July 19, 2023

Sent via electronic and certified mail

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Dear Secretary Haaland, Director Williams, Assistant Director Frazer, and Regional Director Leuders:

The Center for Biological Diversity and Maricopa Audubon Society provide notice to the U.S. Fish and Wildlife Service (“FWS”) that the agency is in violation of the Endangered Species Act (“ESA”) and Administrative Procedure Act (“APA”) due to its unreasonable delay in proceeding with a proposed rule to revise the existing critical habitat designation for the endangered Mount Graham red squirrel (Tamiasciurus hudsonicus grahamensis).

LEGAL BACKGROUND


FWS maintains ongoing duties with respect to critical habitat. The ESA provides for critical habitat revision, subject to the same “best available scientific data” standard as an initial designation.¹ It further provides the right to petition for critical habitat revision, in accordance

with the Administrative Procedure Act (“APA”). Any “interested person” may petition for a revision in a listed species’ critical habitat. Within ninety days, FWS must “make a finding as to whether the petition presents substantial information indicating that the revision may be warranted.”

Upon issuance of a “positive 90-day finding,” FWS must then determine and publish “how [it] intends to proceed with the requested revision” within one year following the petition. Specifically:

“Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, [FWS] shall determine how [it] intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.”

In making its ultimate decision on a petition for critical habitat revision, FWS “has these options: (i) publish a proposed rule revising the critical habitat or finding that a statutory factor (e.g., economic impact or national security) overrides the need for species protection or (ii) find that revision of critical habitat is either not ‘prudent’ or not ‘determinable.’”

FACTUAL BACKGROUND


The Mount Graham red squirrel is found nowhere else in the world besides the Pinaleño Mountains in southeast Arizona. Named after the highest peak in the range, the squirrel has been isolated from other squirrel subspecies since the last ice age, approximately 10,000 years ago. Renowned for its ferocious protection of its home territories, the Mount Graham red squirrel is smaller than most other red squirrel subspecies, weighing in at only 8 ounces and measuring about 8 inches in length. The squirrel’s diet consists primarily of conifer seeds, and during the winter it relies upon seed-bearing cones that have been stored at sites known as middens. These caches are the focal point of the individual squirrel’s territory, and are typically located in logs, snags, stumps, or a large live tree. The condition of these midden sites must remain cool and moist in order to preserve the cached cones.

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3 50 C.F.R. § 424.14(c), (e).
5 Id. § 1533(b)(3)(D)(i).
6 Id. § 1533(b)(3)(D)(ii).
The Mount Graham red squirrel was first described in 1884 and was reportedly common around the turn of the 20th century. The species was, however, declining by the 1920s and rare by the 1950s, likely due to destruction of forested habitat from logging and competition with an introduced population of Abert’s squirrels. Small scale logging activity began in the Pinaleño Mountains in the 1880s and accelerated in the 1930s. In the early 1960s, road construction had reached Mount Graham (High Peak) and by the 1970s, the majority of accessible ancient forests had been logged, greatly reducing the age structure, density, and quality of the squirrel’s habitat.


FWS proposed listing the Mount Graham red squirrel as an endangered species and designating critical habitat on May 21, 1986, and issued a final listing rule on June 3, 1987.

Like all subspecies of red squirrels, the Mount Graham red squirrel is an arboreal species. At the southern extremity of the red squirrel range, the Mount Graham red squirrel is restricted to canopied montane forests. At the time of its listing, the squirrel was found at highest densities in Engelmann spruce and corkbark fir forests, comprising 86 percent of all middens surveyed, with 48 percent of the species’ active middens located above 10,200 feet in elevation. In total, FWS estimated there to be 680 acres of contiguous spruce-fir forest in the Pinaleño Mountains at the time of listing, with an estimated density of 1 red squirrel per 8 acres. The squirrel was also found below 9,200 feet in elevation at the time of listing, with an estimated density of one red squirrel per 124 acres.

In the final listing rule, FWS recognized the proposed construction of a major astrophysical facility on Mount Graham by the University of Arizona as a primary threat to the squirrel. FWS identified numerous potential negative effects of telescope construction, including removal of vegetation resulting in decreased food sources; increased blow-down of trees caused by the opening of forested areas; changes in the microclimatic conditions necessary for middens; increased vulnerability to predation; decreased reproductive interaction due to increased habitat fragmentation and population isolation; and increases in tourism, recreational use, and traffic. The final listing rule noted that due to its isolation and restricted population size and distribution, “the Mount Graham red squirrel is particularly vulnerable to any disturbance that might bring about further declines in its already precariously low numbers and weakening of genetic viability.”

