



March 20, 2024

***Sent via electronic and certified mail***

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**RE: Sixty-day Notice of Intent to Sue for Violations of the Endangered Species Act Relating to the U.S. Fish and Wildlife Service's Failure to Make a 90-Day Determination on a Petition to Revise Critical Habitat for the Sonora chub**

Dear Secretary Haaland,

This letter serves as a 60-day notice of intent to sue the Secretary and U.S. Fish and Wildlife Service ("FWS") from the Center for Biological Diversity, pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), for failing to make a required "90-day finding" on their March 15, 2023 petition to revise existing critical habitat for the threatened Sonora chub (*Gila ditaenia*).

**I. The Petition to Revise Critical Habitat for the Threatened Sonora Chub**

The Sonora chub is a small minnow endemic to streams in southern Arizona and northern Sonora, Mexico. It was listed in 1986 under the ESA due to being threatened by the possible introduction of exotic fishes and their parasites into its habitat, and by potential mining activities. It was considered to be particularly vulnerable to these threats due to its very limited range and intermittent stream habitat in the United States.<sup>1</sup> Since

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<sup>1</sup> 51 Fed. Reg. 16,042(April 30, 1986).

then, the threats to the Sonora chub have grown to include climate change, fire and border activities. The species is also threatened by water development and grazing and continues to remain in a highly precarious state.

FWS designated critical habitat for the Sonora chub concurrently with listing, to include the entire U.S. portion of the species' range as it was known at the time.<sup>2</sup> However, in 1995, a new population of Sonora chub was discovered in California Gulch, outside of the current critical habitat designation. According to FWS, "the limited distribution of Sonora chub in the U.S. places inordinate importance on the quality of habitat in Sycamore Creek and California Gulch."<sup>3</sup> Yet, critical habitat was never revised to include this area.

On March 15, 2023, the Center petitioned to expand critical habitat to California Gulch. This area has habitat features that are essential to the conservation of the species and that are subject to multiple threats such as livestock grazing, border activities and mining. A critical habitat designation is required to ensure that consultations under Section 7(a)(2) of the ESA analyze the impacts of human actions to both the species and the proposed critical habitat as the "jeopardy" and "destruction or adverse modification" standards are not interchangeable.<sup>4</sup>

There are many additional benefits to designating critical habitat that go beyond those arising from the consultation process, such as noticing the public about the existence of important habitat. Protecting California Gulch is additionally necessary to fulfill the Sonora chub recovery plan<sup>5</sup> objective of maintaining populations in all extant locations<sup>6</sup>. It is moreover essential to the survival and recovery of the Sonora chub because of its precarious status and because it would increase the species' redundancy, resiliency and representation, and therefore its viability. Despite being listed for decades, the Sonora chub's ability to sustain long-term populations is highly uncertain due to its extremely limited range in the U.S., coupled with a growing number of threats and inadequate habitat protections.

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<sup>2</sup> 51 Fed. Reg. at 16,044.

<sup>3</sup> Final Biological and Conference Opinion for the Natural Resources Conservation Services' Working Lands for Wildlife Project, U.S. Fish and Wildlife Service Ecological Services, Albuquerque, New Mexico (February 13, 2015) (emphasis added).

<sup>4</sup> 16 U.S.C. § 1536(a)(2).

<sup>5</sup> 16 U.S.C. § 1533(f)(1).

<sup>6</sup> Sonora chub five-year status review August 2013, U.S. Fish and Wildlife Service Ecological Services, Phoenix, Arizona.

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FWS has acknowledged receipt of the petition but has not yet issued its first required response, the 90-day finding.

## **II. FWS' Duty to Respond to the Petition**

FWS maintains ongoing duties with respect to critical habitat. The ESA provides for critical habitat revision, subject to the same “best available scientific data” standard as an initial designation.<sup>7</sup> It further provides the right to petition for critical habitat revision, in accordance with the Administrative Procedure Act (“APA”).<sup>8</sup> The evaluation of such petitions is governed by ESA implementing regulations.<sup>9</sup>

Similar to the process for citizen listing petitions, the ESA requires FWS, within 90 days of receiving the critical habitat revision petition, to “make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted.”<sup>10</sup> It has yet to make this required initial finding here.

## **III. FWS' Ongoing Failure to Issue a 90-Day Finding on the Sonora Chub Critical Habitat Revision Petition Violates the Endangered Species Act**

FWS is in violation of the Endangered Species Act by failing to issue a 90-day finding in response to the March 15, 2023 petition to revise critical habitat for the Sonora chub. This finding was due on or about June 15, 2023.

This notice is provided pursuant to the ESA's citizen suit provision on behalf of Center for Biological Diversity.<sup>11</sup> If FWS does not remedy this violation within the next 60 days, this organization intends to file suit in federal court. Please contact me should you have any questions or if you would like to discuss this matter.

Sincerely,



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<sup>7</sup> 16 U.S.C. § 1533(b)(2).

<sup>8</sup> 16 U.S.C. § 1533(b)(3)(D)(i)-(ii); 5 U.S.C. § 553(e).

<sup>9</sup> 50 C.F.R. § 424.14(c), (e).

<sup>10</sup> 16 U.S.C. § 1533(b)(3)(D)(i). If FWS makes a positive 90-day finding, it must then make a subsequent determination within 12 months as to how “to proceed with the requested revision” and publish that determination in the Federal Register. *Id.* § 1533(b)(3)(D)(ii).

<sup>11</sup> 16 U.S.C. § 1540(g).

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