



**BEFORE THE SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR AND DIRECTOR OF
THE FISH AND WILDLIFE SERVICE**

**SUPPLEMENTAL EVIDENCE FOR THE ONGOING 12-MONTH
REVIEW TO SUPPORT DELISTING THE GOLDEN-CHEEKED
WARBLER FROM THE ENDANGERED SPECIES ACT**

INTRODUCTION & EXECUTIVE SUMMARY

The General Land Office of the State of Texas (“TXGLO”) is submitting the following supplemental evidence in connection with the 12-month status review of the golden-cheeked warbler (“Warbler”) under the Endangered Species Act (“ESA”). Following a petition to delist the Warbler and two lawsuits filed by TXGLO in response to the U.S. Department of the Interior’s Fish and Wildlife Service’s (“the Service’s”) denial of the petition, the Service announced in January that it is conducting a 12-month review of the Warbler’s status. *Endangered and Threatened Wildlife and Plants; 90-Day Findings for Eight Species*, 90 Fed. Reg. 7038, 7041 (Jan. 21, 2025). The evidence and arguments contained herein present the “best scientific and commercial data available” to show that the Warbler should be delisted under the ESA. *See* 16 U.S.C. § 1533(b)(1)(A).

The Service first listed the Warbler as endangered in 1990. As evidenced herein, that listing was based on erroneous estimates that significantly undercounted the Warbler population. Recent population estimates using better, more refined methodologies show that the Warbler population is 16 times larger than when the Service first estimated the population in 1990. Indeed, coupled with its thriving population, the Warbler meets all the ESA’s criteria to delist, including a lack of threats to its habitat, no overutilization, a lack of disease or predation threats, adequacy of existing regulatory mechanism, and no other natural or manmade factors affecting its continued existence. *See* 16 U.S.C. § 1533(a)(1).

The Warbler nests and breeds exclusively in the mixed Ashe juniper and woodlands of Central Texas. The Warbler’s continued listing imposes significant costs and impedes productive land uses across the Warbler’s range. ESA permits and their associated costs prevent many Texas landowners, including TXGLO, from putting their land to productive use, whether that be for housing, commercial buildings, infrastructure, or energy production.

TXGLO has won two lawsuits challenging the Warbler's continued listing. *See Gen. Land Office of Tex. v. United States DOI*, 947 F.3d 309 (5th Cir. 2020); *Gen. Land Office of Tex. v. Dep't of the Interior*, 750 F. Supp. 3d 740 (W.D. Tex. 2024). However, in both cases the court remanded the Service's decision without ordering the Service to delist the Warbler. Following TXGLO's most recent victory, the Service issued a positive 90-day finding and announced it would initiate a 12-month review under 16 U.S.C. § 1533(b)(3)(B). *See* 90 Fed. Reg. at 7041.

Around the same time, the Service completed a five-year status review that recommended downlisting the Warbler from endangered to threatened. While this is a welcome step, the appropriate action is to completely delist the Warbler under the ESA. The 5-year review that recommended downlisting was not published in the Federal Register, contrary to the requirements of 50 C.F.R. § 424.21. On the other hand, the positive 90-day finding was published and asked for comments during the 12-month review. In addition, in response to a Request for Information regarding regulatory reform published by the Department of the Interior, 90 Fed. Reg. 21,504 (May 20, 2025), TXGLO filed a letter dated June 20, 2025, with Gregory Zerzan, Acting Solicitor of the Department of the Interior, setting forth reasons why the Warbler should be delisted. TXGLO is hereby submitting this supplemental evidence for the Service to consider during its 12-month review of the Warbler, which addresses in detail the delisting criteria set forth in 16 U.S.C. § 1533(b)(3)(B)(ii).

Among other things, TXGLO files this supplemental evidence with the Secretary of the Interior and the Director of the Fish and Wildlife Service pursuant to the Right to Petition Government Clause of the First Amendment of the United

Sates Constitution¹ and the Administrative Procedure Act.² For the reasons set forth in detail hereafter, TXGLO respectfully requests the Service to completely delist the Warbler under the ESA.

