

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY [Signature]
DEPUTY

CENTER FOR BIOLOGICAL)
DIVERSITY; CITIZENS')
ALLIANCE FOR SMART)
EXPANSION; AQUIFER)
GUARDIANS IN URBAN)
AREAS)

Plaintiffs)

v.)

DIRK KEMPTHORNE, Secretary of the)
Interior; DALE HALL, Director,)
U.S. Fish and Wildlife Service,)

Defendants.)

Civil Case No.

A09CA 031LY

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiffs the Center for Biological Diversity (the "Center"), Citizens' Alliance for Smart Expansion ("CASE"), and Aquifer Guardians in Urban Areas ("AGUA"), bring this case under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"), to challenge the actions of Defendants Dirk Kempthorne, Secretary of the Interior (the "Secretary"), and Dale Hall, Director of the U.S. Fish and Wildlife Service ("FWS"), regarding the designation of critical habitat for the following species in Texas: Peck's cave amphipod (*Stygobromus pecki*), Comal Springs dryopid beetle (*Stygoparnus comalensis*), Comal Springs riffle beetle (*Heterelmis comalensis*), *Cicurina venii*, Robber Baron Cave harvestman (*Texella cokendolpheri*), vesper cave spider (*Cicurina vespera*), Government Canyon cave spider (*Neoleptoneta microps*), Madla's cave spider (*Cicurina madia*), Robber Baron cave spider (*Cicurina baronia*), *Rhadine exilis*, and Helotes mold beetle (*Batrisodes venyivi*) (collectively, the "Texas species"). The plaintiffs bring

this action because the defendants have failed to designate as critical habitat sufficient areas to provide for the conservation of these species as required by the ESA.

2. Plaintiffs seek an order declaring that defendants have failed to designate sufficient critical habitat to provide for the conservation of these Texas species, and compelling defendants to revise the critical habitat designation in a manner necessary to conserve these species.

JURISDICTION AND VENUE

3. This court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g) (action arising under Endangered Species Act citizen suit provision), 5 U.S.C. § 702 (judicial review of agency action); and 28 U.S.C. § 1331 (federal question jurisdiction).

4. This Court may grant the relief requested under 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief), 16 U.S.C. § 1540(g) (ESA), and 5 U.S.C. § 701-706 (APA).

5. Pursuant to section 11(g)(2)(C) of the ESA, plaintiff Center provided defendants Kempthorne and Hall with written notice of intent to file suit based on Defendants' violation of their mandatory duties under section 4(a)(3) and 4(f) of the ESA more than 60 days prior to the commencement of this action. 16 U.S.C. § 1540(g)(2)(C).

6. Defendants have failed to respond to the Center's written notice, and have not corrected their violations of the law. Therefore, an actual controversy currently exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

7. Venue is proper in the District Court for the Western District of Texas, Austin Division, pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e)(2) because a substantial part of the events giving rise to the Center's claims occurred in this district and this district contains current and historical habitat for the Texas species.

THE PARTIES

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation dedicated to the preservation, protection and restoration of biodiversity, native species, and ecosystems. The Center has over 35,000 members worldwide, including members within this district. The Center has offices in Tucson and Phoenix, Arizona; Silver City, New Mexico; Washington, D.C.; San Francisco, Los Angeles, San Diego, and Joshua Tree, California; and Portland, Oregon.

9. Plaintiff CITIZENS' ALLIANCE FOR SMART EXPANSION is a non-profit corporation based in New Braunfels, Texas, with approximately 300 members. CASE's mission is to protect the quality of life in New Braunfels and the surrounding Hill Country area, to encourage responsible growth and planning, and to preserve the unique environment of the area, including the Edwards Aquifer ecosystem and native species.

10. Plaintiff AQUIFER GUARDIANS IN URBAN AREAS is a non-profit organization based in San Antonio, Texas, with approximately 400 members. AGUA's mission is to strengthen the regulations designed to protect the Edwards Aquifer, to ensure enforcement of existing laws controlling activities affecting the Edwards Aquifer, and to mobilize public opinion to support efforts to protect the Edwards Aquifer ecosystem, including its recharge and contributing streams, its native flora and fauna, and the people who depend on the Aquifer and live in its watersheds.

11. Plaintiffs' members and staff regularly visit, use, and enjoy areas containing current and historic habitat for the Texas Species, and plan to continue visiting, using, and enjoying these areas in the future. Plaintiffs and their members and staff derive environmental, recreational, scientific, and aesthetic benefit from their use and enjoyment of these areas. In

addition, the plaintiffs and their members and staff derive environmental, recreational, scientific, and aesthetic benefit from the continued existence in the wild and the potential recovery of the Texas species. These interests of the plaintiffs and their members and staff have been, are, and will be directly, adversely, and irreparably affected by the defendants' failure to designate sufficient critical habitat to provide for the conservation of the Texas species and by the defendants' exclusion of areas essential to the conservation of these species. The plaintiffs and their members will continue to be prejudiced by defendants' unlawful actions until and unless this Court provides the relief prayed for in this complaint.

