

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

BIODIVERSITY CONSERVATION ALLIANCE,
et al.,

Plaintiffs,

vs.

GALE NORTON, et al.,

Defendants.

Civ. No. 1:04-CV-02026 (GK)

Next Deadline: August 3, 2005
Defendants' Reply in Support of
Cross-Motion for Summary
Judgment Claims Four, Five and
Six

**PLAINTIFFS' COMBINED REPLY/OPPPOSITION RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT ON PLAINTIFFS' FOURTH, FIFTH, AND SIXTH CLAIMS
FOR RELIEF**

INTRODUCTION

The parties' Cross-Motions present a question of statutory construction: does the Endangered Species Act (ESA) section 4(b)(3) authorize Defendants to delay beyond 12 months the preliminary finding on a citizen petition to list an imperiled species. Defendants Secretary Gale Norton and U.S. Fish and Wildlife Service Director Michael Hogan (collectively "FWS") suggest they may delay this mandatory finding indefinitely. FWS, however, does not have unfettered discretion on the timing of a preliminary finding. Instead, ESA section 4(b)(3) caps FWS's ability to delay for reasons of "impracticability" at 12 months because otherwise the carefully-structured ESA listing program that was designed to curtail delays is meaningless.

The Motions also present a question about the appropriate remedy. Plaintiffs seek a court order requiring preliminary findings on three listing petitions within 30 days, whereas FWS does not commit to an enforceable deadline. As this Court previously ruled when presented with a "patent violation" of a mandatory ESA section 4 deadline, issuing an injunction is "essential" to carry out the "will of Congress." Defenders of Wildlife v. Norton, 239 F.Supp.2d 9, 23 (D.D.C. 2003). Moreover, because a preliminary finding is simple and was supposed to occur within 90 days of receipt, and the petition to list the Gunnison prairie dog has already been pending for over one year, the Black Hills mountainsnail petition for almost two years, and the Uinta mountainsnail petition for over four years, Plaintiffs' requested relief is reasonable and warranted.

ARGUMENT

I. FWS HAS VIOLATED ITS MANDATORY DUTY TO RENDER PETITION FINDINGS ON THE THREE IMPERILED SPECIES

Plaintiffs are entitled to summary judgment on Claims Four, Five and Six because FWS has not made the required findings within the statutory time period. Section 4(b)(3) & (B) of the ESA and courts interpreting this ESA subsection require FWS to make a preliminary finding on a listing petition within 90-days of receipt as a general matter, but no later than 12 months after receipt. 16 U.S.C. § 1533(b)(3)(A) & (B); Biological Legal Foundation v. Badgley, 309 F.3d

1166, 1175-76 (9th Cir. 2002); American Lands Alliance v. Norton, 242 F.Supp.2d 1, 8 n. 7 (D.D.C. 2003); Southwest Center for Biological Diversity v. Babbitt, Civ. No. 98-1785-J (S.D. Cal. Oct. 28, 1999) (Exhibit 4 to Pls.' Opening Brief). Over twelve months have passed since FWS received the three petitions at issue and FWS has not made the requisite findings. Accordingly, FWS has "unlawfully withheld" compliance with the ESA.

Nonetheless, FWS argues that section 4(b)(3)(A)'s "to the maximum extent practicable" language allows the agency unbridled discretion to delay the mandatory finding. FWS Opp. at 5-8. There is no dispute whether FWS may take longer than 90 days to respond to a citizen petition. It can, provided the agency demonstrates the "to the maximum extent practicable" exception is satisfied. 16 U.S.C. § 1533(b)(3)(A). However, the impracticability excuse only applies for up to 12 months after petition receipt.¹ The agency's argument that there is no 12-month cap on the discretion to delay the preliminary finding, notwithstanding ESA section 4(b)(3)(B), ignores principles of statutory construction. See Dole v. United Steelworkers of America, 494 U.S. 26, 35 (1990) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme"); South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 510 n. 22 (1986) ("a statute should be interpreted so as not to render one part inoperative"). In addition to the plain language of the ESA section 4(b)(3)(A) & (B) and the several cases that have interpreted this provision, the agency also ignores Congressional intent and the legislative history of ESA section 4, whereby agency discretion to indefinitely delay petition findings was expressly eliminated. H.R. Conf. Rep. No. 835, 97 Cong. 2d Sess. at 20, reprinted in 1982 U.S.C.C.A.N. 2860, 2861-62 (1982 ESA Amendments adding listing deadlines

