

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-cv-2647

CENTER FOR BIOLOGICAL DIVERSITY, a non-profit organization,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE, and

RYAN ZINKE, in his official capacity as Secretary of the Interior,

Defendants.

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**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

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**INTRODUCTION**

1. In this civil action for declaratory and injunctive relief, Plaintiff Center for Biological Diversity (“Center”) challenges the U.S. Fish and Wildlife Service’s (“FWS”) failure to timely designate critical habitat for the western distinct population segment (“DPS”) of the yellow-billed cuckoo (*Coccyzus americanus*) (hereafter, “western yellow-billed cuckoo”), as required by the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*

2. Critical habitat provides important protections for threatened and endangered species beyond that provided by listing alone. Pursuant to section 7(a)(2) of the ESA, federal agencies must ensure through consultation with FWS that any action they authorize, fund, or

carry out will not “jeopardize the continued existence of any [listed] species.” 16 U.S.C.

§ 1536(a)(2). For species with critical habitat, each federal agency must additionally ensure that its actions will not “result in the destruction or adverse modification” of the critical habitat. *Id.* Species with critical habitat designations are twice as likely to be moving toward recovery as species without designated critical habitat.

3. The Center brings this action against FWS to (1) secure declaratory relief that the agency is in violation of the ESA for failing to timely designate critical habitat for the western yellow-billed cuckoo and (2) enjoin the agency to issue a final rule making such designation by a date-certain.

#### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(c) and (g) (action arising under ESA citizen suit provision); 5 U.S.C. § 702 (Administrative Procedure Act (“APA”) review); and 28 U.S.C. § 1331 (federal question jurisdiction).

5. The Court may grant the relief requested under the ESA, 16 U.S.C. § 1540(g); the APA, 5 U.S.C. §§ 701–706; and 28 U.S.C. §§ 2201 and 2002 (declaratory and injunctive relief).

6. Plaintiff provided sixty (60) days’ notice of its intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to Defendants dated July 11, 2018. *See* Exhibit A. Defendants have not taken action to remedy their continuing ESA and APA violations by the date of this complaint’s filing. Therefore, an actual controversy exists between the parties under 28 U.S.C. § 2201.

7. Venue is proper in the United States District Court for the District of Colorado pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because a substantial part of the property that is the subject of the Center's claims is situated in this District.

### **PARTIES**

8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.1 million members and on-line activists.

9. The Center's members include individuals who regularly visit natural areas that are occupied by western yellow-billed cuckoo, and seek to observe or study the cuckoo in its natural habitat. The Center's members and staff derive recreational, spiritual, professional, scientific, educational, and aesthetic benefit from these activities, and intend to continue to use and enjoy these areas in the future.

10. The Center has a long history of environmental advocacy in relation to the western yellow-billed cuckoo, including submitting a petition to list the species in 1998 and as detailed further in the Factual Background.

11. The above-described aesthetic, recreational, professional, and other interests of the Center and its members have been, are being, and will continue to be adversely harmed by Defendants' failure to designate critical habitat for the western yellow-billed cuckoo, and this harm would be remedied by a court order directing FWS to issue a final rule designating critical habitat for the species by a date-certain.

12. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is charged with implementing the ESA for the western yellow-billed cuckoo.

13. Defendant RYAN ZINKE is the Secretary of the United States Department of the Interior and is the federal official in whom the ESA vests final responsibility for making decisions and promulgating regulations required by and in accordance with the ESA, including listing determinations. Secretary Zinke is sued in his official capacity.

## LEGAL BACKGROUND

### I. Endangered Species Act

14. The ESA, 16 U.S.C. §§ 1531–1544, is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes 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).

15. ESA section 4 requires that the Secretary protect imperiled species by listing them as either “endangered” or “threatened.” *Id.* § 1533(a)(1). The Secretary has delegated its administration of the ESA to FWS. 50 C.F.R. § 402.01(b).

16. The ESA requires FWS to “determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (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.

16 U.S.C. § 1533(a)(1).

17. FWS’s listing determinations must be based “solely on the basis of the best scientific and commercial data available.” *Id.* § 1533(b)(1)(A).

