

February 4, 2010

Certified Mail – Return Receipt Requested

Ken Salazar
Secretary of the Interior
Department of the Interior
1849 “C” Street, N.W.
Washington, D.C. 20240

Sam Hamilton, Director
U.S. Fish & Wildlife Service
1849 “C” Street, NW, M/S 3012
Washington, D.C. 20240

Re: Notice of Violations of the Endangered Species Act for illegally designating the West Coast Distinct Population Segment of the Fisher to be warranted but precluded for listing as a threatened or endangered species despite the lack of expeditious progress in listing of threatened and endangered species

Dear Secretary Salazar and Director Hamilton:

On behalf of the Center for Biological Diversity, Sierra Forest Legacy, Environmental Protection Information Center, and Klamath-Siskiyou Wildlands Center, we hereby notify you of violations of Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, by the United States Fish and Wildlife Service (“Service”) in determining that listing the west coast distinct population segment of the fisher is warranted but precluded by higher priority species’ listing because you are failing to make expeditious progress in listing these higher priority species. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). The reasons for this notice are set out in greater detail below.

Background

A close relative of the mink, otter and marten, the fisher (*Martes pennanti*) has a long slender body with short legs, a triangular head with a sharp muzzle and large, rounded ears, and dark brown fur. Fishers have a diverse diet, including porcupines, birds, small mammals, insects, deer carrion, vegetation and fruit. Because they are the sole predator of porcupines, which eat trees, fishers have been reintroduced in many parts of the country by timber companies interested in controlling porcupine populations.

On the west coast, the fisher is reduced to two native populations – one in northern California and extreme southwestern Oregon and another in the southern Sierra Nevada – and a reintroduced population in the southern Oregon Cascades. The fisher’s historic distribution on the west coast included all of western Washington and Oregon, northwestern California and the Sierra Nevada.

The fisher has been eliminated from all of Washington, most of Oregon, and declined to roughly 50% of its historical range in California. Survey information indicates the fisher is likely extirpated in the central and northern Sierra Nevada, dividing the two remaining native populations. The southern Sierra Nevada population is believed to be at substantial risk of extinction due to several factors including isolation, small population size (almost certainly fewer than 500 individuals), low reproductive capacity and ongoing habitat loss. The northern California population is isolated from the larger continental population, and is threatened by habitat loss and fragmentation.

On December 5, 2000, the Service received a petition from the Center for Biological Diversity and other organizations to list the west coast population of the fisher as endangered under the ESA and to designate its critical habitat. On July 31, 2001, the Center and others filed suit in the United States District Court for the Northern District of California challenging the Service's failure to make a timely initial finding as to whether the petition contained substantial information indicating that listing might be warranted, as required by 16 U.S.C. § 1533(b)(3)(A).

On April 4, 2003, that court found the Service to be in violation of the law and ordered the Service to make its initial finding for the fisher within 90 days. *Center for Biological Diversity v. Norton*, No. C 01-2106 SC (N.D. Cal., April 4, 2003). On July 10, 2003, the Service announced that the petition to list the west coast population of the fisher contained substantial information indicating that listing might be warranted. 68 Fed. Reg. 41169.

On April 3, 2004, the Service followed its positive initial finding with a determination that listing the west coast population of the fisher is "warranted, but precluded by higher priority listing actions." This "12-month" finding was published in the Federal Register on April 8, 2004. 69 Fed. Reg. 18770.

On August 3, 2004, the Center for Biological Diversity and other organizations notified you that your warranted but precluded determination failed to demonstrate that listing of the fisher was either precluded or that the agency was making expeditious progress in listing of higher priority species. Your continued failure to make expeditious progress has only become more apparent in the intervening years.

On May 11, 2005, September 12, 2006, December 6, 2007, December 10, 2008, and November 9, 2009, the Service has issued resubmitted petition findings for the fisher that have continued to determine the fisher to be warranted but precluded as part of their annual "Candidate Notice of Review" ("CNOR"), which include findings identical to that for the fisher for hundreds of species. 70 Fed. Reg. 24869, 71 Fed. Reg. 53756, 72 Fed. Reg. 69033, 73 Fed. Reg. 75176, 74 Fed. Reg. 57804.

