UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AMERICAN STEWARDS OF LIBERTY, et al. Plaintiffs,	§ § §	
v.	§ §	No. 1:15-cv-01174-LY
UNITED STATES FISH & WILDLIFE SERVICE, et al. Defendants.	§ § §	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR

Plaintiffs filed this action to challenge the negative 90-day finding of the U.S. Fish and Wildlife Service made in response to a petition to delist the Bone Cave harvestman (*Texella reyesi*). From the outset of the regulatory process that led to the decision in controversy, the Service has made a series of serious missteps. It has repeatedly shown it is incapable of conducting a legally adequate, objective, and timely review of the petition without guidance and oversight from this Court. For this reason, Plaintiffs respectfully request that the Court deny Defendants' request for voluntary remand without vacatur and, instead, remand with instructions to issue a new decision that fulfills all of the requirements of the Endangered Species Act, including the requirements to make its determination (i) solely on the basis of whether the petition presents substantial scientific information that the petitioned action may be warranted, and (ii) within 90-days.

FACTUAL BACKGROUND

On September 6, 1988, the U.S. Fish and Wildlife Service ("Service") published a final rule to list as endangered five species of karst invertebrates known to occur only in Travis and

Williamson counties, including *Texella reyesi*, which is the species at the heart of this case. 53 Fed. Reg. 36,029 (Sept. 16, 1988).[1] Whereas at the time the Service listed the species (later reclassified to include *Texella reyesi*), the agency documented only five or six caves occupied by the species; there are now at least 172 known occupied caves, containing *Texella reyesi*, distributed across the range of the species. Administrative Record ("AR") at M0189 (June 1, 2014) (Delisting Petition). This represents an approximately 3,000 percent increase in the number of known occupied caves since the time of listing.

On June 2, 2014, a group of individuals and entities (the "Petitioners") submitted to the Service a petition to delist *Texella reyesi* (the "Petition"), arguing among other things that the original listing was in error. AR at M0189, M0204-206. The Petition with a complete list of references was submitted to the appropriate personnel in the Service's headquarters in Arlington, Virginia ("Headquarters") and regional office for the Southwest (including Texas) in Albuquerque, New Mexico ("Regional Office") on June 2, 2014 via email. Declaration of A. Aurora ("Aurora Decl.") (Pl. Exh. A) ¶ 2. The Field Supervisor for the Service's Austin, Texas Ecological Services Office ("Austin Office") was copied on that email. AR at M0183-M0184 (Email from Petitioners to Service). The email indicated that a hard copy of the Petition, along with a CD containing "digital copies (on CD) of all of the references cited" (the "CD") were being submitted via mail. *Id.* Although it does not appear in the Administrative Record lodged with this Court by the Service, Petitioners delivered hard copies of the Petition and the CD via Federal Express to the appropriate personnel at Headquarters and the Regional Office. Aurora Dec. ¶¶ 6-7.

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[1] USFWS' 1988 final listing determination included a species known as the Bee Creek Cave harvestman. The Bee Creek Cave harvestman was subsequently determined by USFWS to be two separate species: the Bee Creek Cave harvestman (*Texella reddelli*) and the Bone Cave harvestman (*Texella reyesi*). As a result, in 1993, the Service published in the Federal Register a technical correction so that both species were included on the list of endangered species. 58 Fed. Reg. 43,818 (Aug. 18, 1993).

On April 15, 2015, more than 10 months after submission of the Petition, having not yet acted on the Petition, the Service announced that it would conduct a five-year status review of *Texella reyesi* under the process set forth in 50 C.F.R. 424.21 (the "5-year Review"). 80 Fed. Reg. 20,241 (Apr. 15, 2015). Finally, on June 1, 2015, more than 270 days after the deadline set forth in the ESA to respond to the Petition, 16 U.S.C. 1533(b)(3)(A), the Service published a negative 90-day finding, summarily concluding that the Petition did not present substantial information indicating that the petitioned action may be warranted (the "Negative Finding"). AR at M1716-M1722 (June 1, 2015) (Negative Finding). By letter dated September 3, 2015, Plaintiffs provided Defendants with written notice of Plaintiffs intent to sue over the Negative Finding and, subsequently, on December 15, 2015, Plaintiffs filed this action. AR at M0306-M0309 (Sept. 10, 2015) (Notice of Intent) and Doc. No. 1 (Dec. 1, 2015) (Plaintiffs' Original Complaint).

