



December 12, 2008

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Secretary Dirk Kempthorne
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RE: Notice of Intent to Sue the US Animal and Plant Health Inspection Service (APHIS) and the US Department of Agriculture (USDA) for failing to reinitiate Endangered Species Act consultation with the US Fish and Wildlife Service (USFWS) regarding jeopardy to the endangered Southwestern Willow Flycatcher (*Empidonax traillii extimus*) resulting from USDA APHIS' release of the tamarisk-defoliating leaf beetle within nesting areas and Critical Habitat.

Dear Ms. Smith, Mr. Schafer and Mr. Kempthorne,

The Center for Biological Diversity hereby provides you notice, pursuant to 16 U.S.C. § 1540(g)(2), that you are in violation of the Endangered Species Act for failing to re-initiate formal consultation regarding the effects of tamarisk-defoliating leaf beetle within nesting areas and critical habitat of the endangered Southwestern Willow Flycatcher (*Empidonax traillii extimus*). New information has come to light concerning the effects of the beetle on the flycatcher that were not previously considered.

In an admirable effort to contribute to stream restoration in the West by controlling the spread of invasive tamarisk, APHIS secured concurrence from USFWS that release of the tamarisk-defoliating leaf beetle would have no effect on the flycatcher.¹ This concurrence was based on two assurances, (1) no beetles would be released within 200 miles of flycatcher habitat or within 300 miles of documented flycatcher breeding areas, and (2) the beetles could not become established within the documented range of the flycatcher.

There is now new information that beetles have been introduced in the vicinity of flycatcher habitat, that the beetles have spread to flycatcher nesting areas and habitat, and that the beetles can in fact thrive in these areas. As the result of this new information, APHIS must reinitiate consultation to ensure that further spread of the beetle does not jeopardize the continued existence of the beetle.

Ensuring that the beetles do not jeopardize the flycatcher will require (1) monitoring of the beetle's spread within flycatcher nesting areas, which is not currently occurring; (2) native plant restoration in nesting flycatcher areas already infested by the beetles and in areas vulnerable to infestation by the beetles, and (3) prevention of further introduction of the beetle into flycatcher nesting areas.

Legal Framework

The Endangered Species Act contains procedural requirements designed to ensure that federal agency actions are properly informed by an analysis of their impacts on listed species in order to provide the substantive protections of the Act. Section 7 requires federal agencies to consult with USFWS before taking any action affecting a listed species or its critical habitat. 16 U.S.C. § 1536(a). This consultation process, first, is intended to insure that planned agency actions do not risk jeopardizing listed species. *Id.* Second, the process “offers valuable protections against the risk of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress.” *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998). Upon the conclusion of consultation, the ESA directs USFWS to issue a biological opinion detailing “how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A).²

“[B]iological opinions not only address possible violations of [section] 7(a)(2)[’s jeopardy prohibition], but more generally recommend conservation measures designed to mitigate or remove all adverse effects on an endangered or threatened species. These recommendations pertain to the statutory responsibility of agencies to carry out “programs for the conservation

¹ Correspondence; From: Assistant Director of Endangered Species, US Fish and Wildlife Service; Washington, DC 20240; To: Mr. David Bergsten; Chief, Environmental Services; Policy and Program Development; Animal and Plant Health Inspection; 4700 River Road; Unit 133; Riverdale, MD 20737; RE: Informal Consultation for the Release of a Biological Control Agent (*Diorhabda elongata deserticola*, a leaf beetle) for the saltcedar (*Tamarix* spp.); July 11, 2005.

² The Act’s implementing regulations allow an agency to forego formal consultation in favor of informal consultation (which does not result in a biological opinion) if the federal agency determines, with the written concurrence of FWS, that the proposed action is “not likely to adversely affect any listed species.” 50 C.F.R. 402.14(b)(1).

of endangered species or threatened species” [contained in section 7(a)(1)].