18. A “species” “includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

19. FWS is generally required to designate “critical habitat” at the time of an imperiled species’ listing as threatened or endangered. *Id.* § 1533(a)(3)(A).

20. Critical habitat includes specific areas occupied by the threatened or endangered species with “physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection,” as well as specific areas unoccupied by the species that “are essential for the conservation of the species.” *Id.* § 1532(5)(A). In turn, “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 [the Act] are no longer necessary.” *Id.* § 1532(3). Accordingly, critical habitat includes areas that require proper management to ensure a listed species cannot only survive but also recover.

21. Protecting a species’ critical habitat is crucial for the protection and recovery of many listed species—particularly those that have become endangered or threatened because of historical and ongoing habitat loss or degradation. For example, Section 7 of the ESA requires

all federal agencies to ensure their actions do not “jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification” of their remaining “critical habitat.” *Id.* § 1536(a)(2).

22. Congress prioritized designating critical habitat to ensure species at risk of extinction receive these essential habitat protections in a timely manner. *Id.* § 1533(a)(3), (b)(6); *see also id.* § 1531(b) (statutory directive to “provide a means whereby the ecosystems upon which endangered . . . and threatened species depend may be conserved”). FWS is required, “to the maximum extent prudent and determinable,” to designate critical habitat for a species “concurrently with making a determination” that it is endangered or threatened,” *id.* § 1533(a)(3)(A)(i), and within one year of issuing a rule proposing critical habitat. *Id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii).

23. The ESA does not safeguard a species’ critical habitat until FWS designates it. Accordingly, it is essential that FWS dutifully follow the Act’s procedures and deadlines to ensure it designates critical habitat in a timely manner.

## **II. Administrative Procedure Act**

24. The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

25. The APA provides that a court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law,” *id.* § 706(2)(A), or agency action that is undertaken “without observance of procedure required by law.” *Id.* § 706(2)(D).

## FACTUAL BACKGROUND

### I. The Imperiled Western Yellow-Billed Cuckoo

26. The western yellow-billed cuckoo is a member of the avian family Cuculidae and is a Neotropical migrant bird that winters in South America and summers in the western United States, northwestern Mexico, and southwestern Canada. The cuckoo is a riparian obligate, and “nests almost exclusive[ly] in low to moderate elevation riparian woodlands that cover 50 acres or more within arid to semiarid landscapes.” Proposed Threatened Status for the Western Distinct Population Segment of the Yellow-Billed Cuckoo, 78 Fed. Reg. 61,621, at 61,633 (Oct. 3, 2013) (“Proposed Listing Rule”).

27. Western yellow-billed cuckoos primarily place their nests in willow trees, but also use alder, cottonwood, mesquite, box elder, and sycamore.

28. The cuckoo historically occurred throughout the western U.S. As FWS stated:

Based on historic accounts, the species was widespread and locally common in California and Arizona, locally common in a few river reaches in New Mexico, common very locally in Oregon and Washington, generally local and uncommon in scattered drainages of the arid and semiarid portions of western Colorado, western Wyoming, Idaho, Nevada, and Utah, and probably uncommon and very local in British Columbia.

12-Month Finding for a Petition to List the Yellow-Billed Cuckoo in the Western Continental States, 66 Fed. Reg. 38,611 (July 25, 2001) (“Warranted but Precluded Finding”).

29. Today, however, the cuckoo has been extirpated from large portions of that range and only breeds rarely and locally along rivers, with the largest remaining populations in New Mexico, Arizona, and California. As FWS acknowledged, this restriction of the cuckoo’s historic range “is primarily the result of habitat loss and degradation.” Determination of

Threatened Status for the Western Distinct Population Segment of the Yellow-Billed Cuckoo, 79 Fed. Reg. 59,992, at 60,015 (Oct. 3, 2014) (“Final Listing Rule”).

