

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Defendants.

Case No: 1:21-cv-00791-TJK

**PROPOSED AMICUS BRIEF OF THE AMERICAN STEWARDS OF LIBERTY,
OSAGE PRODUCERS ASSOCIATION, AND TEXAS PUBLIC POLICY FOUNDATION
IN SUPPORT OF THE FEDERAL DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT**

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CERTIFICATE REQUIRED BY LCVR 26.1 OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

We, the undersigned counsel of record for the American Stewards of Liberty (“ASL”), Osage Producers Association, (“OPA”) and Texas Public Policy Foundation (“TPPF”) (collectively, “Amici”) certify that, to the best of our knowledge and belief, there are no parent companies, subsidiaries, affiliates, or companies which own at least 10 percent of the stock of the foregoing organizations which have any outstanding securities in the hands of the public.

These representations are made in order that the judges of this Court may determine the need for recusal.

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FRAP 29(A)(4)(D) STATEMENT OF INTEREST OF AMICI CURIAE

Applicant ASL is a non-profit organization under Section 501(c)(3) of the Internal Revenue Code and is headquartered in Georgetown, Texas. ASL supports the protection of private property rights, fiscal responsibility, and environmental policy based upon sound principles of science, as well as cost-effective solutions to issues associated with land use. ASL's members, located throughout the southern and western U.S., are primarily comprised of farming and ranching families who have been stewards of the land for generations. ASL supports, as part of its mission: the study and research of issues that affect the protection of property rights; education of the public through seminars, publications, and programs regarding the protection of property rights; and initiation of legal proceedings to protect property rights. ASL advocates for a balanced approach to environmental regulation with respect to the administration of the Endangered Species Act ("ESA") and the protection of property rights.

Applicant ASL is actively involved in numerous efforts to improve U.S. Fish and Wildlife Service ("Service") implementation of the ESA, particularly the delisting of species for which the original listing was in error and those species for which current data supports the conclusion that their continued listing under the ESA is not warranted. ASL undertakes these efforts based on its concern that public and private resources are being diverted from other productive activities and instead expended on species that do not meet the criteria for listing under the ESA, as they are not in danger of extinction now or in the foreseeable future.

ASL's members also have an overarching interest in the effective and lawful implementation of the ESA nationwide, including the removal of species from the list of endangered and threatened species that do not meet the criteria for inclusion on such lists.

Applicant OPA is a nonprofit organization under Section 501(c)(3) of the Internal Revenue Code and is headquartered in Hominy, Oklahoma. The OPA has a membership of approximately

150-member oil and gas operators and service companies who operate in Osage County, Oklahoma. The OPA is a forum and voice on issues vital to the economic interests of its members, and on occasion is called upon to take action on behalf of its membership as a whole. This can require raising objections to the policies, procedures, and regulations administered by the Osage Agency, Bureau of Indian Affairs, the Service, and the Department. OPA was among those who submitted the Delisting Petition (defined below) and engaged in the lawsuit filed against the Service and the Department in September 2017.

Applicant TPPF is a non-profit, nonpartisan research organization founded in 1989 and dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Its mission is to educate and affect policymakers and public policy debate with academically sound research and outreach. In accordance with its central mission, TPPF has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Through its Center for the American Future, TPPF pursues policies that will defend private property rights and enforce constitutional limits on the power and authority of the federal government.

In connection with their missions, on August 18, 2015, Amici and others submitted to the Service a petition to delist the American burying beetle (“ABB”) (“Delisting Petition”). FWS001278. On March 16, 2016, the Service published in the Federal Register a positive 90-day finding on the Delisting Petition. *Endangered and Threatened Wildlife and Plants; 90-Day Findings on 29 Petitions*, 81 Fed. Reg. 14,058 (March 16, 2016). Subsequently, on September 21, 2017, Amici and others initiated litigation against the Service due to the Service’s failure to timely publish the required 12-month finding on the Delisting Petition. *American Stewards of Liberty, et al. v. U.S. Dep’t of the Interior, et al.*, No. 6:17-cv-00352-RAW (E.D. Okla.).

