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Adam Zerrenner, Field Supervisor
U.S. Fish and Wildlife Service
Austin Ecological Services Field Office
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Re: American Stewards of Liberty Comments on Golden-cheeked Warbler
(*Setophaga chrysoparia*) 5-year Status Review, Docket No. FWS-R2-ES-2020-
0133.

Dear Mr. Zerrenner:

On behalf of the American Stewards of Liberty (“ASL”),¹ we submit the following comments in response to the U.S. Fish and Wildlife Service’s (“Service”) May 5, 2021 notice (“Notice”) of its initiation of 5-year status reviews for 23 species in the Southwest, including the golden-cheeked warbler (“GCWA”).² ASL appreciates the Service’s consideration of these comment in connection with the 5-year review.

Introduction

Section 4 of the Endangered Species Act (“ESA”) requires the Service, every five years, to review listed species and determine based on such review whether any species should be removed from the list of threatened or endangered species, re-classified from threatened to endangered, or re-classified from threatened to endangered.³ Although not required by statute, the Service generally takes the view that in determining a species’ status, it will look to “new

¹ ASL is a 501(c)(3) charitable organization whose members in central Texas and across the southern and western United States have a fundamental interest in their ability to use their working farming and ranchlands productively and free from regulation under the ESA where such regulation is unsupported by law.

² 5-year Status Reviews of 23 Species in the Southwest, 86. Fed. Reg. 23,976 (May 5, 2021) (“5-Year Review”).

³ 16 U.S.C. 1533(c)(2).

information” that has become available since the relevant species’ listing determination or the most recent status review.⁴

The most recent status review of the GCWA was concluded in 2014.⁵ Since that time, new information has become available that adds to the body of scientific information indicating that the species does not meet the definition of an endangered species under ESA section 3, relevant implementing regulations, and applicable caselaw.

Recent Study Demonstrates Robust GWCA Population

On Thursday, February 25, 2021, the Texas Chapter of the Wildlife Society held its 57th Annual Meeting virtually.⁶ During one of the breakout sessions, Dr. James Mueller, a biologist with the Balcones Canyonlands National Wildlife Refuge, made a presentation titled Where and by how Much do Golden-Cheeked Warbler Models Differ? This presentation described a recently concluded study by the Service which examined potentially available GCWA habitat across the species’ breeding range (based on 2018 satellite imagery) and utilized presence-absence surveys at 3 and 5 minute intervals to verify results. In his presentation, Dr. Mueller reported that the Service’s study concluded that there were between 220,000-276,000 singing male GCWA throughout the species’ breeding range. In response to questions posed to him, Dr. Mueller indicated the species appeared to be “abundant” across its range and that it did not appear to be “imminently threatened with extinction.” Dr. Mueller indicated the results of the study would be published in the near term.

ASL finds the results of the Service’s recent study particularly significant for the following reasons. At the time the GCWA was listed, there were thought to exist only 15,000-17,000 singing males throughout the species range.⁷ In the Service’s 2014 5-year review of the GCWA, the agency acknowledged that a peer-reviewed, published 2012 study by Mathewson, et al.⁸ estimated the rangewide population of male GCWAs to be 263,339.⁹ The Service discounted these results, however, because “others have cautioned that this analysis may have over-predicted density estimates, resulting in inflated population estimates.” Given the results of the Service’s more recent study are consistent with the results of Mathewson et al. 2012, ASL suggests that the species is not currently threatened with extinction across all or a significant portion of its range and likely never has been.¹⁰

⁴ 86 Fed. Reg. at 23,976 (“A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review...”)

⁵ Golden-cheeked warbler (*Setophaga chrysoparia*) 5-Year Review: Summary and Evaluation (2014) (“2014 5-Year Review”); available at: https://ecos.fws.gov/docs/five_year_review/doc4434.pdf.

⁶ See https://tctws.org/wp/wp-content/uploads/2021/02/ShortProgramFinal_2021v3.pdf at 13.

⁷ Final Rule to List the golden-Cheeked Warbler as Endangered, 55 Fed. Reg. 53,153, 53,154 (Dec. 27, 1990).

⁸ Mathewson, et al. 2012. Estimating breeding season abundance of Golden-cheeked warblers in Texas, USA. *Journal of Wildlife Management* 76:1117-1128.

⁹ 2014 5-year review at 5.

¹⁰ 16 U.S.C. 1532.

