

September 25, 2015

Via Federal Express

The Honorable Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Via Federal Express

Benjamin Tuggle, Ph.D.
Southwest Regional Director
U.S. Fish and Wildlife Service
500 Gold Avenue, S.W.
Albuquerque, NM 87102

Via Federal Express

The Honorable Daniel M. Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

Re: Sixty-day notice of intent to sue for violation of section 4(b)(3)(A) of the Endangered Species Act, based on a failure to make a 90-day finding on the American Stewards of Liberty petition to delist the Navasota Ladies'-tresses.

Dear Secretary Jewell, Director Ashe, and Regional Director Tuggle:

On behalf of the American Stewards of Liberty we are informing you of our intent to file a civil suit against the U.S. Fish and Wildlife Service ("Service") pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g). We are providing this letter to you pursuant to the 60-day notice requirement of the citizen suit provision. Specifically, the basis for the intended lawsuit is that the Service has failed to timely make its required 90-day finding on the American Stewards of Liberty's petition to delist the Navasota Ladies'-tresses (*Spiranthes parksii*) in accordance with ESA § 4(b) (3)(A). Instead, the Service has declined to consider the petition in violation of law that the Service itself cites in its letter to the petitioners dismissing review of the petition.

Factual Background:

The Navasota ladies'-tresses ("NLT") is a terrestrial, perennial orchid known to occur primarily in the post oak savanna ecoregion of east-central Texas, although, occurrences have also been recorded from other Texas ecoregions (e.g., the Bastrop Lost Pines and the Southern Tertiary Uplands, the Southern Blackland Prairie and San Antonio Prairie). The NLT has been

known to science since the mid-1940s, with the first collection of specimens in 1945 and an official species description published in 1947. The Service listed NLT as an endangered species in 1982.¹ In the agency's final listing rule, the Service stated that NLT is "primarily threatened due to extremely low numbers, urbanization, and possible over-utilization."²

In the more than three decades since the 1982 listing, a substantial amount of new scientific and commercial information has become available that demonstrates the NLT is not at risk of extinction and that the original listing was in error. Sufficient conservation for the NLT is in place so that neither the existence nor the magnitude of the once perceived potential threats to the species indicates that NLT is at risk now or in the foreseeable future. Therefore, the protections of the ESA were not originally and are not currently warranted for NLT. Furthermore, molecular analyses by numerous researchers using a variety of different markers and methods, including work that has been published in peer-reviewed scientific journals, have failed to support the taxonomic position of NLT as a distinct species apart from the local form of the co-occurring *S. cernua* (commonly known as nodding ladies'-tresses). As such, the best available scientific and commercial information suggests that NLT may not even be a valid taxon eligible for listing.

On May 26, 2015 the American Stewards of Liberty and Steven W. Carothers filed a petition with the Service to delist the NLT. Pursuant to ESA § 4(b)(3)(A), the Service was required to make a finding within ninety days as to whether the petitioned action may be warranted. Ninety days have passed since the petition was filed and the Service has not published its determination. On June 22, 2015, Dr. Carothers received a letter from the Service indicating that the Service had received the petition to delist the NLT, and stating that:

Under the provisions of section 4 of the Act, we must first make an initial finding as to whether a petition to delist a species from the endangered species list presents substantial information indicating that the request action may be warranted. Section 4(b)(3)(A) of the Act provides that, to the maximum extent practicable, this finding be made within 90 days . . . We are currently required to complete a significant number of listing and critical habitat actions in Fiscal Year 2015, including: complying with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date, section 4 (of the Act) listing actions with absolute statutory deadlines, and high-priority listing actions. Complying with these court orders, settlement agreements, and other statutory deadlines will require us to spend most of our resources on these actions during Fiscal Year 2015. Therefore, we are not able to address your petition to delist the federally endangered Navasota ladies'-tresses at this time.³

¹ 47 Fed. Reg. 19539.

² 47 Fed. Reg. 19539.