¹ As a result, FWS's reliance on BLF v. Babbitt is misplaced. See FWS's Opp. at 7-8. That decision did not address the legal question presented here -- whether FWS can take longer than 12 months from petition receipt to make a preliminary petition finding. Instead, plaintiffs "challenge[d] the validity of the 1997 LPG [Listing Priority Guidance] in that it directly conflicts or is an unreasonable interpretation of section 4 of the ESA." 146 F.3d 1249, 1252 (10th Cir. 1998). The BLF v. Babbitt court also rejected the notion that FWS must make the preliminary petition finding within 90 days. Id. at 1253. Plaintiffs in the present litigation do not challenge an LPG or argue the preliminary finding on the three petitions was due within 90 days of receipt.

to "replace the Secretary's discretion with mandatory, nondiscretionary duties"); see Defenders of Wildlife, 239 F.Supp.2d at 23.²

Plaintiffs further note that FWS's non-response to the three petitions mirrors the agency's position on all listing petitions. FWS does not respond to listing petitions. A party must litigate this issue every time a petition is submitted. A citizen is now forced to bring suit simply to get the agency to commit to a date certain to make the required finding -- either through a summary judgment motion like this one or through settlement -- notwithstanding the clear mandates in section 4 of the ESA and the judicial decisions on this issue. FWS maintains this position because it knows there is no consequence other than a court order requiring a petition finding long after the ESA deadline have passed. For this reason, Plaintiffs have also brought a challenge to FWS's illegal pattern and practice of not responding to citizen's listing petitions until forced to by court order.³ Unfortunately for citizens, this strategy has proven effective at advancing FWS's unlawful objective of delay while denying the public's statutory right to a responsive government agency and a critically-imperiled species the protections found in the ESA. See Pls.' Exh. 5 (identifying extinctions occurring during FWS's delays).

II. PLAINTIFFS' REQUESTED REMEDY IS PERMISSIBLE AND WARRANTED

FWS suggests courts need not issue an injunction for violations of the mandatory deadlines in section 4(b) of the ESA. FWS Opp. at 13. However, it is well-established that an injunction is permissible for blatant ESA violations, as is the case here. Badgley, 309 F.3d at 1177. The Supreme Court found that "Congress has spoken in the plainest of words, making it

² Notably, FWS testified in Congress in opposition to the section 4 deadlines as the 1982 Amendments were being debated. The former Assistant Secretary to the Department of the Interior, G. Ray Arnett, recognized the significance of the 1982 Amendments and consequently expressed his opposition to the new listing mandates and deadlines:

The Department opposes this provision because it would effectively eliminate the use of our listing priority system which has been developed as mandated by Congress under section 4(h)(3) of the Act.

1982 U.S. Code & Cong. Ad. News 2840 (emphasis added). Through its priority system, FWS had been able to decide when to respond to a petition.

