

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

AMERICAN STEWARDS OF LIBERTY, §
et. al. §

Plaintiffs, §

v. §

DEPARTMENT OF THE INTERIOR, *et* §
al. §

Defendants. §
§

CIVIL ACTION NO. 1:15-cv-01174-LY

FEDERAL DEFENDANTS' MOTION FOR
VOLUNTARY REMAND WITHOUT VACATUR

This case involves a challenge to the U.S. Fish and Wildlife Service's ("Service") finding that a petition failed to present substantial scientific or commercial information to remove the Bone Cave harvestman from the Federal List of Endangered and Threatened Wildlife under the Endangered Species Act ("ESA"). Pursuant to Rule 7 of the Federal Rules of Civil Procedure and Local Rule 7, the Service respectfully moves the Court for a voluntary remand of this finding because the Service did not directly consider all of the information that was submitted in support of the petition. The Service will undertake a reevaluation of the petition and its reference materials, and will submit a new finding on the petition to the Federal Register no later than March 31, 2017.

As explained more fully below, voluntary remand is within the Court's equitable powers and is appropriate in light of the Service's acknowledgement that materials accompanying the petition were not directly considered in the challenged finding. Vacatur is not warranted and, further, would not provide the relief sought by Plaintiffs or Intervenors, because regardless of whether the 90-day finding is vacated, remand of the finding would leave in place the status quo, i.e., the Bone Cave harvestman would remain an endangered species.¹ The Service also respectfully requests that the Court adopt the proposed remand schedule, which is appropriate and reasonable in light of the Service's existing commitments and projected budget.

On November 9, 2016, undersigned counsel provided the parties with notice that the Service would seek a voluntary remand and a date by which the new finding will be made. Although undersigned counsel provided the other parties with a summary of this motion, Plaintiffs and Intervenors were not willing to provide a position in advance of the filing, and instead reserved their position until they see the filed motion. A proposed order is attached.

¹ The negative 90-day finding obviated the requirement to undertake further analysis on the petition and the status of the species, so even if it was a positive 90-day finding, the Bone Cave harvestman would remain listed as endangered. If the Service concludes in its remanded finding that the petition presents substantial information indicating that delisting the species may be warranted (a positive 90-day finding), it will proceed with making a 12-month finding on whether or not delisting is warranted.

BACKGROUND

I. STATUTORY BACKGROUND

The ESA provides for the listing of species as endangered or threatened. 16 U.S.C. § 1533. An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). Any “interested person” may submit a petition requesting that the Secretary² list, reclassify, or remove a species from the list of protected species. 5 U.S.C. § 553(e); 16 U.S.C. § 1533(b)(3)(A). Section 4 of the ESA provides that “[t]o the maximum extent practicable,” the Secretary must make a finding within 90 days of receiving such a petition “as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). This is known as a “90-day finding.”

In a 90-day finding the Service is determining whether the petition presents the requisite “substantial scientific or commercial information” that the petitioned listing action may be warranted. *See* 16 U.S.C. § 1533(b)(3)(A)-(B). If the Service makes a “positive” 90-day finding, then it must conduct a status review and, within 12 months of receiving the petition, make a finding that the action sought by the petition is either warranted; not warranted; or warranted, but precluded by higher listing priorities. *Id.* § 1533(b)(3). A negative 90-day finding, such as occurred here, ends the listing process for that petition and is subject to judicial review. 16 U.S.C. §§ 1533(b)(3)(C)(ii).

² In this case, “Secretary” refers to the Secretary of the Interior. The Secretaries of Commerce and the Interior share responsibility for implementing the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior is responsible for administering the statute with respect to terrestrial organisms, such as the Bone Cave harvestman, which is the endangered species at issue in this case, and discharges the relevant portions of her responsibility through the Service. *See* 50 C.F.R. §§ 17.11, 402.01(b).