INTEREST OF TXGLO

The General Land Office of the State of Texas is the oldest state agency in Texas. Among other things, TXGLO is charged with maximizing revenues from sale and mineral leasing of Texas public lands. Under the Texas Constitution, this revenue is dedicated to the Permanent School Fund. Tex. Const. art. VII, § 5. TXGLO property includes Warbler habitat. The ESA's restrictions on developing this land undermines TXGLO's ability to maximize revenues from Texas public school lands.

TXGLO also served as plaintiff in two successful lawsuits seeking to delist the Warbler. In *Gen. Land Office of Tex. v. United States DOI*, 947 F.3d 309 (5th Cir. 2020) [hereafter "*General Land Office I*"], the Fifth Circuit found that the Service imposed an improperly heightened standard when reviewing a petition to delist. The Service had impermissibly required the petition to present new evidence that the Service had not considered in its prior reviews of the Warbler's status. *Id.* at 321. Then in *Gen. Land Office of Tex. v. Dep't of the Interior*, 750 F. Supp. 3d 740 (W.D. Tex. 2024) [hereafter "*General Land Office II*"], the Service again imposed an

¹ "Congress shall make no law . . . abridging . . . the right of the people . . . to petition Government for a redress of grievances." U.S. Const. amend. I. The right to petition for redress of grievances is among the most precious of liberties safeguarded by the Bill of Rights. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It shares the "preferred place" accorded in our system of government to the First Amendment freedoms and has a sanctity and sanction not permitting dubious intrusions. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "Any attempt to restrict those First Amendment liberties must be justified by clear public interest, threatened not doubtful or remotely, but by clear and present danger." *Id.* The Supreme Court has recognized that the right to petition is logically implicit in, and fundamental to, the very idea of a republican form of government. *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 552 (1875).

² 5 U.S.C. Section 553(c).

improperly heightened standard by requiring the petition to show proof of recovery. *Id.* at 758. Despite prevailing in two lawsuits, TXGLO has not achieved the ultimate goal of its litigation: completely delisting the Warbler under the ESA.

BACKGROUND

The Warbler is Listed as Endangered in 1990

The Service first categorized the Warbler as endangered in response to an emergency listing petition filed on February 2, 1990. Endangered and Threatened Wildlife and Plants; Proposed Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 18,846 (May 4, 1990). The Service justified this listing on the basis of “ongoing and imminent habitat destruction.” *Id.* at 18,844. The Service indicated that Central Texas contained prime Warbler habitat, and that increased development in the region threatened this habitat. *Id.*

The Service permanently listed the Warbler on December 27, 1990. Endangered and Threatened Wildlife and Plants; Final Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 53,153 (Dec. 27, 1990). Its Final Rule estimated there were about 15,000–17,000 Warblers and between 79,400–263,750 acres of suitable habitat. *Id.* at 53,154. In the Final Rule, the Service found the Warbler should be listed due to (1) present or potential habitat destruction, (2) possible nest predation, (3) a lack of regulatory protection for Warbler habitat, and (4) a lack of reproduction of certain trees within Warbler habitat. *Id.* at 53,157–59. When the Service lists a new species, the ESA requires it to “concurrently” designate critical habitat for that species. 16 U.S.C. § 1533(a)(3)(A)(i). However, the Service deferred designating critical habitat for the Warbler. 55 Fed. Reg. at 53,159. To this day, the Service has not designated critical habitat. *See General Land Office II*, 750 F. Supp. 3d at 762.

