



June 12, 2015

Mr. Adam Zerrenner
Field Supervisor, USFWS
Austin Ecological Field Office
10711 Burnet Road, Ste. 200
Austin, Texas 78758

**RE: Five Year Review, *Texella reyesi*
(80 FR 20241)**

Dear Mr. Zerrenner,

As you are aware, prior to the Service initiating this status review, the Service received a petition to delist the Bone Cave harvestman ("BCH"). On June 01, 2015, the Service published its 90-day finding on the petition, concluding that the petition did not present substantial information that delisting may be warranted (80 Fed. Reg. 30990). We respectfully disagree with this decision. The petition was prepared after conducting a thorough review of the species by independent scientists as well as those with extensive hands on experience conserving the habitat of the harvestman. We incorporate by reference the petition and we request that you consider all the information presented in the petition during your status review.

The negative 90-day finding is arbitrary and capricious and will not withstand judicial scrutiny. As the Service conducts this review, we respectfully suggest that it consider the issue is not whether the objectives of the recovery plan have been achieved, as the recovery plan is purely advisory and full of unfounded assumptions, but whether the BCH was, based on current facts, originally listed in error. The petition clearly documents that to be the case. It simply cannot be credibly said that the Service would have listed the BCH had it known at the time there were over 170 known locations, over 90 of which receive some substantial form of protection, and there were existing a suite of regulations and conservation programs having either direct or collateral benefit to the species. Indeed, there are no far more fully protected locations for this species than there were known locations at the time of listing. It cannot be said with a straight face that the Service would have listed this species if all of its known locations were fully protected.

In fact, we are aware of a host of prior decisions by the Service where the agency determined that delisting was warranted under circumstances similar to those experienced by the BCH.

1. Pine Barrens treefrog (*Hyla andersonii*) (48 Fed. Reg. 52740): The Service delisted this species in 1983, stating that "recent evidence indicates that the species is much more widely distributed than originally known" (48 Fed. Reg. 52740). The Service's final rule noted that while the overall distribution of the species was relatively limited, the likelihood of discovering

more known localities in consideration with the additional new sites discovered indicated that “the Florida population is relatively secure for the immediate future” (48 Fed. Reg. 52741).

As acknowledged by the Service in the 90-day finding, the known distribution of the BCH has increased by a similar amount. Further, in the 90-day finding the Service does not dispute that additional localities are likely to be discovered. The number of known protected sites similarly ensures that the BCH will be relatively secure for the immediate future.

2 Rydberg Milk-Vetch (*Astragalus perianus*) (54 Fed. Reg. 37911): In 1989, the Service delisted this plant on the basis of the discovery of a modest number of new localities (the total number increasing from 1 at the time of listing to 11 at delisting) and the existence of regulatory mechanisms (i.e., U.S. Forest Service management plans) that minimized the impacts of the threats identified in the initial listing factors.

The known distribution of the BCH has increased by a substantially larger amount and the BCH similarly benefits from regulatory mechanisms (i.e., legally binding preserve agreements, City of Austin Environmental Criteria Manual and Void and Water Flow Mitigation Rule, City of Georgetown Water Quality regulations, Texas Commission on Environmental Quality Edwards Aquifer Rules, and the Endangered Species Act for features occupied by multiple federally listed species) that greatly minimize the threats identified in the original listing rule.

3. McKittrick pennyroyal (*Hedeoma apiculatum*) (58 Fed. Reg. 49244): The Service delisted this plant, which currently has a known distribution of only 2 counties, in 1993 because of “the number of newly discovered populations and the remote and inaccessible nature of the habitat” (58 Fed. Reg. 49244). The USFWS determined that since this plant species occurs in hard-to-reach habitats, it is likely that its distribution is even broader than the confirmed locations, and that its natural preferred habitat limits the likelihood of human-related impacts.

The circumstances of the BCH are similar to this plant, in that the BCH also only occurs in a limited geographic area, its known distribution has expanded significantly, and its use of hard-to-reach habitats means that it is likely to occur in more places than currently known. Existing regulations that benefit the BCH also limit human-related impacts to the species and substantially reduce threats.

4. Utah (Desert) Valvata snail (*Valvata utahensis*) (75 Fed. Reg 52272): The Service recently delisted this snail in 2010 after data showed that the species known range increased by 118.5%. The USFWS determined that due to the increased range of the species, the listing factors would not contribute to the likelihood of the species being threatened with extinction in the foreseeable future. The Service also determined that impacts to its habitat from agricultural and industrial activities were no longer threats because “the species persists in these varied mainstem Snake River systems, including impounded reservoir habitats” (75 Fed. Reg. 52280). Despite, the continued presence of previously perceived threats, the proven ability of the species to continue to thrive in those conditions supported delisting.

