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Activists Fight Bid To Ax Suit Over Endangered Toad

By Clark Mindock

Law360 (June 8, 2020, 7:54 PM EDT) -- A federal wildlife agency's argument that it should retain its admittedly deficient plan to protect the endangered Houston toad doesn't make sense and shouldn't allow the government to escape a lawsuit, the Center for Biological Diversity has told a D.C. federal court.

The environmental group said Friday that the U.S. Fish and Wildlife Service has an obligation to amend its 1984 recovery plan for the toad because a revision to the Endangered Species Act passed four years later by Congress required more vigorous enforcement that hasn't occurred.

The government had argued in its motion to dismiss that the wildlife agency had no such obligation because there was no language in the update indicating Congress intended it to be retroactive and no nondiscretionary action had been challenged.

In response, the center argued that the U.S. government itself had repeatedly found its own plan to be deficient but had failed to right that wrong.

It also defies logic to say Congress would want the stricter requirements to apply to recovery plans for species that had been identified as endangered but didn't have plans yet but not apply those requirements to recovery plans already in place, the environmental group said.

"Why would Congress want pre-[1988] listed species without recovery plans to be subject to the more rigorous recovery plan requirements Congress deemed necessary, and yet pre-[1988] listed species with inadequate plans admittedly lacking in such requirements — and particularly objective, measurable recovery criteria — could be subject to such deficient plans forever? Defendants never venture an explanation," the center said.

FWS and the center did not immediately respond to requests for comment.

The Houston toad is a secretive amphibian that burrows and hibernates during the winter. The species has been decimated by drought and development in the past half-century and apparently has been wiped out from its namesake city and surrounding Texas counties, according to court documents. It was listed as endangered in 1970.

The environmental group filed suit in February, claiming that the U.S. government's 1984 recovery plan for the toad has no recovery criteria and no longer relies on the best available science.

The center noted that FWS itself found in a 2011 five-year report that the plan "lacked basic components" seen in similar documents and that it needed to be updated with better science and measurable criteria for bringing the species back from the brink.

The complaint said the next five-year report on the toad ran just one page and concluded that "the evaluation of threats affecting the species ... and analysis of the species in our 2011 5-year review remains an accurate reflection of the species' current status."

FWS argued in its motion to dismiss that the agency has no obligation to amend its plan because federal agencies have broad discretion unless there are challenges to discrete agency actions under the Administrative Procedure Act, which was not the case.

The Center for Biological Diversity is represented by in-house counsel Jennifer L. Loda and Ryan Adair Shannon.

The U.S. government is represented by Shampa A. Panda of the United States Department of Justice.

The case is *Center for Biological Diversity v. David Bernhardt et al.*, case number 1:20-cv-00529 in the U.S. District Court for the District of Columbia.

--Additional reporting by Jack Queen. Editing by Jill Coffey.