

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division**

Case No. 23-cv-81257

THE INSTITUTE FOR REGIONAL
CONSERVATION, CENTER FOR
BIOLOGICAL DIVERSITY, and
NATIONAL PARKS CONSERVATION
ASSOCIATION,

Plaintiffs,

v.

U.S. FISH AND WILDLIFE SERVICE;
MARTHA WILLIAMS, in her official
capacity as Director of the U.S. Fish and
Wildlife Service; and DEB HAALAND, in
her official capacity as Secretary of the U.S.
Department of the Interior,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs The Institute for Regional Conservation, Center for Biological Diversity, and National Parks Conservation Association, by and through undersigned counsel submit this complaint for Declaratory and Injunctive Relief, and in support thereof, allege as follows:

INTRODUCTION

1. The Institute for Regional Conservation (IRC), Center for Biological Diversity (Center), and National Parks Conservation Association (NPCA) (collectively, Plaintiffs), bring this action against the U.S. Fish and Wildlife Service (FWS), Director of the U.S. Fish and Wildlife Service, Martha Williams (Director), and the Secretary of the United States Department of Interior, Deb Haaland (Secretary) (collectively, Defendants) for failing to comply with the nondiscretionary requirements of the Endangered Species Act (ESA), 16 U.S.C. § 1533(b)(3)(B). Defendants have failed to make a timely listing decision regarding a petition submitted by the Plaintiffs to list the ghost orchid (*Dendrophylax lindenii*) as endangered or threatened. Plaintiffs therefore request that this Court order Defendants to comply by a date certain with the ESA's

mandatory, nondiscretionary deadline to make a listing determination on the Plaintiffs' scientific petition to list the ghost orchid as a threatened or endangered species under the ESA. *Id.* Compliance with this mandatory deadline is necessary to ensure the continued survival and recovery of the ghost orchid.

2. The ghost orchid, pictured below, grows only in humid, swampy forests in southwestern Florida and highly restricted parts of Cuba and is threatened with extinction.



Photo Courtesy Tony Pernas

3. The species has declined by approximately 50 percent in Florida and up to 90 percent globally.

4. The ghost orchid is slow-growing, and studies suggest that seed production and dispersal is not likely to keep up with the population decline.

5. The ghost orchid faces many threats including poaching and modifications to its habitat due to hydrological changes, wildfires, sea level rise, and severe storms and hurricanes.

The best available science demonstrates that the threats to the ghost orchid are severe and warrant immediate listing.

6. Poaching is an ongoing threat for the ghost orchid. In October 2022, the Florida Fish and Wildlife Conservation Commission caught individuals poaching 36 rare plants, including a ghost orchid, from a Florida state park. Poaching has also been documented in Big Cypress National Preserve.

7. Due to the impact of ongoing threats to the ghost orchid population, on January 24, 2022, Plaintiffs petitioned Defendants to list the ghost orchid as threatened or endangered.

8. The FWS issued a positive 90-day finding on October 22, 2022 (approximately five-months past the statutory deadline), pursuant to section 4(b)(3)(A) of the ESA, 16 U.S.C. § 1533(b)(3)(A), in which it concluded that Plaintiffs' petition presented "substantial scientific or commercial information" indicating that listing the ghost orchid "may be warranted."

9. Since then, Defendants have not issued the required "12-month finding" under section 4(b)(3)(B) of the ESA, *id.* § 1533(b)(3)(B), indicating whether the petitioned action is warranted, not warranted, or warranted-but-precluded, which was due by January 24, 2023, within 12 months of receiving Plaintiffs' petition.

10. Only with the proposed listing and then final designation that follows a 12-month finding can the ghost orchid receive protection under the ESA.

11. Therefore, Plaintiffs seek declaratory and injunctive relief to enforce the mandatory deadline for Defendants to make a 12-month finding on their petition to list the ghost orchid under the ESA, and to compel Defendants to make a finding as to whether listing the ghost orchid as a threatened or endangered species under the ESA is warranted. *Id.* § 1533(b)(3)(B).

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c), (g)(1)(C) (action arising under ESA citizen suit provision), 5 U.S.C. § 702 (review of agency - action under the Administrative Procedure Act (APA)), and 28 U.S.C. § 1331 (federal question jurisdiction).

13. This Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g); the APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive relief).