On July 29, 2016, Plaintiffs received a provisional administrative record (the "Provisional Record") with respect to the Negative Finding. The Provisional Record did not include 56 of the 63 documents included in the Petition's "literature cited" section ("Literature Cited") and provided to Headquarters and the Regional Office on CD. Plaintiffs notified Defendants of this error in August 2016. Shortly thereafter, Federal Defendants proposed and Plaintiffs agreed to file a joint motion to stay the case with respect to Plaintiffs' claims in order to pursue settlement discussions. Doc. No. 37 (Sept. 28, 2016) (Joint Motion to Stay). Despite these facts, on September 29, 2016, the Service lodged the Administrative Record with the Court that did not include the documents cited in the Petition, included in the Literature Cited, and provided to the Service on CD. Doc. No. 38 (Sept. 29, 2016) (Notice of Lodging of AR).

ARGUMENT

Plaintiffs oppose Defendants' Motion for Voluntary Remand Without Vacatur ("Motion") in light of the facts that: (1) Defendants have, with respect to the Petition, demonstrated that they are not entitled to a presumption of regularity; (2) Defendants have not been forthright with this Court regarding their own conduct; and (3) in light of the foregoing,

Defendants' statement in the Motion that there is at least a serious possibility they will substantiate their prior decision, made before having reviewed the materials submitted in support of the Petition, suggests that remand without guidance from the Court will result in yet another perfunctory process followed by issuance of a pre-determined finding.

I. Defendants Have a History of Mishandling the Petition Process and are not Entitled to the Presumption of Regularity

Plaintiffs recognize that the arbitrary and capricious standard set forth in the Administrative Procedure Act ("APA") is "deferential" and that agencies must be afforded "a presumption of regularity" in their decision-making processes. *Hayward v .U.S. Dept. of Labor*, 536 F.3d 376 (5th Cir. Tex. 2008); see also *RSR Corp. v. EPA*, 588 F. Supp. 1251, 1254 (N.D. Tex. 1984). The presumption of regularity, however, "is not to shield [an agency's] action from a thorough, probing, in-depth review," *United States v. New Orleans Public Service, Inc*., 723 F.2d 422 (5th Cir. La. 1984) and the presumption may be overcome where there is "no accompanying explanation of the reasons underlying an agency's decision." *RSR Corp*., 588 F. Supp. at 1254. With respect to the administrative record, Plaintiffs can overcome the presumption that an agency has properly designated the administrative record with clear evidence to the contrary. See *Sherwood v. Tennessee Valley Authority*, 590 Fed. Appx. 451, 459-60 (6th Cir. Tenn. 2014).

In their Motion, Defendants acknowledge that the Administrative Record is incomplete and appear to mislead this Court as to the reason it is lacking. Doc. No. 55 (Nov. 28, 2016) (Defs. Mot.) at p.5. The facts clearly demonstrate that the Service mishandled the Petition, the CD containing the literature referenced in the Petition, and the Petition review process itself. In this section, we highlight mistakes made by the Service in the course of handling and evaluating the Petition and CD.

On June 2, 2014, the following individuals within the Service received copies of the Petition via electronic mail: Deputy Assistant Director Gina Shultz (Headquarters); Chief of Endangered Species Division for the Service's Southwest Region Susan Jacobsen (Regional

Office); and Austin Ecological Field Services Supervisor Adam Zerrenner (Austin Office). AR at M0183-M0184. The email sent to Mmes. Shultz and Jacobsen on June 2, 2014, on which Mr. Zerrenner was copied, stated:

> On behalf of [Petitioners], we respectfully submit this petition to delist the federally endangered Bone Cave harvestman (*Texella reyesi*)….Hard copies of the petition, as well as digital copies (on CD) of all of the references cited, will be mailed to you tomorrow.

Id. While the initial email sent to the Service on June 2, 2014 included incorrect email addresses for Mmes. Shultz and Jacobsen, Mr. Zerrenner's email address was correct. *Id.* An email with correct addresses for Mmes. Shultz and Jacobsen was sent approximately 30 minutes later. Aurora Decl. ¶ 5. On June 3, 2014, Petitioners sent the Petition and CD to Mmes. Shultz and Jacobson via Federal Express. *Id.* at ¶ 6. The Service's Headquarters and Regional Offices both signed for the Federal Express deliveries on June 4, 2014. *Id.* at ¶ 7. Neither the Federal Express delivery receipts nor any email or other communications from Mmes. Shultz or Jacobson with respect to receipt of the Petition and CD appears in the Administrative Record or Privilege Log accompanying the same. The complete lack of records from the Service's Headquarters and Regional Office concerning receipt of the Petition and CD should, on its own, indicate that the Service is not entitled to the presumption of regularity in the present action. In addition to the faults in the content of the Administrative Record, a careful review of the materials the Service did include in its Administrative Record indicates that the Petition itself was mishandled from the very start.

