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AUG - 7 2003

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CLERK U.S. DISTRICT COURT  
AUG - 6 2003  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION BY DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ENVIRONMENTAL DEFENSE  
CENTER and CENTER FOR  
BIOLOGICAL DIVERSITY,

Plaintiff,

v

UNITED STATES FISH AND  
WILDLIFE SERVICE, STEVEN  
A. WILLIAMS, DIRECTOR  
and GALE NORTON,  
SECRETARY OF THE  
INTERIOR,

Defendants

Case No. EDCV 03-00195-  
VAP(SGLx)

[Motion filed on July 2,  
2002.]

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff's Motion for Summary Judgment came before  
the Court for hearing on August 4, 2003. After reviewing  
and considering all papers filed in support of, and in  
opposition to, the Motion, as well as the arguments  
advanced by counsel at the hearing, the Court GRANTS the  
Motion.

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1 I. BACKGROUND

2 A. Facts

3 The facts are undisputed On January 19, 2000, the  
4 Fish and Wildlife Service ("FWS") published an emergency  
5 rule to list the Santa Barbara County distinct population  
6 segment of the California tiger salamander ("SB CTS") as  
7 endangered (Plaintiffs' Statement of Uncontroverted  
8 Facts ("Uncontroverted Facts"), No. 3.) The final rule  
9 was published on September 21, 2000. (Id , No 3.)

10  
11 The FWS identified direct habitat loss as the primary  
12 cause of reduced distribution of the SB CTS (Id., No  
13 4.) FWS determined that designating critical habitat  
14 would be prudent, but that the critical habitat was "not  
15 determinable." (Id., Nos. 6-7.)

16  
17 Over two and a half years have passed since the final  
18 SB CTS listing decision FWS has not designated a  
19 critical habitat for the SB CTS (Id., No 8 )  
20 Plaintiffs allege that Defendants have failed to  
21 designate timely critical habitat for the SB CTS in  
22 violation of the Endangered Species Act ("ESA"), 16  
23 U.S.C. § 1533

24  
25 B. Procedural History

26 Plaintiffs filed a Complaint on February 25, 2003.  
27 On July 2, 2003, Plaintiffs filed a Motion for Summary  
28

1 Judgment ("Mot.") and their Statement of Uncontroverted  
2 Facts Defendants filed Opposition ("Opp'n") and a  
3 Statement of Genuine Issues ("Genuine Issues") on July  
4 21, 2003. Plaintiffs filed a Reply ("Reply") on July 28,  
5 2003

## 7 II. LEGAL STANDARD

8 A motion for summary judgment shall be granted when  
9 there is no genuine issue as to any material fact and the  
10 moving party is entitled to judgment as a matter of law  
11 Fed. R. Civ. P. 56(c); Anderson v Liberty Lobby, Inc.,  
12 477 U.S. 242, 247-48 (1986). The moving party must show  
13 that "under the governing law, there can be but one  
14 reasonable conclusion as to the verdict " Anderson, 477  
15 U.S. at 250.

16  
17 Generally, the burden is on the moving party to  
18 demonstrate that it is entitled to summary judgment  
19 Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998),  
20 Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707  
21 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears  
22 the initial burden of identifying the elements of the  
23 claim or defense and evidence that it believes  
24 demonstrates the absence of an issue of material fact.  
25 Celotex Corp v Catrett, 477 U.S. 317, 323 (1986).

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28



1 except to the extent that such material facts  
2 are (a) included in the "Statement of Genuine  
3 Issues" and (b) controverted by declaration or  
4 other written evidence filed in opposition to  
5 the motion

6 Local Rule 56-3 requires Defendants submit a response to  
7 each of Plaintiffs' factual statements, and cite  
8 admissible evidence disputing them.

9 Defendants argue that Facts Nos. 1, 2, and 4-6 are  
10 not material to the legal issue. Since Defendant does  
11 not controvert these facts by declaration or other  
12 written evidence, the Statement of Uncontroverted Facts  
13 are admitted to exist without controversy and are hereby  
14 adopted by the Court.<sup>1</sup>

15 **B. Endangered Species Act**

16 The ESA directs the Secretary of the Interior  
17 ("Secretary") to determine which species are "threatened"  
18 or "endangered." 16 U.S.C. § 1533(a)(1). When a species  
19 is listed as endangered or threatened, the ESA mandates  
20 that critical habitat must be designated for that  
21 species. 16 U.S.C. § 1533(a)(3). The Secretary must  
22 designate a critical habitat "to the maximum extent  
23 prudent and determinable" at the time of the final  
24 determination. 16 U.S.C. § 1533(3)(A).