II. FACTUAL AND PROCEDURAL BACKGROUND

On September 16, 1988, the Service determined that the Bone Cave harvestman was endangered under the ESA. 53 Fed. Reg. 36,029 (Sept. 16, 1988).³ The Bone Cave harvestman is a species of spider whose habitat is located in the Edwards Plateau in Travis and Williamson counties. 58 Fed. Reg. 43,818 (Aug. 18, 1993). On June 1, 2015, in response to a petition to remove the Bone Cave harvestman from the list of endangered species, the Service determined that the petition failed to present substantial scientific or commercial information indicating that the removal may be warranted. 80 Fed. Reg. 30,990 (June 1, 2015).

On December 15, 2015, Plaintiffs filed the Complaint challenging the 90-day finding, and an Amended Complaint on June 28, 2016. ECF Nos. 1, 24. Plaintiffs challenge the 90-day finding as violating the statutory requirements of the ESA and APA by primarily failing to apply the correct standard for 90-day findings under the ESA. ECF No. 24 at 22-23. On December 16, 2015, Intervenors filed their Motion to Intervene. Intervenors challenge the 90-day finding as unconstitutional under the Commerce Clause. ECF No. 18 at 11-15.

STANDARD OF REVIEW

A “voluntary remand” is a request by an agency for “remand without [judicial] consideration of the merits.” *Central Power & Light Co. v. United States*, 634 F.2d 137, 145 (5th Cir. 1980). The Supreme Court has explained that a court’s authority to remand a decision without judicial consideration is vested in its equitable powers:

The jurisdiction to review the orders of [the agency] is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.

³ The 1988 final listing determination included five separate species, one of which was the Bee Creek Cave harvestman. Subsequent scientific studies concluded that the Bee Creek Cave harvestman actually consisted of two separate species: the Bee Creek Cave harvestman and the Bone Cave harvestman. As a result, in 1993, the Service made a technical correction to include both species on the list of endangered species. 58 Fed. Reg. 43,818 (Aug. 18, 1993).

Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939). A voluntary remand is consistent with the principle that “[e]mbedded in an agency’s power to make a decision is its power to reconsider that decision.” *ConocoPhillips Co. v. E.P.A.*, 612 F.3d 822, 832 (5th Cir. 2010) (citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)). “When an agency action is under review by a federal court, the agency may . . . seek a remand to reconsider its decision.” *Frito-Lay, Inc. v. U.S. Dep’t of Labor*, 20 F. Supp. 3d 548, 552-53 (N.D. Tex. 2014) (citing *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1027–28 (Fed. Cir. 2001)). “[E]ven in the absence of intervening events [since the agency’s original action], the agency may request a remand, without confessing error, to reconsider its previous position.” *Frito-Lay*, 20 F. Supp. 3d at 553 (citing *SKF-USA*, 254 F.3d at 1028). “An agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion” and notice must be provided to the parties. *ConocoPhillips Co. v. E.P.A.*, 612 F.3d at 832.

Courts “commonly grant such motions [for voluntary remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.” *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 n.3 (D.C. Cir. 1993) at 524 (collecting cases); *Anchor Line Ltd. v. Fed. Maritime Comm’n*, 299 F.2d 124, 125 (D.C. Cir. 1962) (“when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency”). Even where a party objects to the requested voluntary remand, courts routinely grant such motions. *See, e.g., ConocoPhillips Co. v. E.P.A.*, 612 F.3d at 831-33 (granting motion for voluntary remand over objection by intervenor); *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417-18 (6th Cir. 2004) (reversing denial of motion for voluntary remand over plaintiff’s objection and noting such remands may be appropriate even where there has been no new evidence or intervening change in law); *Ethyl Corp.*, 989 F.2d at 524 (granting voluntary remand over the plaintiff’s objection).

ARGUMENT

I. VOLUNTARY REMAND IS APPROPRIATE IN THIS CASE.

The circumstances of this case satisfy the well-established grounds for granting a voluntary remand. The Service requests a voluntary remand of the 90-day finding for the Bone Cave harvestman in order to evaluate certain reference materials that were not directly considered in the original 90-day finding. After producing the administrative record for this case, the Plaintiffs advised the Service that the administrative record was missing certain reference materials that the petitioners had provided separately on a disc that accompanied the petition. Declaration of Gary Frazer (“Frazer Decl.”) (Def. Ex. A) ¶ 3. The Service then realized that the disc containing these reference materials had not reached the field staff responsible for evaluating the scientific materials related to the 90-day finding, and as such, the Service did not directly review them. *Id.* Part of the problem was that the petition did not mention the disc containing these reference materials. *Id.*

