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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL
DIVERSITY; and MARICOPA
AUDUBON SOCIETY,

Plaintiffs,

v.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

ANIMAL AND PLANT HEALTH
INSPECTION SERVICE; and U.S.
FISH AND WILDLIFE SERVICE,

Defendants.

I. INTRODUCTION

1. The defendants Animal and Plant Health Inspection Service (“APHIS”) and United States Fish and Wildlife Service (“FWS”) are in violation of the Endangered Species Act, 16 U.S.C. § 1533 et seq. (“ESA”) by having failed to reinitiate consultation with each other in the face of new information regarding the effects of APHIS’ decision to permit the

introduction of a tamarisk-defoliating leaf beetle into the environment on the endangered southwestern willow flycatcher, a songbird listed as endangered under the ESA. This suit seeks an order compelling APHIS and FWS to reinitiate consultation under the ESA, in order to promote riparian restoration efforts that will avoid jeopardizing the flycatcher with extinction, and avoid destruction or adverse modification its habitat designated as “critical” under the ESA.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g)(1)(A) and 28 U.S.C. § 1331.

3. Venue in this court is proper under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e).

III. PARTIES

4. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“CBD”) is a non-profit corporation with its primary office in Tucson, Arizona, and with other offices throughout the United States. CBD is actively involved in species and habitat protection issues throughout North America and the World, with over 40,000 members. CBD’s members (including its staff) include Arizona residents with biological health, educational, scientific research, moral, spiritual, aesthetic, and recreational interests in the southwestern willow flycatcher. CBD and its members have participated in extensive efforts to

protect and recovery the flycatcher, including administrative action and lawsuits that lead to the species being listed as endangered under the ESA, to designate its critical habitat, and to protect it from various actions that threaten it. CBD brings this action on its own behalf and on behalf of its adversely affected members and staff. CBD members and staff use specific places where flycatchers are found on an ongoing basis, and where flycatchers may no longer live if the efforts are not taken to protect and restore habitat that is threatened by defoliation by the leaf beetle.

5. Plaintiff MARICOPA AUDUBON SOCIETY (“MAS”) is an organization of volunteer members dedicated to the enjoyment of birds and other wildlife, with a primary focus on the protection and restoration of the habitat of the Southwest, through education and community involvement. MAS is a nonprofit Arizona organization with approximately 2,300 members. MAS has a long history of involvement with the protection of habitat for migratory songbirds including the southwestern willow flycatcher. MAS’s members protect, enjoy, and benefit from the survival of the flycatcher for wildlife observation, research, education, aesthetic and recreational activities, and use specific places where flycatchers are found on an ongoing basis, and where flycatchers may no longer live if the efforts are not taken to protect and restore habitat that is threatened by defoliation by the leaf beetle.

6. APHIS' and FWS's failure to reinitiate ESA consultation has prevented the implementation of protective measures essential for protection of the flycatcher. The above-described biological health, cultural, educational, scientific, aesthetic, conservation and recreational interests of the plaintiffs have been, are being, and will continue to be adversely affected and irreparably injured by the defendants' actions and inactions. Unless this Court grants the requested relief, these interests will continue to be adversely affected and irreparably harmed by Defendants' failure to reinitiate consultation under the ESA. If the requested relief is granted, reinitiation of consultation will likely lead to amelioration of these harms.

7. The defendant ANIMAL AND PLANT HEALTH INSPECTION SERVICE ("APHIS") is an agency within the United States Department of Agriculture, that was responsible for approving release of the leaf beetle in several western states, and that is responsible for ESA consultation with the Fish and Wildlife Service over the effects of its actions on the flycatcher.

8. The defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is an agency within the United States Department of Interior that is responsible for ESA consultation on agency actions for the flycatcher, and for imposing protective measures pursuant to such consultations.