The ESA requires the Service to conduct a review of each listed species every five years. 16 U.S.C. § 1533(c)(2)(A). The Service completed its first five-year status

review of the Warbler in 2014—twenty-four years after the species’ initial listing. U.S. Fish and Wildlife Service, Golden-Cheeked Warbler 5-Year Review (Aug. 26, 2014), <https://tinyurl.com/2ev8p6h3>. The Service was required to conduct five-year status reviews of the Warbler in 1995, 2000, 2005, and 2010. *See* 16 U.S.C. § 1533(c)(2)(A). It failed to do so, and the Service never explained why it failed to meet its statutory duty. Following the 2014 review, the Service was required to conduct five-year status reviews in 2019 and 2024. The Service completed its most recent five-year status review earlier this year. U.S. Fish and Wildlife Service, Golden-Cheeked Warbler 5-Year Status Review 72 (Jan. 6, 2025), <https://tinyurl.com/45s7mjc8>.

The Warbler’s listing under the ESA imposes significant regulatory burdens. When a species is listed under the ESA, property owners must seek permits or approval of activities on their land that could potentially disturb the species. *See* 16 U.S.C. § 1539(a). A “take” is broadly defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. *See* 16 U.S.C. § 1532(19). This makes developing any land with Warbler habitat extremely difficult. As an example, TXGLO received an appraisal for a 2,316 acre property it owns in Bexar and Kendall counties. The appraisal found that 84% of the property contained Warbler habitat. Because of this, the property value is 35% less than comparable properties without Warbler habitat. Additionally, TXGLO would have to go through a lengthy federal permitting process if it were to develop the property for any other use. Under the Service’s mitigation process, TXGLO would have to replace every one acre of developed land with three acres of new Warbler habitat. These ESA regulations triggered by the Warbler’s listing impose significant costs on TXGLO and other private landowners, as well as impede infrastructure development, economic development, energy production, and land use.

TPPF Files Petition to Delist in 2015

In 2015, the Texas Public Policy Foundation (“TPPF”)—whose attorneys represent TXGLO—petitioned the Department of the Interior to delist the Warbler. That petition presented scientific evidence showing the Warbler’s 1990 listing was made in error because the Department significantly underestimated the Warbler’s population. It also cited a 2015 study showing the Warbler’s population was 16 times larger than was believed in 1990. This study, conducted by the Institute of Renewable Natural Resources at Texas A&M, “summarized the extensive research and analysis that has been performed since 1990 and concluded that the warbler’s listing status should be re-examined.” The petition presented additional information showing that habitat fragmentation and urbanization do not threaten the Warbler, and that conservation plans exist to mitigate the Warbler’s probability of extinction. The petition’s evidence is summarized in the argument section below. That evidence meets the ESA’s standard to delist a species. *See* 16 U.S.C. § 1533(a)(1).

The Service Denies the Petition to Delist

Despite the evidence presented in TPPF’s petition, in 2016 the Service issued a 90-day finding denying the petition. Endangered and Threatened Wildlife and Plants; 90-Day Findings on Two Petitions, 81 Fed. Reg. 35,698 (June 3, 2016). The Service concluded that the petition “does not provide substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* at 35,700. That was because the petition provided “[n]o new information . . . that would suggest that the species was originally listed due to an error in information.” *Id.* The Service also concluded that the Warbler population had not recovered and faced threats to its habitat from urbanization. *Id.*

TXGLO Wins Two Lawsuits Against the Service

Following the Service’s decision to deny the delisting petition, TXGLO filed a lawsuit in the U.S. District Court for the Western District of Texas. *See Gen. Land*

Office of Tex. v. U.S. Fish and Wildlife Serv., 2019 WL 1010688 (W.D. Tex. Feb. 6, 2019). The district court granted summary judgment in favor of the Service and upheld the first 90-day finding. *Id.* TXGLO successfully appealed the district court’s ruling to the Fifth Circuit. *Gen. Land Office I*, 947 F.3d at 321. The Fifth Circuit found that the Service applied an “inappropriately heightened” standard by requiring the petition to include new information rather than substantial information. *Id.* The Fifth Circuit then remanded the first 90-day finding for the Service to apply the correct legal standard. *Id.*

On remand, the Service issued a second 90-day finding in 2021 that again denied the petition to delist. Endangered and Threatened Wildlife and Plants; 90-Day Findings for Three Petitions, 86 Fed. Reg. 40,186 (July 27, 2021). This time the Service faulted the petition for failing to show conclusive evidence of Warbler population recovery. TXGLO again sued the Service for applying the incorrect legal standard. The district court granted summary judgment to TXGLO and remanded the second 90-day finding for reconsideration. *Gen. Land Office II*, 750 F. Supp. 3d at 763. However, the district court did not provide additional relief, such as requiring the Service to make a positive 90-day finding or requiring the Service to delist the Warbler. *Id.* at 763–64.

