IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

BIODIVERSITY CONSERVATION ALLIANCE, et al.,	)	Civ. No. 1:04-CV-02026 (GK)
Plaintiffs,	)	Next Deadline: August 3, 2005 Defendants' Reply in Support of Cross-Motion for Summary Judgment Claims Four, Five and Six
vs.	)	
GALE NORTON, et al.,	)	
Defendants.	)	

PLAINTIFFS' OBJECTIONS AND RESPONSES TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

Plaintiffs provide their responses and objections to Defendants' Statement of Material Facts concerning liability on Claims Four, Five and Six as follows:

1 & 3. Plaintiffs object to FWS's claims that it is not, and has not been, practicable to make the required petitions findings on relevance grounds. Because it has been over 12 months from the date receipt of the petitions to list the Gunnison prairie dog, Black Hills mountainsnail and Uinta mountainsnail, as a matter of law, the impracticability excuse does not apply and is not relevant to deciding the cross-motions for summary judgment.

Plaintiffs note FWS relies in its brief on the Declaration of Elizabeth Stevens, which was filed concurrently with the government's Motion for Summary Judgment. To the extent the Court believes Ms. Stevens declaration is necessary to decide liability, a continuance of the proceedings is appropriate to allow Plaintiffs to conduct discovery, including taking Ms. Stevens deposition, pursuant to Rule 56(f).

2 & 21. Plaintiffs respond to Defendants' proposed schedule by noting ESA section 4(b)(3) requires preliminary petition findings within 90 days of receipt and the three petitions that are the subject of the Cross-Motions have been pending between 18 and 48 months. As a result, Plaintiffs are requesting an injunction requiring petition findings on all three species within 30 days.

4. Plaintiffs object to FWS's reference to the legal implications of the Anti-Deficiency Act because it is not a statement of fact. In any case, FWS's interpretation of the Anti-Deficiency Act is legally invalid. Center for Biological Diversity v. Norton, 304 F.Supp.2d 1174, 1180 (D. Ariz. 2003) (rejecting Anti-Deficiency Act as justification for non-compliance with ESA deadlines).

5-18. Plaintiffs object to FWS's claims that it is not, and has not been, practicable to make the required petitions findings on relevance grounds. Because it has

been over 12 months from the date receipt of the petitions to list the Gunnison prairie dog, Black Hills mountainsnail and Uinta mountainsnail, as a matter of law, the practicability excuse does not apply and is not relevant to deciding the cross-motions for summary judgment.

Plaintiffs note FWS relies on the Declaration of Elizabeth Stevens, which was filed concurrently with the government's Motion for Summary Judgment. To the extent the Court believes Ms. Stevens declaration is necessary to decide liability, a continuance of the proceedings is appropriate to allow Plaintiffs to conduct discovery, including taking Ms. Stevens deposition, pursuant to Rule 56(f).

Plaintiffs further note that budget deficiencies are self-imposed because the agency fails to request sufficient funding from Congress and, when it loses cases, the agency is implementing a policy of paying attorney fees and costs from the same funds it would use to complete petitions findings rather than its prior policy of paying attorney fees and costs from the Treasury Department's Judgment Fund. See Center for Biological Diversity v. Norton, 304 F.Supp.2d at 1178-82 (discussing and rejecting same budgetary excuses offered here).

19 & 20. Plaintiffs object to statements in these numbered paragraphs on relevance grounds. Neither statutorily-required status review nor the steps necessary for the 12-month finding (16 U.S.C. § 1533(b)(3)(B)) is not part of the process for a preliminary 90-day petition finding and therefore are not legally or factually relevant to decide the cross-motions.

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Respectfully submitted,

Dated: July 27, 2005

/s

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/s

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