IV. FACTS

9. The southwestern willow flycatcher is a small, colorfully marked songbird with a song described as a sneezy “fitz-bew” or “fit-za-bew,” its call a repeated “whitt.” “The southwestern willow flycatcher [*E. t. extimus*] occurs in riparian habitats along rivers, streams, or other wetlands, where dense growths of willows (*Salix* sp.), *Baccharis*, arrowweed (*Pluchea* sp.), buttonbush (*Cephalanthus* sp.), tamarisk (*Tamarix* sp.), Russian olive (*Eleagnus* sp.) or other plants are present, often with a scattered overstory of cottonwood (*Populus* sp.). Throughout the range of *E. t. extimus*, these riparian habitats tend to be rare, widely separated, small and/or linear locales, separated by vast expanses of arid lands. The southwestern willow flycatcher has experienced extensive loss and modification of this habitat and is also endangered by other factors, including brood parasitism by the brown-headed cowbird.” 60 Fed Reg. 10,694 (Feb. 27, 1995) (scientific citations omitted). “[U]p to 90 percent of southwestern riparian ecosystems have been lost or modified.” *Id.* at 10,698.

10. “The purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . .” 16 U.S.C. § 1531(b). To this end, the ESA requires that the FWS protect such species and their habitats

by listing them as either “threatened” or “endangered,” and by designating “critical habitat” for each listed threatened or endangered species. 16 U.S.C. § 1533. “Critical habitat” means those areas that are essential to the “conservation” of a species. 16 U.S.C. § 1532(5)(A). “Conservation” means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3).

11. The ESA requires federal agencies to consult with the FWS in order to ensure that agency actions are “not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification” of designated “critical habitat.” 16 U.S.C. § 1536(a)(2).

12. In March of 2005, APHIS conducted a “Biological Assessment for Biological Control of Saltcedar (*Tamarix* spp.) in Fifteen States,” to assess the effect of its release of “a biological control agent, *Diorhabda elongata* deserticola (*D. e. deserticola*), a leaf beetle,” that “[t]he USDA, Agricultural Research Service (ARS) has researched and developed” on the flycatcher and other species. 2005 Biological Assessment at 1. It found that the release was “not likely to adversely affect the southwestern willow flycatcher or its critical habitat,” largely because the release would occur well north of the flycatcher’s

primary habitat, and it was not believed that the leaf beetle could travel to and survive in the more southerly latitudes where primary flycatcher habitat is found, and even where the leaf beetle did destroy tamarisk used by flycatchers, the Biological Assessment found: “It is expected that any saltcedar control accomplished by *D. e. deserticola* will be gradual over many years; one estimate is that 75-85% control may be achieved after 10 or more years, under ideal conditions (Dudley et al., 2000). This rate of control should permit the concurrent recovery of native trees and shrubs through natural regeneration or restoration efforts without a net loss of southwestern willow flycatcher habitat, even in areas where flycatchers nest in saltcedar (Dudley et al. 2000).” *Id.* at 74-75.

13. APHIS entered into consultation with FWS, asking for concurrence with its determination. Based on the findings in the Biological Assessment, FWS concurred with APHIS’ determination that there was not likely to be an adverse effect on the flycatcher or its critical habitat.

14. New information reveals that the assumptions underlying the Biological Assessment’s findings and the FWS’s concurrence are incorrect. As explained by the FWS in November of 2008:

An experimental biocontrol program to control tamarisk is underway by U.S. Department of Agriculture (USDA), Animal Plant and Health Inspection Service (APHIS) by releasing tamarisk leaf beetles (*Diorhabda elongata*) (beetle).

APHIS entered into Section 7 consultation for releases throughout much of the west and portions of the southwestern United States beginning in 1998 (USFWS 1999, 2003, 2004, 2005a, 2005b), receiving concurrences for the flycatcher rangewide and for designated critical habitat (only in then, Region 1). Arizona (AZ) and much of New Mexico (NM) (primarily the greater Rio Grande drainage) were omitted from these proposals because even in the absence of tamarisk, landscape level changes to riparian areas along rivers (from damming, timing of water releases, river diversion, water storage, agricultural return flow, groundwater pumping, levees, etc.) prevent the complete restoration/development of native riparian forests. *Approximately 30% of all flycatcher territories are dominated by tamarisk and 53% contain tamarisk* (Durst et al. 2006). The Flycatcher Recovery Team recommended a 200-mile buffer between beetle releases and flycatcher habitat (USFWS 2002).

In the referenced consultations, flycatcher effect determinations/ concurrences were based upon the belief that the Fukang, China, Chilik, and Kazakhstan ecotypes of the beetle would move only “tens of feet per year” (USFWS 1999) and would not overwinter or establish below the 38th parallel (USDA 2005, 2008).

