

Dec. 16, 2010

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Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act and Administrative Procedure Act in the Promulgation of the Final Rule to Designate Critical Habitat for the Salt Creek Tiger Beetle

Dear Secretary Salazar and Director Gould:

This letter provides you with 60 days notice that the Center for Native Ecosystems, the Xerces Society and the Center for Biological Diversity intend to sue the U. S. Fish and Wildlife Service (“FWS”) for violating Section 4 of the Endangered Species Act (“ESA”), *16 U.S.C. § 1531, et seq.*, and its implementing regulations, and the Administrative Procedures Act (“APA”), *5 U.S.C. §§ 551 et. seq.*, in issuing the final critical habitat rule for the Salt Creek tiger beetle (*Cicindela nevadica lincolniana*). *75 Fed. Reg. 17,466 (Apr. 6, 2010)*. FWS’ final critical habitat designation violates the ESA by failing to rely on the best available science and by failing to designate critical habitat areas essential to the conservation of the tiger beetle. This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA. *16 U.S.C. § 1540(g)*.

I. Background Facts:

The Salt Creek tiger beetle is an active, ground-dwelling, predatory insect endemic to saline wetlands and streams of eastern Lancaster and Saunders Counties, Nebraska. *75 Fed. Reg. 17,466*. Over 90 percent of the endangered Salt Creek tiger beetle’s salt marsh habitat has been destroyed or severely degraded. The Salt Creek tiger beetle is one of the rarest insects in the world and occupies one of the most restricted ranges of any insect in the United States. *Id. at 17,474*. In 2008, only 165 adult Salt Creek tiger beetles were detected during surveys. *Id. at 17,466*. Threats to tiger beetle habitat include stream channelization and bank armoring, wetland draining and filling, excessive freshwater input into saline streams and wetlands, and overgrazing. *Id. at 17,473*.

On May 4, 2005, the Nebraska field office of the FWS developed a document entitled the *Draft Strategy for the Designation of Critical Habitat for the Salt Creek Tiger Beetle* (*Cicindela nevadica lincolniana*), *Advanced Concept Paper* (“ACP”). This paper was prepared by the

Nebraska Game and Parks Commission, Lower South Platte Natural Resource District, FWS Nebraska field office and University of Nebraska-Lincoln biologists, entomologists and wetland ecologists. The ACP proposed 36,906 acres (14,935 ha), comprising ten recovery units, be designated as critical habitat for the Salt Creek tiger beetle. Three independent peer-reviewers, experts in the conservation of rare and ESA listed tiger beetles and other insects, reviewed and concurred with conclusions of the ACP.

On October 6, 2005, the FWS published in the Federal Register the final rule to list the Salt Creek tiger beetle as endangered under the ESA. *70 Fed. Reg. 58,335*. In the rule, FWS identified habitat destruction as the “greatest threat to the Salt Creek tiger beetle.” *Id. at 58,341*. Despite the existence of the ACP, FWS did not designate critical habitat at the time of listing. FWS did announce that critical habitat was prudent and determinable and the agency was in the process of identifying the physical and biological features essential to the conservation of the species.

Under significant pressure from the Region Six office to limit the size of critical habitat, the Nebraska field office reduced its recommendation to 15,000 acres of critical habitat, distributed across six recovery areas. Original ACP team members, including the Nebraska field office, emphasized that 15,000 acres was the bare minimum needed to allow the species avoid extinction and recover. Nebraska field office staff expressed concern that involvement of the Washington office in drafting the critical habitat rule would “adversely affect our ability to practice biology before being subjected to political considerations.” *Email correspondence from Steve Anschutz, (FWS Nebraska Field Supervisor) to Mary Henry (Assistant Regional Director, Region Six) (November 11, 2005)*. In May 2006, the Nebraska field office issued a briefing paper recommending 14,334 acres be designated. *Briefing for ARD-Ecological Services, Region 6, Critical Habitat Designation for the Salt Creek Tiger Beetle, prepared by Robert R. Harms and Jeffery T. Runge, Ecological Services Nebraska Field office, Grand Island, Nebraska (May 19, 2006)*.

Over the next four years, the Nebraska field office was repeatedly instructed to reduce the recommended critical habitat acreage by the FWS Region Six and Washington offices. The Region Six office explained to the Nebraska field office that “the amount of acreage the [field office] was proposing would not get past Julie McDonald [sic].” *Email correspondence from John Cochnar (Nebraska field office) to Mike LeValley (Region Six) (June 5, 2007)*. After a series of reductions in the proposed critical habitat, all of which were objected to by the Nebraska field office staff as scientifically indefensible, the Washington office directed the Nebraska field office to reduce the acreage to no more than 1,500 acres pursuant to a “verbal policy” to only designate occupied habitat and “minimal” acreage. *Email correspondence from Jeff Runge (Nebraska field office) to Robert Harms (Nebraska field office) re: notes from a conference call with Chris Nolan (Washington office) (Mar. 16, 2006)*. FWS ultimately reduced the total critical habitat designation to 1,933 acres in the final rule, a mere 5 percent of the 36,906 acres originally recommended by the expert scientific panel in the ACP. *75 Fed. Reg. 17465*.

