



May 22, 2008

Corbin Newman, Regional Forester
USDA Forest Service
333 Broadway SE
Albuquerque, NM 87102
Fax: (505) 842-3110

Re: 60-day Notice of Intent to Sue the U.S. Forest Service for Fossil Creek management practices adversely affecting federally listed species in violation of the Endangered Species Act.

Dear Mr. Newman,

Fossil Creek is located along the border between the Tonto and Coconino National Forests in Central Arizona. It is a sensitive treasure of a riparian ecosystem newly recovering from 100 years of diverted base flows. Fossil Creek provides habitat for federally endangered species, Spikedace, Loach Minnow, Razorback Sucker, Gila Topminnow and numerous other native listed and unlisted fish species.

Eight years ago, we signed the Settlement Agreement with Arizona Public Service to decommission the Childs and Irving Power Plants and to return full base flows to Fossil Creek. Three years ago, in June 2005, full base flow was returned to Fossil Creek.

Since the return of full flows to Fossil Creek, the streamside deposition of trash and human waste and the streamside degradation from increased overnight camping and trampling has reached an unacceptable level. The 2007 recreation season was particularly hard on Fossil Creek as human waste and garbage littered the banks, broken tree branches marked user-created trails, and kayaks arrived by the truck-load. The fragile re-building travertine and the newly created pools and habitat for native fish are threatened by this sudden influx. The 2008 recreation season is proving to be no different.

The Center for Biological Diversity and other groups have waited patiently for the Tonto and Coconino Forest Supervisors to protect Fossil Creek. In correspondence, dated September 11, 2007, and December 15, 2007, and in meetings of November 13, 2007 and May 22, 2008, we have requested protection commensurate to the increasing recreational pressures.

No restrictions on overnight camping have been instituted. No facilities are yet available for overnight camping. Inadequate facilities are available for day use. And law enforcement presence has been inadequate to control the situation.

No area-specific management plan has been prepared to guide management at Fossil Creek despite the drafting of a plan provided for public comment in October 2002. At the very least, overnight camping along Fossil Creek must be immediately curtailed until a management plan is implemented.

We are now facing another summer season of increasingly destructive recreation impacts. More “stakeholders” meetings have been initiated; however, no meaningful protection has

resulted. Attached are copies of our communications, dated September 11, 2007 and December 15, 2007. Response letters from the Forest Service dated October 16, 2007 and January 17, 2008 are also attached.

Fossil Creek and the endangered species dependent on Fossil Creek can wait no longer for Forest Service action.

The Forest Service has multiple authorities to utilize in support of the conservation of Fossil Creek's endangered species and to protect the stream itself. The Forest Service may enact a temporary closure order to camping under 36 § CFR 261.50 (a): "...Forest Supervisors may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portion thereof." This includes restricting camping and being in the area after sundown or before sunrise (36 CFR §§ 261.58 [e], [f]).

Under 36 CFR § 261.53, special closures may be enacted for the protection of: "(a) Threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish...(b) Special biological communities...(c) Objects or areas of historical, archeological, geological, or paleontological interest...(d) Scientific experiments or investigations...(e) Public health or safety." All are applicable to Fossil Creek.

The Endangered Species Act ("ESA") requires that the Forest Service "utilize their authorities" to "conserve endangered species and threatened species" and must ensure that management does not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. §§ 1531(c)(1, 2), 1536(a)(1).

As of November 2, 2007, Loach Minnow and Spikedace were repatriated to Fossil Creek. Loach minnow and Spikedace are both listed under the Endangered Species Act. They are both listed as threatened; however, petitions for up-listing to endangered have been found warranted. Loach minnow survives in fewer than a dozen locations from an original distribution in suitable habitats in low to high elevation streams throughout the Gila River Basin. Spikedace populations remain in only eight (including Fossil Creek) locations from an original distribution throughout the Basin in suitable habitats in low and intermediate streams.

On the day of repatriation of Loach Minnow and Spikedace back into Fossil Creek, prints of horse hooves and horse droppings were evident along and in the creek, as were signs of the activities documented above. Since then, Razorback Sucker and Gila Topminnow, also listed, have been repatriated.

In order to protect the habitat at Fossil Creek and conserve the newly restored Loach Minnow, Spikedace, Razorback Sucker and Gila Topminnow, at the very minimum, a closure order to overnight camping is necessary to reduce the amount of impact. The closure order should remain in effect until a management plan is implemented. A closure can be enacted to protect the public health and safety, property, rare species, etc., all of which are applicable to the situation at Fossil Creek. Closure to overnight camping will help control trash and waste which are increasingly threatening public health and safety, property and rare species.

Section 7(a)(1) of the Endangered Species Act requires that all federal agencies shall "in consultation with and with the assistance of [FWS], utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and

threatened species” 16 U.S.C. § 1536 (a)(1). The term “conservation” means to use all methods and procedures that are necessary to bring an endangered species to the point at which the ESA’s conservation measures are no longer necessary. 16 U.S.C. § 1532(3)

The Forest Service is in violation of 16 U.S.C. § 1536 (a)(1). Specifically, these violations include: (1) failure to stop destruction of streamside vegetation, (2) failure to stop contamination of waters by human waste from overnight campers, (3) failure to implement overnight camping closures, (4) failure to finalize a management plan, and (5) failure to protect the repatriated Loach Minnow and Spikedace which are essential to recovery of both species.

