

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY,
CENTER FOR BIOLOGICAL DIVERSITY,
and DOUGLAS H. WATTS,

Plaintiffs,

Civil Action No.

v.

CARLOS M. GUTIERREZ, Secretary of Commerce, and
DIRK KEMPTHORNE, Secretary of the Interior,

Defendants.

COMPLAINT

1. This case is brought against the Secretary of Commerce and Secretary of Interior for failing to act on a petition to list the Kennebec River population of Atlantic salmon as endangered under the Endangered Species Act (“ESA” or “Act”) within the time required by the Act. The Kennebec River population of salmon is in danger of becoming extinct.

JURISDICTION AND VENUE

2. Subject matter jurisdiction is conferred upon this Court by 16 U.S.C. § 1540(g) (the citizen suit provision of the ESA) and 28 U.S.C. § 1331 (federal question jurisdiction). Venue lies within this District pursuant to 16 U.S.C. § 1540(g)(30(A) and 28 U.S.C. § 1391(e).

THE PARTIES

3. Plaintiff Friends of Merrymeeting Bay (“FOMB”) is a non-profit organization dedicated to preserving the ecological, aesthetic, historical, recreational and commercial values of Maine’s Merrymeeting Bay and its watershed, which includes the Kennebec River. FOMB has over 400 members.

4. Plaintiff Center for Biological Diversity (“CBD”) is a national non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center and its members are concerned with the conservation of endangered species, including the Atlantic salmon, and the effective implementation of the Endangered Species Act. CBD has approximately 380 members in Maine.

5. Plaintiff Douglas H. Watts resides in Augusta. He lives alongside the Kennebec River. Mr. Watts authored the petition to list the Kennebec population of Atlantic salmon as endangered.

6. Defendant Carlos Gutierrez is the United States Secretary of Commerce.

7. Defendant Dirk Kempthorne is the United States Secretary of the Interior.

THE ENDANGERED SPECIES ACT

8. In enacting the Endangered Species Act, Congress expressly found that species of fish, wildlife and plants that are in danger of or threatened with extinction are of “esthetic, ecological, educational historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). The ESA also provides: “It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in

furtherance of the purposes of this chapter.” 16 U.S.C. § 1531(c)(2). By enacting the Endangered Species Act, Congress intended protection of endangered species to be afforded the highest of priorities.

9. Under the ESA, an “endangered species” is a species (other than certain dangerous insect pests) which is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). A “threatened species” is a species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20). The Secretary of Commerce and Secretary of the Interior are responsible for determining whether a species should be listed as endangered or threatened.

10. Among the conservation benefits authorized for endangered and threatened species are: protection from being jeopardized by federal activities; restrictions on take and trafficking; a requirement that the federal government develop and implement recovery plans for listed species under United States jurisdiction; authorization to seek land purchases or exchanges for important habitat; and federal aid to State conservation departments with cooperative endangered species agreements. Listing also lends greater recognition to a species’ precarious status, encouraging conservation efforts by other agencies (federal, state and local), independent organizations, and concerned individuals.

11. Under 5 U.S.C. § 553(e) and 50 C.F.R. § 424.14, citizens are authorized to submit a petition to the Secretaries of Commerce and Interior requesting that the Secretaries list a species as endangered or threatened. Once a petition to list a species as endangered or threatened is received, the Secretaries have, to the maximum extent practicable, 90 days within which to make an initial determination on the petition (known

as a “90-day finding”). 16 U.S.C. § 1533(b)(3)(B). If the initial determination is positive, the Secretaries must conduct a “status review” of the species. 16 U.S.C. § 1533(b)(3)(A). Further, if the initial determination is positive, the Secretaries have 12 months from the date the petition was received to make a determination on the petition (known as a “12-month finding”). 16 U.S.C. § 1533(b)(3)(B). A 12-month finding must find one of the following: (i) the petitioned action is not warranted; (ii) the petitioned action is warranted; (iii) the petitioned action is warranted but precluded for certain specified reasons. 16 U.S.C. § 1533(b)(3)(B). The duty to make a 12-month finding once a 90-day finding is made is mandatory. A 12-month finding must be published in the Federal Register. 16 U.S.C. § 1533(b)(3)(B)(i)-(iii).

12. The ESA authorizes citizens to bring a suit against the Secretaries for failing to perform any act or duty under 16 U.S.C. § 1533 which is not discretionary, 16 U.S.C. § 1540(g) (1)(C), and against any person for violating a provision of the Act, 16 U.S.C. § 1540(g)(1)(A). Such a suit can be brought 60 days after written notice is given, as provided in 16 U.S.C. § 1540(g)(2)(A) and (C).