On November 20, 2018, the parties settled the case and, as a result of that settlement agreement, the Service published a proposed rule to change the status of the ABB from endangered to threatened and to promulgate a special ESA section 4(d) rule setting forth how the “take” prohibition of ESA section 9 would apply to the species. Endangered and Threatened Wildlife and Plants; Reclassifying the American Burying Beetle From Endangered to Threatened on the Federal List of Endangered and Threatened Wildlife With a 4(d) Rule, 84 Fed. Reg. 19,013 (May 3, 2019) (“Proposed Rule”). ASL provided comments on the Service’s Proposed Rule. On October 15, 2020, the Service published a final rule reclassifying the ABB from endangered to threatened (“Downlisting Rule”) and promulgated a final ESA section 4(d) rule setting forth the specific prohibitions relative to the species (“4(d) Rule”). Endangered and Threatened Wildlife and Plants; Reclassification of the American Burying Beetle From Endangered to Threatened With a Section 4(d) Rule, 85 Fed. Reg. 65,241 (Oct. 15, 2020). Those rules became effective on November 16, 2020. *Id.*

As demonstrated above, Amici have a continuing interest in the listing status of the ABB.

FRAP 29(A)(4)(E) STATEMENT OF AUTHORSHIP

Consistent with Federal Rules of Appellate Procedure, rule 29(a)(4), as adopted by LCvR 7(o)(5), the undersigned counsel for Amici, state that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund the preparation or the submission of this brief; and no person other than the Amici, their members, and their counsel contributed money intended to fund the preparation or the submission of this brief.

ARGUMENT

The American Stewards of Liberty (“ASL”), Texas Public Policy Foundation (“TPPF”), and Osage Producers Association (“Osage”) (collectively, “Amici”) hereby submit this amicus

brief in support of Federal Defendants' Cross-Motion for Summary Judgment ("Federal Defendants' Motion"). ECF No. 24-1.

The Service's Downlisting Rule, 85 Fed. Reg. 65,241 (Oct. 15, 2020), should be upheld by this Court. Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion"), ECF No. 21-1, ignores the well-settled requirement that in matters of agency expertise in interpreting technical and other data, courts must defer to the agency. Put simply, in examining the same information reviewed by the Service (the expert agency), Plaintiff concludes that the ABB is currently threatened with extinction throughout all or a significant portion of its range. Amici, on the other hand, previously have argued that the ABB does not warrant listing at all and have provided population and distribution data supporting their position. While Amici believe their position is correct, the Service has examined information available to it, including climate change modeling, has considered uncertainty inherent in making predictions relative to climate change and other factors, and has made a determination within its area of special expertise. That determination is that while the ABB does not meet the definition of an endangered species, the ABB does meet the definition of a threatened species. Given the limited scope of review applicable in this case, the court should decline to overturn the Downlisting Rule, as it is clear that in this instance the agency acted conservatively in determining the ABB—a species whose population appears stable and whose range has expanded by two orders of magnitude since listing—warranted downlisting.

I. This Court should Defer to the Service's Decision to Downlist the ABB.

As described in the Delisting Petition, the known range of the ABB has expanded from 473,000 acres at the time the species was listed to more than 51,000,000 acres at the time of preparation of the Delisting Petition. This more than 100-fold expansion of the known range has held more or less stable since the mid-2000s. FWS001295. In addition to expansion of the species

range by more than two orders of magnitude, the population of the ABB has also been demonstrated to be larger and more robust than was known at the time of listing. At the time the species was listed, the Service was aware of one population in New England totaling approximately 520 individuals and the collection of fewer than ten beetles from eastern Oklahoma. 54 Fed. Reg. 29,652 (July 13, 1989). However, more recent estimates put the species' population at more than 40,000 individuals across its range. FWS001296.

Additionally, while the Service has indicated the species may be impacted by climate change and has identified land use changes as a potential threat to the species, the Service has not indicated that the range or population of the ABB currently is shrinking. FWS001379. Indeed, in its Downlisting Rule, the agency acknowledged the availability of “[l]arge quantities of potentially suitable habitat” in the Southern Plains and Northern Plains analysis areas, with most analysis areas containing “large areas of managed protected lands.” 87 Fed. Reg. at 65,245. The Service also acknowledged that the species' resiliency was “moderate to high” in all but one analysis area, that the species' representation is moderate, and that current genetic diversity is “relatively high.” *Id.* at 65,246. In sum, the ABB currently appears to be stable, with little or no evidence that the species is experiencing population-level decline. In the view of Amici, this information should have led the Service to delist the ABB.

