitebark pine.

189. In the section of its July 2011 decision where the agency lists the "High-Priority Listing Actions" that will receive funding for listing in Fiscal Year 2010 or 2011 – instead of whitebark pine – the agency lists 39 species with Listing Priority Numbers between 3 and 12.

190. Species with Listing Priority Numbers between 3 and 12 do not face greater threats than whitebark pine, which has a Listing Priority Number 2.

191. The other 60 species in the "High-Priority Listing Actions" table have a Listing Priority Number 2, but there is no explanation as to whether or how those species face greater threats than that of whitebark pine, which also is a Listing Priority Number 2.

192. Regardless, almost 40% of the species receiving funding in Fiscal Years

2010/2011, which the agency categorizes as "High Priority Listing Actions," actually have a lower listing priority than whitebark pine, and therefore cannot legally preclude the listing of whitebark pine.

193. In its July 2011 finding, FWS argues that "[i]n [Fiscal Year] 2010, the Service received many new petitions and a single petition to list 404 species. The receipt of petitions for a large number of species is consuming the Service's listing funding that is not dedicated to meeting court-ordered commitments."

194. First, as noted above, any negative 90 day findings, negative 12 month findings, or warranted-but-precluded findings on new petitions cannot legally preclude the listing of whitebark pine.

195. Additionally, FWS does not disclose that the majority of its "court-ordered commitments" are a result of the agency's *voluntarily-entered* settlement agreements, which were approved by a court. *In re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377-EGS, dkt #31-1, dkt #42-1, dkt #55, dkt#56 (D. D.C.)

196. Some of the specific commitments by FWS, which the agency entered into in 2011, include setting definite dates for either the issuance of a proposed listing rule, or the issuance of a not-warranted finding, for a number of specific candidate list species with a lower listing priority than whitebark

pine, including, but not limited to, the following:

a. FWS committed to a determination by the end of Fiscal Year 2012 for the acuna cactus [LPN 3], Jollyville Plateau salamander [LPN 8], Miami blue butterfly [LPN 3], and wekiu bug [LPN 8];

b. FWS committed to a determination by the end of Fiscal Year 2013 for the bi-state (Mono Basin) distinct population segment of greater sage-grouse [LPN 3], Dakota skipper [LPN 8], Mexican garter snake [LPN 3], mountain yellow-legged frog [LPN 3], North American wolverine [LPN 6], red knot [LPN 3], Rosemont talussnail [LPN 5], yellow-billed cuckoo [LPN 3], and Yosemite toad [LPN 11];

c. FWS committed to a determination by the end of Fiscal Year 2014 for Arctic grayling [LPN 3], black pine snake [LPN 3], least chub [LPN 7], Rio Grande cutthroat trout [LPN 9], Tucson shovelnose snake [LPN 3], Pacific fisher [LPN 6], and yellow-billed loon [LPN 8];

d. FWS committed to a determination by the end of Fiscal Year 2015 for the Eastern massasagua [LPN 9], greater sage-grouse range-wide (including Columbia DPS) [LPN 6 & LPN 8], headwater chub [LPN 8], Kentucky arrow darter [LPN 3], roundtail chub [LPN 9], and southern Idaho ground squirrel [LPN 9]; and

e. FWS committed to a determination by the end of Fiscal Year 2016 for

the Relict leopard frog [LPN 11], and Tahoe yellow cress [LPN 8]. *In re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377-EGS, dkt #31-1, dkt #42-1, dkt #55, dkt#56 (D. D.C.)

197. In addition, in 2011, FWS voluntarily agreed to conclusively address – with either a proposed rule or a "not-warranted" finding – all 251 species on the 2010 candidate list (from its 2010 Candidate Notice of Review) by the end of Fiscal Year 2016. *In re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377-EGS, dkt #31-1, dkt #42-1, dkt #55, dkt#56 (D. D.C.); *see also* 75 Fed. Reg. 69222 (November 10, 2010).

198. 96 of the 251 candidate species in the 2010 Candidate Notice of Review had a Listing Priority Number 2, and zero species had a Listing Priority Number 1.

199. Thus, FWS voluntarily agreed to list 155 species with a lower priority than whitebark pine by the end of Fiscal Year 2016.

200. The agency's voluntary commitment to list 155 candidate species with a lower priority than whitebark pine was approved/ordered by the federal court and thus became effective on September 9, 2011. *In re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377-EGS, dkt #31-1, dkt #42-1, dkt #55, dkt#56 (D. D.C.)

201. The agency's decision not to list whitebark pine – despite its Listing Priority

Number 2 – was issued July 19, 2011. 76 Fed. Reg. 42631 (July 11, 2011).

202. FWS has not made any commitment to list whitebark pine by any date certain.

203. FWS recently filed documents in federal court indicating that it "is now well ahead [of the] schedule" it set for itself in the 2011 settlement agreements discussed above. "[B]ased on its present internal work plans, the Service currently expects to complete a listing determination for the wolverine [Distinct Population Segment] no later than January 18, 2013 – more than nine months in advance of the court-ordered deadline." *Cottonwood Environmental Law Center v Salazar*, CV-12-057-DLC, docket #7-1 (D. Mont. July 3, 2012).