The Service’s request is neither arbitrary nor capricious, because the remand will allow the Service to directly consider the “electronic or hard copies of supporting materials” in completing the new 90-day finding on the petition. 50 C.F.R. § 424.14(c)(6); *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002) (finding voluntary remand reasonable based on the misdelivery of a brief). Because it appears that electronic copies of reference materials provided to the Service on disc were not considered in the 90-day finding, the Service believes it is appropriate to reconsider the underlying petition, including all of the reference materials provided with the petition. Frazer Decl. ¶ 5. The reevaluation of the underlying petition and the supplemental materials will result in a new 90-day finding, superseding the 90-day finding at issue in this case. *Id.* As required by the ESA, the Service will make a new finding as to whether the petition presents substantial scientific or commercial information indicating that removing the Bone Cave harvestman from the List of Endangered and Threatened Wildlife may be warranted. *See* 16 U.S.C. § 1533(b)(3)(A). The Service will publish the new 90-day finding in the Federal Register and comply with any subsequent requirements of the ESA. Frazer Decl. ¶ 5.

If the Court grants this motion for a voluntary remand, the Service intends to initiate the process of a new 90-day finding as soon as the Court issues its order. *Id.* ¶ 6. Assuming the Court grants this Motion and there are no significant adverse changes, among other things, to the Service's current budget and workload, the Service anticipates submitting a new 90-day finding regarding the Bone Cave harvestman to the Federal Register by March 31, 2017. Frazer Decl. ¶¶ 6-7. This date is reasonable and appropriate under the circumstances given the Service's other existing commitments, court-ordered deadlines, and budgetary constraints. *Id.* ¶¶ 6-7.

Granting the Service's request for a remand, rather than adjudicating the merits of Intervenor's and Plaintiffs' claims will conserve judicial and party resources. *Ethyl Corp.*, 989 F.2d at 524 (courts "commonly grant such motions [for voluntary remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete"); *Frito-Lay, Inc. v. U.S. Dep't of Labor*, 20 F. Supp. 3d at 553. Indeed, granting a voluntary remand of the 90-day finding will result in largely the same relief that the parties would be entitled to if they prevailed on the merits of their claims. As the Fifth Circuit has held, except in rare circumstances, when a plaintiff alleges that "an agency decision is not sustainable on the basis of the administrative record, the matter should be remanded to the agency for further consideration." *Basinkeeper v. U.S. Army Corps of Engineers*, No. 15-6982, 2016 WL 3180643, at *4 (E.D. La. June 8, 2016) (quoting *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 238–39 (5th Cir. 2007)); see Pls. Am. Comp., Prayer for Relief, ¶ 3 (asking the Court for an order remanding the 90-day finding to the agency).

Reconsideration also must occur within a reasonable time after the decision being reconsidered was made, and notice of the agency's intent to reconsider must be given to the parties. See *ConocoPhillips Co. v. E.P.A.*, 612 F.3d at 832. Courts have found that there is "no hard and fast rule regarding what constitutes 'reasonable time' with respect to voluntary remand." *Frito-Lay, Inc. v. U.S. Dep't of Labor*, 20 F. Supp. 3d at 555 (collecting cases and finding that it is clear "that apparently no true rules exist"). Here, the challenged 90-day finding

was published on June 1, 2015. 80 Fed. Reg. 30,990. The Service, however, was not aware that the administrative record was missing certain reference materials until the Plaintiffs notified the Service on September 1, 2016. Shortly after learning about this missing material, the Service and Plaintiffs attempted to resolve the matter through settlement, *see* ECF Nos. 37, 39, but those attempts proved unsuccessful and the Service promptly filed this motion. *Macktal*, 286 F.3d at 826 (taking into account the fact that the agency acted promptly once it became aware of its decision to reconsider and gave notice to the parties).