³ Letter from Joy E. Nicholopoulos, Acting Regional Director, Ecological Services Region 2 to Dr. Steven W. Carothers, Ph.D. dated June 16, 2015.

Legal Background:

Section 4 of the ESA authorizes individuals to petition the Secretary of the Interior to list, downlist, or delist a species. Once a petition has been filed with the Service, the Service is obligated to respond.⁴ As stated in ESA § 4(b) (3)(A):

To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

If at this "90-day finding" stage the Service makes a positive determination that delisting may be warranted, ESA § 4(b)(3)(B) obligates the Service to

"[w]ithin 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, ...make one of the following findings:

- (i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.
- (ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).
- (iii) The petitioned action is warranted, but that--(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

Once a proposed rule has been issued in conjunction with a positive 12-month finding, ESA § 4(b)(6)(A)(i)(I) requires that the Service, within one-year of the date of publication of the proposed regulation, publish the final regulation to implement its determination to delist the species.

⁴ The Secretary has delegated its authority under the ESA to the Service.

ESA § 11(g) gives an express right for any person to "commence a civil suit on his own behalf ... against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under [Section 4] which is not discretionary with the Secretary." Therefore the ESA allows citizen suits for failures of the Service to meet its obligations under Section 4. The Service's failure to make a 90-day finding on the NLT is such an instance.

The Service's Failure to Respond is in Violation of the ESA and Contrary to Public Policy:

The Service's letter to Dr. Carothers is unacceptable. The letter acknowledges the law as quoted above requires that it review the petition but then states that listing-related court orders and court-approved settlement agreements and other statutory deadlines will dominate the Service's resources and prevent the Service from considering the petition. However, the named tasks have separate Service budgets from the action required to respond to the NLT delisting petition, so this argument is irrelevant.⁵ Moreover, the petition consists of twenty-seven pages, clearly-written and documented. It should not require so many hours to review those twenty-seven pages (which, in accordance with Section 4 is the only document that the Service reviews for a 90-day determination) such that the review could not be accomplished and the Service's determination published within the time frame prescribed by law. The Service's claim that it does not have time to review a twenty-seven page petition to make a finding as to whether a reasonable person may find that delisting is warranted is insupportable.

The fact that species such as the NLT remain listed exhausts resources exponentially more than the few hours it would take to review the petition and make a 90-day finding. The letter evidences a disregard for the landowners impacted by the listing as well as a defiance of unambiguous statutory requirements. Considering all of the new listings that the Service has volunteered to do through the settlements that the Service references in the letter, removing species that are no longer in peril or were listed in error should be one of the Service's top priorities.

Conclusion:

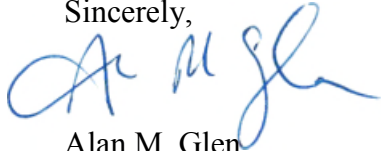
Ninety days have passed since the American Stewards of Liberty and Dr. Carothers filed their petition with the Service to delist the NLT. The Service has not published the 90-day finding it was required to make in accordance with Section 4(b)(3)(A). The Service's sole duty at this juncture is to review the petition and make a determination whether the petition presents substantial scientific or commercial information indicating that delisting may be warranted. The Service should be able to review the twenty-seven page petition and make such a finding within the timeframe prescribed by law. Pursuant to ESA § 11(g), the American Stewards of Liberty intends to commence a civil suit based on the Service's failure to make its required 90-day

⁵ Since 1999, delisting activities have been a part of the recovery program with a budget separate and apart from the listing budget. In the Service's 2015 budget, the Service noted that funding of delisting had increased and that delisting demonstrates the efficacy of the ESA. See http://www.fws.gov/budget/2015/FY2016_FWS_Greenbook.pdf.

Secretary Jewell, Director Ashe, and Regional Director Tuggle
60-Day Notice of Intent to Sue
September 14, 2015
Page 2

finding. If the Service does not make the required finding for the NLT within the next sixty days, we intend to file suit.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alan M. Glen". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Alan M. Glen
Nossaman LLP