14. Plaintiffs provided sixty days' notice of their intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to Defendants dated June 12, 2023.¹ FWS's Florida state supervisor, Larry Williams, acknowledged receipt of the notice letter, but Defendants have not otherwise responded to the letter or indicated they will immediately remedy their ESA violation.

15. Venue is proper in the United States District Court for the Southern District of Florida under 16 U.S.C. § 1540(g)(3)(A) (allowing "any person" to commence a civil suit on his own behalf) and 28 U.S.C. § 1391(e) because the ghost orchid is located within this judicial district, all or a substantial part of the events or omission giving rise to the claims set forth in this Complaint occurred within this judicial district, and Plaintiff IRC resides in this judicial district. 28 U.S.C. § 1391(e)(1)(C). Venue in the West Palm Beach Division is proper because Plaintiff IRC resides in Palm Beach County. S.D. Fla. L. R. 3.1.

PARTIES

16. Plaintiff THE INSTITUTE FOR REGIONAL CONSERVATION (IRC) is a non-profit organization headquartered in Delray Beach, Florida, with focused field work in Florida and the Caribbean. IRC is dedicated to the protection, restoration, and long-term management of biodiversity in the region. It strives to prevent local and global extinctions of rare plants, animals, and ecosystems. IRC's members and staff seek to protect and restore viable populations of all native plant and animal species, including the ghost orchid. IRC has conducted intensive floristic field work in South Florida since 1995, which is housed and curated in the Floristic Inventory of South Florida. IRC collaborates with the Florida Natural Areas Inventory, NatureServe, and other organizations and colleagues to study, assess, and rank rare plants in the region, including the ghost orchid.

17. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (Center) is a national, nonprofit conservation organization incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico, including in Florida. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has more than 84,000 members throughout the country. The Center and its members are concerned with the conservation of

¹ Exhibit A.

threatened and endangered species, such as the ghost orchid, and ensuring the effectiveness of ESA's implementation.

18. Plaintiff NATIONAL PARKS CONSERVATION ASSOCIATION (NPCA) is a national, nonprofit conservation group headquartered in Washington, D.C., with 27 locations nationwide, including in Florida. Since NPCA was established in 1919, it has advocated for protection of the natural environment in and around the national parks and has worked to uphold laws and support new legislation to protect natural, cultural and historical sites and the public's enjoyment of them. NPCA uses its partnerships with advocates, organizations, and government leaders to bridge local advocacy and national policy. More than 1.6 million members and supporters of NPCA, along with program and policy experts, committed volunteers, staff lobbyists, community organizers, and communication specialists work to preserve the nation's most iconic and inspirational places for present and future generations. Specifically, NPCA promotes the restoration of native fish, plant, and wildlife species to national parks and adjacent lands, including the efforts to protect the ghost orchid and its habitat in Florida.

19. Plaintiffs' members and staff include individuals with interests in ghost orchids and their habitat, ranging from scientific, professional, and educational interests to recreational, aesthetic, moral, and spiritual interests. Plaintiffs' members and staff enjoy, on an ongoing basis, the biological, scientific, research, education, economic, conservation, recreational, and aesthetic values of ghost orchids.

20. Plaintiffs' members enjoy the mysterious nature of the ghost orchid, located deep in swamp forest mostly on pond apple and pop ash trees, only blooming for a few weeks per year.

21. Plaintiff IRC has long-standing interests in the preservation and recovery of endangered and threatened species, such as the ghost orchid, in Everglades National Park and Big Cypress National Preserve. For example, two of its members have visited ghost orchid habitat this year already, and one has concrete plans to visit in 2024 in the hopes of seeing a ghost orchid. Their conservation, scientific, research, educational, and recreational interests in observing healthy ghost orchid populations are harmed by the Defendants' delay in finalizing protections for them, as are their moral interests in ghost orchids.

22. The Center is dedicated to protecting Florida's biodiversity, including the ghost orchid. One member of the Center spends nearly every day during tourist season as a tour guide

through ghost orchid habitat in Everglades National Park and the Fakahatchee Strand Preserve State Park. She has concrete plans to visit the Preserve in early September 2023 to lead a small group on a four-day ‘swamp tromp’ as well as plans to visit in 2024. This member’s economic, aesthetic, and recreational interests are harmed by the Defendants’ delay in finalizing the protection of the ghost orchid.