The request for voluntary remand is also timely, as briefing for Intervenor's claims is not scheduled to be complete until February 17, 2017, and the court is not scheduled to hear oral argument until March 24, 2017. *See* ECF No. 35 at 3. However, the Service intends to move to stay that briefing and argument, because proceeding would be a waste of judicial and party resources given that the Service is scheduled to complete its new 90-day finding on the Bone Cave harvestman on March 31, 2017, a week after the scheduled argument date. Frazer Decl. ¶ 7. On November 9, 2016, undersigned counsel provided notice to the parties of the grounds for the motion and the date for the new 90-day finding. Def. Ex. B (email string). In light of the Intervenor's upcoming briefing deadline, the Service also offered to extend or stay the briefing deadlines to allow adequate time to respond to the motion for voluntary remand, but Intervenor declined. Therefore, this motion is timely, and the parties were provided notice of the Service's motion on November 9, 2016, and offered an extension or stay if needed.

II. REMAND SHOULD BE WITHOUT VACATUR.

The Court should allow the Service to reconsider its 90-day finding for the Bone Cave harvestman without vacating the current finding. Allowing the finding to remain in place is well within the Court's equitable discretion. *Frito-Lay, Inc. v. U.S. Dep't of Labor*, 20 F. Supp. 3d at 557-58. Remand without vacatur is appropriate: "when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so, and when

vacating would be disruptive.”⁴ *Central and South West Services, Inc. v. United States Environmental Protection Agency*, 220 F.3d 683, 692 (5th Cir. 2000).

The circumstances here meet this test. Although the Service did not consider the missing reference materials, there is a serious possibility that the agency will be able to substantiate its 90-day finding on remand. In addition, litigating over the current 90-day finding would be waste judicial and party resources because the current claims will become moot when the Service issues its new 90-day finding based on a new administrative record, which will occur before the Court would be able to even finish adjudicating the current case. *See Frito-Lay, Inc. v. U.S. Dep't of Labor*, 20 F. Supp. 3d at 557-58 (a court should not have to consider how it would rule if “the record that was before the [Service] were different from what it actually was.”).

Moreover, neither Plaintiffs nor Intervenors will be prejudiced by leaving the 90-day finding in place during remand because whether the finding is vacated or not would not alter the fact that the Bone Cave harvestman will remain listed during the remand. This is because the 90-day finding found that delisting the species was not warranted based on the available information, so the species would still remain listed. Remanding the finding would allow the Service to make a new 90-day finding based on a new administrative record that includes the reference materials provided on the disc. If the Service concludes in the new finding that the petition presents substantial information indicating that delisting the species may be warranted, it will proceed with making a 12-month finding on whether or not delisting is warranted. If the Service concludes in the new 90-day finding that the petition does not present substantial information indicating that delisting may be warranted, the merits of the finding can then be challenged by Plaintiffs and Intervenors according to the new administrative record.

⁴ Furthermore, some district courts have found that vacatur is not appropriate where it would require an “independent determination” that the agency decision is not in accordance with the law. *Frito Lay*, 20 F. Supp. 3d at 557-58; *see also Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135 (D.D.C. 2010).

In sum, the Service's request that the Court leave the 90-day finding in place pending completion of remand satisfies the factors that courts in this Circuit consider in deciding whether to vacate.

CONCLUSION

For all the foregoing reasons, the Service respectfully requests that the Court grant its motion and enter an order remanding the 90-day finding for the Bone Cave harvestman to the Service for preparation of a new 90-day finding to be submitted to the Federal Register by March 31, 2017. The Service's request for voluntary remand without vacatur is reasonable, timely, and all parties were provided with valid notice. *See ConocoPhillips Co. v. E.P.A.*, 612 F.3d at 832.

Respectfully Submitted,

JOHN C. CRUDEN,
Assistant Attorney General
SETH M. BARSKY, Chief
MEREDITH L. FLAX, Assistant Chief

/s/ Jeremy Hessler

JEREMY HESSLER
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Phone: (202) 305-0431
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Email: jeremy.hessler@usdoj.gov

Attorneys for Federal Defendant

OF COUNSEL
FRANK LUPO, Attorney Advisor
U.S. Department of the Interior, Office of the Regional Solicitor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2016, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jeremy Hessler

JEREMY HESSLER
California Bar No. 281462
U.S. Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-0204
Facsimile: (202) 305-0275