Romero-Barcelo v. Brown, 643 F.2d 835, 857 (1st Cir. 1981) (omission in original), rev’d on other grounds sub. nom. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

If USFWS finds in its biological opinion that a planned agency action will likely jeopardize the continued existence of a listed species, it may “suggest those reasonable and prudent alternatives” which USFWS believes would avert that likelihood. 50 C.F.R. § 402.02. USFWS may further include an “incidental take statement” within a biological opinion, if an agency action will result in an incidental take of a protected species but will not jeopardize that species’ continued existence. 16 U.S.C. § 1536(b)(3)(B)(4). As part of any incidental take statement, USFWS must specify the impact of the taking on protected species, reasonable and prudent measures to minimize that impact, and terms and conditions to implement those measures. *Id.* Incidental take described in such an incidental take statement is excepted from the Act’s general prohibition on take of protected species. 16 U.S.C. § 1536(o)(2).

Section 7’s consultation obligations do not cease upon issuance of a biological opinion, but rather continue as long as the federal agency remains involved or retains control over the action. “The duty to consult is ongoing, and formal consultation must be reinitiated in specified circumstances” *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1445 n. 6 (9th Cir. 1992). *See also Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994) (section 7 creates ongoing responsibility to consult on continuing agency action). According to the ESA’s implementing regulations:

“Reinitiation of consultation is required and shall be requested by the Federal agency or by [USUSFWS], where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; or
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.”

50 C.F.R. § 402.16. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1387-88 (9th Cir. 1987) (discussing circumstances under which re-initiation of consultation is required).

Accordingly, the regulations expressly mandate the reinitiation of consultation relating to the effects of the beetle on the flycatcher because there is “new information” that “reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.”

The Southwestern Willow Flycatcher, tamarisk and APHIS' release of the beetle

The Center for Biological Diversity petitioned USFWS for listing and protection of the flycatcher on January 25, 1992.³ USFWS listed the flycatcher as endangered on February 27, 1995 citing, "extensive loss of habitat, brood parasitism, and lack of adequate protective regulations."⁴ USFWS designated Critical Habitat on July 22, 1997,⁵ and revised it on October 19, 2005.⁶

APHIS is responsible for regulation and control of exotic plants and animals entering the United States. In March 2005, USDA APHIS proposed expansion of its program to import and release tamarisk-defoliating leaf beetles into the western United States to aide riparian restoration efforts.

Tamarisk has contributed to the degradation of riparian areas throughout the West; however, tamarisk eradication efforts in the Southwest are complicated by the fact that the endangered flycatcher survives in riparian areas often dominated by tamarisk in Arizona, California, Nevada, New Mexico, and Utah. In August 2002, the Southwestern Willow Flycatcher Recovery Team Technical Subgroup described the situation in detail and warned of the perils of tamarisk eradication without mitigation:

"Forty-seven percent of willow flycatcher territories occur in mixed native/exotic habitat (> 10% exotic) and twenty-five percent are at sites where tamarisk is dominant (Sogge et al. 2000). Flycatchers nest in tamarisk at many river sites, and in many cases, use tamarisk even if native willows are present (Table 2) (Sferra et al. 2000). Southwestern willow flycatchers nest in tamarisk at sites along the Colorado, Verde, Gila, San Pedro, Salt, Bill Williams, Santa Maria, and Big Sandy rivers in Arizona (McCarthy et al. 1998), Tonto Creek in Arizona (McCarthy et al. 1998), the Rio Grande and Gila rivers in New Mexico (Hubbard 1987, Maynard 1995, Cooper 1995, Williams, unpubl. data), and the San Dieguito, lower San Luis Rey, and Sweetwater rivers in California (Kus, unpubl. data), Meadow Valley Wash (Tomlinson, unpubl. data), and Virgin River in Nevada (McKernan and Braden 1999). Rangelwide, 86% of nests were in tamarisk in mixed and exotic habitats. In Arizona, 93% of the 758 nests documented from 1993 - 1999 in mixed and exotic habitats were in tamarisk. This distribution is similar on an annual basis in Arizona, where in 1999, 92% of the 303 nests in mixed and exotic habitats were in tamarisk (Paradzick et al. 2000)..." (p. 13)

³ Petition to List the Southwestern Willow Flycatcher (*Empidonax traillii extimus*) as a Federally Endangered Species; Suckling, Kieran, David Hogan, Robin D. Silver, M.D., The Biodiversity Legal Foundation, Friends of the Owls, Forest Guardians; January 25, 1992.