23. Plaintiff NPCA has interests in protecting the ghost orchid. One member has spent thousands of hours in ghost orchid habitat for recreational, educational, and professional reasons. She hopes to bring her family to this habitat to see ghost orchids in their native swamp environment in the future. Another member of NPCA is a professional photographer and enjoys capturing wildlife and plants in the Big Cypress National Preserve. He has been to ghost orchid habitat more than seven times this year and has concrete plans to visit in September 2023 and 2024. These members’ recreational, educational, and professional interests in the ghost orchid are harmed by the Defendants’ delay in finalizing the protection under the Endangered Species Act.

24. Defendants’ failure to comply with the ESA’s nondiscretionary deadline for issuing a 12-month finding deprives the ghost orchid of crucial statutory protections necessary for the survival and recovery of the species. Plaintiffs’ conservation and recovery interests are impaired until the ghost orchid receives ESA protection. Therefore, Plaintiffs’ members and staff are injured directly by Defendants’ failure to timely determine whether to list the ghost orchid. This delay allows the plant and its habitat to remain unprotected, resulting in ongoing harm. The injuries described are actual, concrete, and ongoing, presently suffered by Plaintiffs and their members, and they will continue to occur unless this Court grants the relief requested in this complaint. Defendants’ failure to adhere to the ESA’s statutory timelines directly causes these injuries. The relief sought herein—an order compelling the immediate publication of a 12-month finding for the ghost orchid—would redress these injuries. Plaintiffs and their members have no other adequate remedy at law.

25. Defendant U.S. FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for the ghost orchid, including through prompt compliance with the ESA’s mandatory listing and critical habitat deadlines. The Secretary of the U.S. Department of the Interior has delegated administration of the ESA to FWS through 50 C.F.R. § 402.01(b).

26. Defendant MARTHA WILLIAMS is the Director of FWS and is charged with implementing the ESA for the ghost orchid. Plaintiffs sue Defendant Williams in her official capacity.

27. Defendant DEB HAALAND is the Secretary of the Department of the Interior (Secretary) and is the federal official with the responsibility to administer and implement the provisions of the ESA, including the listing decision for the ghost orchid. Plaintiffs sue Secretary Haaland in her official capacity.

STATUTORY FRAMEWORK

28. The ESA is a comprehensive federal statute that declares endangered and threatened species to be of “esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” *Id.* § 1531(b).

29. In this regard, ESA section 4(a) requires that the Secretary protect imperiled species by listing them as either “endangered” or “threatened.” *Id.* § 1533(a). The ESA defines a “species” as “any subspecies of fish or wildlife or plant and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

30. In addition, section 9 of the ESA makes it unlawful for “any person” to “remove and reduce to possession any [endangered plant] species from areas under Federal jurisdiction . . . [or to] damage or destroy any such species on any other area in knowing violation of any law or regulation of any State.” *Id.* § 1538(a)(2)(B).

31. Other provisions require the Secretary to designate “critical habitat” for listed species, *id.* § 1533(a)(3); require the Secretary to “develop and implement” recovery plans for listed species, *id.* § 1533(f); authorize the Secretary to acquire land for the protection of listed species, *id.* § 1534; and authorize the Secretary to make federal funds available to states to assist in the conservation of endangered and threatened species, *id.* § 1535(d).

32. A species is “endangered” when it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is “threatened” when it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

33. The ESA requires FWS to determine whether any species is endangered or threatened because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. *Id.* § 1533(a)(1).

34. The ESA also requires FWS to “give consideration” to species that “have been identified as in danger of extinction, or likely to become so within the foreseeable future,” by any State agency responsible for the conservation of fish or wildlife or plants. *Id.* § 1533(b)(1)(B)(ii). The Florida Department of Agriculture and Consumer Services has listed the ghost orchid as endangered.

35. To ensure the timely protection of species at risk of extinction, Congress set forth a detailed process whereby citizens may petition the Secretary to list a species as endangered or threatened. The process includes mandatory, nondiscretionary deadlines that the Secretary must meet so that species in need of protection receive the ESA’s substantive protections in a timely fashion.

36. Upon receipt of a listing petition, FWS must, “to the maximum extent practicable, within 90-days” make an initial finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* § 1533(b)(3)(A). If FWS determines that a petition does present substantial information indicating that listing “may be warranted,” the agency must publish that finding and proceed with a full scientific review of the species’ status, known as a “status review.” *Id.*

37. Upon completing the status review, within 12 months of receiving the petition, FWS must publish a “12-month finding” making one of three listing determinations: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but precluded by higher-priority listing actions. *Id.* § 1533(b)(3)(B).