12. Defendant DIRK KEMPTHORNE is sued in his official capacity as the Secretary of the Interior. The Secretary is the federal official responsible for complying with the statutory requirements of the ESA for terrestrial species (including freshwater fish), including the designation of critical habitat.

13. Defendant DALE HALL is sued in his official capacity as the Director of the United States Fish and Wildlife Service (the "Service"). As Director, Mr. Hall is the Service official responsible for complying with and implementing the ESA.

STATUTORY BACKGROUND

14. The fundamental purpose of the ESA is to provide a program for the conservation of endangered and threatened species and the habitats upon which these species depend. 16 U.S.C. § 1531(b). Under the ESA, the term "conservation" means the use of all methods and procedures to bring any endangered or threatened species to the point at which the protections of the ESA are no longer necessary – that is, to recover species so that they no longer need legal protection. 16 U.S.C. § 1532(3).

15. A species receives the full range of protections afforded by the ESA only if it is

listed as endangered or threatened. The ESA requires the Secretary to issue regulations listing species as endangered or threatened based on the present or threatened destruction, modification, or curtailment of a species' habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting the species' continued existence. 16 U.S.C. § 1533(a)(1). An endangered species is one "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A threatened species 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).

16. Concurrently with listing a species as endangered or threatened, and "to the maximum extent prudent and determinable," the Secretary must also designate "critical habitat." 16 U.S.C. § 1533(a)(3). "Critical habitat" includes (i) those areas occupied by a species at the time of its listing that contain the physical or biological features essential to the conservation of the species and that may require special protection or management considerations and (ii) those areas outside the area occupied by a species at the time of its listing that the Secretary has determined to be essential to the conservation of the species. 16 U.S.C. 1532(5)(A).

17. The ESA requires the Secretary to make critical habitat designations "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). An area may be excluded from critical habitat if the Secretary "determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species

concerned.” *Id.*

18. Critical habitat is protected from destruction or adverse modification under section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

19. The APA, 5 U.S.C. §§ 701-706, provides the standard for judicial review of final agency action. Under the authority of the APA, a reviewing court must hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A). A reviewing court must also compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

FACTUAL BACKGROUND

Freshwater Invertebrates

20. On December 18, 1997, the FWS placed three species of freshwater invertebrates—the Peck’s Cave amphipod, Comal Springs dryopid beetle, and Comal Springs riffle beetle—on the ESA’s list of endangered and threatened species. 62 Fed. Reg. 66295. These three species are known only from four spring systems in central Texas: Comal Springs and Hueco Springs in Comal County; and Fern Bank Springs and San Marcos Springs in Hays County. The three species depend on these spring systems and related subterranean aquifers to provide adequate resources for their survival. The source water flows for Comal Springs and San Marcos Springs is the San Antonio segment of the Edwards Aquifer. A primary threat to the three invertebrate species is potential failure of spring flow due to drought or excessive groundwater pumping of the Edwards Aquifer, which could result in loss of aquatic habitat for the species.

21. On July 17, 2006, and in response to a lawsuit by the Center, the FWS published a proposed critical habitat designation for the three species of freshwater invertebrates known to occur only in Texas. 71 Fed. Reg. 40588. One year later the FWS published a final critical habitat designation for these three species. Designation of Critical Habitat for the Peck's Cave Amphipod, Comal Springs Dryopid Beetle, and Comal Springs Riffle Beetle, 72 Fed. Reg. 39248 (July 17, 2007). The total area designated for the amphipod is approximately 38.5 acres, for the dryopid beetle is about 39.5 acres, and for the riffle beetle it is about 30.3 acres.

22. In response to its proposed critical habitat rule, the FWS received comments, including from two expert peer reviewers, objecting to the FWS's failure to propose sufficient critical habitat to protect the Edwards Aquifer. Thus, for example, peer reviewer William Shepard of the University of California, Berkeley wrote that "I do not agree with the critical habitat declarations for either *Stygoparmus comalensis* or *Stygobromus pecki*. The critical habitat declaration as currently stated for each only represents the smallest, most obvious, and most lethal part of their habitat or range. In my opinion, the critical habitat for each is the Edwards Aquifer." This sentiment was echoed by David Bowles of the National Park Service who stated that "the proposed critical habitats fail to address the broader, and arguably more important, issue of maintaining spring flows and levels in the Edwards Aquifer. While protecting the immediate physical habitats in the spring-runs and subterranean recesses is critical to the survival of the listed species, so is protecting the source water for these habitats." Mr. Bowles also wrote that "[t]he most significant weakness of this [proposed designation] is that it fails to address the key underlying issue and primary threat to the survival of the species—maintaining sufficient water volume in the Edwards Aquifer to ensure that the springs do not stop flowing or that subterranean recesses and conduits are not dewatered."

