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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,  
THE CENTER FOR SIERRA NEVADA  
CONSERVATION, NATURAL RESOURCES  
DEFENSE COUNCIL, and SIERRA NEVADA  
FOREST PROTECTION CAMPAIGN,

Plaintiffs,

v.

GALE A. NORTON, in her official  
capacity as Secretary of the  
Interior; and MARSHALL P. JONES,  
in his official capacity as Acting  
Director, United States Fish and  
Wildlife Service,

Defendants.

No. C 01-2950 SC

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ORDER GRANTING  
PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT

ENTERED IN CIVIL DOCKET

4/4/03

United States District Court  
For the Northern District of California

I. INTRODUCTION

On July 31, 2001, Plaintiffs Center for Biological Diversity, the Center for Sierra Nevada Conservation, the Natural Resources Defense Council and the Sierra Nevada Forest Protection Campaign, ("Plaintiffs") filed a Complaint for Declaratory and Injunctive Relief to compel Defendants Secretary of the Interior Gale Norton ("Secretary") and Acting Director of the United States Fish and Wildlife Service ("Service") Marshall Jones (collectively "Defendants") to comply with certain listing provisions of the

1 Endangered Species Act ("ESA"), 16 U.S.C. § 1533.

2 Now before the Court is Plaintiffs' Motion for  
3 Reconsideration of this Court's partial denial of Plaintiffs'  
4 January 4, 2002, Motion for Summary Judgment. For the reasons set  
5 forth below, Plaintiffs' motion is granted.

6  
7 **II. BACKGROUND**

8 While Plaintiffs' Complaint alleged violations of the ESA  
9 with regard to the California spotted owl (*Strix occidentalis*)  
10 ("owl") and the West Coast population of the fisher (*Martes*  
11 *pennanti*) ("fisher"), the instant motion concerns only the fisher.

12 Defendants received Plaintiffs' petition to list the fisher  
13 under the ESA on December 5, 2000. Section 4(b)(3)(A) of the ESA  
14 provides that, "To the maximum extent practicable, within 90 days  
15 after receiving the petition of an interested person ... to add a  
16 species to ... [the Secretary's list of endangered species], the  
17 Secretary shall make a finding as to whether the petition presents  
18 substantial scientific or commercial information indicating that  
19 the petitioned action may be warranted." 16 U.S.C.  
20 § 1533(b)(3)(A).

21 The Secretary did not make this finding ("initial finding")  
22 within 90 days of December 5, 2000. As a result, on April 10,  
23 2001, Plaintiffs notified the Secretary of her failure to comply  
24 with 16 U.S.C. § 1533(b)(3)(A). Receiving no response, Plaintiffs  
25 filed the instant action on July 31, 2001, seeking, with regard to  
26 the fisher, to compel Defendants to make the initial finding  
27 specified in 16 U.S.C. § 1533(b)(3)(A).

1           On January 4, 2002, Plaintiffs filed a motion for summary  
2 judgment in which they argued that Defendants violated 16 U.S.C.  
3 § 1533(b)(3)(A). It was undisputed both that more than one year  
4 had passed since the Secretary received Plaintiffs' petition  
5 regarding the fisher, and that the Secretary had not yet made the  
6 initial finding set forth in 16 U.S.C. § 1533(b)(3)(A).  
7 Plaintiffs argued that even if 16 U.S.C. § 1533(b)(3)(A) gives the  
8 Secretary discretion to take more than 90 days to make an initial  
9 finding, 16 U.S.C. § 1533(b)(3)(A) and § 1522(b)(3)(B), read  
10 together, require the Secretary to make the initial finding within  
11 12 months of her receipt of Plaintiffs' petition. 16 U.S.C. §  
12 1533(b)(3)(B) provides that, "Within 12 months after receiving a  
13 petition that is found under subparagraph (A) to present  
14 substantial information indicating that the petitioned action may  
15 be warranted, the Secretary shall" determine whether the  
16 petitioned action is in fact warranted. Finding Plaintiffs'  
17 argument cogent, but ultimately unavailing, this Court, on March  
18 5, 2002, denied Plaintiffs' motion with regard to the fisher.<sup>1</sup>

19           Not long after that, on November 4, 2002, the Ninth Circuit  
20 issued its decision in Biodiversity Legal Foundation v. Badgley,  
21 309 F.3d 1166. In Badgley, the Ninth Circuit held: (1) that both  
22 the initial finding set forth in 16 U.S.C. 1533(b)(3)(A) and the  
23 final determination set forth in 16 U.S.C. 1533(b)(3)(B) must be  
24 completed within 12 months of date the petition is received, and  
25 (2) that a Court is compelled to grant injunctive relief when the

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27           <sup>1</sup> In the same Order of March 5, 2002, this Court granted  
28 Plaintiffs' motion for summary judgment with regard to the owl.

