

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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|---|---|-----------------------|
| CENTER FOR BIOLOGICAL DIVERSITY, |) | |
| INC., FISHABLE INDIANA STREAMS |) | |
| FOR HOOSIERS, INC., THE HOOSIER |) | |
| ENVIRONMENTAL COUNCIL, INC., and |) | |
| PRAIRIE RIVERS NETWORK |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | Case No. 1:20-cv-1227 |
| |) | |
| DAVID BERNHARDT, in his official capacity |) | |
| as Secretary of the U.S. Department of the |) | |
| Interior, and |) | |
| the U.S. FISH AND WILDLIFE SERVICE, |) | |
| and |) | |
| GARY FRAZER, in his official capacity as |) | |
| Assistant Director of the U. S. Fish and Wildlife |) | |
| Service, |) | |
| |) | |
| Defendants. |) | |

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Center for Biological Diversity, Inc. (“Center”), Fishable Indiana Streams for Hoosiers, Inc., The Hoosier Environmental Council, Inc., and Prairie Rivers Network seek declaratory and injunctive relief to address Defendants’ continuing failure to fulfill their mandatory statutory duty to determine, within twelve months of the filing the Center’s petition to Defendants, whether listing of the lake sturgeon (*Acipenser fulvescens*) is warranted, not warranted, or warranted but precluded under the Endangered Species Act (“ESA”) (16 U.S.C. § 1533(b)(3)(B) (2003)).

2. Lake sturgeon were once abundant in the Great Lakes and other watersheds such as the Mississippi River, but their populations have dwindled severely because of

overexploitation and the effects of hydroelectric facilities, pollution, and invasive species. Since the late 19th century, their population numbers have plummeted from an estimated fifteen million to less than one percent of that number. They have been extirpated from many of their historical spawning tributaries and, in some cases, from entire river drainages. If no action is taken, lake sturgeon face extinction.

3. In response to these ongoing threats to lake sturgeon, on May 14, 2018, Plaintiff Center for Biological Diversity petitioned Defendants Secretary of the Interior David Bernhardt, the U.S. Fish and Wildlife Service, and Assistant Director of the U.S. Fish and Wildlife Service Gary Frazer either to list the sturgeon as “threatened” or to list imperiled distinct populations of sturgeon as “endangered” or “threatened” (Exhibit A). The Center also requested that the Service designate critical habitat for all listed U.S. populations of the lake sturgeon concurrent with listing.

4. Under the ESA, the Secretary of the Interior has a non-discretionary duty to determine within ninety days, to the maximum extent practicable, whether a petition presents substantial information indicating the listing of the species may be warranted. 16 U.S.C. § 1533(b)(3)(A).

5. If the Secretary finds a petition presents substantial information indicating the listing of the species may be warranted, the Secretary of the Interior has a non-discretionary duty to determine within twelve months of the filing of the petition whether the listing is warranted, not warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B).

6. Defendants were obligated to respond to the Center’s May 14, 2018 petition with a ninety-day finding on whether the petition presented substantial information on or before August 12, 2018.

7. More than a year later, on August 15, 2019, Defendants published a finding that the Center's petition presented substantial information indicating that listing of the lake sturgeon may be warranted.

8. Because Defendants found the Center's petition presented substantial information indicating that listing of the lake sturgeon may be warranted, the ESA obligated Defendants to determine whether such listing was warranted, not warranted, or warranted but precluded by on or before May 14, 2019. 16 U.S.C. § 1533(b)(3)(B).

9. Defendants failed to meet their statutory obligation to make such a determination by May 14, 2019.

10. On December 12, 2019, Plaintiffs sent Defendants their statutorily-required sixty-day notice-of-intent-to-sue for Defendants' failure to make, within twelve months of the Center's petition, a determination of whether listing of the lake sturgeon was warranted, not warranted, or warranted but precluded by other pending listing actions. 16 U.S.C. § 1540(g)(2)(C).

11. As of the date of filing of this Complaint, which is more than sixty days after December 12, 2019, Defendants have not published such a determination.

12. As a result, Plaintiffs seek declaratory and injunctive relief to enforce the mandatory deadline for Defendants to make a twelve-month finding on Plaintiff's "Petition to List U.S. Populations of Lake Sturgeon (*Acipenser fulvescens*) as Endangered or Threatened under the Endangered Species Act" ("Petition") that listing is warranted, not warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B).