The Service Recommends Downlisting the Warbler to Threatened

Following that second court victory, the Service issued a positive 90-day finding and announced it would initiate a 12-month review under 16 U.S.C. § 1533(b)(3)(B). Endangered and Threatened Wildlife and Plants; 90-Day Findings for Eight Species, 90 Fed. Reg. 7038, 7041 (Jan. 21, 2025). A few weeks before, the Service completed a five-year status review that recommended downlisting the Warbler from endangered to threatened. U.S. Fish and Wildlife Service, Golden-Cheeked Warbler 5-Year Status Review 72 (Jan. 6, 2025), *supra*. The 12-month review will determine whether the Warbler should be downlisted from endangered to

threatened, or whether it should be delisted altogether. This review must be completed by January 2026. *See* 16 U.S.C. § 1533(b)(3)(B).³

ARGUMENT

I. The Warbler Meets the ESA’s Criteria to Delist

An interested person may petition the Service to list, delist, or reclassify the status of a species. 16 U.S.C. § 1533(b)(3)(A). TPPF filed such a petition in 2015. The Service reviews listing and delisting petitions for “substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* Substantial information means “credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.” 50 C.F.R. § 424.14(h)(1)(i). This substantial information standard does not require a petition to present new information, *Gen. Land Office I*, 947 F.3d at 321, or to disprove the Service’s bases for listing the species. *Gen. Land Office II*, 750 F. Supp. 3d at 757–58. The Service must use the same five factors for delisting a species that it uses for listing a species. 16 U.S.C. 1533(a)(1). These are:

- (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.

³ By letter to Gregory Zerzan, Acting Solicitor of the Department of the Interior, dated June 20, 2025, TXGLO submitted its Response to Regulatory Reform Request for Information, setting forth reasons why the Warbler should be delisted. The letter was submitted via regulations.gov, as requested by the Department of the Interior. *See* 90 Fed. Reg 21,504 (May 20, 2025).

Id.; 50 C.F.R. § 424.11(e). A species will be delisted if the Service determines the species has recovered or if the original listing decision was in error. 50 C.F.R. § 424.11(e)(2)–(3).

In 2015, TPPF and several others petitioned the Service to delist the Warbler. That petition presented scientific evidence showing the Warbler’s 1990 listing was made in error because the Department significantly underestimated the Warbler’s population. It also cited a 2015 study showing the Warbler’s population was 16 times larger than was believed in 1990. The petition presented additional information showing that habitat and fragmentation and urbanization do not threaten the Warbler, and that conservation plans exist to mitigate the Warbler’s probability of extinction. The petition’s evidence is summarized below. That evidence meets the ESA’s standard to delist a species. 16 U.S.C. 1533(a)(1); 50 C.F.R. § 424.11(e).

A. The Warbler does not face present or threatened destruction of its habitat.

The Warbler is not facing destruction of its habitat in a manner that threatens its continued existence. Recent scientific studies show that Warbler breeding habitat is sufficient to support a stable population. Although the 1990 listing decision estimated a habitat size between 551,668–1,771,552 hectares, recent studies have shown actual habitat to be on the high end of that range. The Duarte Study found 1,678,281 hectares of Warbler habitat. Adam Duarte et al., *Spatiotemporal Variation in Range-Wide Golden-Cheeked Warbler Breeding Habitat*, 4 Ecosphere 5 (2013) [hereafter “Duarte Study”]. The Collier Study found 1,678,053 hectares of habitat. Bret A. Collier et al., *Predicting Patch Occupancy in Fragmented Landscapes at the Rangewide Scale for an Endangered Species: An Example of the American Warbler*, 18 Diversity & Distrib. 158 (2012) [hereafter “Collier Study”]. The Collier Study indicates that there is five times more warbler breeding habitat than identified at the time of the Warbler’s listing in 1990. The Mathewson Study estimated the 2009