---

25  
26  
27 <sup>1</sup>**JUDGE:** Defendants also dispute the third conclusion  
28 of law.

1 An extension of the deadline is proper if designation  
2 is not "prudent" or "determinable." At the time of  
3 listing the SB CTS, the FWS determined that designating  
4 critical habitat would be prudent, but that the habitat  
5 was "not determinable." Uncontroverted Facts, Nos 6-7;  
6 65 Fed. Reg. 57261-61

7  
8 If the critical habitat is not determinable at the  
9 time of listing, the Secretary "may extend the one-year  
10 period .. by not more than one additional year." 16  
11 U S.C. § 1533(b)(6)(C)(11). By the close of that  
12 additional year, however, the Secretary must publish, to  
13 the maximum extent prudent, a final critical habitat  
14 designation based on such data as may be available at  
15 that time. 16 U S.C § 1533(b)(6)(C)(11).

16  
17 The FWS published a proposed rule to list the SB CTS  
18 as endangered on January 19, 2000. 65 Fed. Reg. 3110.  
19 FWS had until January 19, 2002, to designate a critical  
20 habitat and has failed to do so. FWS concedes that it  
21 has failed to comply with this mandatory duty. (Opp'n at  
22 2 )

23  
24 The "clear objectives and language of Congress in  
25 passing the ESA removed the traditional discretion of  
26 courts in balancing the equities before awarding  
27 injunctive relief." Biodiversity Legal Foundation v

28

1 Badgley, 309 F 3d 1166, 1177 (9th Cir. 2002) (citing TVA  
2 v Hill, 437 U S 153, 194 (1978)) Thus, injunctive  
3 relief is mandatory

4  
5 Since Defendants concede liability, the only issue  
6 before the Court is determination of a reasonable  
7 schedule to mandate compliance. Although Plaintiffs are  
8 correct when they argue that injunctive relief is  
9 required "irrespective of agency resource limitations,"  
10 this does not defeat the Court's discretion to determine  
11 a reasonable schedule for such relief. (Mot. at 15.)<sup>2</sup>

12  
13 Defendants argue that the Court should set a deadline  
14 of October 15, 2006, for publication of a proposed rule  
15 and October 15, 2007, for publication of a final rule.  
16 (Opp'n at 22.) In Plaintiffs' Motion, they request that  
17 Defendants take final action and designate critical  
18 habitat for the SB CTS by April 5, 2004 (Mot at 14.)  
19 In light of Defendants' Opposition, Plaintiffs modified  
20 their request. In their Reply, Plaintiffs request a  
21 proposed rule by January 15, 2004, and publication of a  
22 final rule by November 15, 2004. (Reply at 11.)

23  
24  
25 <sup>2</sup> The caselaw holds that the "court has no discretion  
26 to consider the Service's stated priorities" in  
27 determining whether or not to issue an injunction.. " but  
28 does not speak to the nature of the remedy Biodiversity  
Legal Foundation v. Badgley, 309 F.3d 1166, 1177-78 (9th  
Cir. 2002) A similar argument was rejected in Center  
for Biological Diversity v Norton, 212 F. Supp. 2d 1217,  
1221 n. 3 (S.D. Cal. 2002).

1           Although Defendants admit that they have failed to  
2 comply with the mandates of the ESA, they argue that it  
3 is a result of "FWS' budgetary shortfalls, workload  
4 constraints, existing court-ordered and court-approved  
5 obligations, and other relevant factors " (Opp'n at 2 )  
6 According to Defendants, they could not complete the  
7 designation in fiscal years 2001 and 2002 because other  
8 court-orders "devoured all funds appropriated by Congress  
9 in those fiscal years " (Opp'n at 8.) They were unable  
10 to comply this year due to "unexpected court orders,  
11 required extensions of time, and increased costs." (Id.)  
12 Defendants anticipate that the next two years' budgets  
13 will be similarly consumed by pre-existing commitments.  
14 (Id )

15  
16           Plaintiffs contend that arguments based on  
17 inadequate resources must fail. (See, Mot. at 15.) See,  
18 e g , Forest Guardians v Babbitt, 174 F 3d 1178, 1192  
19 (10th Cir 1999) ("In the face of Congress' clear  
20 command, the Secretary's inadequate resource argument  
21 must fail with respect to the appropriate remedy";  
22 Conservation Council for Hawaii v. Babbitt, 24 F. Supp.  
23 2d 1074, 1078 (D. Haw. 1998) ("Congress set forth in the  
24 ESA specific time periods for making certain decisions  
25 and those time periods must be followed. To the extent  
26 the Secretary feels aggrieved by Congress' failure to  
27 allocate proper resources in which to comply with his  
28

1 statutory duty, Congress, not the courts, is the proper  
2 governmental body to provide him relief.") (quoting  
3 Southwest Center for Biological Diversity v Babbitt, No.  
4 96-1874, slip. op. at 7 (D. Ariz. 1997)).

