

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

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GREGORY C. LANGHAM
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

'08 - CV - 00441 - REB - BNB

BY _____ DEP. CLK

CENTER FOR NATIVE ECOSYSTEMS,

Plaintiff,

v.

DIRK A. KEMPTHORNE, Secretary of the Department of the Interior, and
U.S. FISH AND WILDLIFE SERVICE,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This civil action for declaratory and injunctive relief is brought under the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g)(1)(C), for violations of the ESA, 16 U.S.C. § 1533(b), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq.

2. Plaintiff Center for Native Ecosystems challenges the failure of Defendants Secretary of the Interior Dirk Kempthorne (Secretary) and the U.S. Fish & Wildlife Service (FWS) to issue the initial substantial information finding on Plaintiff's Petition to Amend the Critical Habitat Designation for the clay-loving wild buckwheat, in violation of the ESA.

3. On July 17, 2006, Plaintiff submitted an ESA petition to the Secretary to revise the critical habitat designation for the clay loving wild buckwheat, one of Colorado's rarest plants. Nineteen months have passed since the Plaintiff filed the Petition. Despite the dire condition of, and ongoing threats to, the wild buckwheat, the Secretary has failed to act on the Petition as the ESA requires.

4. Plaintiff seeks a declaration that the Secretary violated Section 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), by failing to make an initial finding as to whether Plaintiff's Petition presents substantial scientific information indicating that the revision may be warranted and that this failure constitutes agency action unlawfully withheld and/or unreasonably delayed under the APA, 5 U.S.C. § 706(1). Plaintiff further seek an order requiring FWS to complete the mandatory ESA findings.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1). Alternatively, the Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 701 *et seq.* (APA). The requested relief is proper under 16 U.S.C. § 1540(g)(1) and 28 U.S.C. §§ 2201-2202 (declaratory judgment and injunctive relief).

6. In compliance with 16 U.S.C. § 1540(g)(2)(C), on November 9, 2006, Plaintiff furnished Defendants with written notice of their violations of the ESA and Plaintiff's intent to file suit. Over sixty days have elapsed since the notice was sent. The violations complained of in the notice letter are continuing and have not been remedied.

7. Venue is proper in this judicial district pursuant to 16 U.S.C. § 1540(g)(3)(A), as all or part of the alleged violations of the ESA occurred in the District of Colorado, and 28 U.S.C. § 1391(e) because this is an action against an agency of the United States, because a substantial part of the events and omissions giving rise to the claims occurred in Colorado, and because Plaintiff's principle office is in Colorado.

8. There exists now between the parties an actual, justiciable controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

PARTIES

9. Plaintiff CENTER FOR NATIVE ECOSYSTEMS (hereinafter "CNE") is a Colorado non-profit organization with its principal office in Denver, Colorado. CNE has

approximately 280 members, the majority of whom reside in Colorado. CNE's mission is dedicated to conserving and recovering native and naturally functioning ecosystems in the Greater Southern Rockies. The Grand Valley area, including the Gunnison Gorge and the Adobe Hills, where clay-loving wild buckwheat grows, has long been a conservation priority for CNE. Its members frequently use and enjoy this area, including the areas proposed for consideration as critical habitat for the wild buckwheat, for wildlife viewing, recreational, aesthetic, and scientific activities and will continue to do so. The wild buckwheat is a unique component of the Greater Southern Rockies, one that CNE's members and staff have observed and appreciated on multiple occasions in the past and will do so again in the future. CNE brings this action on behalf of itself and its adversely affected members.

10. CNE, its staff, and its members have a substantial and concrete interest in this matter. The actual, concrete injuries to Plaintiff's interests are traceable to Defendants' conduct. Plaintiff is adversely affected and aggrieved by the Secretary's failure to comply with the ESA and the APA. The requested relief will redress CNE's and its members' injuries. The Plaintiff has no adequate remedy at law.

11. Defendant DIRK KEMPTHORNE is the United States Secretary of the Interior. In that capacity, Secretary Kempthorne has supervisory responsibility over the U.S. Fish and Wildlife Service. Defendant Kempthorne is sued in his official capacity.

12. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency of the United States within the Department of the Interior. FWS is the agency to which the Secretary of the Interior has delegated responsibility of implementing the ESA and its regulations with respect to terrestrial species, including reviewing and acting on petitions for revision of critical habitat under ESA § 4(b)(3), 16 U.S.C. § 1533(b)(3).

LEGAL BACKGROUND: THE ENDANGERED SPECIES ACT

13. The ESA is designed to provide a program for the conservation of endangered or threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b).

14. The first step in the ESA's system of protection requires FWS to "list" vanishing species as either "threatened" or "endangered" and to designate their "critical habitat." 16 U.S.C. § 1533. A species is "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). The ESA does not provide any substantial protection for a species unless it is first listed.

15. Upon listing a species, FWS must also "concurrently" designate "critical habitat" for the listed species to the maximum extent prudent and determinable. 16 U.S.C. § 1533(b)(6)(C). FWS "may, from time-to-time thereafter as appropriate, revise such designation." *Id.* § 1533(a)(3)(A)(ii). FWS must base its critical habitat determinations on the best scientific data available and take into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. *Id.* § 1533(b)(2).

