



**Western
Watersheds
Project**

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Working to protect and restore Western Watersheds

May 6, 2009

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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Re: **Notice of Intent to Sue for Violations of the Endangered Species Act Regarding the Gila River Habitats of Loach Minnow, Spikedace, Southwestern Willow Flycatcher, and Lesser Long-nosed Bat**

Dear Sirs:

In accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), Western Watersheds Project (“WWP”) hereby provides notice of intent to sue for violations of the ESA relating to your agencies’ obligations with respect to loach minnow, spikedace, southwestern willow flycatcher, and lesser long-nosed bat on eighteen allotments on the Tucson Field Office of the Bureau of Land Management.

As explained below, loach minnow, spikedace, southwestern willow flycatcher, and lesser long-nosed bat are all listed as endangered and threatened species under the ESA and continue to struggle in the Gila River and the surrounding watershed of the Myers, Whitlow, Horsetrack, Teacup, Cochran, LEN, A Diamond, Battle Axe, Rafter Six, Hidalgo, Piper Springs, Christmas, Mescal Mountain, Smith Wash, Dripping Springs, Ponderosa, Kearny, and Government Springs allotments (collectively, “Mid-Gila 18”). Your agencies have responsibilities to protect and recover these species and their habitat, yet have failed to fulfill those responsibilities due to inadequate grazing management practices that are not sufficient to prevent jeopardy and take of these animals throughout these watersheds.

BACKGROUND

Listed Species

The Middle Gila River watershed is the portion of the Gila River below the Coolidge Dam downstream to the area of Ashurst-Hayden Dam, in both Gila and Pinal counties. The BLM administers livestock grazing on 18 grazing allotments within this watershed, which includes 159,250 acres of federal land.

The loach minnow (*Tiaroga cobitis*) was listed as threatened in 1986 and critical habitat was designated in 2007. The Gila River watershed serves as designated critical habitat for this species, and designated critical habitat occurs on the Myers, Whitlow, Horsetrack, Teacup, Cochran, LEN, A Diamond, Battle Axe, Rafter Six, Hidalgo, Piper Springs, and Kearny allotments. The Government Springs, Dripping Springs, Smith Wash, LEN, and Whitlow allotments are also within the watershed of critical habitat for the species.

The spikedace (*Meda fulgida*) was listed as threatened in 1997, and additionally, uplisting to endangered has been found to be warranted but precluded. It has designated critical habitat on the Myers, Whitlow, Teacup, Cochran, LEN, A Diamond, Battle Axe, Rafter Six, and Kearny allotments. The Government Springs, Dripping Springs, Smith Wash, LEN, and Whitlow allotments are also within the watershed of critical habitat for the species.

The lesser long-nosed bat (*Leptonycteris currosae yerbabuena*) was listed as endangered in 1988. It relies upon desert scrub habitat, including agave and columnar cactus as food plants. The 2003 Biological Opinion determined the Myers, Whitlow, Teacup, A-Diamond, Cochran, Piper Springs, Smith Wash, Hidalgo, and Christmas allotments are all within foraging distances of known roosts.

The southwestern willow flycatcher (*Empidonax trallii extimus*) was listed as endangered in 1995. This species relies on dense riparian habitats for breeding and primarily uses riparian tree species during the summer for nesting and fledging. Critical habitat for this species was designated on October 19, 2005 and includes segments of the Gila River within the Middle Gila/San Pedro Management Unit between the Dripping Springs Wash to the Town of Cochran. 70 FR 60886-61009. The Christmas, Dripping Springs, Hidalgo, Piper Springs, Smith Wash, Kearny, Rafter 6, A Diamond, Battle Axe, Teacup, Cochran, Horsetrack, and Myers allotments are all within this same corridor. The 2003 Biological Opinion reported that this species had been documented nesting on the Mescal Mountain, A Diamond, Battle Axe, LEN, Rafter Six, and Cochran allotments and using portions of the Kearny, Smith Wash, Hidalgo, and Piper Springs allotments.

Consultation History

Formal consultation for the 18 allotments on the middle Gila River began in 1996 (02-21-96-F-0205). The 18 allotments are Myers, Whitlow, Horsetrack, Teacup, Cochran, LEN, A Diamond, Battle Axe, Rafter Six, Hidalgo, Piper Springs, Christmas, Mescal Mountain, Smith Wash, Dripping Springs, Ponderosa, Kearny, and Government Springs allotments. The biological evaluation was revised by the BLM to include the Standards and Guidelines for Conservation Measures for the cactus ferruginous pygmy-owl and the southwestern willow flycatcher. In November 2000, the BLM resubmitted the revised biological evaluation for formal consultation on 18 allotments in the Middle Gila River Ecosystem. After several delays and extensions, the U.S. Fish and Wildlife Service finalized a draft

Biological Opinion at the end of 2001. The BLM provided comments to USFWS in February 2003 and, after another round of drafts and reviews, the final Biological Opinion for livestock grazing on 18 allotments was issued October 23, 2003 (02-21-00-F-0029).