A. USFWS appears initially to have ignored the Petition

Aside from the email delivered by Petitioners to the Field Supervisor for the Austin Office on June 2, 2014, there is no mention of the Petition in the Administrative Record or Privilege Log until September 15, 2014 – a week after the deadline for the Service's 90-day finding had passed under section 4(b)(3)(A) of the ESA, 16 U.S.C. 1533(b)(3)(A). In an email from the Austin Office to the Regional Office, the Austin Office asks whether the Regional Office had reviewed the Petition to determine whether it qualified as a petition. The Regional

Office responded by stating that the Petition qualified and that the Service had until June 4, 2015 (long past the statutory deadline) to respond in order to "avoid paying attorneys [sic] fees…" AR at M0304 (Sept. 18, 2014) (Email from Regional Office to Austin Office).

There is no subsequent reference to the Petition in the Administrative Record until January 15, 2015—more than seven months after the Petition was delivered to the Service—where Frank Lupo (with the Solicitors' Office within the Department of the Interior) indicates to Alan Glen, attorney for Petitioners that the Service's delay in responding to the Petition was:

> …complicated by the fact that [it] is a delisting petition. Therefore the Service cannot just review the [P]etition, standing alone. The Service must also review the voluminous information already in our files regarding this species in order to complete an accurate 90-day finding on the petition.

AR at M0354-M0356 (Jan. 15, 2015) (Email from Solicitor to A. Glen). Similarly, the Privilege Log contained scant references to the Petition.

B. USFWS appears to have ignored relevant, available data concerning the species' status

Despite the Solicitor's statement that the Service's task in evaluating the Petition was "complicated" by the fact that it must review "voluminous information already in [the Service's] files" regarding *Texella reyesi*, and the fact that the Service almost certainly had in its files the vast majority of the documents referenced in the Petition and included on the CD provided to the Service, the agency admittedly failed to review almost all of those documents. Doc. No. 55 at p. 5. In its Motion, Defendants appear to pass the buck, indicating that the Service's error was understandable because "[p]art of the problem was that the petition did not mention the disc containing these reference materials." *Id.* There are at least two problems with Defendants' explanation as to why relevant, available scientific information was not considered by the Service.

First, while it is true that the Petition itself did not reference the CD, the Literature Cited contained sufficient identifying information on each of the sources referenced in the Petition. At the time the Petition was received by the Service, the agency had or should have had in its

possession the vast majority of the documents referenced in the Petition and set forth in the Literature Cited because the Service authored or approved the document, referenced the document in the 5-year Review, or the Petition included a valid hyperlink to the document. In the end, the Service included only *seven* of the 63 documents cited in the Petition in the Administrative Record filed with this Court. The degree to which relevant and available data were ignored by the Service, regardless of whether or not the Austin Office staff responsible for reviewing the Petition had the CD, evidences either that the Service decided before ever reviewing the Petition that it would make a negative finding or that the Service cannot be presumed capable of reviewing relevant data.

Second, Defendants' reliance on regulations that were not in place at the time the Petition was submitted or this action brought is plainly improper. In its Motion, Defendants reference the Service's petition regulations found at 50 C.F.R. 424.14(c) for the position that its request for voluntary remand is proper because "remand will allow the Service to directly consider the 'electronic or hard copies of supporting materials' in completing the new 90-day finding…" Doc. No. 55 at p. 5, citing 50 C.F.R. 424.14(c). The referenced regulation, however, was not adopted by the Service until September 27, 2016, more than two years after the Petition was filed and more than one year after the filing of the extant action. Thus, while Defendants appear to imply that it was the Petitioners who were somehow at fault for failing to provide "electronic or hard copies of supporting materials," the petition regulations in place both at the time Petitioners submitted the Petition and, again, when Plaintiffs filed this action, contained no such reference to "electronic or hard copies of supporting materials." 50 C.F.R. 424.14(c). In any event, Petitioners ***did*** provide a CD with a complete set of the references cited in the Petition.

II. Defendants Have Not Been Forthright About Their Conduct

Defendants have attempted to mislead this Court as to the facts surrounding delivery and receipt of the Petition and CD, stating that the Service

> realized that the disc containing these reference materials had not reached the field staff responsible for evaluating the scientific materials related to the 90-day

> finding [and that p]art of the problem was that the petition did not mention the disc containing these reference materials.

Doc. No. 55. at p. 5 (internal citations omitted). While it is true that the Petition itself did not reference the CD, as noted above, the email from Petitioners submitting the Petition stated plainly that a CD containing "digital copies…of all of the references cited" would be delivered to the Service along with hard copies of the Petition. AR at M0183-M0184. The Austin Office Field Supervisor forwarded that email to several staff members within the Austin Office, including Cyndee Watson, who appears to have been responsible for drafting the Service's response to the Petition. *Id*.; see also AR at M0304, M0310 (Sept. 15, 2014) (Email from Watson to Shull), M0375 (Feb. 17, 2015) (Email from Smith-Castro to Watson), and M0648 (March 23, 2015) (Email from Watson to Smith-Castro). Thus, while it is true that the Petition itself did not reference the CD, the transmittal email did and, therefore, all relevant agency personnel had notice that the CD was forthcoming.