JURISDICTION AND VENUE

13. This Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c), (g)(1)(C) (action arising under Endangered Species Act citizen suit provision) and 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as a defendant).

14. This Court has authority to grant the requested relief pursuant to 16 U.S.C. § 1540(g)(1)(C) (Endangered Species Act) and 28 U.S.C. §§ 2201, 2202 (Declaratory Judgments Act).

15. As required by the ESA, 16 U.S.C. § 1540(g)(2)(C), the Center provided the Secretary with written notice of its intent to sue more than sixty days ago, on December 12, 2019 (Exhibit B). (Return receipt to notice, Exhibit C).

16. Because the Secretary has not remedied his violations of law, there exists an actual controversy between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

17. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A). Lake sturgeon live in this judicial district, a substantial part of the events giving rise to the cause of action occurred in this judicial district, and Defendant United States Fish and Wildlife Service maintains an office in this judicial district.

PARTIES

18. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY, INC. (“Center”) is a non-profit organization with over 70,000 members and offices in Tucson and Flagstaff, Arizona; Oakland and Los Angeles, California; Denver, Colorado; Saint Petersburg, Florida; Honolulu, Hawaii; La Paz, Mexico; Minneapolis and Duluth, Minnesota; Portland, Oregon; Seattle, Washington; and Washington, D.C. The Center is dedicated to the preservation, protection, and

restoration of biodiversity, and it works through science, law, and creative media to secure a future for all species hovering on the brink of extinction.

19. Plaintiff FISHABLE INDIANA STREAMS FOR HOOSIERS, INC. (“FISH”) is a non-profit organization committed to ensuring the conservation, preservation, and restoration of Indiana’s rivers and their diverse wildlife.

20. Plaintiff THE HOOSIER ENVIRONMENTAL COUNCIL, INC. is an Indiana non-profit organization dedicated to shaping Indiana’s environmental future. It is one of the state’s largest environmental advocacy organizations and uses education and advocacy to secure protection of Indiana’s forests, lakes, rivers, native fish and wildlife, and groundwater.

21. Plaintiff the PRAIRIE RIVERS NETWORK is a non-profit organization based in Champaign, Illinois. It is the Illinois affiliate of the National Wildlife Federation, the nation’s largest conservation organization, and it combines science, law, and collective action to protect and restore the rivers and wildlife of Illinois.

22. Plaintiffs’ members and/or staff use and enjoy, and intend to use and enjoy, waters where the lake sturgeon are found for observation and research, and other recreational, scientific, and educational activities. Plaintiffs’ members and/or staff have researched, studied, and observed the lake sturgeon and intend to continue to do so in the future.

23. Plaintiffs’ members and/or staff are being adversely affected and irreparably injured by the Defendants’ continued violations of the Endangered Species Act with regard to their failure to make requisite determinations about the lake sturgeon. Plaintiffs bring this suit on their own behalf and on behalf of their adversely affected members and staff.

24. Defendant DAVID BERNHARDT is the Secretary of the Interior (“Secretary”). The Secretary is the federal official charged with administering the ESA and listing species as endangered or threatened under the ESA. He is sued in his official capacity.

25. The Secretary has delegated his obligation to review and make findings on listing petitions under the ESA to Defendant U.S. FISH AND WILDLIFE SERVICE.

26. Defendant GARY FRAZER is the Assistant Director of the U.S. Fish and Wildlife Service (“the Service”). He is sued in his official capacity.

LEGAL BACKGROUND

27. The ESA, 16 U.S.C. §§ 1531–1544, provides comprehensive protections for both endangered and threatened species.

28. In passing the ESA, Congress found that different species “have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation” and that “other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(1)-(2). Accordingly, the purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

29. To this end, section 4 of the ESA requires the Secretary to protect imperiled species by listing them as either “endangered” or “threatened.” 16 U.S.C. § 1533(a).

30. The Secretary has delegated its administration of the ESA to the Service. 50 C.F.R. § 402.01(b).

31. The Service must make listing determinations “*solely* on the basis of the best available scientific and commercial information regarding a species’ status, without reference to

possible economic or other impacts of such determination.” 50 C.F.R. § 424.11(b) (emphasis in original); *see* 16 U.S.C. § 1533(b)(1)(A).