Section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), requires all federal agencies, in consultation with the FWS, to insure that any action authorized, funded, or carried out by the agency is: “...a. not likely to jeopardize the continued existence of any endangered species or threatened species (hereafter “not likely to jeopardize the existence of species”).” 16 U.S.C. § 1536(a)(2).

The implementing regulation specific to Section 7(a)(2), 50CFR402.14 states: “PART 402--INTERAGENCY COOPERATION--ENDANGERED SPECIES ACT OF 1973, AS AMENDED...Sec. 402.14 Formal consultation...(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species...”

The Forest Service is in violation of Section 7(a)(2) and 50 CFR402.14 for failing to consult the U.S. Fish and Wildlife Service for repatriation of endangered species into a stream experiencing destructive management practices resulting in detrimental effects on Loach Minnow and Spikedace.

Background

Fossil Creek forms a portion of the boundary between Coconino and Tonto national forests in Coconino and Gila counties, Arizona, respectively. It is located west and southwest of Strawberry on the northeast side of Deadman Mesa. Fossil Creek flows in a southwesterly direction and enters the Verde River about two miles south of Childs. Surface flow of about 43 cubic feet per second in Fossil Creek is perennial beginning at Fossil Springs and extending to the Verde River. Tributaries to Fossil Creek have surface water that is intermittent to ephemeral in time and space, plus there are many springs and stock tanks in the watershed. The riparian area includes a linear gallery forest of sycamore, Fremont cottonwood, and Goodding and other willows. The chemical content of the water emanating from Fossil Springs creates travertine deposits in the form of small dams and cascading waterfalls for many miles downstream. Elevation is from 2500’ to 4300’.

Fossil Creek is geologically and biologically unique. From Fossil Springs downstream for several miles, its geomorphology is dominated by travertine deposition, resulting in many series of large cascading pools stair stepping down the slope as the stream flows towards the Verde River. Fossil Creek supported populations of at least six native fish, and has potential to support several others that are rare and endangered in the Gila River basin. Roundtail and Headwater Chubs, Sonora and Desert Suckers, and Longfin and Speckled Dace were found in abundance in Fossil Creek above a constructed fish barrier located a few miles above the stream’s confluence

with the Verde River. Since restoration began, several other threatened or endangered native fish species have been re-established. Razorback Sucker, which were stocked into Fossil Creek in the 1980's and survived for nearly a decade, were stocked again earlier this year. Loach minnow and Spikdace were stocked into Fossil Creek above the dam in November 2007. In addition to the Razorback, Loach Minnow and Spikedace, Gila Topminnow have also been stocked into Fossil Creek. Other aquatic animals of interest in the watershed include Chiricahua and Yavapai leopard frogs, garter snakes, canyon tree frog, Sonoran mud turtle, and Fossil springsnail.

In addition to Fossil Creek, Spikedace remain only in seven locations throughout the Gila River drainage basin. In addition to Fossil Creek, Loach Minnow remains in fewer than a dozen locations from original distribution habitats in low to high elevation streams throughout the Basin.

Fossil Creek is a large, free-flowing mountain stream within easy driving distance of most of Arizona's population. Since decommissioning of the hydroelectric facilities and return of full flows to the stream channel, human use is increasing rapidly. It is extremely attractive for recreation and sightseeing, a situation that will easily result in overuse by humans and lasting damage to the fragile resources of the riparian area and valley bottom. Increasing recreational use also increases the threat of the introduction of exotic, invasive species.

Restoration of full flows to Fossil Creek represented a singular, monumental exception to the unrelenting loss of Arizona's rivers. APS committed \$13 million to the decommissioning of their Irving and Childs power plants and the revegetation and restoration of the creek. The Arizona Game and Fish Department, U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, Northern Arizona University, U.S. Forest Service and several additional university, agency and individual biologists contributed to a massive stream restoration project to remove non-native fish.

Given the historic loss of some 90% of our riparian areas, the restoration of full flows to Fossil Creek certainly reflects the interests and welfare of the public. The restoration effort by APS, state and federal agencies, Northern Arizona University, the Yavapai-Apache tribe and numerous conservation groups has been widely acclaimed in the media, including a documentary, "A River Reborn: the Restoration of Fossil Creek," shown on PBS locally and throughout the country.

Current forest management standards and guidelines are in place, but were developed previous to the burgeoning visitor use of the area, and are now inadequate to meet the demands of the use. For this reason, it is imperative that management standards and guidelines specific to the Fossil Creek corridor be implemented before inappropriate use becomes intractable to management. In the interim, closures and enforcement should be implemented.

Conclusion

Pursuant to 16 U.S.C. § 1540(g), the Center for Biological Diversity expects the U.S. Forest Service to stop their violations of the law. If you fail to end your illegal actions within 60 days, we will have no choice but to seek judicial remedy.

If you have further questions, please contact Ms. Michelle Harrington at (602) 628-9909 or mharrington@biologicaldiversity.org. Our mailing address is Center for Biological Diversity, P.O. Box 39629, Phoenix, AZ 85069-9629.

Sincerely,



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Rivers Conservation Manager



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