The known range of the BCH has also increased dramatically since the time of listing from 75 square miles to at least 148 square miles (i.e., by approximately 97%) and, like the Utah Valvata snail, it continues to persist in many areas impacted by previously perceived threats.

5. Columbian White-tailed Deer (*Odocoileus virginianus leucurus*), Douglas County distinct population segment) (68 Fed. Reg. 43647): In 2003, the Service delisted the Douglas County distinct population segment of the Columbian white-tailed deer due to recovery. Conservation efforts turned around an observed decline in the population of this species, but the range of the delisted population segment still included only one county in Oregon. The basis for delisting the distinct population segment was the establishment of secure habitats.

Similarly, the BCH occurs across a relatively restricted range of two Texas counties and benefits from more than half of its currently known localities receive substantial protection from threats.

6. Robbins' Cinquefoil (*Potentilla robbinsiana*) (67 Fed. Reg. 54968): In 2002, the Service delisted the Robbins' cinquefoil due the application of protective conservation actions and the addition of new viable populations. The Service determined that delisting was warranted due to recovery, even though the criteria in the recovery plan had not been met. In response to comments, the Service iterated that “the objectives identified during the recovery planning process provide a guide for measuring the success of recovery, but are not intended to be absolute prerequisites, and should not preclude a reclassification or delisting action if such action is otherwise warranted” (67 Fed. Reg. 54972).

The BCH is much more broadly distributed than previously known, many known sites and additional areas of potential habitat are fully protected in preserves, and existing regulations significantly minimize threats to the species outside of preserves. Similar to the Robbins' cinquefoil, the status of the BCH is sufficiently secure that achieving the specific objectives of the recovery plan are not necessary for delisting.

Existence and Magnitude of Threats Do Not Support ESA Protections

Since listing in 1998, a significant amount of new scientific and commercial information has become available that demonstrates BCH occurs in significantly more locations than originally believed. Given the vastly increased number of known localities occupied by the species, many of which are protected, the perceived threats believed to apply to the species are not of a magnitude or intensity that is likely to cause the extinction of the species now or in the foreseeable future. The circumstances of BCH are similar to those in the examples above, where the consideration of new populations or occupied sites prompted the USFWS to delist. Like the Utah Valvata snail, BCH has also demonstrated the ability to persist and thrive in conditions where the USFWS assessment of threats should indicate a decline or extirpation. This new information supports the conclusion that the protections of the ESA are no longer warranted for BCH since the existence or magnitude of threats to the species, or both, do not support a conclusion that the species is at risk of extinction now or in the foreseeable future.

Substantial Conservation Has Been Achieved Assuring There is No Risk of Extinction

In addition, a substantial level of conservation has been achieved for BCH. These efforts have been accomplished through the establishment of permanent preserves dedicated to the protection and management of the species and more generally through the implementation of local and state regulations that minimize adverse effects on BCH habitat across the range of the species. When coupled with the knowledge of a significantly expanded range and known distribution of the species and evidence that the threats to the species may not be as severe as originally assumed, these conservation measures sufficiently assure the continued survival of the species and avert the risk of extinction in the foreseeable future.

While in its 90-day finding the Service quibbles with whether the over 90 locations receiving protection are fully protected, it is without debate that there are more fully protected locations now than there were known locations at the time of the listing. Is this Service really saying it would have listed the species anyway even though all known locations were fully protected? No, the listing was clearly in error. Upon these facts, refusing to initiate a 12-month review is clearly unlawful.