population of male warblers was between 223,000–301,000, with the median estimate at 262,013. Heather A. Mathewson et al., *Estimating Breeding Season Abundance of Golden-Cheeked Warblers in Texas, USA*, 76 J. Wildlife Mgmt. 1117, 1123 (2012) [hereafter “Mathewson Study”]. That figure is 16 times higher than the population estimated at the time of the Warbler’s listing. 55 Fed. Reg. at 53,154 (estimating the Warbler population to be between 15,000–17,000 birds). The Alldredge study found that the probability of the Warbler’s extinction is low as long as enough habitat exists to support more than 3,000 breeding pairs in each of the eight defined recovery regions. Matthew W. Alldredge et al., *Golden-Cheeked Warbler (Dendroica chrysoparia) in Texas: Importance of Dispersal toward Persistence in a Metapopulation*, in *Species Conservation and Management: Case Studies* (2004) [hereafter “Alldredge Study”]. The Mathewson Study confirmed the total amount of available Warbler habitat exceeds that threshold. TPPF cited all of these studies in its 2015 petition.

The best available science shows that both Warbler population and Warbler habitat is much greater than was estimated in 1990 when the Warbler was originally listed. Thus the Warbler is not at risk due to habitat destruction. This factor weighs in favor of delisting.

B. The Warbler is not being overused.

The Warbler is not being overutilized for commercial, recreational, scientific, or educational purposes. The Service’s own five-year review in 2014 admitted “[t]here is no evidence that GCWA are threatened by overutilization.” U.S. Fish and Wildlife Service, *Golden-Cheeked Warbler 5-Year Review 10* (Aug. 26, 2014), *supra*. The 2025 five-year review confirmed there is no new information on overutilization. U.S. Fish and Wildlife Service, *Golden-Cheeked Warbler 5-Year Status Review 65* (Jan. 6, 2025), *supra*. This factor weighs in favor of delisting.

C. Disease and predation do not threaten the Warbler.

Disease and predation is not a serious threat to Warblers. The original 1990 listing suggests fire ants (*Solenopsis invicta*) could become a threat to young warblers. 55 Fed. Reg. at 53,158 But there has been no evidence supporting this theory. Documented warbler predators (adults and young) include snakes, birds, mammals, and red-imported fire ants. Mike M. Stake et al., *Video Identification of Predators at Golden-Cheeked Warbler Nests*, 75 J. Field Ornithology 337 (2004) [hereafter “Stake Study”]. The Stake Study noted that the height of Warbler nests reduced the risk of fire ant predation and that Warblers are not the main target of other birds or mammals.

Brood parasitism is uncommon and represents a small risk to overall Warbler nest survival. At most there is one documented outbreak in 2012 of avian pox that was confirmed on Balcones Canyonlands Preserve in Austin, Texas. This appears to be an isolated event and there are no other disease detection records for this species. Thus there is little threat to Warblers from disease and predation. This factor weighs in favor of delisting.

D. Existing regulatory mechanisms are adequate to protect the Warbler.

Existing regulatory mechanisms are adequate to protect the Warbler even absent ESA protection. Most notably, the Warbler is protected under the 1975 Texas Endangered Species law. *See* Tex. Parks & Wildlife Code § 68.001 et seq. This listing is separate from the federal ESA. Additionally, Warbler habitat is protected in Balcones Canyonlands National Wildlife Refuge, conservation plans on Fort Hood, and approximately 160 habitat conservation plans on private lands that are enforceable by FWS. The Alliance for the Conservation of Mesoamerican Pine-Oak Forests protects Warbler habitat outside the United States in its Central American migrating grounds. Warbler habitat is actively managed on many Texas Parks and

Wildlife Management Areas, Nature Conservancy properties in Texas, and on other public and private lands. In contrast, the Service has never designated critical habitat for the Warbler under the ESA.