16. "Critical habitat" is defined as: (i) the specific areas within the geographic area occupied by the species, at the time it is listed in accordance with the provisions of [the ESA] on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of [the ESA], upon a determination by [FWS] that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A).

17. The ESA defines "conservation" as the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided ... are no longer necessary." 16 U.S.C. § 1532(3).

18. Designation of critical habitat for listed species provides additional protection and benefits for a species' conservation because all federal agencies must consult with FWS to "insure that any action authorized, funded, or carried out by [federal agencies] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in

the destruction or adverse modification of [its critical habitat].” 16 U.S.C. § 1536(a)(2) (emphasis added).

19. Any interested person can petition FWS to revise a critical habitat designation. The ESA specifies mandatory deadlines for FWS to respond to petitions from the public for revisions of critical habitat designations. 16 U.S.C. § 1533(b)(3)(D).

20. Upon receipt of such a petition, FWS has ninety days “to the maximum extent practicable,” to “make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted.” 16 U.S.C. § 1533(b)(3)(D)(i). FWS must then “promptly publish” that finding in the Federal Register. *Id.*

21. In addition, FWS must, within twelve months after receiving such a petition “determine how [it] intends to proceed with the requested revision,” and “promptly publish notice of such intention in the Federal Register,” unless it has previously found that the petition failed to present substantial scientific information indicating that the revision may be warranted. 16 U.S.C. § 1533(b)(3)(D)(ii).

22. Although Congress intended the Secretary to issue these initial findings within ninety days of receiving a petition to revise critical habitat, the language “to the maximum extent practicable” provides the Secretary with some flexibility on the timing. Nonetheless, because the deadline for the 12-month finding is firm, the initial finding must be issued in sufficient time that the Secretary can still comply with the 12-month finding deadline. 16 U.S.C. § 1533(b)(3)(D)(ii).

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS

23. The clay-loving wild buckwheat (*Eriogonum pelinophilum*) is a low, rounded perennial plant. It has woody stems at its base and herbaceous stems above. The short narrow leaves are dark green above and densely woolly below. Clusters of small white to cream-colored flowers bloom at the ends of the herbaceous branches in June and July.

24. The wild buckwheat grows in an extremely limited range. It occurs in whitish alkaline clay soil along the bases of the Mancos shale hills between Delta and Montrose in

western Colorado. It occurs nowhere else in the world. The wild buckwheat has long been threatened by habitat loss caused by overgrazing and development and the resulting fragmentation of its habitat. Much of the buckwheat's original habitat now lies under the town of Montrose.

25. FWS listed the wild buckwheat as an endangered species on July 13, 1984. 49 Fed. Reg. 28562-28565. FWS based its listing decision on habitat fragmentation and loss, threats from overgrazing and off-road vehicle traffic, and its vulnerability because it requires a particular type of soil. *Id.*

26. When the buckwheat was listed as endangered, only one population was known. That population had approximately 10,000 individual plants. It was located on 120 acres of private land in Delta County, Colorado, known as "Lawhead Gulch." A grazing operation threatened this one buckwheat population. FWS designated a total of 119.8 acres at Lawhead Gulch as critical habitat. 49 Fed. Reg. 28565. Because critical habitat has limited application on private land, however, the critical habitat designation did not stop this Lawhead Gulch population from being decimated. In 2001, off-road vehicular activities largely destroyed this population.

27. In accordance with section 4(f) of the ESA, FWS published a Recovery Plan for the wild buckwheat on November 10, 1998. *See* 16 U.S.C. § 1533(f). The Recovery Plan called for the designation of more critical habitat to ensure the buckwheat's survival and recovery. Extensive surveys by the Colorado Natural Heritage Program have revealed a total of sixteen additional populations of wild buckwheat. These discoveries expanded the known range and total population of the species. However, the critical habitat designation has not been amended or modified despite the discovery of other populations. The current critical habitat designation for the wild buckwheat omits the largest and most biologically important populations of this species, including the populations at Wacker Ranch/Fairview South and North Selig Canal. The Recovery Plan also directed BLM to develop a Habitat Management Plan for the wild

buckwheat. To date, BLM has not published a Habitat Management Plan.

28. On July 17, 2006, Plaintiff submitted its Petition to the Secretary to revise the critical habitat designation for the wild buckwheat and include the newly-discovered areas.

29. On July 24, 2006, the United States Post Office delivered this petition to the Washington D.C. office of the U.S. Fish and Wildlife Service via registered mail. On September 29, 2006, FWS acknowledged receipt of this petition.

30. Plaintiff's Petition proposed to amend the critical habitat for the wild buckwheat to include the full extent of the following populations: Lawhead Gulch, Star Nelson Airport, North Selig Canal, Selig Canal, Candy Lane/Peach Valley, Olathe South (if it still exists), North Mesa (if it still exists), North Fairview, Montrose Northeast, Montrose East, Cedar Creek, Oak Grove Road, Sunshine Road, and Wacker Ranch/Fairview South. The Petition also proposed including areas that are essential to the conservation of the species and which may require special management or protection. The Petition presented substantial scientific information demonstrating that a revision of the buckwheat's critical habitat is warranted.