Defense Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

AMERICAN STEWARDS OF LIBERTY, et al.,))	Case No. 15-cv-1174-LY
Plaintiffs,))	
v.))	
UNITED STATES FISH & WILDLIFE))	DECLARATION OF
SERVICE, et. al,))	GARY FRAZER
Defendants.))	
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I, Gary Frazer, declare as follows:

1. I am the Assistant Director for Ecological Services of the U.S. Fish and Wildlife Service (“Service”), an agency of the U.S. Department of the Interior, located in Washington, D.C. In my capacity as Assistant Director, I am responsible to the Director of the Service and to the Secretary of the Interior for the administration of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, including recommendations about whether species should be listed as endangered or threatened and designations of critical habitat.

2. The Service added the species involved in this litigation, the Bone Cave harvestman (*Texella reyesi*), to the Federal List of Endangered and Threatened Wildlife in 1988. In 2014, the Service received a petition to remove the Bone Cave harvestman from the Federal List of Endangered and Threatened Wildlife. On June 1, 2015, the Service published in the *Federal Register* a “90-day finding,” pursuant to 16 U.S.C. §

1533(b)(3)(A), concluding that the petition failed to present substantial scientific or commercial information indicating that removing the species from the Federal List of Endangered and Threatened Wildlife was warranted. 90-Day Finding on Petition to Remove the Bone Cave Harvestman (*Texella reyesi*) From the List of Endangered and Threatened Wildlife, 80 Fed. Reg. 30,990 (June 1, 2015). This litigation was brought in response to the Service's negative 90-day finding.

3. After the Service compiled and produced the Administrative Record for this lawsuit, the Plaintiffs advised the Service that the Administrative Record was missing certain reference materials that the petitioners had provided on a disc that accompanied the petition. Upon further investigation, the Service has concluded that the disc did not reach the Service's Texas Ecological Services office, which was directly responsible for drafting the 90-day finding. Instead, the field staff received only an electronic copy of the petition itself, and not the accompanying disc with reference materials. The petition itself contained no indication that an accompanying disc of reference materials was provided. As such, those reference materials were not directly considered in making the 2015 90-day finding.

4. The Service's regulations related to ESA petitions require a petition to include "electronic or hard copies of supporting materials" so that those materials may be considered in the Service's finding regarding the petition. 50 C.F.R. § 424.14(c)(6).

5. Because it appears the petition included electronic copies of reference materials that were not considered in the 2015 90-day finding, the Service believes it is appropriate to reconsider the underlying petition, including all of the reference materials provided with the petition. The reconsideration of the underlying petition will result in a new 90-day finding. Pursuant to 16 U.S.C. § 1533(b)(3)(A), the Service will make a finding as to whether the petition presents substantial scientific or commercial information indicating that removing the Bone Cave harvestman from the List of Endangered and Threatened Wildlife may be warranted. If the petition is found to present such information, the Service shall promptly commence a review of the status of the species. The Service will

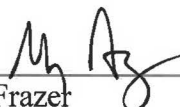
publish the new 90-day finding in the *Federal Register* and comply with any subsequent requirements of the ESA.

6. The Service intends to initiate the process of a new 90-day finding regarding the petition, including all supporting materials provided with the petition, as soon as the Court issues a remand order. This new 90-day finding will be conducted by biologists in the Service's Texas Ecological Services office and will include review by Service scientists at both the Regional Office in New Mexico and Headquarters in Falls Church, Virginia. The Service has struggled for many years to balance its workload of statutorily-required petition findings, proposed and final listing rules, and critical habitat designations in light of its limited resources. The Service is required by several existing court orders to complete other petition findings, proposed and final listing rules, and critical habitat designations by previously identified dates in the coming weeks and months. In particular, some of the Service staff who will be involved in this new 90-day finding for the Bone Cave harvestman are already tasked with completing five 12-month findings on or before December 30, 2016, pursuant to a court order in *New Mexico Cattle Growers' Association, et al. v. U.S. Department of the Interior*, 15-cv-01065-PJK-LF (D. N.M.).