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8 51 Fed. Reg. 18,630.
11 Id.
12 Id. at 20,998.
FWS designated critical habitat for the Mount Graham red squirrel on January 5, 1990. 55 Fed. Reg. 425. The designation totals approximately 2,000 acres in three areas—essentially all entirely located in high elevation, spruce-fir forest—Hawk Peak/Mount Graham, Heliograph Peak, and Webb Peak. These areas contained about 70 percent of all known squirrel middens at the time of designation. In comments on the draft listing and critical habitat rule, FWS was asked to enlarge the critical habitat to include additional occupied and unoccupied areas, including the lower elevation mixed-conifer forests “where red squirrels have been previously observed and where they appear to have survived their most vulnerable period in history.” In declining the recommendation, FWS reasoned that the “higher elevations appear[] to be the most important to this squirrel and contains the highest density of squirrel middens.”


In 1988, Congress passed the Arizona-Idaho Conservation Act. In response to lobbying by the University of Arizona (“UA”), the Act included a provision exempting telescope construction from compliance with ESA section 7 consultation requirements. Subsequently, three telescopes and associated roads and infrastructure have been constructed on and near Emerald Peak—the UA Columbus or Large Binocular Telescope, the Vatican Advanced Technology Telescope, and the German Max Plank Submillimeter Telescope.

In addition to the direct and indirect destruction of habitat essential to the Mount Graham red squirrel resulting from telescope construction, the high elevation spruce-fir forests of the Pinaleño Mountains have experienced significant ecological changes, including large, high-severity fires in 1996, 2004, and 2017, extended drought, and outbreaks of forest insects.

Firefighting efforts to protect the telescopes have further compounded the loss of Mount Graham red squirrel habitat. As observed by the Forest Service in 2010, the telescopes “have precipitated aggressive firefighting techniques, and inhibited the restoration of natural ecosystem processes.”

In 1988, approximately 615 suitable acres of the estimated 700 historical acres of pure spruce-fir forest remained. Today, essentially none of that high elevation, essential spruce-fir habitat survives. Consequently, the Mount Graham red squirrel population has declined to critically low numbers (an estimated 156 animals in the most recent 2022 annual survey) and is surviving in isolated pockets of the mixed conifer forest lower in elevation.

13 Id.
14 Id.
16 Id., Title VI, Mount Graham International Observatory.
17 Final Environmental Impact Statement for the Pinaleño Ecosystem Restoration Project, U.S. Forest Service Southwestern Region (February 2010).

Lower-elevation mixed conifer forests (which have long been recognized as important to the species) are now serving as refugia from the destruction of spruce-fir habitat and, for the foreseeable future, are essential to the species’ continued survival. Today, surviving squirrels are found primarily in four areas (Grant Hill, Riggs Lake, Turkey Flat, and Columbine), all outside of the upper elevation spruce-fir forests currently designated as critical habitat.

In order to address the dire status of the Mount Graham red squirrel, on December 14, 2017, the Center and Maricopa Audubon petitioned for revision of the existing critical habitat to include these and other essential areas.

The Petition specifically requests revision of critical habitat as follows:

“In general, we recommend designation of critical habitat in mixed-conifer and spruce-fir forest above 7,400 feet . . . What is not general, and most important here, is the inclusion of areas currently occupied by the Mount Graham red squirrel. These areas are the Grant Hill area, the Riggs Lake area, Turkey Flat, and Columbine.”

5. Petitioners’ Litigation to Compel the Overdue 90-Day Finding.

Similar to the process for citizen listing petitions, the ESA requires FWS within 90 days of receiving a critical habitat revision petition to “make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted.”18 When FWS was nearly 1 ½ years late in making its 90-day finding, Petitioners Center for Biological Diversity and Maricopa Audubon Society sued on April 16, 2019, to compel the required determination.19

In response to this litigation, FWS finally published the required 90-day finding on September 6, 2019, announcing that Petitioners had “present[ed] substantial scientific or commercial information indicating that the revised critical habitat may be warranted.”20 As the agency further detailed in the accompanying review form:

“The petition provided information supporting that circumstances have changed significantly within designated critical habitat for the Mount Graham red squirrel since our January 5, 1900 designation. Information in our files also supports this conclusion. Further, a previous USFWS report (De Luise 1990, entire) evaluated red squirrel critical habitat shortly after

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19 Center for Biological Diversity v. Bernhardt, Case No. 4:19-cv-218-RCC (D. Ariz.).
it was designated, and concluded that, at that time, it should be revised. Since then, the spruce-fir component of Mount Graham red squirrel critical habitat has been severely impacted by insect outbreaks, fires, climate change, and drought.”