Similarly, knowledge about the amount of habitat available for use by the GCWA has also improved since the time of listing. The Service's listing rule stated that between 60,650 and 263,750 acres of suitable habitat for the GCWA was thought to be present across the range.¹¹ As described in the 2014 5-year review, various modern estimates of habitat availability indicate approximately 4 million acres of suitable habitat are present across the range.¹² Furthermore, recent work by Long et al. (2021) demonstrates that GCWA "occupy and reproduce under a much broader range of vegetative conditions than currently described" leading to recommendations that management and conservation efforts consider geographic variations in suitable habitat characteristics.¹³

GCWA Enjoys Robust Conservation Across its Range

In addition to the new information confirming that the species' population remains robust across its range, the GCWA continues to benefit from robust conservation measures implemented across its range. According to the 2014 5-Year Review, more than 180,000 acres of lands receive long-term protection and management benefitting the GCWA for conservation purposes, with an additional 100,000 acres preserved and/or maintained for the benefit of GCWAs in connection with ESA section 7 consultations, and 59,000 acres of habitat protected pursuant to ESA section 10 permits.¹⁴ The 2014 5-Year Review also indicated the availability of \$1.3 million for preservation and/or maintenance of GCWA habitat.¹⁵ At least two programmatic-scale habitat conservation plans benefitting the GCWA have been approved by the Service since its publication of the 2014 5-Year Review—the Southern Edwards Plateau Habitat Conservation Plan and LCRA Transmission Services Corporation Habitat Conservation Plan—which would collectively conserve more than 30,000 additional acres of GCWA habitat.¹⁶ Other conservation actions performed in relation to ESA section 7 consultations after the 2014 5-year review protected more than 2,000 acres of GCWA habitat, including approximately 1,400 acres of new conservation contributing to the Balcones Canyonlands National Wildlife Refuge.¹⁷

GCWA Should be Delisted

Service regulations require the agency delist a species if the Service finds, after conducting a status review, that based on the best scientific and commercial data available, the

¹¹ 55 Fed. Reg. at 53,154.

¹² 5-year review at 7. See also Morrison, M.L., R.N. Wilkins, B.A. Collier, J. Groce, H. Mathewson, T. McFarland, A. Snelgrove, T. Snelgrove, and K. Skow. 2010. Golden-cheeked warbler population distribution and abundance. Texas A&M Institute of Renewable Natural Resources, College Station, Texas, USA; Duarte, A., J.L.R. Jensen, J.S. Hatfield, and F.W. Weckerly. 2013. Spatiotemporal variation in range-wide golden-cheeked warbler breeding habitat. *Ecosphere*. 4(12):1-12.

¹³ Long, A.M., H.A. Mathewson, and M.L. Morrison. 2021. The influence of geographic variation in vegetation characteristics on habitat use and productivity of an endangered warbler. *Forest Ecology and Management*. 482 (2021):118857.

¹⁴ 2014 5-Year Review at 10.

¹⁵ *Id.*

¹⁶ These plans may be found at https://www.fws.gov/southwest/es/austintexas/esa_c_hcp_news.html.

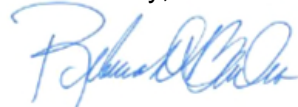
¹⁷ See, generally, U.S. Fish & Wildlife Service Environmental Conservation Online System, Golden-cheeked warbler; found at: <https://ecos.fws.gov/ecp/species/33>.

species “does not meet the definition of an endangered species or a threatened species.”¹⁸ In making this determination, the same regulations require the Service to apply the listing factors set forth in 50 C.F.R. 424.11(c).¹⁹ It is ASL’s opinion that a species numbering in the hundreds of thousands with significant conservation across its range is not “in danger of extinction throughout all or a significant portion of its range...”²⁰ and is unlikely “to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”²¹

ASL notes that the Service has on multiple occasions delisted species on the basis that population numbers were high and/or that the species had significant on-the-ground conservation in place. For example, in 2018, the Service delisted the black-capped vireo (*Vireo atricapilla*) (“BCVI”) on the basis that it had recovered.²² At the time the species was listed in 1987, 350 individual birds were known to occur within Oklahoma, Texas, and northern Mexico. In the Service’s delisting rule, the agency acknowledged that no range-wide population estimate was available. The Service nevertheless relied on indications the species was stable based on a number of known variables, including that information from annual BCVI monitoring at four publically managed areas demonstrated stable or increasing population estimates since 2005, with an estimated population of 14,418 adult males.²³ The Service also noted conservation of the BCVI required under various habitat conservation plans addressing the species.²⁴ Remarkably, the Service delisted the Kirtland’s warbler (*Setophaga kirtlandii*) in 2019 on the basis of recovery with an estimated population of 2,383 singing males.²⁵

ASL is confident that, when taken together, the best scientific and commercial information available, including that gathered during this 5-year review will demonstrate that the GCWA does not meet the definition of an endangered or threatened species.

Sincerely,



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Nossaman LLP

RHB/jm

¹⁸ 50 C.F.R. 424.11(e).

¹⁹ *Id.*

²⁰ 16 U.S.C. 1532(6).

²¹ *Id.* at (20).

²² 83 Fed. Reg. 16,228 (Apr. 16, 2018).

²³ *Id.* at 16,229.

²⁴ *Id.* at 16,230.

²⁵ 84 Fed. Reg. 54,436 (Oct. 9, 2019).