7. The Service anticipates being able to submit a new 90-day finding regarding the Bone Cave harvestman to the *Federal Register* by March 31, 2017. We make this projection based on certain assumptions regarding available staff and resources, specifically (i) that the amount of funding available will not be substantially less than that in the current Continuing Resolution; (ii) that the Service will not be required to comply with significant additional court orders to complete new petition findings, listing determinations, or critical habitat designations; (iii) that the Service will continue to have the legal authority to complete 90-day findings; and (iv) that the Service will continue to have the authority to hire and retain sufficient program staff to be able to carry out the specified commitments.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on November 14, 2016.



Gary Frazer
Assistant Director for Ecological Services
U.S. Fish and Wildlife Service

Defense Exhibit B

From: Hessler, Jeremy (ENRD)
To: ["Weiland, Paul S."](#); [Ennis, Chad](#); [Chance Weldon](#); [Robert Henneke](#); [Collins, Kevin](#); [Glen, Alan M. Lawrence-Hammer, Lesley \(ENRD\)](#); [Lupo, Frank](#)
Cc:
Subject: RE: BCH - Motion for Voluntary Remand
Date: Thursday, November 10, 2016 3:29:00 PM

Paul and Chad:

Due to DOJ policy, I am unable to share a draft of our motion prior to filing it. As you recall, yesterday I shared the following summary of our motion with you:

The Service will file a motion for a voluntary remand to allow it to make a new 90-day finding with respect to the petition dated June 2, 2014. The reason for this voluntary remand is to allow the Service to consider all the information included with or referenced in the petition. The Service will send the new 90-day finding to the Federal Register no later than March 31, 2017.

If you are not willing to provide a position based on this summary, I can state in the motion that the other parties indicated that they reserve their position until they see the filed motion.

Thanks,

Jeremy

From: Weiland, Paul S. [mailto:pweiland@nossaman.com]
Sent: Thursday, November 10, 2016 2:40 PM
To: Hessler, Jeremy (ENRD) <JHessler@ENRD.USDOJ.GOV>; Ennis, Chad <Chad.Ennis@bracewelllaw.com>; Chance Weldon <cweldon@texaspolicy.com>; Robert Henneke <rhenneke@texaspolicy.com>; Collins, Kevin <Kevin.Collins@bracewelllaw.com>; Glen, Alan M. <aglen@nossaman.com>
Cc: Lawrence-Hammer, Lesley (ENRD) <LLawrence-@ENRD.USDOJ.GOV>; Lupo, Frank <frank.lupo@sol.doi.gov>
Subject: RE: BCH - Motion for Voluntary Remand

Plaintiffs are not prepared to take a position on a motion for voluntary remand until we see the motion and memo in support.

It is not clear whether you are asking for our input on any other motion. Is the government intending to file a motion to seek a stay? Is the government also intending to file a motion to lift the stay currently in place?

Paul

From: Hessler, Jeremy (ENRD) [mailto:Jeremy.Hessler@usdoj.gov]
Sent: Thursday, November 10, 2016 11:35 AM
To: Ennis, Chad; Weiland, Paul S.; Chance Weldon; Robert Henneke; Collins, Kevin; Glen, Alan M.
Cc: Lawrence-Hammer, Lesley (ENRD); Lupo, Frank
Subject: RE: BCH - Motion for Voluntary Remand

Thank you for your response. I will represent Intervenors as opposing a motion to stay or in the alternative extend Defendants' response deadline to your motion for summary judgment.

Do Intervenors oppose the motion for a voluntary remand?

From: Ennis, Chad [<mailto:Chad.Ennis@bracewelllaw.com>]
Sent: Thursday, November 10, 2016 2:30 PM
To: Hessler, Jeremy (ENRD) <JHessler@ENRD.USDOJ.GOV>; Weiland, Paul S. <pweiland@nossaman.com>; Chance Weldon <cweldon@texaspolicy.com>; Robert Henneke <rhenneke@texaspolicy.com>; Collins, Kevin <Kevin.Collins@bracewelllaw.com>; Glen, Alan M. <aglen@nossaman.com>
Cc: Lawrence-Hammer, Lesley (ENRD) <LLawrence-@ENRD.USDOJ.GOV>; Lupo, Frank <frank.lupo@sol.doi.gov>
Subject: RE: BCH - Motion for Voluntary Remand

Jeremy,

Based on what you have told us, we do not see a reason to alter the briefing schedule. We do not believe that a remand has any bearing on our Constitutional claims.