31. None of the areas Plaintiff identified in the Petition are fully protected from the types of threats they now face, which include development of housing and infrastructure, ongoing agricultural and grazing impacts, off-highway vehicle riding, new power line construction and a major highway development proposed for the area east of Montrose.

32. On the private land east of Olathe and Montrose where the wild buckwheat grows, the rapid conversion of agricultural lands into suburban housing developments threatens to destroy large segments of the Wild Buckwheat's habitat. Eight known populations have already been destroyed by housing developments, and almost half of the remaining populations are imminently threatened by new housing development.

33. The Uncompahgre Field Office of the BLM is planning to revise and update their Resource Management Plan ("RMP") next year. The Uncompahgre RMP Revision covers the southern half of the buckwheat's range and includes the Fairview South Areas of Critical

Environmental Concern, and other significant populations of wild buckwheat. Changes to the Uncompahgre RMP may include an increase to off-road vehicle route designations, grazing allotment renewals and re-designation of Areas of Critical Environmental Concern, all which will negatively impact the buckwheat's viability. BLM is also renewing certain grazing permits for allotments that cover some of the largest and most important buckwheat populations.

34. The increasing popularity of motorized recreation on public and private lands is another imminent threat to the survival and recovery of the wild buckwheat. On the adjacent BLM land west of the Gunnison Gorge, growing cross-country trespass by dirt bikes and off road vehicles threatens to trample several populations of wild buckwheat.

35. A proposal to divert Highways 50 and 550 onto BLM and farmland east of Montrose would run directly through several populations of wild buckwheat, including some of the largest and healthiest ever found. Amending the critical habitat of the wild buckwheat before plans for a Montrose Beltway are fully developed may be critical to the species' survival and recovery.

36. Delta-Montrose Electric Association Engineering has plans to expand its electric system east of Montrose. The East Montrose Project includes the construction and operation of a new 115kV transmission line and two new substation facilities in Montrose County. Eighteen miles of power lines will be built, crossing private and BLM lands to connect the East Montrose Substation to an existing electrical infrastructure. The proposed power lines for the East Montrose Project cross through the buckwheat's range and may negatively impact the viability of the species.

37. The FWS must act quickly, and within the nondiscretionary timelines of the ESA, to re-designate the critical habitat for the wild buckwheat, before its habitat is further destroyed by the aforementioned rapidly progressing threats.

FIRST CLAIM FOR RELIEF

38. Each and every allegation contained in the preceding paragraphs of this

Complaint is incorporated herein by reference as if fully set forth herein.

39. Defendants are violating and unlawfully withholding compliance with Section 4(b)(3)(D) of the ESA, 16 U.S.C. § 1533(b)(3)(D). Defendants have not complied with the ESA's deadline for responding to the Petition. Defendants have failed to issue an initial finding as to whether Plaintiff's Petition to Revise the Critical Habitat Designation for the clay-loving wild buckwheat presents substantial scientific information indicating a revision may be warranted. Defendants' failure to make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted, as required by Section 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), constitutes a violation of a non-discretionary duty within the meaning of the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1), and constitutes agency action unlawfully withheld, in violation of the APA, 5 U.S.C. § 706(1).

SECOND CLAIM FOR RELIEF

40. Each and every allegation contained in the preceding paragraphs of this Complaint is incorporated herein by reference as if fully set forth herein.

41. By failing to make an initial finding on Plaintiff's Petition to Revise the Critical Habitat Designation for the clay-loving wild buckwheat, Defendants have unreasonably delayed compliance with Section 4(b)(3)(D)(i) of the ESA, 16 U.S.C. § 1533(b)(3)(D)(i), in violation of the APA, 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

(1) Declare that Defendants are violating the ESA by failing to make an initial finding in response to Plaintiff's Petition to Amend the Critical Habitat of the Clay-loving Wild Buckwheat;

(2) Declare that the Defendants' failure to issue the initial finding on Plaintiff's Petition is agency action unlawfully withheld and/or unreasonably delayed under the APA;

(3) Order Defendants to promptly publish an initial finding on Plaintiff's Petition within 30-days of the Court order;

(4) Further order Defendants, if the initial finding concludes that the petition presents substantial scientific information indicating that the revision may be warranted, to promptly issue the 12-month finding required by 16 U.S.C. § 1533(b)(3)(D)(ii) thereafter, and promptly publish such findings in the Federal Register;

(5) Enjoin Defendants from issuing any "not likely to adversely affect" concurrences or findings under Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), on any action that may affect the clay-loving wild buckwheat until the Secretary completes review of the Petition;

(6) Award Plaintiff their costs of litigation, including reasonable expert witness fees and attorneys fees, pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(4), the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or any other applicable provisions of law; and

(7) Grant Plaintiff such further relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted,

Dated: March 3, 2008

/s/ Neil Levine
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