38. If FWS’s 12-month finding concludes that listing is warranted, the agency must publish notice of the proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. *Id.* § 1533(b)(3)(B)(ii).

39. Within one year of publication of the proposed regulation, the ESA requires FWS to render its final determination on the proposal. *Id.* § 1533(b)(6)(A). At such time, FWS must

either list the species, withdraw the proposed listing rule, or, if there is substantial disagreement about scientific data, delay a final listing determination for up to six months in order to solicit more scientific information. *Id.* § 1533(b)(6)(A)(i), (B)(i).

40. With limited exceptions, the ESA requires FWS to designate “critical habitat” at the time of an imperiled species’ listing as endangered or threatened. *Id.* § 1533(a)(3)(A). Thus, FWS must, “to the maximum extent prudent and determinable,” designate critical habitat for a species “concurrently with making a determination . . . that a species is an endangered species or a threatened species,” *id.* § 1533(a)(3)(A)(i), and within one year of proposing critical habitat, *id.* § 1533(b)(6)(A)(ii), (C)(ii).

41. In requiring the designation of critical habitat at the time of listing the species, the ESA aims to ensure that all species at risk of extinction receive these essential habitat protections in a timely manner. *Id.* § 1533(a)(3)(A), (b)(6)(A)(ii), (b)(6)(C); *see also id.* § 1531(b) (statutory directive to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”).

42. The ESA’s conservation measures apply only after the Secretary lists a species as threatened or endangered. Section 7(a)(2) of the ESA requires all federal agencies to ensure that their actions do not “jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification” of a species’ “critical habitat.” *Id.* § 1535(a)(2). Protecting a species’ critical habitat is crucial for the protection and recovery of many listed species, especially those that are endangered or threatened because of historical and ongoing habitat loss or degradation.

43. The ESA does not protect a species facing extinction until FWS lists it as endangered or threatened; therefore, it is critical that Defendants follow Congress’ ESA listing procedures and deadlines for the species to be protected in a timely manner.

FACTUAL BACKGROUND

44. The ghost orchid produces white flowers with a sweet-smelling evening fragrance. Most blooms occur between June and August. The lower petal has two long tendrils that twist slightly downward, resembling the hind legs of a jumping frog. The roots and short

stem of the orchid are so well camouflaged on trees that the white flower may seem to float in mid-air, hence the name “ghost orchid.”

45. Ghost orchids are found in moist, swampy forests in southwestern Florida and highly restricted areas of Cuba. The ghost orchid colonizes host trees with moist, corrugated, or semi-corrugated bark.

46. In Florida, the ghost orchid is typically found between 3.25-6.5 feet (1-2 meters) above ground level, but always above the high-water mark. Mature plants may not flower at all within a season, and plants with more than one flower open at once are exceedingly rare.

47. At night, as pictured below, the ghost orchid is pollinated by the sphinx moth (*Sphingidae*). The ghost orchid has multiple possible pollinators or flower visitors, but only a few moth species are likely to be effective pollinators.

48. Scientists estimate that the ghost orchid historically had a range greater than 350,000 square kilometers (sq. km.); however, today the current estimated range is less than 29,000 sq. km. This current range includes the Fakahatchee Strand Preserve State Park, Big Cypress National Preserve, Florida Panther National Wildlife Refuge, and a small number of other sites—all United States locations in southwestern Florida. Though conservation areas provide some protection for ghost orchids, the orchids are still vulnerable to existing and new habitat threats.

49. Poaching is an ongoing threat to the ghost orchid due to the species’ inherent beauty and rarity. With such a small population to start, each poaching event is a direct harm to the future of the species. Since the listing petition was submitted, at least one poaching incident has occurred. Five days after FWS published the 90-day finding, on October 24, 2022, Florida’s Fish and Wildlife Conservation Commission officers apprehended poachers in Fakahatchee Strand Preserve State Park. The officers recovered 36 rare epiphytes, including a ghost orchid. Though law enforcement caught these poachers, it is unlikely that officers catch every poacher. Therefore, it is likely the poaching incidents are higher than the recorded incidents reflect. Ghost orchids can be purchased through online retail sites such as Etsy, Amazon, and Bloomify. The sale of and demand pressures on the species will only increase the likelihood of poaching activities.

50. Hurricanes also have significant potential to directly impact ghost orchid habitat. Recent monitoring of a subpopulation in Big Cypress National Preserve indicated that 30 percent

of ghost orchid host trees had died as a result of Hurricane Irma in 2017. Past hurricanes have degraded the ghost habitat by downing trees, contributing to a reduction in mature plants and a decline in the total population. Climate change will likely increase the intensity of major hurricanes in the coming years.