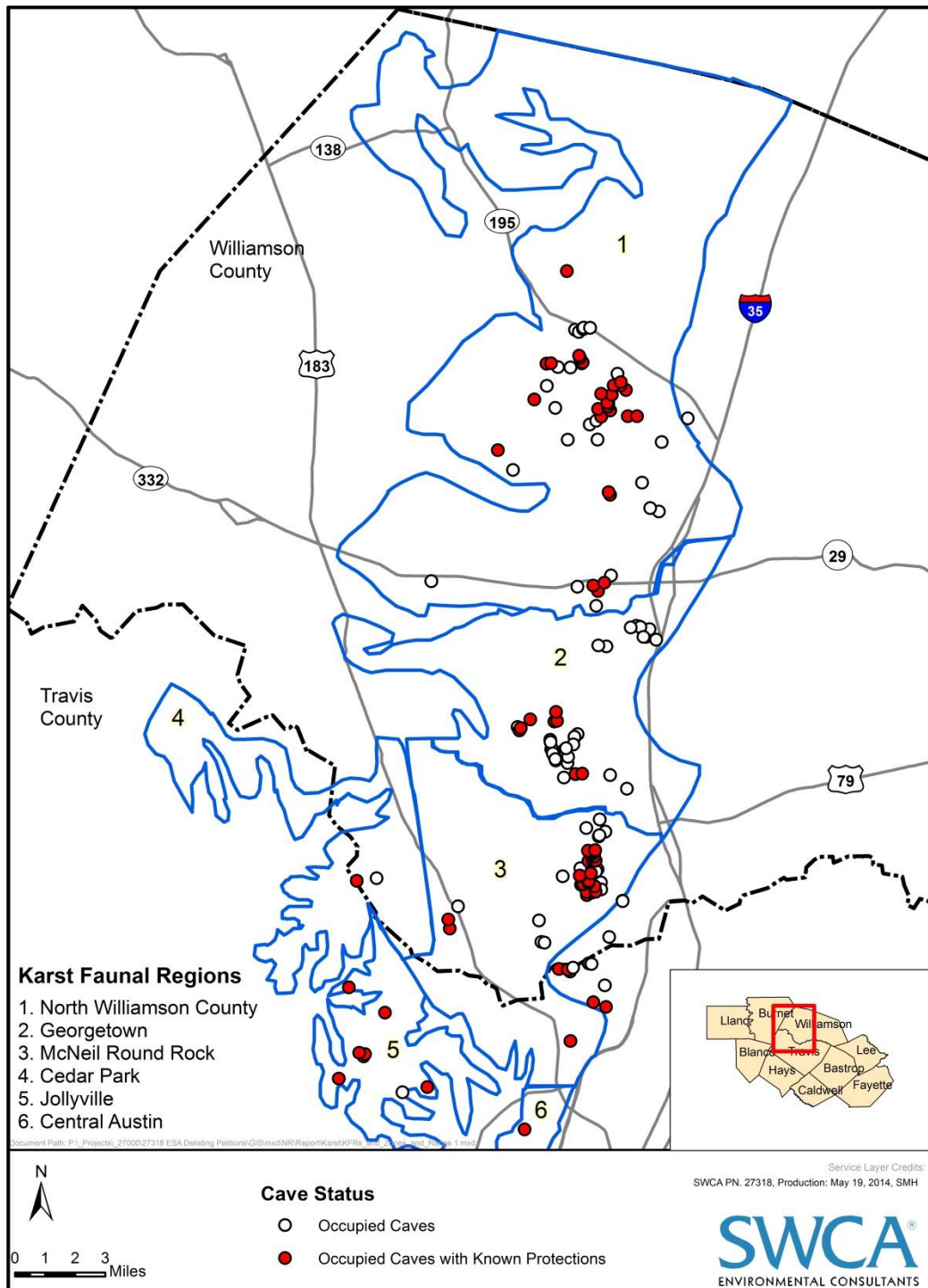
Summary

During this review process, the Service has the opportunity to look back on the extensive history of the conservation effort for this species as well as take a hard look at the original listing data. It is our belief that by using sound scientific reasoning, it will become clear, if not to the Service then to the courts, that this species never warranted federal protection.

The purpose of the Endangered Species Act is not to list in perpetuity, but to recover species in peril. By refusing to remove this species from the endangered list, the agency is robbing others of precious resources that could be used for more meaningful conservation efforts.. The de-listings cited above show a pattern and practice of species being removed when it has been demonstrated the listings were in error. The Service's refusal to do so for the Bone Cave harvestman is clearly arbitrary and capricious.

Comparison of BCH to Six Prior Delisting Actions by the USFWS (from Table 4 of the delisting petition).

| Species | Known Status at Listing | Known Status at Delisting | Reason for Delisting | Percent Increase |
|--|--|---|--|------------------|
| Pine Barrens treefrog (<i>Hyla andersonii</i>) | 7 localities | 150 localities | New Information | 2,042% |
| Rydberg Milk-Vetch (<i>Astragalus perianus</i>) | 1 locality | 11 localities | New Information | 1,106% |
| McKittrick pennyroyal (<i>Hedeoma apiculatum</i>) | 7 localities | 36 localities | New information | 414% |
| Columbian White-tailed Deer (<i>Odocoileus virginianus leucurus</i> , | 400-500 individuals | 6,000 individuals | Designation of secure habitat zones | 1,418% |
| Aleutian Canada goose (<i>Branta canadensis leucopareia</i>) | 790 individuals | 36,978 individuals | Increased number of individuals, threats not as severe as originally believed | 4,581% |
| Robbins' Cinquefoil (<i>Potentilla robbinsiana</i>) | 2,000 individuals | 4,000 individuals | Increased number of individuals, threats not as severe as originally believed | 600% |
| Bone Cave Harvestman (<i>Texella reyesi</i>) | 5-6 localities (one <i>T. reddelli</i> and not <i>T. reyesi</i> , so actually 4-5) | Currently 172 localities; not currently delisted. | Potentially, increased number of localities, threats not as severe as originally believed, new information | 3,340% |



Occupied BCH caves with known protection and/or management activities (from Figure 2 of the delisting petition).