32. The ESA defines a “species” as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

33. Once a species is listed as either endangered or threatened, the ESA’s conservation measures apply to protect it. 16 U.S.C. § 1538.

34. A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

35. Upon listing, endangered species gain all of the protections under section 9 of the ESA. 16 U.S.C. § 1538.

36. Upon listing, threatened species are protected under section 4(d) of the ESA, 16 U.S.C. § 1533(d), which requires the Service to issue regulations to conserve threatened species and allows the Service to extend the statutory protections afforded to endangered species by section 9, 16 U.S.C. § 1538, to threatened species.

37. To ensure the timely protection of species at risk, Congress set forth a detailed process whereby citizens may petition the Service to list a species as endangered or threatened, and established deadlines for the Service’s response. 16 U.S.C. § 1533(b)(3); *see* 50 C.F.R. § 424.14.

38. The petition process includes mandatory, non-discretionary deadlines so that species in need of protection timely receive the ESA’s substantive protections. The three

required findings are the ninety-day finding that a petition presents substantial information indicating that listing may be warranted, the twelve-month listing determination (also known as the “twelve-month finding”), and, for species that the Service determines warrant protection, the final listing determination.

39. Within twelve months of the date it receives a petition, the Service must make and publish a finding that: (1) listing is “warranted;” (2) listing is “not warranted;” or (3) listing is “warranted but precluded” by other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B).

40. If the Service’s twelve-month finding concludes that listing is warranted, the agency must publish notice of the proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. 16 U.S.C. § 1533(b)(3)(B)(ii).

41. The ESA requires the Service to render its final determination on the proposal within one year of publication of the proposed regulation. 16 U.S.C. § 1533(b)(6).

FACTUAL BACKGROUND

42. The lake sturgeon (*Acipenser fulvescens*) is a large, long-lived, freshwater fish species that historically inhabited rivers and lakes throughout three major North American watersheds: Hudson Bay, the Great Lakes basin, and the Mississippi River drainage.

43. The historical abundance of lake sturgeon in the Great Lakes alone was impressive: it is estimated that more than fifteen million sturgeon inhabited the Great Lakes in the late 1800s.

44. Today, sturgeon numbers in the Great Lakes and other regions are less than one percent of this estimated historical peak. Indeed, the extent of the sturgeon’s extirpation from

waters of both the Mississippi River basin and Great Lakes now imperils the ability of surviving populations to recover naturally.

45. Lake sturgeon populations in each of the Red River, Lake Superior, the Missouri River, the Ohio River, the Arkansas-White River and the lower Mississippi River may warrant endangered status.

46. Lake sturgeon populations in each of Lake Michigan and the upper Mississippi River basin may warrant threatened status.

47. Studies cited in the Center's Petition suggest that these populations could be considered distinct population segments.

48. Lake sturgeons, like all sturgeons in general, are highly vulnerable to habitat alteration and over-fishing because of their specialized habitat requirements, the long time it takes them to reach breeding maturity, and their episodic reproductive success.

49. Lake sturgeon have a low reproductive rate and may not begin to spawn until they are between fifteen and twenty-five years old.

50. Lake sturgeon are potamodromous, meaning they spawn by migrating between lakes and streams.

51. Because lake sturgeon are potamodromous, they are vulnerable to the closure of habitat by dams and other waterway alterations.

52. Lake sturgeon are benthivores, or bottom feeders.

53. Because lake sturgeon are long-lived benthivores, they are particularly susceptible to mercury and other heavy metal pollution due to steady accumulation of these contaminants in their fatty deposits.

54. In addition to severe overfishing in the late 19th and early 20th centuries, lake sturgeon are also harmed by historic dam construction, which blocked access to spawning and rearing habitat, by dramatic changes to water quality due to water pollution, and by ecosystem changes from water diversions, logging, conversion of land to agricultural use, and river channelization.

55. Some recovery measures are being implemented, like reintroduction into former habitats and mitigation of the effects of dams through removal or improved stream flow.

56. However, while recovery measures can stabilize imperiled sturgeon populations, reintroduction and efforts to improve stream flow cannot make up for losses in genetic diversity, which are permanent.