**THE PETITION TO LIST THE KENNEBEC RIVER
POPULATION OF ATLANTIC SALMON AS ENDANGERED**

13. The populations of anadromous Atlantic salmon present in the Gulf of Maine distinct population segment (a distinct population segment is a subgroup of a vertebrate species) represent the last wild remnant of U.S. Atlantic salmon and the southernmost extent of the range of the species. According to the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service of the Department of Commerce (“NOAA Fisheries Service”), the historic Atlantic salmon run in the U.S. is estimated to have approached 500,000 fish. The Kennebec River had some of the largest historical

Atlantic salmon runs in New England. According to NOAA Fisheries, factors responsible for decline of the species include dams, fishing, forest management practices, agriculture, and salmon aquaculture.

14. On May 11, 2005, plaintiffs FOMB and Mr. Watts, along with the Maine Toxics Action Coalition, submitted to the Secretaries of Commerce and Interior a petition to list the population of Atlantic salmon (*Salmo salar*) in the Kennebec River as endangered under the ESA (the "Petition"). In response to the Petition, on November 14, 2006 NOAA Fisheries Service issued a 90-day finding that "the petition presents substantial scientific information indicating that the petitioned action may be warranted." The 90-day finding on the Petition is published at 71 Federal Register 66,298. A Status Review for the Kennebec River and other populations of Atlantic salmon in the Gulf of Maine distinct population segment has already been written; it is dated July 2006. The Status Review has been peer reviewed. The Status Review concluded the likelihood of extinction of Atlantic salmon in the Gulf of Maine distinct population segment ranges from 17%-75% within the next 100 years.

THE SECRETARIES HAVE NOT MADE A 12-MONTH FINDING

15. A 12-month finding on the Petition was due in May 2006. Neither the Secretary of Commerce nor the Secretary of the Interior has made a 12-month finding on the Petition. Making a 12-month finding on the Petition would not require a significant amount of resources.

16. Neither the Secretary of Commerce nor the Secretary of the Interior has fulfilled his mandatory obligation imposed by 16 U.S.C. § 1533(b)(3)(B).

17. By failing to make a 12-month finding, the Secretaries have violated the Act.

18. Plaintiffs gave notice of the violations asserted herein more than 60 days before the commencement of this suit. A copy of the notice letter and signed receipts by the Secretaries' offices are attached as Exhibit A.

PLAINTIFFS' STANDING TO BRING THIS SUIT

19. The plaintiffs (i.e., Mr. Watts and various members of FOMB and CBD) are interested in maintaining the natural biodiversity of the Kennebec River and its environs. Plaintiffs live near, own property near, and recreate on and near the Kennebec River and Merrymeeting Bay. Among other activities, Plaintiffs kayak on, canoe on, fish in (recreationally and commercially), walk and hike along, lead guided trips on, and observe aquatic life and wildlife in and around the Kennebec River and Merrymeeting Bay. Plaintiffs enjoy and in many ways receive great value from the presence of wild Atlantic salmon, and do not want the wild Atlantic salmon population in the Kennebec River to become extinct. The dearth of Atlantic salmon in the Kennebec River diminishes plaintiffs' use and enjoyment of the river. If Atlantic salmon were populous enough in the Kennebec River, Plaintiffs would fish for and eat that salmon. Recovery of Atlantic salmon in the Kennebec River would increase economic opportunities for Plaintiffs because there would be a greater demand for guided trips that Plaintiffs could lead.

RELIEF REQUESTED

Plaintiffs request this Court:

a. Declare that by failing to make a 12-month finding on the Petition, the Secretaries have failed to perform an act and duty under § 1533 of the ESA which is not discretionary with the Secretaries;

- b. Declare that by failing to make a 12-month finding on the Petition, the Secretaries have violated the Act at 16 U.S.C. § 1533(b)(3)(B);
- c. Order the Secretaries to expeditiously make a 12-month finding on the Petition;
- d. Award costs of litigation (including reasonable attorney and expert witness fees);
- e. Order such other relief as the Court deems appropriate.

Dated: May 12, 2008

_____/s/
David A. Nicholas
20 Whitney Road
Newton, Massachusetts 02460
(617) 964-1548
dnicholas@verizon.net

_____/s/
Bruce M. Merrill
225 Commercial Street Suite 501
Portland, Maine 04101
(207) 775-3333
mainelaw@maine.rr.com

Michael Senatore
(Pro hac vice application to be filed)
Center for Biological Diversity
1601 Connecticut Avenue, N.W. Suite 701
Washington, D.C. 20009-1056
(202) 232-1217