VIOLATIONS OF THE ENDANGERED SPECIES ACT

The ESA requires BLM to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat.” 16 U.S.C. § 1536(a)(2). The agencies have an ongoing duty to comply with ESA Section 7’s prohibition against jeopardy and adverse modification of critical habitat. To that end, consultation must be reinitiated when (1) the amount or extent of take specified in an incidental take statement is exceeded, (2) new information reveals effects that may affect listed species or critical habitat in a manner or to an extent not previously considered, (3) the action is modified in a manner to cause effects not previously considered, or (4) critical habitat is designated that may be affected. 50 C.F.R. § 402.16. BLM has not complied with these requirements.

Reinitiation is required for many reasons. First, critical habitat was designated for the southwestern willow flycatcher on October 19, 2005. 70 FR 60886-61009. Many areas within the Middle Gila River watershed now contain designated critical habitat, including segments of the Gila River within the Middle Gila/San Pedro Management Unit between the Dripping Springs Wash to the Town of Cochran, which includes the Christmas, Hidalgo, Piper Springs, Kearney, Rafter Six, A Diamond, Battle Axe, Teacup, Cochran, and LEN allotments. Therefore, BLM needs to reinitiate consultation to consider impacts to this newly designated critical habitat, as stated explicitly in the regulations.

Second, the amount and extent of take specified in the ITS has been exceeded, new information has revealed effects on listed species and critical habitat in a manner and extent not previously considered, and the action has been modified in a manner to cause effects not previously considered—because BLM is not ensuring that the Terms and Conditions, and other assumptions of the Biological Opinion, are followed.

The 2003 Biological Opinion contains several Incidental Take Statements (ITS), one each for the five species.¹ The first, for the southwestern willow flycatcher, states that authorized take would be exceeded if various indicators are exceeded on the Kearny and Rafter Six allotments. BiOp at 48. The ITS also sets several binding Terms and Conditions, including: limiting grazing to winter months, implementing monitoring before, during, and after livestock have used a riparian pasture, setting utilization at less than 30 percent, immediately removing livestock from flycatcher habitat, implementing fencing by 2006, notifying the USFWS of any trespass within 48 hours, restricting maintenance and management to non-breeding seasons, removing cattle in cases of cowbird parasitism in excess of five percent nest failure. BiOp at 49-50. The Biological Opinion also requires the BLM to submit an annual monitoring report summarizing the effectiveness of the terms and conditions as well as trespass and intrusion into riparian pastures of the project area. BiOp at 50. Additionally, the Biological Opinion states, “If flycatchers are found to nest during the life of the project in grazed portions of the allotments other than the Rafter Six or Kearney allotments, incidental take could

¹ The fifth species covered in the Biological Opinion, cactus ferruginous pygmy owl, has since been removed from the list of Endangered Species. We note, however, that conservation groups submitted a petition to relist the species in March 2007.

potentially occur that is not addressed herein. Such information may warrant reinitiation and reconsideration of the scope of the incidental take statement.” BiOp at 50-51.

The BiOp contains numerous other requirements with respect to other species. The Biological Opinion states, “The BLM propose to conserve... the southwestern willow flycatcher, and other listed species and their habitat, while managing livestock grazing use through the implementation of Arizona’s Standards for Rangeland Health and Guidelines for Grazing Administration, specific range improvements, and grazing lease terms and conditions to meet existing Land Use Plan objectives on the thirteen riparian allotments and five upland allotments whose leases have expired.” BiOp at 3. In riparian corridors, this includes eliminating authorized livestock grazing between April 1 and November 1 and limiting utilization in riparian areas. BiOp at 4. For the uplands, these goals include limiting foraging on browse species, reducing cattle congregation within 5 miles of southwestern willow flycatcher to reduce attraction of brown-headed cowbirds, and restricting the developments of range projects. BiOp at 4-5.

The Biological Opinion recognizes that there are implementation requirements for all of these conservation measures, “Grazing at proposed utilization levels in the uplands may help reduce some impacts to the existing riparian habitat but will eliminate the impacts only if the new utilization levels are strictly followed.” BiOp at 24. Importantly, the Biological Opinion states, “Exclusion of grazing in the riparian corridor will be specified in the terms and conditions of the grazing permits through written agreements or decisions with the permittees.” BiOp at 4.

However, the BLM is not ensuring that the Terms and Conditions and other assumptions of the Biological Opinion are followed. For example, the proposed grazing decisions of spring 2009 on the Teacup, Whitlow, Cochran, and Horsetrack allotments fail to propose or ensure the reductions described in the Biological Opinion. Nor do the decisions include terms and conditions regarding seasonal exclusions in riparian areas or utilization limits in riparian or upland areas of the allotments. Similar problems exist for many other annual authorizations, bills, and final grazing decisions for allotments covered by the Biological Opinion.

Another example is that the Biological Opinion assumed that the Cochran allotment, “will not be authorized until riparian fencing is in place,” to exclude livestock from the Gila River. BiOp at 9. The Biological Opinion was based on the allotment being in non-use. BiOp at 147. However, BLM issued a proposed decision this spring to allow yearlong grazing on the Cochran allotment, despite the fact that it does not even know whether the fence which was supposed to be built to ensure that livestock will not enter the riparian area has been completed.² The proposed decision also did not specify that the riparian pasture of the allotment (created by the new fence) would only be grazed from November 1 to April 1, as specified in the Biological Opinion. BiOp at 10.

