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September 3, 2014

Via CMRRR 9314 7699 0430 0005 9131 42

The Honorable Sally Jewell
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

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Benjamin Tuggle, Ph.D.
Southwest Regional Director
U.S. Fish and Wildlife Service
500 Gold Avenue, S.W.
Albuquerque, NM 87102

Via CMRRR 9314 7699 0430 0005 9134 01

The Honorable Daniel M. Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

Re: Sixty-day notice of intent to sue for violation of section 4(b)(3)(A) of the Endangered Species Act, based on a failure to make a 90-day finding on the American Stewards of Liberty's petition to delist the Bone Cave harvestman.

Dear Secretary Jewell, Director Ashe, and Regional Director Tuggle:

On behalf of the American Stewards of Liberty, we are informing you of our intent to file a civil suit against the U.S. Fish and Wildlife Service ("Service") pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g). We are providing this letter to you pursuant to the 60-day notice requirement of the citizen suit provision. Specifically, the basis for the intended lawsuit is that the Service has failed to timely make its required 90-day finding on the American Stewards of Liberty's petition to delist the Bone Cave harvestman (*Texella reyesi*) in accordance with ESA § 4(b)(3)(A).

Factual Background:

The Bone Cave harvestman is known to occur only in limestone caves and voids north of the Colorado River in Travis and Williamson Counties, Texas. The Service originally listed the harvestman in 1988 based on limited information. In 1988, the Service made largely unsupported assumptions as to the harvestman's rarity and listed the species as endangered. Since the harvestman's listing in 1988, there has been an increase in known cave localities from five or six to an astonishing 172. As more data have been gathered, the rarity theorized by the Service in 1988 has been shown to be in error. Moreover, significant conservation is in

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place with at least 94 known localities (55 percent of the total known localities) currently protected in preserves, parks, or other open spaces.

Biologists continue to discover new, occupied localities and this trend is likely to continue as more areas are explored and more caves are discovered. New information indicates that this species inhabits not just caves that humans can access, but tiny cracks and voids of all sizes in the limestone substrate of Travis and Williamson counties north of the Colorado River. Development activities on the surface are not as detrimental to the harvestman as the Service originally assumed. For example, the harvestman lives successfully in Inner Space Caverns, a heavily-visited recreational attraction located under an Interstate Highway, as well as in dozens of other well-known caves surrounded by development. In addition, state and local ordinances already protect most caves in Travis and Williamson counties (e.g. City of Austin Environmental Criteria Manual, City of Georgetown Resolution No. 122013-C, Texas Commission on Environmental Quality's (TCEQ) Edwards Aquifer Rules, and the TCEQ Texas Pollution Discharge Elimination System (TPDES)).

On June 2, 2014, the American Stewards of Liberty filed a petition with the Service to delist the Bone Cave harvestman. Pursuant to ESA § 4(b)(3)(A), the Services was required to make a finding within 90 days as to whether the petitioned action may be warranted. Ninety days have passed since the American Stewards of Liberty filed their petition and the Service has not published its determination.

Legal Background:

Section 4 of the ESA authorizes individuals to petition the Secretary of the Interior to list, downlist, or delist a species. Once a petition has been filed with the Service, the Service is obligated to respond.¹ As stated in ESA § 4(b)(3)(A):

To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

If at this “90-day finding” stage the Service makes a positive determination that delisting may be warranted, ESA § 4(b)(3)(B) obligates the Service to

“within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, ...make one of the following findings:

- (i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

¹ The Secretary has delegated its authority under the ESA to the Service.

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- (ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).
- (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 of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

Once a proposed rule has been issued in conjunction with a positive 12-month finding, ESA § 4(b)(6)(A)(i)(I) requires that the Service, within one-year of the date of publication of the proposed regulation, publish the final regulation to implement its determination to delist the species.

ESA § 11(g) gives an express right for any person to “commence a civil suit on his own behalf ... against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under [Section 4] which is not discretionary with the Secretary.” Therefore the ESA allows citizen suits for failures of the Service to meet its obligations under Section 4. The Service’s failure to make a 90-day finding on the harvestman is such an instance. The petition consists of sixty-five pages, clearly-written and documented. It should not require so many hours to review those sixty-five pages (which, in accordance with Section 4 is the only document that the Service reviews for a 90-day determination) such that the review could not be accomplished and the Service’s determination published within the prescribed time frame.

American Stewards of Liberty:

The American Steward of Liberty, along with the other parties that will be joining in the lawsuit have been impacted by the Bone Cave harvestman’s status as federally endangered under the ESA. Since the listing 26 years ago, the Service has assumed that surface disturbance above a void or cave caused destruction of the subsurface ecosystem. Throughout that time, the Service has required that developments be severely restricted in the vicinity of caves occupied by the harvestman. In fact, under Williamson County’s regional habitat conservation plan, landowners must set aside at least 8.5 acres around an occupied cave or pay up to \$400,000 to develop within 50 feet of the cave entrance. Discovering a previously unknown void during construction is a significant risk within the range of the harvestman. Dozens of projects under active construction, including important public highway projects, have been put on hold, sometimes for weeks, with contractors and equipment idled so that biologists could conduct surveys for the harvestman and coordinate with Service staff. A conservative estimate of what this listing has cost landowners, citizens and local governments is \$150 million dollars.

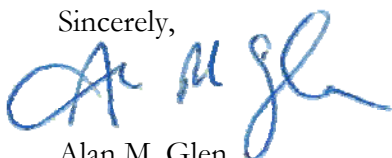
Conclusion:

Ninety days have passed since the American Stewards of Liberty filed their petition with the Service to delist the Bone Cave harvestman. The Service has not published the 90-day finding it was required to make in

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accordance with Section 4(b)(3)(A). The Service's sole duty at this juncture is to review the petition and make a determination whether the petition presents substantial scientific or commercial information indicating that delisting may be warranted. The Service should be able to review the sixty-five page petition and make such a finding within the prescribed timeframe. Pursuant to ESA § 11(g), the American Stewards of Liberty intends to commence a civil suit based on the Service's failure to make its required 90-day finding. If the Service does not make the required finding for the Bone Cave harvestman within the next sixty days, we intend to file suit.

Sincerely,

A handwritten signature in blue ink, appearing to read "A M Glen". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Alan M. Glen
Sedgwick LLP