Nevertheless, Amici recognize the well-established rule that a court will defer to an agency's interpretation of matters within its technical expertise. *American Wildlands v. Kempthorne*, 530 F.3d 991, 1000 (D.C. Cir. 2008) (internal citations omitted); *see also Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983). Where a decision “requires a high level of technical expertise,” deference to the agency is “especially warranted.” *Safari Club International v. Zinke*, 878 F.3d 316, 326 (D.C. Cir. 2017) (*citing Marsh v. Or. Nat. Res. Council*,

490 U.S. 360, 377 (1989)). The D.C. Circuit has explained that “[t]he rationale for deference is particularly strong when the agency is evaluating scientific data within its technical expertise” and that “in an area characterized by scientific and technological uncertainty, this court must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives.” *American Wildlands*, 530 F.3d at 1000 (internal citations omitted); *see also Balt. Gas & Elec. Co.*, 462 U.S. at 103.

While Amici remain convinced that the best available information does not indicate the ABB currently faces threats to a degree that warrants continued listing as endangered or threatened, Amici also recognize that the required standard of review provides a material level of deference to the Service—which is among the reasons Amici declined to challenge the Downlisting Rule in federal court.

II. The Service Decision to Downlist the Species May Not under the APA be Set Aside by the Court.

In the following paragraphs, Amici provide information and insight supporting the Service’s Downlisting Rule.

A. Plaintiff ignores true listing criteria and focuses on outdated recovery criteria.

Plaintiff attempts to make much about the supposed “fact” that the ABB does not meet the “criteria” for downlisting as established in the species’ 1991 recovery plan (“ABB Recovery Plan”). FWS004943. However, Plaintiff ignores that: (1) the Service and federal courts agree that the “criteria” for recovery as set forth in species’ recovery plans need not be met for a species to be down-listed; (2) the Service rightfully determined that the ABB Recovery Plan was out of date and no longer was representative of the best available information; and (3) the status of a species as endangered or threatened (or not) is required to be judged solely against the listing factors set forth in section 4 of the ESA.

1. Recovery plan downlisting criteria are not prerequisite to downlisting.

Numerous courts have held that although the ESA requires that the Service prepare species recovery plans, such plans serve as guidance for the agency and do not carry the force of law in an agency's determination whether or not a species has recovered (or can recover). *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012) (recovery “plan is a statement of intention, not a contract”); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (holding that 16 U.S.C. § 1533(f) makes plain that recovery plans are merely for guidance purposes); *Conservation Cong. v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014) (holding that recovery plans provide guidance for species conservation and are not binding authorities). The Service previously has successfully argued in this Court that the “criteria in the Recovery Plan, unlike the factors in § 4(a)(1) of the [ESA], are not binding upon the agency in deciding whether a species is no longer endangered and therefore should be delisted.” *Friends of Blackwater*, 691 F.3d at 432.

The agency recognized the same in its Downlisting Rule, stating that recovery plans:

...are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the [ESA]. A decision to revise the status of a species, or to delist a species, is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer [endangered or threatened], regardless of whether that information differs from the recovery plans.

Downlisting Rule, 85 Fed. Reg. 65,241, 65,242 (Oct. 15, 2020).

Rather, and as described in greater detail in section II.A.3. *infra*, in determining whether a species has or has not recovered, the agency is required to objectively apply the listing factors set forth in ESA section 4 and relevant regulations. In the case of the Downlisting Rule, the Service applied the listing factors and determined the ABB did not meet the definition of an endangered species.

2. The Service properly determined the ABB Recovery Plan no longer represents the best available information relative to the status and needs of the ABB.

Plaintiff also conveniently downplays the Service’s reasonable determination in the Downlisting Rule that “information [in the Recovery Plan] is considered to be out of date” for various reasons, including because the criteria for downlisting set forth in the Recovery Plan were based on “limited empirical data” and “may not appropriately address future threats [to the species] given [the Service’s] current understanding of the species’ range and risks to populations...” Downlisting Rule, 85 Fed. Reg. at 65,243. Instead, and to assist the agency in applying the ESA section 4 listing factors to the ABB, the Service developed the Species Status Assessment (“SSA”), FWS001321, which “provides an updated, revised analysis of current and future risks [to the ABB] based on [the Service’s] current understanding of the species’ needs.” Proposed Rule, 84 Fed. Reg. 19,013, 19,018 (May 3, 2019). The Service’s decision not to measure the species’ status against a Recovery Plan the agency had deemed “out of date” was proper and should not be second guessed by Plaintiff or this court. *Id.*

3. In adopting the Downlisting Rule, the Service sufficiently for the purposes of review examined the status of the ABB against the five statutory listing criteria.