⁴ Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher; US Fish and Wildlife Service, Department of Interior; 60 FR 10694; February 27, 1995.

⁵ Final Determination of Critical Habitat for the Southwestern Willow Flycatcher; US Fish and Wildlife Service, Department of Interior; 62 FR 39129; July 22, 1997.

⁶ Designation of Critical Habitat for the Southwestern Willow Flycatcher (*Empidonax traillii extimus*); US Fish and Wildlife Service, Department of Interior; 70 FR 60886; October 19, 2005.

“Tamarisk eradication can be detrimental to willow flycatchers in mixed and exotic habitats, especially in or near occupied habitat or where restoration is unlikely to be successful. Risks to the flycatcher increase if the tamarisk control projects are implemented in the absence of a plan to restore suitable native riparian plant species or if site conditions preclude the re-establishment of native plant species of equal or higher functional value. Threats also increase if the eradication projects are large-scale in nature, thus possibly setting the stage for large-scale habitat loss.” (p. 15)

“Throughout the western U.S., large tracts of tamarisk are being cleared for purposes including water salvage, flood water conveyance, and/or wetland restoration. Such actions pose a threat to southwestern willow flycatchers when conducted in areas of suitable habitat (occupied or unoccupied) and when conducted in the absence of restoration plans to ensure replacement by vegetation of equal or higher functional value.” (p. 39)⁷

On July 11, 2005, USFWS concurred with APHIS’ release of “a biological control agent (*Diorhabda elongate deserticola*, a leaf beetle) for the saltcedar (*Tamarix* spp.) in seven States in 2005 and in an additional six States in the future.”⁸ USFWS concurred with the qualification, “Our response is based on a biological assessment (BA) dated March 2005...as well as clarifications provided by APHIS staff via email dated May 10, 24, and 25, 2005, and additional information from our files...”

USFWS’ concurrence was predicated on two premises from USDA APHIS’ Biological Assessment:

- (1) “All proposed *D. e. deserticola* release locations are situated at least 200 miles from reported flycatcher habitats, and at least 300 miles from documented breeding areas,” (p. 74) and
- (2) “*Diorhabda* populations cannot become established in virtually all of the documented range of southwestern willow flycatcher.” (p. 75)⁹

Based on these two assurances, USFWS concurred with APHIS’ conclusion “that release of *D. e. deserticola* is not likely to adversely affect federally-listed species, species proposed for listing, or their critical habitats in the fifteen States.”¹⁰ USFWS concluded:

⁷ Final Recovery Plan: Southwestern Willow Flycatcher (*Empidonax traillii extimus*); Prepared By Southwestern Willow Flycatcher Recovery Team Technical Subgroup; Region 2, U.S. Fish and Wildlife Service, Albuquerque, New Mexico 87103; August 2002.

⁸ Correspondence; From: Assistant Director of Endangered Species, US Fish and Wildlife Service; Washington, DC 20240; To: Mr. David Bergsten; Chief, Environmental Services; Policy and Program Development; Animal and Plant Health Inspection; 4700 River Road; Unit 133; Riverdale, MD 20737; RE: Informal Consultation for the Release of a Biological Control Agent (*Diorhabda elongata deserticola*, a leaf beetle) for the saltcedar (*Tamarix* spp.); July 11, 2005.

⁹ Biological Assessment for Biological Control of Saltcedar (*Tamarix* spp.) in Fifteen States; Agency Contact: Tracy Horner, Ph.D., Policy and Program Development, Animal and Plant Health Inspection Service, U.S. Department of Agriculture; March 2005.