6. Petitioners’ Litigation to Compel the Overdue 12-Month Finding.

If FWS makes a positive 90-day finding on a petition to revise an existing critical habitat designation, as it did in this instance, the ESA requires the agency to then make a subsequent determination within 12 months as to how it intends “to proceed with the requested revision” and publish that determination in the Federal Register.22 When FWS was once again late in making this determination, Petitioners on November 30, 2020, brought a second lawsuit to compel the overdue action.23 On April 12, 2021, the parties reached a settlement under which the agency agreed to make the required 12-month finding no later than July 29, 2021.24

FWS published the required 12-month finding on August 3, 2021.25 In that finding, the agency stated that it “intend[s] that any revisions to critical habitat for the Mount Graham red squirrel be as accurate and comprehensive as possible,” and that first completing a Species Status Assessment (“SSA”) and revised recovery plan “will inform” such revisions.26 The finding further states that “[o]nce the SSA and revised recovery plan are complete, a rulemaking process will be initiated if revisions to the subspecies’ critical habitat are determined to be appropriate.”

NOTICE OF VIOLATION

The APA requires administrative agencies to conclude matters presented to them “within a reasonable time” and empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.”28 Here, FWS has unreasonably delayed its issuance of a proposed rule to revise critical habitat for the Mount Graham Red Squirrel.

Petitioners’ critical habitat revision petition was submitted more than 5 and ½ years ago. During this time, FWS has repeatedly failed to provide timely determinations as required by the ESA, its required actions instead twice compelled by litigation.

23 Center for Biological Diversity v. Bernhardt, Case No. 4:20-cv-525-LCK (D. Ariz.).
24 Id., Docket No. 18.
26 Id.
27 Id.
28 5 U.S.C. §§ 555(b), 706(1).
Two years ago, the agency issued a 12-month finding, stating its intent to initiate a rulemaking process following finalization of the SSA and revised recovery plan (which has been in draft form since 2011) but did set forth a concrete plan or timetable for any of these actions.\(^{29}\)

Moreover, a date for a rulemaking to revise critical habitat for the Mount Graham red squirrel is not included in FWS’s most recent Workplan, which guides the timing of the agency’s ESA section 4 decisions through the next five years.\(^{30}\) The Service uses the Workplan in an effort to “balance [its] annual workload between the various types of listing and critical habitat actions, including 90-day petition findings, 12-month petition findings, proposed and final listing determinations, and proposed and final critical habitat designations.”\(^{31}\) The Service thus apparently intends to delay proceeding with rulemaking by at least an additional five years.

Together, these circumstances demonstrate that FWS’s ongoing failure to initiate rulemaking to revise critical habitat for the Mount Graham red squirrel constitutes unreasonable delay under the APA.\(^{32}\) If FWS does not remedy this violation by providing a reasonable date-certain for initiating such rulemaking, the Center for Biological Diversity and Maricopa Audubon Society intend to file suit in federal court. Please contact me should you have any questions or if you would like to discuss this matter.

Sincerely,

Brian Segee
bsegee@biologicaldiversity.org
T: (805) 750-8852
U.S. mail:
Center for Biological Diversity

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\(^{29}\) See *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 37 (D.D.C. 2000) (“[A]n ambiguous, indefinite time frame for review of [a] petition [can] constitute[] unreasonable delay within the meaning of APA § 706(1).”). Petitioner Center for Biological Diversity received records through the Freedom of Information Act (“FOIA”) demonstrating that FWS considered an internal timeline for making a decision under which it projected finalizing the SSA in October 2021 and the revised Recovery Plan in December 2022 (Attachment 1), but neither action has been completed as of the date of this Notice.


\(^{32}\) *Muwekma Tribe*, 133 F. Supp. 2d at 37 (“DOI’s noncommittal estimate coupled with the specific history of interaction between these parties gives rise to a finding of ‘unreasonable delay’ in *this* case.”) (emphasis in original).
Attachment 1
## Marit’s Projects Timeline

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