In addition to significantly reducing the amount of critical habitat, the Region Six and Washington offices also redefined the PCEs for the tiger beetle deleting portions of the PCEs definitions provided by the expert scientific panel in the ACP. The original PCEs included

“moist barren salt flats, sustained through complex interactions between saline soils, evaporation, and encompassing protective zones, required for thermoregulation, foraging, and reproduction” and “sustained natural surface and groundwater hydrologic regimes required to hydrate salt flats and stream banks to meet reproductive and physiological requirements, and reduce competition for prey and parasitism.” *Draft Briefing for ARD-Ecological Services, Region Six, prepared by Robert R. Harms and Jeffery T. Runge (Nebraska field office) (May 19, 2006)*. The corresponding PCEs in the final rule removed all reference to protective zones and references to natural surface and groundwater hydrologic regimes. *See 75 Fed. Reg. 17,473*.

II. Statutory Framework:

The ESA is a federal statute whose purpose is to conserve “the ecosystems upon which endangered species and threatened species depend” and “to provide a program for the conservation of such endangered species.” *16 U.S.C. § 1531(b)*. To this end, the ESA requires that the FWS protect such species by listing them as either “threatened” or “endangered,” and by designating “critical habitat” for each listed threatened and endangered species. *16 U.S.C. § 1533*. Designated critical habitat is subject to a prohibition on “destruction or adverse modification” by any action authorized, funded, or carried out by any federal agency. *16 U.S.C. § 1536(a)(2)*.

The ESA defines the term “critical habitat” for a threatened or endangered species as:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection: and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). “Conservation” means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *16 U.S.C. § 1532(3)*.

The ESA requires the Service to make critical habitat designations “on the basis of the best scientific data available.” *16 U.S.C. § 1533(b)(2)*. ESA implementing regulations lay out the process for designating critical habitat:

- In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:
- (1) Space for individual and population growth, and for normal behavior;
 - (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
 - (3) Cover or shelter;

- (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;
- (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

50 CFR 424.12 (b). The regulation further directs the Secretary to “focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species.” *Id.* Known primary constituent elements (“PCEs”) of the species’ critical habitat must be listed in the rule. *Id.*

III. Violations: FWS Failed to Follow the Best Available Science and Failed to Designate Areas Essential to the Conservation of the Species.

The final critical habitat rule for the Salt Creek tiger beetle violates the ESA because the FWS failed both to follow the best available science and to designate those areas containing the physical and biological features essential for the conservation of the species as required by the Act. 16 U.S.C. §§ 1533(b)(2), 1532(5)(A)(i). Despite the numerous and vocal objections of the panel of expert scientists the agency had employed to recommend critical habitat, multiple peer reviewers, and the agency’s own biologists in the Nebraska field office and Region One office, FWS disregarded the expert recommendations of the ACP – the very team of experts “convened by the Service for the express purpose of identifying potential critical habitat, identified as essential to the conservation of the species...” *Memorandum from Michele Zwartjes, Listing Division, Region 1 to Ann Carlson (Region Six), re: Review of draft Final Critical Habitat Rule for the Salt Creek Tiger Beetle at 2 (Nov. 6, 2008).*

Though both the Nebraska field office and the Region One biologist who reviewed the final critical habitat rule cited the ACP as the best available science, the FWS ignored its conclusions including, but not limited to, the total amount of acreage necessary to provide for conservation, the need to designate significant areas of currently unoccupied habitat, the definition of the PCEs of habitat for the species, the dispersal capability of the tiger beetle, the number and dispersal of populations necessary to conserve the species, and the need to protect both entire saline complexes because of the ephemeral nature of barren salt flats and the migration corridors between complexes. FWS also ignored its own past practice in developing recovery plans and designating critical habitat for species with similar habitat requirements and/or face similar threats in designating only four populations on only two streams. Ignoring the best available science resulted in a designation that fails to include areas essential to the conservation of the tiger beetle, including the mixed freshwater and saline wetland complexes on which the tiger beetle depends, migratory corridors, and a sufficient number of populations on a sufficient number of streams to guard against catastrophic anthropogenic and stochastic events.

The failure to follow the best available science and the failure to designate all areas essential to the recovery of the Salt Creek tiger beetle render the final critical habitat rule arbitrary and capricious and otherwise contrary to law.

III. Conclusion:

FWS must promulgate a revised rule designating critical habitat for the Salt Creek tiger beetle that fully complies with the ESA by relying on the best available science and by protecting the physical and biological features essential for the conservation of the species. While the agency promulgates the new critical habitat rule, the current critical habitat designation should remain in effect.

If FWS does not act within 60 days to correct its ongoing violations of the ESA, the Center for Native Ecosystems, Xerces Society, and Center for Biological Diversity will pursue litigation in federal court. We will seek injunctive and declaratory relief, legal fees and costs. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us.

Sincerely,

/s/

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