Even if the Warbler is delisted under the ESA, the Warbler may continue to be protected under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12. These regulatory mechanisms provide more than adequate protections for both the Warbler and its habitat. This factor weighs in favor of delisting.

E. Natural and other manmade factors do not threaten the Warbler's continued existence.

Natural and manmade factors are not significantly threatening the Warbler. The Service's 1990 listing decision overstated the effects that urbanization (both encroachment and noise) have on the Warbler population. The Butcher Study found that warblers establish territories in patches as small as approximately 2.6 hectares in rural landscapes. Jerrod A. Butcher et al., *Evidence of a Minimum Patch Size Threshold of Reproductive Success in an Endangered Songbird*, 74 J. Wildlife Mgmt. 133 (2010). Follow-up research conducted in the Austin area found that minimum patch size requirements for territory establishment were of similar size (about 13 hectares). Dianne Hali Robinson, *Effects of Habitat Characteristics on Occupancy and Productivity of a Forest-Dependent Songbird in an Urban Landscape* (May 2013) (unpublished M.S. thesis, Texas A&M University). As to noise, the Lackey Study found comparable warbler abundance, pairing success, and fledging success across road-noise-only sites, road construction sites, and control sites. Melissa A. Lackey et al., *Experimental Determination of the Response of Golden-cheeked Warblers (Setophaga chrysoparia) to Road Construction Noise*, 74 Ornithological Monographs 91 (2012). Similarly, Warblers at the Fort Hood Military Reservation occupy and breed in patches exposed to active military activity and there is no correlation between Warbler reproductive success and noise level. Roel Lopez et al., *Support to*

Military Land Management and Training on Fort Hood, Texas: Year 5 Final Annual Report (Cumulative) (2012). Other than urbanization, oak wilt is another listed concern for Warbler habitat. Oak wilt does not affect territorial placement or fledgling success, but does have some detrimental effect on pairing success. Laura R. Stewart et al., *Spatial and Temporal Distribution of Oak Wilt in Golden-Cheeked Warbler Habitat*, 38 Wildlife Soc’y Bulletin 288 (2014) [hereafter “Stewart Study”]. The Stewart Study found that oak wilt is more likely to occur outside Warbler habitat. These other natural and manmade factors do not present a threat to the Warbler population. This factor weighs in favor of delisting.

II. The Service Must Consider New Evidence Confirming the Warbler Population Is Much Larger Than Originally Estimated

At the 12-month review stage, the Service is not limited to evidence presented in the petition to delist. Nor is the Service limited to evidence that existed when the petition was filed. Rather, the Service must use the “best scientific and commercial data available” to make delisting decisions. 16 U.S.C. § 1533(b)(1)(A). That means the Service must consider all data that is available at the time when the Service conducts its 12-month review.

A 2022 study conducted by Fish and Wildlife Service employees confirmed the Mathewson Study’s population estimate. The Mathewson Study had found that the estimated 2009 population of male warblers was between 223,000–301,000, with the median estimate at 262,013. Mathewson Study, 76 J. Wildlife Mgmt. 1117, 1123 (2012). The 2022 study, which was led by James Mueller and Steven Sesnie (both Fish and Wildlife Service employees), estimated that the 2018 population of male warblers was between 154,000–312,000, with the median estimate at 217,444. James Mueller et al., *Multi-scale Species Density Model for Conserving an Endangered Songbird* 14 (2022), <https://doi.org/10.1002/jwmg.22236> [hereafter “Mueller Study”]. The authors explained their population estimate varied slightly from the Mathewson

Study because they used a different methodology. *Id.* When the Mueller Study’s authors used the Mathewson Study’s methodology as an alternative, their median population estimate was 264,560—2,000 higher than the Mathewson Study. *Id.* Even if the Mueller Study’s median estimate of 217,444 male warblers is more accurate, that population size is still 13.6 times higher than the Service’s 1990 estimate. *See* 55 Fed. Reg. at 53,154 (estimating the Warbler population to be between 15,000–17,000 birds).