Once the Service concluded that the criteria in the Recovery Plan were outdated, it would have been arbitrary for the agency to base a status review of the species on that plan. The Service sufficiently examined the ABB’s status against the five statutory listing factors and determined that the threats to the species posed by climate change were sufficient to warrant the species’ listing as threatened, but that the species did not face other significant threats—such as those posed by typical land use—that, alone, would warrant the species’ listing as endangered. In its Downlisting Rule, the Service explained:

...the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an “endangered species” or a “threatened species.” In determining whether a species meets either definition, we must evaluate all identified threats by considering the species’ expected response, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level.

Downlisting Rule, 85 Fed. Reg. at 65,243.

The Service went on to state that the agency will determine whether a species meets the definition of an endangered or threatened species after examining an analysis of threats to the species, actions and conditions that will have a positive effect on the species, and “describing the expected effect on the species now and in the foreseeable future.” *Id.*

Using this framework and the analysis contained in the SSA, the Service determined that the species does not currently meet the definition of an endangered species, but that there was a likelihood that it would become an endangered species in the foreseeable future. FWS001321.

Specifically, the Service found that the species’ resiliency is currently “at least moderate for all analysis areas except the Red River Analysis Area and high for at least 2 analysis areas”, that overall species’ representation is moderate, that current genetic diversity of the species is “relatively high”, but that due to the loss of a significant portion of its historical range, its ecological diversity has been reduced. FWS001498. Given these facts, there was no other reasonable finding for the Service to make but that the ABB is not currently endangered because a species with moderate to high resiliency, moderate representation, and relatively high genetic diversity with an abundant amount of habitat across a broad range cannot conceivably be “in danger of extinction throughout all or a significant portion of its range.” *See* 16 U.S.C. § 1531(6). The Service ultimately found that the species “does not currently meet the definition of endangered under the [ESA] because it is not presently in danger of extinction.” Proposed Rule, 84 Fed. Reg. at 19,024. Nevertheless, the Service determined that because of the perceived threat of climate

change on the species' ability to survive in the future, the species was "likely to become an endangered species within the foreseeable future throughout all of its range." *Id.*; *see also* 16 U.S.C. § 1532(20). The Service's findings were based on the analysis contained in its SSA, which included a detailed assessment of the threats to the species posed by climate change. Proposed Rule, 84 Fed. Reg. at 19,024.

As noted above, while it is Amici's view that the record, in fact, supports delisting the ABB, the Service interpreted the available data conservatively in favor of the species, took the middle ground, and promulgated the Downlisting Rule. This decision is within the ambit of deference established under the APA.

B. The conclusion set forth in the Service's 5-year Review was flawed.

Throughout its motion for summary judgment, ECF No. 21-1, Plaintiff argues—counter to the facts in the record—that the status of the ABB did not change between the conclusion of the Service's *American Burying Beetle (Nicrophorus americanus) 5-year Review* ("5-year Review"), FWS005024, and the Downlisting Rule. But the Delisting Petition demonstrates that the known range, distribution, and population of the species increased substantially since the time of listing, FWS001278, and the Service's SSA bears this out. FWS001327-28. In light of this information, it is appropriate for the court to defer to the Service's conclusion that the species should be downlisted from endangered to threatened.

C. Anecdotal evidence of historical decline in range and distribution is irrelevant to a listing decision.

Plaintiff devotes a significant portion of its brief to the argument that the distribution and population of the ABB has declined relative to its historical status. However, historical downward trends do not automatically cause a species to meet the ESA's definition of "endangered"—which requires that the species is *currently* in danger of extinction throughout all or a significant portion

of its *contemporary* range.¹ Rather than focus on the historical trends of a given species, the Service is required to examine the status of the species against the five listing factors as they pertain to present or future conditions. For example, section 4 of the ESA, governing listing decisions under the ESA, requires the Service to examine whether there exists “present or threatened destruction, modification, or curtailment of [a species’] habitat or range.” 16 U.S.C. § 1533(a)(1)(A). Notably absent from the ESA is a requirement that the Service examine past or historic destruction, modification, or curtailment of a species’ range.

Likewise, guidance issued by the Service in 2001 pertaining to preparation of species status assessments for taxa under consideration for listing and attached as Exhibit 1 to Amici’s Brief stated:

...it is important to distinguish between current (say within the last 10 years) and historical trends; historical trends provide background and perspective, while current trends provide the evidence that listing is warranted or unwarranted.

Guidance for Conducting Status Assessments for taxa which are under consideration for listing as threatened or endangered species (Service, 2001 at p. 4).

Current National Marine Fisheries (“NMFS”)² guidance relative to conducting species status assessments echoes this perspective, stating (in connection with evaluating whether a portion of a species’ range is “significant”): “[e]valuating whether a portion of a range qualifies as “significant” is done relative to the species’ current range (not relative to its historic range).”