30. Even in its remaining strongholds, “past riparian losses are estimated to be about 90 to 95 percent in Arizona, 90 percent in New Mexico, and 90 to 99 percent in California.” *Id.* As a result of this habitat loss and other threats discussed in more detail below, the western yellow-billed cuckoo “has declined by several orders of magnitude over the past 100 years, and [ ] this decline is continuing.” Proposed Listing Rule, 78 Fed. Reg. at 61,642. For example, FWS noted in 2013 that “[r]ecent declines over the past 15 years have shown both a loss of breeding yellow-billed cuckoos in smaller isolated spots and declines in numbers at core breeding areas.” *Id.*

31. According to FWS’s own recent estimates, western yellow-billed cuckoos have been reduced to 350 to 495 pairs in the United States and 330 to 530 pairs in Mexico. *Id.*

## **II. Timeline of Endangered Species Act Protections for the Yellow-Billed Cuckoo**

32. The Center petitioned to list the western yellow-billed cuckoo as a federally endangered species more than twenty years ago, on February 2, 1998. (available at: [http://www.biologicaldiversity.org/species/birds/yellow-billed\\_cuckoo/pdfs/petition.pdf](http://www.biologicaldiversity.org/species/birds/yellow-billed_cuckoo/pdfs/petition.pdf) (last accessed October 15, 2018)).

33. Despite the cuckoo’s clearly imperiled status and numerous recognized threats to its continued existence, litigation has been repeatedly necessary to compel FWS to meet its requirements to respond to that petition under the ESA

34. In March 1999, the Center sued FWS for its failure to make the required 90-day finding as to whether the listing petition presented substantial or commercial information



indicating that the listing may be warranted. 16 U.S.C. § 1533(b)(3)(A); *Southwest Ctr. for Biological Diversity v. Badgley* (D. Or. Case No. 3:99-cv-00396-KI). Following the initiation of that suit, FWS published the required finding on February 17, 2000, determining that listing “may be warranted.” 65 Fed. Reg. 8104 (Feb. 17, 2000).

35. The Center again filed suit on July 31, 2000, challenging FWS’s failure to make the required 12-month finding on whether to list the western yellow-billed cuckoo, which was due February 9, 1998. On October 11, 2000, a federal judge agreed with the Center that FWS had missed its mandatory deadline and ordered the agency to make a decision on whether to propose listing for the cuckoo by July 19, 2001. *Ctr. for Biological Diversity v. Badgley*, No. 00-1045-KI, 2000 U.S. Dist. LEXIS 15155 (D. Or. Oct. 11, 2000).

36. On July 25, 2001, FWS determined that ESA protection for the western yellow-billed cuckoo was warranted, but that “an immediate proposal to list is precluded by other higher priority listing actions.” 12-Month Finding for a Petition to List the Yellow-Billed Cuckoo, 66 Fed. Reg. 38,611 (July 27, 2001).

37. FWS made no progress towards protecting the cuckoo for the next decade.

38. On July 25, 2011, the Center and FWS reached a legal settlement requiring the agency to make overdue decisions on whether to add 757 species, including the western yellow-billed cuckoo, to the endangered list by 2018. Stipulated Settlement Agreement, *In re Endangered Species Act Section 4 Deadline Litigation*, No. 1:10-cv-0377-EGS (D.D.C July 12, 2011), ECF No. 42-1.

39. Following that agreement, FWS proposed to list the cuckoo as a threatened species on October 2, 2013. Proposed Listing Rule, 78 Fed. Reg. at 61,621. In that listing

proposal, FWS acknowledged that more than 90 percent of the cuckoo's riparian habitat in the western U.S. has been destroyed or degraded, and that this loss of riparian habitat and consequent habitat fragmentation resulted from a multitude of threats.

40. On October 3, 2014, FWS issued a final rule listing the western yellow-billed cuckoo as threatened. In summarizing the factors compelling listing, FWS stated:

The primary factors threatening the western DPS of the yellow-billed cuckoo are the loss and degradation of habitat for the species from altered watercourse hydrology and natural stream processes, livestock overgrazing, encroachment from agriculture, and conversion of native habitat to predominantly nonnative vegetation . . . Additional threats . . . include the effects of climate change, pesticides, wildfire, and small and widely separated habitat patches. The cumulative impact from various threats is also a factor that will exacerbate multiple existing threats to the western yellow-billed cuckoo and its habitat . . . [B]ecause the yellow-billed cuckoo is not a protected or sensitive species in a majority of the United States or in Canada and Mexico, the application of [existing] regulatory mechanisms to conserve the western yellow-billed cuckoo or its habitat is unknown and the effectiveness of these regulatory mechanisms is uncertain.