1 Secretary fails to complete listing determinations within the  
2 statutorily mandated time frames. Id., at 1178.

3 In light of Badgley, Plaintiffs filed the instant motion for  
4 reconsideration on February 27, 2003.

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6 **III. LEGAL STANDARD**

7 Summary judgment is proper only when there is no genuine  
8 issue of material fact and, when viewing the evidence in the light  
9 most favorable to the nonmoving party, the movant is entitled to  
10 prevail as a matter of law. Fed. R. Civ. P. 56(c); Cleary v. News  
11 Corp., 30 F.3d 1255, 1259 (9th Cir. 1994). Once a summary  
12 judgment motion is made and properly supported, the nonmoving  
13 party may not rest on mere allegations, but must set forth  
14 specific facts showing that there is a genuine issue for trial.  
15 Fed R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324  
16 (1986). In other words, the nonmoving party must show that there  
17 are "genuine factual issues that properly can be resolved only by  
18 a finder of fact because they may reasonably be resolved in favor  
19 of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
20 250 (1986).

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22 **IV. DISCUSSION**

23 It is undisputed that well over 12 months have passed since  
24 the Defendants received Plaintiffs' petition, and that the  
25 Defendants still have not made the initial finding regarding  
26 fisher. It is also disputed, in light of Badgley and of  
27 Defendants' explicit concession, that: (1) Defendants have

1 violated 16 U.S.C. § 1533(b)(3)(A), and (2) this Court must compel  
2 the Secretary to complete the initial finding.

3 The only issue left to resolve is the deadline by which the  
4 Secretary must make this initial finding. While the parties  
5 propose different dates for this deadline, they do agree that this  
6 Court has discretion to select a reasonable date. Plaintiffs ask  
7 this Court to compel the Secretary to make the initial finding  
8 within 60 days of the date of this Order. Defendants ask this  
9 Court to make the deadline April 26, 2004.

10 Plaintiffs argue that 60 days is a reasonable amount of time  
11 for completion to the initial finding for three reasons: (1) the  
12 fisher is in severe decline, (2) completing the initial finding is  
13 a relatively quick and inexpensive undertaking that is likely to  
14 take only 2-3 weeks and cost approximately \$7,000, and (3) other  
15 courts have imposed deadlines as short as 90 days for completion  
16 of the same type of initial finding.

17 Defendants contend that a 60-day limit is unreasonable in  
18 light of the Service's severely constrained budget and its heavy  
19 backlog of ESA listing-related work. Congress has limited the  
20 amount the Service can spend on ESA listing-related activities in  
21 fiscal year 2003 to \$9,077,000.00, and the Service "expects this  
22 entire amount to be consumed by complying with existing Court  
23 orders and court-approved settlement agreements, essential program  
24 management, and high priority listing actions such as emergency  
25 actions." Defs.' Resp. to Pls.' Mot. for Reconsideration, at 5.  
26 Defendants do not dispute Plaintiffs' contention that completing  
27 the initial finding for the fisher is a relatively quick and

1 inexpensive task. Indeed, Defendants acknowledge that the average  
2 cost to complete an initial finding is \$10,000.00. Second  
3 Declaration of Gary Frazer, Attachment 4, at 2. Instead,  
4 Defendants insist that they will not be able to begin work on this  
5 initial finding until late January, 2004, at the earliest.

6 This Court recognizes both the Service's financial straits as  
7 well as the fact that "timeliness in the listing process is  
8 essential." Center for Biological Diversity v. Norton, 254 F.3d  
9 833, 839 (9th Cir. 2001). After weighing these factors as well as  
10 the arguments presented by parties, this Court finds that the  
11 relatively quick and inexpensive nature of the initial finding  
12 cuts strongly against the Defendants' proposed deadline.  
13 Accordingly, this Court finds a reasonable deadline for the  
14 completion of the initial finding in response to Plaintiffs'  
15 petition to list the fisher as endangered to be 90 days from the  
16 date of this Order.