204. FWS fails to address how the fact that it is "well ahead of schedule" listing species with a lower priority number than whitebark pine relates to its determination not to list whitebark pine – a species with the highest priority number on the waiting list.

CLAIM FOR RELIEF

The agency's decision that whitebark pine is warranted for listing, but precluded due to higher priority actions, is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

205. All above paragraphs are incorporated by reference.

206. FWS must base its warranted-but-precluded decision on whether there are

higher priority actions in the form of imminent or pending proposals to list species that face greater threats.

207. The first step in this determination is the assignment of a Listing Priority Number 1 through 12.

208. Listing Priority Number 1 is the highest priority.

209. FWS assigns whitebark pine to Listing Priority Number 2.

210. There are currently no candidate species with Listing Priority Number 1.

211. FWS alleges that within the list of species with a Listing Priority Number 2, it also provides a supplemental rank to further prioritize the species.

212. However, in its July 2011 decision, FWS fails to itemize all LPN 2 species and explain the alleged supplemental priority ranking for each of them. FWS also fails to disclose where whitebark pine falls within the alleged second tier priority list within LPN 2 species.

213. The agency's July 2011 decision indicates that FWS decided to allocate Fiscal Year 2010/2011 funding for 39 species with a lower priority number than whitebark pine.

214. Additionally, the agency voluntarily entered into settlement agreements in 2011 that commit the agency to issue a final proposed rule or not-warranted finding for 155 species with a lower priority number than whitebark pine.

215. The agency must prioritize species depending on the threat they face.

216. A warranted listing should only be precluded by listings for other species if the other species face greater threats.

217. It is arbitrary and capricious, an abuse of discretion, and a violation of the ESA for the agency to hold that whitebark pine is precluded from listing by higher priority species because there are no species on the candidate list with a higher priority number than whitebark pine.

218. It is arbitrary and capricious, an abuse of discretion, and a violation of the ESA for the agency to hold that whitebark pine is precluded from listing by higher priority LPN 2 species because in its July 2011 decision, the agency does not itemize and disclose the list of ranked LPN 2 species, disclose where whitebark pine falls within that alleged second tier ranking, and explain the reasons why individual species with the same priority number face greater threats than whitebark pine. *See e.g. Center for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1099, 1102-1103 (9th Cir.2006)(discussed above); *California Native Plant Society v. Norton*, 2005 WL 768444, *5 -6 (D. D.C. 2005)(discussed above); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins*., 463 U.S. 29, 48, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (requiring an agency to "cogently explain why it has exercised its discretion in a given manner"); *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196-97, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) ("It will not do for a

court to be compelled to guess at the theory underlying the agency's action....").

219. Even if the agency did disclose a list of ranked LPN 2 species, whitebark pine would need to be at top of the list, in part due to the magnitude and imminence of threats, but also due to the fact that the imperiled status of whitebark pine is the sole reason that the Ninth Circuit Court of Appeals ordered FWS not to delist the Yellowstone grizzly bear. *Greater Yellowstone Coalition, Inc. v. Servheen,* 665 F.3d 1015 (9th Cir. 2011). In other words, the imperiled status of whitebark pine is preventing the full recovery of another, already-listed, threatened species.

220. It is arbitrary and capricious, an abuse of discretion, and a violation of the ESA for the agency to refuse to list whitebark pine, a species with the highest priority number on the candidate list, based on purported funding shortfalls, because, as discussed above, (a) FWS cannot consider judicially-imposed deadlines in other cases as a basis for preclusion, (b) funding caps are self-imposed by the Department of Interior, (c) the Department refuses to request enough funds to list all species that require ESA protection, and (d) FWS is apparently capable of finding funding when necessary because it has raised/earmarked enough funding to list 155 species with a lower priority listing number than whitebark pine.

221. Additionally, the agency's purported funding shortfalls appear even more dubious as an excuse in light of its recent admission that it is "well ahead of schedule" making listing determinations for dozens of species with a lower priority number than whitebark pine.

RELIEF REQUESTED

For all of the above-stated reasons, Plaintiffs request that the Court award the following relief:

A. Declare, hold, and adjudge that FWS's "precluded" determination in its July 2011 decision for whitebark pine is arbitrary, capricious, an abuse of discretion, and/or contrary to law;

B. Reverse and remand FWS's July 2011 "precluded" determination with instructions for FWS to promptly publish a proposed listing rule for whitebark pine by a reasonable and court-ordered deadline;

C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under the Endangered Species Act, 16 U.S.C. § 1540(g), the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and/or all other applicable authority;

D. Enter such other and further relief as the Court may deem appropriate to protect whitebark pine and the public interest.

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Respectfully submitted this 15th Day of January, 2013.

/s/ Rebecca K. Smith
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