III. Defendants May Not Adhere to the Correct Standard if Remand is Granted

In addition to the concerns set forth above, Plaintiffs are concerned that Defendants intend to use the remand to "substantiate" a flawed decision that was based on a fraction of the substantial scientific and commercial information available to the Service at the time the agency was analyzing the Petition. Defendants state that the circumstances here meet the test set forth by the Fifth Circuit in *Central and South West Services, Inc. v. United States Environmental Protection Agency*, which held remand is appropriate where "there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so and when vacating would be disruptive." 220 F.3d 683, 692 (5th Cir. 2000). Specifically, Defendants state that "there is 'at least a serious possibility' that the agency will be able to reevaluate the reference materials from the disc, and thus 'substantiate its [prior] decision' on remand." Doc. No. 55 at p. 8 (internal citations omitted). While Defendants pay lip service to the Service's duty to evaluate whether the Petition presents "substantial information indicating that delisting the species may be warranted," the Service's past conduct with respect to the Petition and its

contemporary statements indicate that there is a very real possibility that the agency will use its time on remand simply to shore up its previously held position.

Plaintiffs also are concerned that the Service will again ignore the claim set forth in the Petition that *Texella reyesi* was listed in error and, instead, evaluate only whether the Petition presents evidence that the species has met the criteria for delisting based on recovery. Pls. First Am. Compl. at ¶¶ 43-46. Although the Petition claimed as one of the bases for delisting *Texella reyesi* that the species was listed in error, and set forth data and reference materials pertinent to that claim, the Service arbitrarily applied only the standards relevant to petitions claiming a species has recovered. See, generally, Pls. First Am. Compl. at ¶¶ 43-46 and 50 C.F.R. 424.11(d).

As noted above, when the Service receives a petition to delist a species, it must first determine whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted." 50 C.F.R. 424.14(b). When a petition claims that a species was originally listed in error, Service regulations require the agency to delist the species where "[s]ubsequent investigations…show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error. 50 C.F.R. 424.11(d)(3). Conversely, where a petition claims a species has recovered, the Service is to delist the species "…only if the best scientific and commercial data available indicate that it is no longer endangered or threatened." 50 C.F.R. 424.11(d)(2).

While Plaintiffs believe that the Service should have determined that *Texella reyesi* meets the standard for a positive 90-day finding based on the fact that the species has recovered, the Service's failure to evaluate at all whether or not the original listing was in error was a fatal flaw.

IV. Defendants' Position does not meet the Standard for Voluntary Remand

Defendants cite to numerous federal decisions indicating that, generally speaking, remand of federal agency decisions should be permitted. Doc. No. 55 at p. 6. But Defendants make several critical errors in their interpretation of the "law" governing remand. For example, Defendants cite to *Frito-Lay, Inc. v. U.S. Dep't of Labor* for the proposition that "[w]hen an

agency action is under review by a federal court, the agency…may seek a remand to reconsider its decision…." 20 F. Supp. 3d 548, 552-53 (N.D. Tex. 2014). While the court in that case indicated that remand generally is appropriate where an agency's concern is "substantial and legitimate," and not made in "bad faith," the court took care to explain why remand in the case before it was appropriate:

> Here, the [agency] relied on admittedly incorrect evidentiary allegations. Defendants seek to cure their mistake…[and] have been forthcoming about the merits of Plaintiff's challenges and admitted the alleged errors once they were discovered.

Id.

Defendants neglected to inform this Court that the Service had the CD in its possession when the Petition was delivered to the agency, had the names and citations of all materials referenced in the Petition, had the vast majority of those materials in its own possession at the time the Petition was delivered to the agency, and for some unknown reason declined to consider the materials therein. In light of the errors and omissions committed by the Service as described in this Response, it would be inequitable for this Court to grant Defendants' Motion, particularly since Plaintiffs have incurred significant costs in connection with this litigation and are eligible to receive an award of attorneys' fees. See 16 U.S.C. 1540(g); 28 U.S.C. 2412.

CONCLUSION

For the foregoing reasons, Plaintiffs oppose Defendants' Motion for Voluntary Remand without Vacatur and, instead, request this Court remand with instructions that the Service issue a new decision that fulfills all relevant requirements of the ESA, including specifically the requirement that the Service make its determination within 90-days of the date of the order granting remand and that the Service use those 90 days to determine whether the Petition presents "substantial scientific or commercial information indicating the petitioned action may be warranted." 16 U.S.C. 1533(b)(3)(A). Plaintiffs additionally request this Court retain jurisdiction and determine that Plaintiffs are prevailing parties.

Dated: December 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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