17 Plaintiffs, in their motion for reconsideration, also ask  
18 this Court to require the Secretary to complete the final  
19 determination under 16 U.S.C. § 1533(b)(3)(B) within six months of  
20 the date of the initial finding, should that initial finding be  
21 positive. Defendants ask this Court to deny the request because:  
22 (1) Plaintiffs' Complaint did not allege a violation of  
23 § 1533(b)(3)(B) and the issue was not presented to the Court in  
24 the briefing of Plaintiffs' January 4, 2002, Motion for Summary  
25 Judgment, (2) this Court lacks jurisdiction to grant the requested  
26 relief because the Secretary's duty to make the 12-month finding  
27 under § 1533(b)(3)(B) is triggered only when the Secretary has  
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1 first made a positive initial finding, and (3) Plaintiffs' request  
2 for a 12-month finding is not yet ripe because the Secretary has  
3 not yet made its initial finding.

4 However, Plaintiffs' Complaint and Motion for Summary  
5 Judgment both clearly explain that Defendants' failure to comply  
6 with 16 U.S.C. § 1533(b)(3)(A) jeopardizes compliance with 16  
7 U.S.C. § 1533(b)(3)(B). The Complaint also asks this Court to  
8 retain jurisdiction over this case until such time as the  
9 Secretary makes the initial finding, and if the finding is  
10 positive, to retain jurisdiction until the Secretary complies with  
11 her duty to publish proposed and final regulations to implement  
12 the listing of the fisher. While this Court cannot compel  
13 Secretary to make a final determination whether to list the fisher  
14 as endangered until the Secretary has first made a positive  
15 initial finding pursuant to 16 U.S.C. § 1533(b)(3)(A), it is  
16 indisputable that, should the Secretary make such a positive  
17 initial finding, the Secretary will at that very instant be in  
18 violation of 16 U.S.C. § 1533(b)(3)(B). Therefore, in the  
19 interest of justice and of judicial economy, this Court shall  
20 retain jurisdiction over this case until such time as the  
21 Secretary either: (1) determines that Plaintiffs' petition to list  
22 the fisher as an endangered species does not present substantial  
23 information indicating that listing the fisher is warranted, or  
24 (2) complies with all its duties relating to the listing of the  
25 fisher under both 16 U.S.C. § 1533(b)(3)(A) and § 1533(b)(3)(B).

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V. CONCLUSION

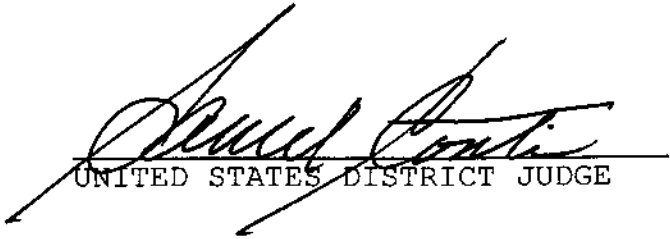
This Court hereby GRANTS Plaintiffs' Motion for Reconsideration of this Court's partial denial of Plaintiffs' January 4, 2002, Motion for Summary Judgment. Defendants are hereby ORDERED to make, within 90 days of the date of this Order, an initial finding under 16 U.S.C. § 1533(b)(3)(A) in response to Plaintiffs' petition to list the fisher as endangered.

Should the Secretary's initial finding be positive, the Secretary is further ORDERED to file with this Court and to serve upon Plaintiffs, within ten days of the date of the Secretary's positive initial finding, a statement setting forth the date by which the Secretary proposes to complete the final determination under 16 U.S.C. § 1533(b)(3)(B). Plaintiffs shall have ten days to file a response to this statement, after which this Court shall set a deadline for the Secretary's completion of the final determination under 16 U.S.C. § 1533(b)(3)(B).

Lastly, Defendants are ORDERED to review periodically the plight of the fisher in an effort to discern whether it faces circumstances warranting an emergency listing pursuant to 16 U.S.C. § 1533(b)(7).

IT IS SO ORDERED.

Dated: April 4, 2003

  
UNITED STATES DISTRICT JUDGE