23. Notwithstanding these and other comments urging the FWS to protect portions of the Edwards Aquifer – the source water for the spring systems the species depend upon for their survival – the FWS failed to designate these areas as critical habitat.

24. The decision to eliminate any subterranean waters, including the Edwards Aquifer, from designation as critical habitat was ordered by Deputy Assistant Secretary Julie MacDonald. In a memo to the Director of the FWS, the Acting Regional Director for Region 2 of the FWS wrote that “[t]he DAS [Deputy Assistant Secretary] made a policy decision to eliminate subterranean waters from critical habitat designation” and “[t]hat action removed approximately 400 acres from critical habitat designation that were in the draft proposed rule.”

Karst Invertebrate Species

25. On December 26, 2000, the FWS placed nine karst invertebrate species known from Bexar County, Texas, on the ESA’s list of endangered and threatened species. 65 Fed. Reg. 81419. These species are: *Cicurina venii*, Robber Baron Cave harvestman (*Texella cokendolpheri*), vesper cave spider (*Cicurina vespera*), Government Canyon cave spider (*Neoleptoneta microps*), Madla’s cave spider (*Cicurina madia*), Robber Baron cave spider (*Cicurina baronia*), *Rhadine exilis*, and Helotes mold beetle (*Batrisodes venyivi*).

26. All nine species inhabit subterranean voids or caves known as Karst. “Karst” refers to caves formed by the slow dissolution of calcium carbonate from limestone bedrock by acidic groundwater. This process creates numerous sinkholes, caves and smaller voids, many of which form along cracks, fractures, and faults. The primary threat to these species is the destruction and deterioration of their karst habitat resulting from continued human expansion and development.

27. On August 27, 2002, and in response to a lawsuit brought by the Center, the FWS proposed a total of 9,516 acres to be designated as critical habitat for these species. 67 Fed. Reg. 55064.

28. On April 8, 2003, the FWS issued a final critical habitat rule for the nine Karst invertebrates totaling just 1,063 acres, or nearly 90% less than what was originally proposed.

29. Areas proposed as critical habitat and determined to be essential to the conservation of the nine karst invertebrates were excluded from the final designation pursuant to sections 3(5)(A)(i) and 4(b)(2) of the ESA based on FWS's determination that certain conservation plans provide adequate special management and protection for the species. These exclusions resulted in no critical habitat for the Government Canyon Bat Cave spider and Government Canyon Bat Cave meshweaver.

CLAIMS FOR RELIEF

30. Each and every allegation set forth above is incorporated herein by reference.

FIRST CLAIM FOR RELIEF (Violation of Endangered Species Act – Freshwater Species)

31. In designating critical habitat for the three Texas Freshwater Species, the defendants failed to use the best available scientific data and failed to designate habitat essential to the conservation of these species. For these reasons and others, Defendants failed to perform their non-discretionary duties as required by the ESA, and have acted in a manner that is arbitrary, capricious, and not in accordance with law. 16 U.S.C. § 1540(g); 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF (Violation of the Endangered Species Act – Karst Invertebrates)

32. In designating critical habitat for the nine Karst Invertebrate Species, the defendants: failed to use the best available scientific data; failed to designate habitat essential to the conservation of these species; excluded areas from critical habitat without adequately considering the benefits of designation; and excluded areas from critical habitat based on arbitrary determinations that such areas were not in need of special management and protection. For these reasons and others, Defendants failed to perform their non-discretionary duties as required by the ESA, and have acted in a manner that is arbitrary, capricious, and not in accordance with law. 16 U.S.C. § 1540(g); 5 U.S.C. § 706(2)(A).

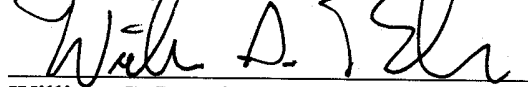
PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that the Court enter judgment providing the following relief:

1. Declare that defendants violated the ESA by issuing inadequate and unlawful critical habitat designations for the Texas Species;
2. Remand the final critical habitat designations to the FWS for further proceedings;
3. Award the Plaintiffs' costs, including reasonable attorney's fees and expert witness fees; and
4. Provide such other relief as the court deems just and proper.

Dated: January 14, 2009

Respectfully Submitted,



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