¹ It is likely the case that many native species have seen declines in population and distribution as a consequence of the settlement of the United States over the past two centuries. However, many of these species are not in danger of extinction in the foreseeable future because the contemporary populations are secure.

² The ESA is administered by the Service for terrestrial and freshwater species, as delegated by the U.S. Secretary of the Interior. The National Marine Fisheries Service (“NMFS”) administers the ESA for marine and anadromous species, as delegated by the U.S. Secretary of Commerce. Thus, NMFS is the agency that makes listing determinations for marine and anadromous species.

Guidance on Responding to Petitions and Conducting Status Review under the Endangered Species Act (NMFS, Updated February 1, 2021, at p. 15).

When one undertakes this exercise for the ABB, it is readily apparent that the species is not *currently* in danger of extinction throughout all or a significant portion of its range.

First, the range of the ABB is not currently contracting. At the time of the Service's 5-year Review, the agency described the range of the ABB as including parts of nine states. FWS005031. Subsequently, in 2015, the Service expanded its description of the known ABB range to include more than 500,000 acres to the western edge of the species' range in Oklahoma to accommodate new survey results. FWS001299. Taken together, the known range of the ABB has expanded from approximately 473,000 acres at the time of listing to more than 51,000,000 acres as of the date of the Delisting Petition—a more than 100-fold expansion in the size of the species' known range. FWS001300. This expanded range has held relatively stable since the mid-2000s. FWS001300. These facts were either ignored or purposefully omitted in Plaintiffs' Motion.

Second, like the ABB's range, the species' population is also substantially larger than was known at the time the species was listed. When the Service listed the ABB in 1986, the agency indicated that the Block Island population was estimated at 520 individuals and reported collecting only 10 individual ABBs from Oklahoma between 1979–1988. Today, the estimated population of the ABB includes more than 40,000 individuals across the species range, and the populations in seven of the ten states within the ABB's current range have been described by several studies as stable or increasing in size. FWS001301.

III. The 4(d) Rule adopted by the Service satisfies the conservation standard.

Plaintiff's Motion claims that the 4(d) Rule does not satisfy a "conservation standard" as purportedly required under the ESA for species-specific ESA section 4(d) rules. However, Plaintiffs fail to recognize that without the Service's adoption of a 4(d) rule, there would be no

prohibitions relative to the ABB, as that species is listed as threatened. Instead, the Service adopted a robust 4(d) rule that protects the species, while also ensuring continued economic security.

Section 9 of the ESA makes it unlawful to “take” species listed as endangered. 16 U.S.C. § 1538(a). “Take” is defined by the ESA as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* at § 1532(19). “Take” of endangered species is prohibited by the ESA whether or not such take is intentional. “Take” that occurs incidentally in connection with otherwise lawful activities (such as land development) is commonly referred to as “incidental take.”

By contrast, section 4 of the ESA indicates that where a species is listed as threatened, the Service “shall issue such regulations” as it “deems necessary and advisable to provide for the conservation of such species.” Section 4 further states that the Service “may by regulation prohibit with respect to any threatened species any act prohibited under [ESA section 9]...” *Id.* at § 1533(d). When the Service downlisted the ABB to threatened, the blanket prohibition on “take” no longer applied to that species. Instead, the Service adopted a species-specific rule pursuant to ESA section 4(d) that the agency viewed as necessary and advisable for the species’ conservation. The 4(d) Rule satisfies the conservation standard set forth in ESA section 4(d) for several reasons.

First, and as noted above, because the ABB is listed as threatened rather than endangered, the Service was under no obligation to prohibit incidental take in the first place.

Second, to the extent Plaintiff complains about allowing take within the Southern Plains analysis area, the Service was reasonable not to prohibit take in the Southern Plains because ABBs in that area are not threatened with typical land development activities (*see* 4(d) Rule, 85 Fed. Reg. 65,241, 65,259 (Oct. 15, 2020)). Further, because the Service determined that the future effects of climate change on ABBs within the Southern Plains Analysis Area may make that area

uninhabitable by mid-century no matter what conservation measures are taken, it was not unreasonable for the Service to allow land-disturbing activities in the Southern Plains Analysis Area.

CONCLUSION

Amici encourages this court to defer to the Service's Downlisting Rule and 4(d) Rule and reject Plaintiff's attempt to have this court substitute its judgment for that of the expert agency.

DATED: May 12, 2022

Respectfully submitted,

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