¹⁰ *Ibid.*, p. 1.

“Based on the information you have provided, and as discussed in the enclosure, we concur that release of *D. e. deserticola* for control of saltcedar may affect, but is not likely to adversely affect, any threatened or endangered species. It is also not to destroy or adversely modify any critical habitat of such species and is not likely to jeopardize any species proposed to be listed as endangered or threatened or result in destruction or adverse modification of any area proposed to be designated as critical habitat. The basis for our determinations, including assumption regarding the scope of the action, is identified in the enclosure. If the assumptions addressed are not realized (e.g., adverse effects to listed species or critical habitat are detected), consultation should be reinitiated.”¹¹

Both of USDA APHIS’ premises upon which USFWS’ concurrence was based are now known to be false.

In July 2006, the City of St. George, Utah secured beetles from APHIS’ Delta, Utah release site (39.21 degrees latitude) and introduced them along the Virgin River into Critical Habitat at approximately 37.09 degrees latitude. By summer 2008, the beetles were flourishing along the Virgin River within flycatcher Critical Habitat and within an area of known flycatcher nesting. By July 2008, the beetles had spread to Littlefield, Arizona (36.89 degrees latitude). If they successfully continue to spread to the Colorado River, they will reach nesting tamarisk-containing flycatcher along the lower Colorado River and the Gila Salt, San Pedro, and Verde Rivers in central Arizona.¹²

The tamarisk-defoliating leaf beetle’s hibernation cycle is related to hours of daylight. APHIS’ assurance that the beetle “cannot become established in virtually all of the documented range of southwestern willow flycatcher,”¹³ was based on their belief that the beetle could not survive below the 38th parallel, the latitude from which they were originally secured. The northernmost extent of flycatcher Critical Habitat begins on the Virgin River in Utah at 37.13 degrees latitude.

Tamarisk-defoliating leaf beetles have now been introduced into occupied flycatcher nesting habitat as well as within flycatcher Critical Habitat. Adverse modification of flycatcher Critical Habitat has already occurred. Individual occupied nests have already failed likely as a result of the beetle’s tamarisk defoliation. The destruction will undoubtedly continue without the institution of emergent mitigation measures.

Unfortunately, no mitigation is being undertaken or even planned within or near the tamarisk nesting areas already invaded or in the nesting areas likely to be invaded by the

¹¹ Correspondence; From: Assistant Director of Endangered Species, US Fish and Wildlife Service; Washington, DC 20240; To: Mr. David Bergsten; Chief, Environmental Services; Policy and Program Development; Animal and Plant Health Inspection; 4700 River Road; Unit 133; Riverdale, MD 20737; RE: Informal Consultation for the Release of a Biological Control Agent (*Diorhabda elongata deserticola*, a leaf beetle) for the saltcedar (*Tamarix* spp.); July 11, 2005.

¹² “Not Wanted in Arizona, Tamarisk Leaf Beetles; Handout presented at the Colorado River Basin Science and Resource Management Symposium, Scottsdale, Arizona, US Fish and Wildlife Service, November 18, 2008.

¹³ Biological Assessment for Biological Control of Saltcedar (*Tamarix* spp.) in Fifteen States; Agency Contact: Tracy Horner, Ph.D., Policy and Program Development, Animal and Plant Health Inspection Service, U.S. Department of Agriculture; March 2005; p. 75.

beetle. Mitigation must provide for native cottonwoods and willows to replace the defoliated tamarisk or the critical flycatcher populations will be lost.

Current monitoring efforts of the beetle are not coordinated and are not comprehensive. They are being accomplished in a haphazard manner by various agencies. The agencies involved in monitoring along the Virgin River beetle epicenter include APHIS, Utah Division of Wildlife, and the Bureau of Reclamation via their flycatcher survey contractor, SWCA Environmental Consultants.

USFWS' concurrence correspondence to APHIS of July 11, 2005, states,

“If the assumptions addressed are not realized (e.g., adverse effects to listed species or critical habitat are detected), consultation should be reinitiated.”