³ Plaintiffs' pattern and practice claims (Claim Eleven and Twelve) are currently subject to a government Motion to Dismiss that is pending with the Court.

abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities." Tennessee Valley Authority v. Hill, 437 U.S. 153, 173 (1978). In fact, this Court previously ruled "granting this [injunctive] relief is essential to fully and effectively carry out the will of Congress." Defenders of Wildlife, 239 F.Supp.2d at 23.⁴ In reaching this conclusion, the Court relied on the 1982 ESA Amendments that added deadlines to the listing process because FWS "was not making efficient and speedy progress in the process of listing" and noted FWS "must make decisions within specific periods of time and [] will be accountable for failure to make timely and defensible decisions." Id. (citations omitted).⁵

Further, requiring FWS to make the three petition findings within 30 days is reasonable. As FWS admitted in a case before Judge Robertson, "[t]he 90-day finding is not a tremendous undertaking." BLF v. Babbitt, 63 F.Supp.2d 31, 35 (D.D.C. 1999). One court described the 90-day finding as one that "[is] not overly-burdensome, does not require conclusive information, and uses the 'reasonable person' to determine whether substantial information has been presented to indicate that the action may be warranted." Moden v. U.S. Fish and Wildlife Serv., 281 F.Supp.2d 1193, 1204 (D. Or. 2003). Three aspects of ESA section 4(b)(3)(A) illustrate the point. First, the finding is due "within 90 days" to the maximum extent practicable. 16 U.S.C. § 1533(b)(3)(A). Notwithstanding that the impracticability exception appears to have swallowed the general rule, Congress still imposed a 90-day deadline, indicating the minimal amount of work Congress believed necessary. Second, the scope of FWS's review is limited, whereby FWS

⁴ FWS's argument against an injunction relies on one subsection of the ESA's citizen suit provision. FWS Opp. at 14. As this Court recognized, determining Congressional intent is not so limited and extends to other citizen suit subsections as well as the section 4 deadline provisions. Defenders of Wildlife, 239 F.Supp.2d at 23.

⁵ FWS cites ESA section 4(h) to suggest the Court is not required to issue an injunction. FWS's Opp. at 14. In considering the interplay between the citizen petition process and FWS's section 4(h) priority system, however, Congress and the courts favor the petition process. Congress stated in the ESA's legislative history:

Although the Department of the Interior uses a priority system to determine which of the hundreds of unlisted endangered species should be acted on first, the petitioning process interrupts the Department's priority system by requiring immediate review. H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 1978, reprinted in 1978 U.S.C.C.A.N. 9453; Center for Biological Diversity v. Norton, 254 F.3d 833, 840 (9th Cir. 2001).

must determine "whether the petition presents substantial scientific and commercial information." Id. (emphasis added). In contrast, at subsequent stages of the ESA listing process FWS must expand its review beyond the petition to the "best available" scientific information. See id. § 1533(b)(1)(A); Center for Biological Diversity v. Norton, 351 F.Supp.2d 1137, 1143-44 (D. Colo. 2004). Third, the ESA merely asks FWS to determine if listing "may be warranted." 16 U.S.C. § 1533(b)(3)(A). After the 90-day finding, the ESA standard is elevated to whether listing "is warranted." Id. § 1533(b)(3)(B); id. § 1533(b)(6)(A). In the present case, FWS has had far longer than 90 days -- for the Uinta mountainsnail, the petition has been awaiting a preliminary finding since August 21, 2001, the Black Hills mountainsnail since September 24, 2003, and the Gunnison prairie dog since February 23, 2004.

Lastly, FWS's reliance on critical habitat designation work to argue against the requested 30-day deadline for the petition findings is not permissible. CNPS v. Norton, 2005 WL 76844 *5-6 (D.D.C. March 24, 2005). Similarly, to rebut Plaintiffs' requested 30-day timeframe, FWS cannot rely on any listing activities other than "pending and imminent proposals to list species." See H. Conf. Rep. No. 97-835 at 21 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2860-62 (emphasis added).

Respectfully submitted,

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/s

Neil Levine, *Pro Hac Vice*
Law Offices of Neil Levine
1400 Glenarm Place, Suite 300
Denver, CO 80202

/s

Robert Ukeiley (MD14062)
Law Office of Robert Ukeiley
433 Chestnut Street
Berea, KY 40403

Attorneys for Plaintiffs