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Refer To File # 501774-0002

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

September 3, 2021

The Honorable Deb Haaland
U.S. Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Martha Williams
Principal Deputy Director of the U.S. Fish and
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Amy Leuders
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Adam Zerrenner, Field Supervisor
U.S. Fish and Wildlife Service's Austin
Ecological Field Services Office
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Re: **Sixty-day Notice of Intent to sue for violation of section 4(b)(3)(B) of the Endangered Species Act, based on U.S. Fish and Wildlife Service failure to make a timely 12-month finding on the petition of American Stewards of Liberty, John F. Yearwood, Kathryn Heidemann, Charles and Cheryl Shell, Walter Sidney Shell Management Trust, and Steven W. Carothers to remove the Bone Cave harvestman (*Texella reyeisi*) from the list of endangered species**

Secretary Haaland, Acting Director Williams, Regional Director Leuders, and Field Supervisor Zerrenner:

On behalf of the American Stewards of Liberty ("ASL"), we write to inform 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, 16 U.S.C. 1540(g) ("ESA"). We provide this letter to you pursuant to the 60-day notice requirement of the ESA citizen suit provision. Specifically, the basis for the intended lawsuit is that the Service has failed to timely make its required 12-month finding on the petition ("Petition") to delist the Bone Cave harvestman (*Texella reyeisi*) ("BCH") submitted by the above-referenced parties in accordance with 16 U.S.C. 1533(b)(3)(B).

Factual Background

The BCH is a terrestrial karst invertebrate that occurs in caves and voids north of the Colorado River in Travis and Williamson Counties, Texas. The Service listed the BCH as endangered in 1988 based on a paucity of information regarding the abundance and distribution of the species; there were only five or six known localities of the species and these locations occurred in a rapidly developing area. The Service listed the species in order to respond to perceived immediate threats caused by development. Since the species was listed, there has been a steady, continuous increase in the number of known occupied localities from just a handful to dozens then scores, and now hundreds.

On June 2, 2014, ASL, John Yearwood, Kathryn Heidemann, Charles and Cheryl Shell, Walter Sidney Shell Management Trust, and Steven W. Carothers (collectively, “Petitioners”) submitted the Petition to the Service. The Petition set forth information supporting Petitioners’ contention that the BCH warranted delisting. Specifically, the Petition provided substantial information indicating: (1) an increase of BCH localities from five or six at the time of listing to 172 at the time of the Petition; (2) significant conservation for the species (55 percent of known localities); (3) regulatory protections for most caves in the species’ range via state and local laws and regulations and ordinances; and (4) biologists are constantly discovering new, occupied BCH localities. In addition, as detailed in the Petition, state and local entities have undertaken numerous efforts that directly or indirectly conserve the BCH.

Despite the Petition providing this substantial information, on June 1, 2015, the Service made a negative 90-day finding on the Petition (“Original Negative Finding”). ASL and other parties brought suit in the U.S. District Court for the Western District of Texas. On December 22, 2016, at the request of the Service the court voluntarily remanded the Original Finding so that the agency could examine information in its administrative record that it previously had not considered. The court ordered the Service to make a new 90-day finding on or before April 7, 2017. On March 27, 2017, the Service requested the court extend that deadline, which the court did. On May 4, 2017, the Service made a second negative 90-day Finding (“Second Negative Finding”).

ASL challenged the Second Negative Finding in the Western District and on March 28, 2019, the court found that the Service had acted arbitrarily and capriciously in denying the Petition. In making this finding, the Court noted “the Service violated its regulations when it required [ASL] to essentially present conclusive evidence about the [BCH’s] population trends—more evidence than the Service admits is available or attainable.” *American Stewards of Liberty v. Department of the Interior*, 370 F.Supp.3d 711, 725 (W.D. Tex. 2019). The court also found that the Petition “present[ed] extensive evidence that the gravest threat to the [BCH] identified in the 1988 listing—loss of habitat due to development—might not be as grave as was predicted...and that reconsideration of the listing determination may be warranted.” *Id.* at 726.

As a result, the Second Negative Finding was vacated and, pursuant to a separate stipulation, the Service was ordered to make a new 90-day finding on or before October 15, 2019. On October 10, 2019, the Service published its third 90-day finding on the Petition, this time, determining that the Petition presented substantial scientific or commercial information indicating delisting the BCH may be warranted (“Positive 90-day Finding”). As is described in greater detail below, the Service

is in violation of section 4 of the ESA as a result of its failure to publish a 12-month finding on the Petition as required under the statute. 16 U.S.C. 1533(b)(3)(B).

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 obliged to respond. As stated in section 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 the Service makes a positive determination that delisting may be warranted at this “90-day finding” stage, then section 4(b)(3)(B) obligates the Service:

[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.

(Emphasis added).

Once the Service issues a proposed rule to effectuate a positive 12-month finding that the petitioned action is warranted, section 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. Importantly, while ESA section 4 indicates that the Service “to

the maximum extent practicable” must make an initial finding on a petition within 90 days of receipt, **the Service is not given leeway to delay its final, 12-month, finding on a petition**. ESA section 4 plainly states that “[w]ithin 12 months after receiving a petition” on which the Service makes a positive 90-day finding, the Service “shall” make an ultimate finding on the petition. *Id.* at 4(b)(3)(B). Courts have described the 12-month finding deadline as “mandatory,” “not at all ambiguous,” and “exquisitely clear,” see, e.g., *Friends of Animals v. Salazar*, 670 F.Supp.2d 7, 12 (D.D.C. 2009); *Center for Biological Diversity v. Norton*, 254 F.3d 833, 837 (9th Cir. 2001), and have indicated the 12-month finding must be made within 12 months of receiving a petition “regardless of when [the Service] issued its 90-day finding.” *Biodiversity Legal Foundation v. Norton*, 180 F.Supp.2d 7, 9 (D.D.C. 2001).

ESA section 11, 16 U.S.C. 1540(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 authorizes citizen suits alleging a failure of the Service to meet its obligations under Section 4.

The Service’s failure to reach a timely 12-month finding on the petition to delist the BCH represents the agency’s failure to perform an act which is not discretionary and is thus subject to the citizens’ suit provision of ESA section 11(g).

Conclusion

Maintenance of the BCH on the list of endangered species is not warranted under the listing criteria of the ESA. Despite the Service’s October 10, 2019 Positive 90-day Finding, the Service has failed to publish the requisite 12-month finding announcing its determination of whether delisting the species is warranted. If the Service does not publish a finding of whether delisting the BCH is warranted within the next 60 days, ASL intends to file suit and seek appropriate declaratory and injunctive relief as well as the costs of litigation (including reasonable attorney fees).

The ESA compels the Service to make a 12-month finding on the Petition, and ASL believes the petitioned-for action of delisting the BCH is well-supported by best available science and the law. ASL has expended significant resources in connection with preparing and submitting the Petition, challenging two arbitrary 90-day findings made by the Service with respect to the Petition, and, most recently, submitting on July 1, 2020 substantial comments in connection with the Service’s status review required in connection with an ultimate 12-month finding. Among other things, comments submitted by ASL during the BCH status review demonstrated that 50% of the species’ known localities have been protected, that distribution of the species has increased more than 3,000% over a period of 25 years, and that the species persists even where localities have been impacted by development.

The Service has all the information necessary to make its required 12-month finding. Pursuant to section 4(b)(3)(B) of the ESA, the Service must promptly do so.

Please feel free to contact me in the event you have any questions regarding this matter.

Best regards,



Rebecca Hays Barho
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