57. Today, many populations of lake sturgeon are isolated or fragmented.

58. Indeed, the vast majority of spawning habitats are still inaccessible to lake sturgeon because of dams.

59. While Federal Energy Regulatory Commission (“FERC”) dam relicensing procedures are one possible area for lake sturgeon conservation to be a factor, the infrequency of license review and historical ineffectiveness of FERC protections for potamodromous fish mean more stringent protections are necessary.

60. For instance, FERC’s issuance in 2014 of a fifty-year license for hydropower operation at Williams Dam on Indiana’s East Fork White River did not take fully into account the impact of the dam on the endangered lake sturgeon population immediately below it.

61. In addition, existing relevant state regulations are inconsistent, which is particularly problematic with migratory species such as the lake sturgeon since they utilize different habitats throughout their lives and may utilize areas in different jurisdictions.

62. For these reasons, lake sturgeon require the protections afforded by listing under the ESA.

63. As a result, the Center filed a Petition to the U.S. Fish and Wildlife Service on May 14, 2018 asking that the Service either (i) to protect the lake sturgeon as a threatened species under the ESA, or alternatively, (ii) to identify and list distinct population segments of lake sturgeon in the U.S. as endangered or threatened.

64. The Center's Petition also requested that the Service concurrently designate critical habitat for the lake sturgeon pursuant to 16 U.S.C 1533 § (a)(3)(A)(i).

65. On August 15, 2019, Defendants published in the Federal Register their ninety-day finding that the Center's Petition presented substantial information indicating that listing of the lake sturgeon may be warranted. Endangered and Threatened Wildlife and Plants; 90-Day Findings of Three Species, 84 Fed. Reg. 41691 (proposed Oct. 15, 2019) (to be codified at 50 C.F.R. pt. 17).

66. Despite the need for lake sturgeon protections, and despite a positive ninety-day finding published by Defendants that the Center's Petition presented substantial information indicating that listing of the lake sturgeon may be warranted, the Service has yet to make the requisite twelve-month finding—more than 20 months after the filing of the Center's Petition on May 14, 2018.

67. On December 12, 2019, Plaintiffs sent Defendants its sixty-day notice-of-intent-to-sue for Defendants' failure to determine—within twelve months of the Center's May 14, 2018 petition and after Defendants made its positive ninety-day finding—whether listing of the lake sturgeon was warranted, not warranted, or warranted but precluded by other pending listing actions. 16 U.S.C. § 1540(g)(2)(C).

68. Between when the Center submitted its lake sturgeon Petition and December 31, 2019, the Service has undertaken nineteen or more species listing-related actions that were published in the Federal Register.

69. Based on these facts, it was practicable for the Service to make the twelve-month finding on Plaintiff's sturgeon Petition before this action was filed, but the agency failed to act.

CLAIM FOR RELIEF

70. Paragraphs 1–69 are incorporated herein, by reference.

71. Under the ESA, the Secretary must—upon its finding that a petition presents substantial information indicating that listing of a species may be warranted—make within twelve months of receiving the petition a finding that listing is (1) “warranted;” (2) “not warranted;” or (3) “warranted but precluded.” 16 U.S.C. § 1533(b)(3)(B). The Secretary must publish the finding in the Federal Register. *Id.*

72. On August 15, 2019, the Secretary published its finding on the Center's Petition that listing of the lake sturgeon may be warranted in the Federal Register.

73. The Secretary has failed to make and publish in the Federal Register within twelve months of the Center's May 14, 2018 Petition a finding that listing of the lake sturgeon is warranted, not warranted, or warranted but precluded.

74. By failing to make a twelve-month finding on the Center's Petition, the Secretary has failed to perform non-discretionary acts or duties within the meaning of the ESA's citizen suit provision. 16 U.S.C. § 1540(g)(1)(c).

REQUEST FOR RELIEF

Plaintiff requests that this Court enter judgment providing the following relief:

1. Declaratory judgment that the Secretary failed to comply with his non-discretionary duty under 16 U.S.C. § 1533(b)(3)(B), to make and to publish in the Federal Register a twelve-month finding regarding the Petition;
2. Injunctive relief compelling the Secretary to make and publish in the Federal Register a twelve-month finding on the Center's Petition by a date certain, but no later than twelve months from the date on which an order is issued;
3. An order awarding Plaintiffs their costs of litigation, including reasonable attorneys' fees and costs; and
4. Other such relief as the Court deems just and proper.

Respectfully submitted this February 20, 2020,

/s/ Mark N. Templeton

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