The Mueller study was published in 2021—after TPPF filed its petition—and it represents the “best scientific and commercial data available.” *See* 16 U.S.C. § 1533(b)(1)(A). The Service must use this study in its 12-month review. *Id.* The Mueller Study further bolsters TXGLO’s argument that the Warbler should be delisted.

III. Downlisting the Warbler from Endangered to Threatened Does Not Alleviate Regulatory Burdens

The Warbler’s listing under the ESA imposes significant regulatory burdens. When a species is listed under the ESA, property owners must seek from the Service permits or approval of activities on their land that could potentially disturb the species. *See* 16 U.S.C. § 1539(a). A “take” is broadly defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. *See* 16 U.S.C. § 1532(19). This makes developing any land with Warbler habitat extremely difficult. Additionally, under the Service’s mitigation process, TXGLO would have to replace every one acre of developed land with three acres of new Warbler habitat. These ESA regulations triggered by the Warbler’s listing impose significant costs on TXGLO and other private landowners, as well as impede infrastructure development, economic development, energy production, and land use.

Downlisting the Warbler from endangered to threatened will not reduce these regulatory burdens. The ESA itself only imposes the aforementioned restrictions on an endangered species. *See* 16 U.S.C. § 1538. But section 4(d) of the ESA authorizes the Secretary to “issue such regulations as he deems necessary and advisable to provide for the conservation of” threatened species. 16 U.S.C. § 1533(d). The first ESA implementing regulations used this authority to make all the prohibitions related to endangered species also apply to threatened species. *See* Protection for Threatened Species of Wildlife, 43 Fed. Reg. 18,180, 18,181 (Apr. 28, 1978). In other words, a species is subject to the same regulatory requirements regardless of whether it is classified as endangered or threatened. This is commonly referred to as the section 4(d) “blanket rule.” *See* Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23,919, 23,920 (Apr. 5, 2024).

In 2019, the Trump Administration shifted from a blanket rule under section 4(d) to a case-by-case determination for each threatened species. Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019) (amending 50 C.F.R. § 17.31). However, the Biden Administration reverted to the blanket rule in 2024. 89 Fed. Reg. at 23,939. That blanket rule is still in effect today. *See* 50 C.F.R. § 17.31. Even if the Trump Administration reinstates its 2019 case-by-case rule, that rule only applied to species listed as threatened after the rule’s effective date. To provide meaningful regulatory relief for the Warbler as a threatened species, the Secretary would have to reinstate the 2019 case-by-case rule either (1) before the Warbler is downlisted; or (2) issue a new species-specific provision for the Warbler after the rule is finalized. Delisting the Warbler altogether avoids this complicated regulatory maneuvering.

As the regulations stand today, downlisting the Warbler from endangered to threatened will not reduce any of the regulatory burdens imposed on TXGLO and other Texas landowners. The proper action is to delist the Warbler under the ESA.

CONCLUSION

The Warbler meets the ESA's criteria to delist the species under the ESA. The Warbler's continued listing—whether as endangered or threatened—imposes significant costs and regulatory burdens on landowners in Central Texas. These restrictions prevent TXGLO from performing its duty to maximize revenue for the Permanent School Fund. For all the reasons set forth herein, and for those set forth in the letter dated June 20, 2025, to Gregory Zerzan, the Service should conclude its 12-month review by completely delisting the Warbler under the ESA. *See* 16 U.S.C. § 1533(b)(3)(B)(ii).

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Respectfully submitted,

**ROBERT HENNEKE
CHANCE WELDON
THEODORE HADZI-ANTICH
ERIC HEIGIS
TEXAS PUBLIC POLICY
FOUNDATION**
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

By: 
THEODORE HADZI-ANTICH
tha@texaspolicy.com

ATTORNEYS FOR TXGLO