This year, beetles were found in occupied flycatcher habitat and designated critical habitat in AZ and Utah (UT) along the Virgin River (Figure 1) and historically occupied flycatcher habitat at Meadow Valley Wash, in southern NV.

In 2006, unauthorized collection, transportation, and release of beetles occurred on the Virgin River in St. George, UT (USDA 2008). *The beetles have spread downstream into AZ (25+ miles) to just below the 37th parallel. Beetles are now known to move much greater distances than anticipated [at least 50 miles over a three-year period (2001 to 2004) in northern NV (USDA 2005)]. Occupied flycatcher nesting habitat was defoliated during the 2008 flycatcher breeding season during incubation and nestling phases (Figure 1). Beetles are now present in southern UT and NV and northern AZ where they were not intended to be placed, nor were expected to survive (USFWS 2005).*

We are contacting our partners such as the BLM, Bureau of Reclamation, Arizona Game and Fish Department, UT Division of Wildlife Resources, State Entomologists, and APHIS, and coordinating

with other FWS Field and Regional Offices. Reclamation is particularly concerned with the movement of beetles into the boundaries of the Lower Colorado River Multi-species Habitat Conservation Plan area and how it may negatively impact the plan's success. *If beetles continue to thrive at these lower latitudes, move further south, and remain effective defoliators, the adverse effect to flycatchers and other migratory and nesting riparian-obligate wildlife could extend throughout the length of the Colorado River into Mexico as well as into central and eastern Arizona, southern California (CA), and NM.* This could significantly impact other conservation efforts such as Salt River Project's Roosevelt Habitat Conservation Plan. Other pathways into AZ and NM exist from releases and/or potential releases in CA, Colorado (CO) and Texas (TX).

Additionally, APHIS has reported that trees impacted by the beetles are not dying at the 80% rate as previously indicated, but mortality is between 25 and 50% (S. Usnick, APHIS, pers. com.). Trees are defoliating during the spring/summer and resprouting in the fall, generating concern that the creation of additional leaf litter without killing trees may cause an increased fire risk.

We believe tamarisk biocontrol poses a serious risk to the recovery of the flycatcher and the status of riparian-dependent wildlife in AZ and NM, and possibly in CA, southwestern CO, and southern NV and UT.

FWS memorandum November 10, 2008 (emphases added).

15. After consultation on an agency actions has already occurred, “[r]einitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: . . .(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.” 50 C.F.R. § 402.16 (emphasis added). Despite this requirement, and the

acknowledgment of new information by FWS, neither APHIS nor FWS has requested reinitiation of consultation.

CLAIM FOR RELIEF

16. The above paragraphs are incorporated here by reference.

17. Based on the above facts and legal obligations, APHIS and FWS are required to reinitiate consultation over the effects of the leaf beetle introduction program, pursuant to 50 C.F.R. § 402.16. and 16 U.S.C. § 1536(a)(2), to ensure that the program does not threaten the flycatcher with extinction, and does not destroy or adversely modify its critical habitat. Because the defendants have failed to comply with this requirement, they have violated the ESA, and/or have acted or failed to act in a manner that is arbitrary, capricious, or not in observance with law or procedure required by law. 16 U.S.C. § 1540(g)(1)(A); 5 U.S.C. §§ 701-706.

REQUEST FOR RELIEF

FOR THESE REASONS, plaintiffs respectfully request that this Court enter judgment providing the following relief:

1. Declare that defendants are in violation of the ESA, by having failed to reinitiate consultation pursuant to the ESA over the effects of the leaf beetle program on the southwestern willow flycatcher and its critical habitat;
2. Direct by injunction that the defendants immediately reinitiate ESA consultation so that the agencies may consider riparian restoration efforts

and other actions needed to avoid jeopardizing the flycatcher with extinction,
and to avoid destruction or modification of its critical habitat; and

3. Grant plaintiffs their costs of litigation, including reasonable attorney fees as provided by 16 U.S.C. § 1540(g)(4) and 28 U.S.C. § 2412; and
4. Provide other such relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED March 27, 2009.

 /s/Matt Kenna
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