Final Listing Rule, 79 Fed. Reg. at 60,034.

41. Approximately six weeks prior to the final listing rule, on August 15, 2014, FWS issued a proposed rule to designate 546,335 acres of critical habitat for the cuckoo in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Texas, Utah, and Wyoming. Proposed Rule for Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo, 79 Fed. Reg. 48,548 (Aug. 15, 2014).

42. Under the proposed rule, FWS described the physical or biological features essential to the conservation of the cuckoo as including riparian woodlands (“generally willow-dominated [with] above average canopy closure (greater than 70 percent) [that] have a cooler, more humid environment than the surrounding riparian and upland habitats”); adequate prey base

(large breeding insects and tree frogs); and dynamic riverine processes (“allow[ing] habitat to regenerate at regular intervals, leading to riparian vegetation with variously aged patches from young to old.”). *Id.* at 48,554.

43. FWS limited proposed river segment critical habitats to “blocks of riparian habitat greater than 200 acres in extent and greater than 325 feet in width, with one or more densely foliated, willow-dominated nesting sites and cottonwood-dominated foraging sites.” *Id.* at 48,553. The proposed river segment critical habitats “were either occupied by mated pairs of western yellow-billed cuckoo in at least one year between 1998 and 2012 or were occupied by individual western yellow-billed cuckoos of unknown mating status during the breeding season (late June through mid-August) in at least 2 years between 1998 and 2012.” *Id.* at 48,556.

44. The 546,335 acres of proposed critical habitat are comprised of 80 units (6 in California, 2 in California/Arizona, 37 in Arizona, 8 in New Mexico, 7 in Colorado, 8 in Utah, 4 in Idaho, 3 in Nevada, 1 in Nevada/Arizona, 1 in Wyoming, 1 in Wyoming/Utah, and 2 in Texas). *Id.* at 48,557-48,558.

45. The proposed rule, however, also included extensive exclusions under section 4(b)(2). In total, the 29 proposed exclusions (3 in California, 2 in California/Arizona, 18 in Arizona, 3 in New Mexico, 2 in Colorado, and 1 in Idaho) encompass 197,257 acres—more than 36 percent of the proposed acreage.

46. FWS has not finalized the proposed rule for the designation of critical habitat for the western yellow-billed cuckoo.

**CLAIM FOR RELIEF**  
**Violation of the ESA, 16 U.S.C. § 1533(a)(3), (b)(6)(C)**

47. Plaintiff incorporates all preceding paragraphs by reference.

48. The ESA required FWS to designate critical habitat for the western yellow-billed cuckoo concurrently with its decision to list the species, 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C), and within one year of proposing critical habitat,. *Id.* § 1533(b)(6)(A)(ii).

49. On August 15, 2014, FWS issued a proposed rule to designate 546,335 acres of critical habitat for the western yellow-billed cuckoo. 79 Fed. Reg. 48,548. FWS has not issued a final critical habitat rule. FWS's failure to timely issue a final critical habitat designation violates the ESA. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C).

50. FWS's violations are subject to judicial review under the ESA. *Id.* § 1540(c), (g)(1)(C).

#### **REQUEST FOR RELIEF**

Wherefore, Plaintiff respectfully requests that the Court:

1. Declare that Defendants violated the Endangered Species Act by failing to designate critical habitat for the western yellow-billed cuckoo;
2. Order FWS to designate final critical habitat for the western yellow-billed cuckoo under the Endangered Species Act by a date-certain, § 1533(a)(3)(A);
3. Grant Plaintiff its reasonable attorneys' fees and costs associated with this action, as provided by the Endangered Species Act, § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. § 2412; and
4. Provide such other relief as the Court may deem just and proper.

Respectfully Submitted this 17th day of October, 2018.

/s/ Brian Segee  
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