APHIS has not requested to reinitiate consultation with USFWS as required in USFWS' July 11, 2005 concurrence and as required by law. Significant habitat modification and degradation of occupied nesting habitat has occurred and has likely resulted in take of flycatchers, adverse modification of critical habitat and potential jeopardy of the species. APHIS has a direct duty to ensure that these things do not occur as a result of their actions and is thus in violation of the Endangered Species Act.

In addition, to complicate matters even further, APHIS has now released into Texas and California tamarisk-defoliating leaf beetles secured from areas below the 37th parallel in Tunisia, Crete, Greece and Uzbekistan.¹⁴ These strains are even better adapted to latitudes in which flycatcher is found. With the current jeopardy to flycatcher from a strain of beetle from above the 38th parallel that APHIS claimed “cannot become established in virtually all of the documented range of southwestern willow flycatcher [below the 37th parallel],”¹⁵ the potential risk from more southerly adapted beetles is obvious. This increased risk to flycatcher must also be evaluated upon reinitiation of consultation.

Given these violations, the Endangered Species Act requires that USDA and APHIS reinitiate consultation with USFWS to assure that their actions do not adversely modify Critical Habitat or jeopardize the continued existence of the endangered flycatcher.

¹⁴ Bean, Dan, Biocontrol of Tamarisk Using the Leaf Beetle, *Diorhabda elongata*; Colorado Department of Agriculture, Palisade Insectary; Tamarisk Coalition Newsletter; April 2007.

Hudgeons, Jeremy L., Allen E. Knutson, Kevin M. Heinz, C. Jack Deloach, Tom L. Dudley, Robert R. Pattison, and Jim R. Kiniry; Defoliation by introduced *Diorhabda elongata* leaf beetles (*Coleoptera: Chrysomelidae*) reduces carbohydrate reserves and regrowth of *Tamarix* (*Tamaricaceae*); *Biological Control*; July 31, 2007.

Deloach, Jr., C.J., Knutson, A.E., Moran, P.J., Michels, G.J., Thompson, D.C., Carruthers, R.I., Nibling, F., Fain, T.G. Biological Control of Saltcedar (*Cedro salado*) (*Tamarix* spp.) in the United States, with Implications for Mexico. 2007; In: Lira-Saldivar, R.H., editor. *Bioplaguicidas Y Control Biologico*. International Symposium of Sustainable Agriculture, 24-26 October 2007, Saltillo, Coahuila, Mexico. p. 142-172.

Milbrath, Lindsey R., C. Jack Deloach, and James L. Tracy; Overwintering Survival, Phenology, Voltinism, and Reproduction Among Different Populations of the Leaf Beetle *Diorhabda elongate* (*Coleoptera: Chrysomelidae*); USDA-ARS, Grassland, Soil and Water Research Laboratory, 808 E. Blackland Rd., Temple, TX 76502; *Environmental Entomology* December 2007.

“A beetle can save our water,” Phoebe Sweet; *Las Vegas Sun*; March 23, 2008.

¹⁵ Biological Assessment for Biological Control of Saltcedar (*Tamarix* spp.) in Fifteen States; Agency Contact: Tracy Horner, Ph.D., Policy and Program Development, Animal and Plant Health Inspection Service, U.S. Department of Agriculture; March 2005, p. 75.

In 60 days, if APHIS does not reinitiate formal consultation with USFWS as required by law, the Center will seek judicial relief. If you have further questions, please contact Robin Silver, M.D., Center for Biological Diversity, P.O. Box 1178, Flagstaff, AZ 86002, by mail; by phone: (602) 799-3275, or by Email: rsilver@biologicaldiversity.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Robin Silver", with a stylized flourish at the end.

Robin Silver, M.D.
Center for Biological Diversity

cc: Mr. Dale Hall
U.S. Fish and Wildlife Service Director
FAX: 202-208-6965

Matt Kenna, Esq.
Western Environmental Law Center