Best,
Chad

From: Hessler, Jeremy (ENRD) [<mailto:Jeremy.Hessler@usdoj.gov>]
Sent: Thursday, November 10, 2016 12:06 PM
To: Ennis, Chad; Weiland, Paul S.; Chance Weldon; Robert Henneke; Collins, Kevin; Glen, Alan M.
Cc: Lawrence-Hammer, Lesley (ENRD); Lupo, Frank
Subject: RE: BCH - Motion for Voluntary Remand

Hello Chad,

I think there are at least two options for the parties to work this out jointly.

We could avoid the voluntary remand entirely if the parties agree to stay the case until the new finding is finished (i.e. 3/31/17). Then based on the new finding, we can discuss dismissal or a date to file amended complaints.

Alternatively, we can file a motion for voluntary remand, and then move to stay the briefing schedule or extend it by x number of days if the court does not grant the voluntary remand.

I am happy to talk more about options today, and I am hopeful that we avoid unnecessary motions practice.

Thanks,

Jeremy

From: Ennis, Chad [<mailto:Chad.Ennis@bracewelllaw.com>]
Sent: Thursday, November 10, 2016 12:06 PM
To: Hessler, Jeremy (ENRD) <JHessler@ENRD.USDOJ.GOV>; Weiland, Paul S. <pweiland@nossaman.com>; Chance Weldon <cweldon@texaspolicy.com>; Robert Henneke <rhenneke@texaspolicy.com>; Collins, Kevin <Kevin.Collins@bracewelllaw.com>; Glen, Alan M. <aglen@nossaman.com>
Cc: Lawrence-Hammer, Lesley (ENRD) <LLawrence-@ENRD.USDOJ.GOV>; Lupo, Frank <frank.lupo@sol.doi.gov>
Subject: RE: BCH - Motion for Voluntary Remand

Jeremy,

Do you intend to file any motions with respect to Intervenors case based upon the voluntary remand?

Chad

CHAD ENNIS

Senior Counsel

Chad.Ennis@bracewelllaw.com

T: +1.512.494.3622 | F: +1.800.404.3970

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From: Hessler, Jeremy (ENRD) [<mailto:Jeremy.Hessler@usdoj.gov>]
Sent: Wednesday, November 09, 2016 11:55 AM
To: Weiland, Paul S.; Chance Weldon; Ennis, Chad; Robert Henneke; Collins, Kevin; Glen, Alan M.
Cc: Lawrence-Hammer, Lesley (ENRD); Lupo, Frank
Subject: BCH - Motion for Voluntary Remand

Hello all,

The Service will soon file a motion for a voluntary remand to allow it to make a new 90-day finding with respect to the petition dated June 2, 2014. The reason for this voluntary remand is to allow the Service to consider all the information included with or referenced in the petition. The Service will send the new 90-day finding to the Federal Register no later than March 31, 2017.

Seeing as Intervenors' opening motion is due Nov. 15, the Service is amenable to an extension or stay of the briefing schedule to allow Intervenors sufficient time to consider this new information.

Please let me know your clients' position on this motion no later than 5:00 pm ET tomorrow (11/10).

Thank you,

Jeremy

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AMERICAN STEWARDS OF)	
LIBERTY, et al.)	No. 15-cv-1174-LY
)	
Plaintiff)	
)	[PROPOSED] ORDER
v.)	
)	
UNITED STATES FISH & WILDLIFE)	
SERVICE, et al.,)	
)	
Defendants.)	
_____)	

This Court, having considered the Defendants’ Motion for Voluntary Remand, and for good cause shown, the Court finds that Defendants’ Motion is reasonable, timely, and all parties were provided with valid notice. It is **HEREBY ORDERED** that Defendants’ Motion for Voluntary Remand granted and the Service is ordered to prepare and send a new 90-day to the Federal Register by March 31, 2017.

IT IS SO ORDERED on this ___ day of _____, 2016.

HON. LEE YEAKEL
UNITED STATES DISTRICT JUDGE