Violations of Section 4(b)(3)(B)

Section 4(b)(3)(B) of the ESA provides:

Within 12 months after receiving a petition that is found . . . to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

- (i) The petitioned action is not warranted
- (ii) The petitioned action is warranted
- (iii) The petitioned action is warranted, but that –
 - (I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and
 - (II) expeditious progress is being made to add qualified species to either [the endangered species list or the threatened species list] and to remove from such lists species for which the protections of this chapter are no longer necessary.

If the third such finding is made with respect to a petition then the Service must revisit that finding each year, and make a fresh determination whether proceeding with a proposed listing may be deferred based on the pertinent statutory criteria. *Id.* at § 1533(b)(3)(C)(i); see also 74 Fed. Reg. 57812 (“Section 4(b)(3)(C) of the Act requires that when we make a warranted but precluded finding on a petition, we are to treat such a petition as one that is resubmitted on the date of such a finding. Thus, we are required to publish new 12-month findings on these ‘resubmitted’ petitions on an annual basis.”). In short, in order to make a WBP determination for any petitioned species, either as an initial matter or in subsequent years, the Service must establish that it is making “expeditious progress” in actually “add[ing]” species to the lists of endangered and threatened species.

As the Ninth Circuit stated, “[t]he circumstances under which the Secretary may invoke [the warranted but precluded] excuse, however, are narrowly defined; Congress emphasized that providing for the ‘warranted but precluded’ designation was not designed to justify ‘the foot-dragging efforts of a delinquent agency.’” *Center for Biological Diversity v. Norton*, 254 F.3d 833, 838 (9th Cir. 2001) (citing to the ESA’s legislative history). “Specifically,” the court went

on, “the Secretary must show that she is ‘actively working on other listings and delistings and must determine and publish a finding that such other work has resulted in pending proposals which actually precluded [her] proposing the petitioned action at that time.’ . . . For that reason, ‘*the Secretary must determine and present evidence that she is, in fact, making expeditious progress in the process of listing and delisting other species.*’” *Id.* (citing legislative history) (emphasis added).

In originally determining listing of the fisher was warranted but precluded and in every subsequent determination that listing of the fisher continues to be warranted but precluded, the Service has utterly failed to demonstrate that expeditious progress is being made in adding qualified species to the list. Indeed, rather than demonstrating that the Service is making expeditious progress in adding species to the endangered and threatened lists, the five CNORs containing resubmitted findings for the fisher convincingly demonstrate precisely the opposite, i.e., that FWS is making virtually no progress at all in adding admittedly qualified species to the lists.

The Most recent CNOR issued on November 9, 2009 notes listing of only one species, a Hawaiian plant called *Phyllostegia hispida*, since the previous notice was published on December 10, 2008. 74 Fed. Reg. 57816. Likewise, CNORs for 2005, 2006, 2007 and 2008 identify listing of eight, six, zero and one species, respectively. Thus, during the more than five years following the fisher first being declared warranted but precluded, the Service only listed a total of sixteen species for a rate of roughly three species per year. By comparison, during the eight years of the Clinton administration, the Service listed an average of 65 species per year or a total of 522 species.

At the present rate of listing, it is unlikely that the fisher will receive protection any time soon. Currently, there are 249 candidate species, of which more than half are priority two or three according to the Service’s priority ranking system, compared to the fisher’s ranking of six. This means that all of these species will have to be listed first, which at a rate of three species per year could take literally decades. The fisher has already lost substantial range and the Service considers the magnitude of threats to the fisher to be “high.” 74 Fed. Reg. 57821. Clearly, delay of protection of the fisher by decades is not what Congress envisioned in requiring the Service to make expeditious progress.

Failure to make expeditious progress render the Service’s 12-month finding for the fisher and subsequent resubmitted findings arbitrary, capricious and an abuse of discretion, in violation of the ESA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706.

Conclusion

The Service’s continued reluctance to take the action that the dire plight of the fisher demands – listing as an endangered species – has once again caused the Service to violate the

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ESA. If the Service does not remedy these violations, we intend to commence an appropriate action in United States District Court.

If you believe any of the foregoing to be in error, have any questions, or wish to discuss this matter, please do not hesitate to call us.

Sincerely,

A handwritten signature in black ink that reads "David Greenwald". The signature is written in a cursive style with a checkmark-like flourish at the end.

D. Noah Greenwald
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