5  
6 The Ninth Circuit, however, rejects such a strict  
7 interpretation Environmental Defense Center v. Babbitt,  
8 73 F.3d 867, 872 (9th Cir. 1995) (where lack of available  
9 funds prevents Secretary from complying with ESA,  
10 district court may exercise discretion to set reasonable  
11 schedule for compliance). See also, Center for  
12 Biological Diversity v Norton, 212 F. Supp. 2d 1217  
13 (S.D. Cal. 2002) ("Norton"). Defendants point to several  
14 district court cases in the Ninth Circuit which have  
15 followed this reasonableness standard.

16  
17 These cases, however, hold that the Court should  
18 consider the FWS' limited resources, not that the remedy  
19 must be controlled by them Defendants' compliance with  
20 the ESA already is 18 months overdue. Now Defendants  
21 seek an additional 50 months to designate a critical  
22 habitat for the SB CTS Such an extraordinary delay is  
23 unreasonable

24  
25 Even in the cases cited by Defendants, most of which  
26 were more complex than the present case, the extensions  
27 granted were more limited In Conservation Council, the  
28

1 dispute was over the FWS' failure to designate critical  
2 habitats for 245 endangered or threatened Hawaiian plant  
3 species. On August 10, 1998, the Court ordered the FWS  
4 to publish proposed rules regarding the designation or  
5 non-designation of 100 species by November 30, 2000, and  
6 publish rules regarding the remaining species by April  
7 30, 2002. Conservation Council, 24 F. Supp. 2d at 1079.  
8 The Court directed FWS to publish a final rule within one  
9 year of each proposed publication. Id. Thus, the Court  
10 gave FWS approximately two years to publish proposed  
11 rules for 100 species and less than one and one-half  
12 additional years for the remaining 145 species. Here,  
13 Defendants request over three years to publish a proposed  
14 rule for one species.

15  
16 In Norton, the Court recognized its responsibility to  
17 "set a reasonable timeline" in light of FWS's "budgetary  
18 shortfalls, workload constraints, and other relevant  
19 factors." Norton, 212 F. Supp. 2d at 1221 On the other  
20 hand, the FWS could not delay determinations based on  
21 anticipated budget shortfalls. Id. at 1226

22  
23 In Norton, FWS needed to designate critical habitat  
24 for eight plant species On July 1, 2003, the Norton  
25 Court directed the FWS to publish a proposed rule for the  
26 first species by July 28, 2003, just over one year after  
27  
28

1 the Court's Order Critical habitats for all eight  
2 species were to be proposed by November 30, 2004, just  
3 over two years after the Court's Order Id.

4  
5 In Center for Biological Diversity v. Norton, 2001 WL  
6 1602696 (N D Cal. 2001) ("Center for Biological  
7 Diversity"), an unpublished opinion, the district court  
8 directed the FWS to publish a *final* determination for the  
9 first species within one year of the Order. Center for  
10 Biological Diversity, 2001 WL 1602696, \*4.

11  
12 Here, there is only one species The Court is not  
13 persuaded that the FWS cannot begin considering the  
14 critical habitat until October 1, 2004 (See, Opp'n at  
15 14.) While Defendants claim that their anticipated  
16 budget for fiscal year 2004 is expected to be consumed  
17 by pre-existing commitments, Congress has yet to pass  
18 this budget. Thus, this argument is premature See  
19 Norton, 212 F. Supp. 2d at 1226.

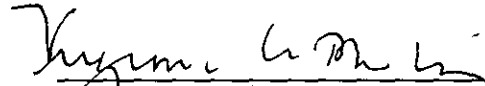
20  
21 Defendants shall commence work on the designation in  
22 the next fiscal year. Defendants are directed to publish  
23 a proposed critical habitat for the SB CTS no later than  
24 January 15, 2004, and publication of a final rule by  
25 November 15, 2004

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IV. CONCLUSION

For the aforementioned reasons, Plaintiffs' Motion  
for Summary Judgment is GRANTED

Dated August 6, 2003

  
\_\_\_\_\_  
VIRGINIA A. PHILLIPS  
United States District Judge