51. Climate change and associated future predicted sea level rise are also significant threats to the ghost orchid. Sea level rise will drastically reduce ghost orchid habitat, causing inundation by sea water and conversion of habitat. The National Oceanic and Atmospheric Administration predicts that sea level on the western Florida coast will rise about half a meter by 2050. South Florida is severely threatened by sea level rise, especially in coastal freshwater ecosystems like the forests of the Fakahatchee Strand.

52. Ghost orchids take a long time to mature and are found in small, isolated subpopulations that can have diminished genetic variability, which can lead to a reduced ability to adapt and respond to environmental stressors, which can decrease the probability of long-term survival. Species that are restricted to geographically limited areas are inherently more vulnerable to extinction than more widespread species because of the increased risk of genetic bottlenecks, random demographic fluctuations, climate change, stochastic events, and localized catastrophes such as hurricanes and disease outbreaks.

53. Wildfires, which are a normal part of the ecosystem dynamics in South Florida, are becoming more severe and threaten ghost orchids due to periodic drought conditions and rising temperatures. While wildfires are helpful to some systems, they can pose significant threats to ghost orchid populations. These fires have the potential to kill ghost orchids directly or by killing host trees. As a result, the habitat quality for ghost orchids is reduced, impacting their survival and overall population dynamics. The combination of increasing wildfire intensity on the ghost orchid's habitat further exacerbates the challenges the species faces in its struggle for survival.

54. On January 24, 2022, Plaintiffs petitioned to list the ghost orchid as threatened or endangered due to ongoing threats to its population. The FWS issued a positive 90-day finding nearly nine months later, on October 22, 2022, stating that the petition presented substantial information warranting consideration for listing. *Id.* § 1533(b)(3)(A). Despite this finding, the FWS has not provided the required 12-month finding, which was due on January 24, 2023. This 12-month finding is necessary to determine whether listing the ghost orchid under the ESA is

warranted, not warranted, or warranted-but-precluded. *Id.* § 1533(b)(3)(B). The listing is essential for the ghost orchid to receive mandatory, binding protection under the ESA.

CLAIM FOR RELIEF

Violation of the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B) Failure to Make a Timely 12-Month Finding for the Ghost Orchid (*Dendrophylax lindenii*)

55. Plaintiffs re-allege and incorporate by reference all the allegations set forth in this Complaint.

56. The ESA mandates that Defendants publish a finding within 12 months of receiving a petition to list a species when it makes a 90-day finding that listing may be warranted. 16 U.S.C. § 1533(b)(3)(B). Defendants have violated that express statutory command.

57. Defendant's violation of the ESA's express statutory command to issue a 12-month finding within twelve months of the date of receipt of a petition has caused injury to Plaintiffs and their members.

58. The failure also constitutes agency action that has been "unlawfully withheld or unreasonably delayed" within the meaning of the APA. 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court enter a Judgment for Plaintiffs providing the following relief:

1. Declare that Defendants violated the ESA and/or the APA by failing to issue a timely 12-month finding on Plaintiffs' petition to list the ghost orchid under the ESA;
2. Order Defendants to issue, by a reasonable date certain, the 12-month finding on the petition to list the ghost orchid under the ESA, 16 U.S.C. § 1533(b)(3);
3. Grant Plaintiffs their attorneys' fees and costs in this action as provided by the ESA, 16 U.S.C. § 1540(g)(4), or any other applicable law; and
4. Provide such other relief as the Court deems just and proper.

DATED: September 13, 2023

Respectfully submitted,

/s/ Elise Pautler Bennett
ELISE PAUTLER BENNETT (FL Bar No. 106573)
Attorney E-mail: ebennett@biologicaldiversity.org
Center for Biological Diversity
P.O. Box 2155
St. Petersburg, FL 33731

Telephone: (727) 755-6950

/s/ Jaclyn Lopez

JACLYN LOPEZ (FL Bar No. 96445)

Attorney E-mail: jmlopez@law.stetson.edu

Jacobs Law Clinic, Stetson University

1401 61st St. S.

Gulfport, Florida 33707

Telephone: (727) 490-9190

*Attorneys for Plaintiffs The Institute for Regional
Conservation, Center for Biological Diversity, and
National Parks Conservation Association*