Additionally, the Biological Opinion states that the livestock operator on the Teacup allotment does not want their livestock to use the [Gila] river, and there are no plans to allow them access during any season.” BiOp at 9. Still, the BLM did not formalize this exclusion in the terms and conditions of the 2009 proposed grazing decision. Because the Biological Opinion relies on this exclusion, it should have been included as a mandatory measure for the new permit.

² We attempted to reviewed the monitoring file for the Cochran allotment in April 2009, but were told that there is no monitoring file for this allotment. We were told that that allotment file (which we were not permitted to see) contains no record of fence construction.

A final example is that BLM is failing to follow the 30% utilization standard mandated by the Biological Opinion. The Biological Opinion describes utilization on riparian woody species as less than 30 percent of the apical meristems of seedlings and saplings from 0 to 6 feet tall to encourage tree recruitment. BiOp at 4. The utilization levels assigned to upland allotments is less than 30 percent on perennial palatable shrubs and grasses. BiOp at 20, 45. The utilization level of 30 percent in desert scrub communities was designed to benefit the lesser long-nosed bat. BiOp at 68, 69. Recovery of spikedace and loach minnow critical habitat depends on improvements in watershed condition, which the Biological Opinion expected with the implementation of a 30 percent utilization limit. BiOp at 78, 82, 87. Despite these clear requirements, the Rangeland Health Assessment for the Teacup, Whitlow, Cochran, and Horsetrack allotments declared, "Completion Upland Health Assessments on the allotment showed light stocking rates and that grazing use (utilization) well below the 40 percent threshold." RHA at 5. BLM appears to be willfully disregarding the mandated standards.

Third, BLM is not procedurally conducting the actions as described in the BE and Biological Opinion. For example, the Biological Opinion states that: "Without intensive monitoring, herding of livestock, or a reduction in stocking levels, use will be exceeded. Monitoring and implementing management based upon the results will be the key activities to prevent livestock from exceeding use limits." BiOp at 23. The Biological Opinion states even the annual authorization of winter use in the riparian areas should be based on monitoring: "Similar to use limits, monitoring [riparian] pastures is important when determining if it is appropriate to graze these riparian areas from November 1 to April 1. Without establishing the herbaceous component before allowing livestock to enter a pasture, it will not be known whether there is enough herbaceous forage available for livestock. If livestock are found staying in riparian areas as a result of mild winters and not being regularly herded, then cattle can physically harm riparian trees by browsing, trampling, trailing and bedding. If livestock are present when cottonwood and willow trees are not dormant, the trees can be significantly affected by herbivory. BiOp at 25. The Biological Opinion recommends that a monitoring plan should be implemented to better determine when the actual growing season is in the project area to help alleviate overuse of riparian areas in the project area. BiOp at 42. BLM has failed, and continues to fail, to conduct the required monitoring or to develop a monitoring plan.

For example, the BLM's spring 2009 proposed decisions did not impose herding requirements or monitoring plans, nor did the proposed decisions reduce the stocking levels on the allotments. Instead, the proposed decisions for the Teacup, Whitlow, Cochran, and Horsetrack allotments maintained the status quo and tiered to a decades old Resource Management Plan to establish authorized use.

Moreover, the BLM has not been monitoring and does not plan to monitor the allotments to ensure compliance. The Biological Opinion states, "Improving habitat conditions is reliant in part on the BLM's monitoring and appropriate response to the results.... Timely and frequent monitoring will be needed." BiOp at 45. Despite this, Rangeland Health Assessments issued in 2009 for four of the Mid-Gila 18 allotments (the Teacup, Whitlow, Cochran, and Horsetrack allotments) indicate that the agency has no dry weight rank, point cover, line intercept or utilization data. RHA at 10-11. The RHA claims the agency has actual use and Pace frequency data, but two of the allotments (the Cochran and Horsetrack) do not even have monitoring files, much less data to ensure conformance with the Biological Opinion. The agency appears to believe that the classification of these allotments as "custodial" exempts it from compliance with the ESA, when in fact the custodial designation cannot apply to allotments with "significant resource-use conflict/controversy." The most recent utilization monitoring on the Teacup allotment was conducted in 1990, and there is no monitoring of the riparian

areas, according to the short form evaluation we read in the BLM Tucson office. This hardly demonstrates “timely and frequent” monitoring of habitat conditions in the project area.

Finally, new information since 2003 about effects to the listed species in the Mid-Gila 18 allotments warrants reinitiation of consultation. Available evidence shows that livestock are continuing to cause damage to riparian areas from both authorized and unauthorized grazing. We accompanied the BLM on a fieldtrip in May 2005 and witnessed unauthorized use of the riparian corridor, and we suspect that this is not an isolated incident. Recent developments on ongoing drought and the effects of global warming in the West, new invasive species infestations, increased recreational pressures through off-road vehicle use, and the changing socio-economics of livestock operations all merit a reexamination through renewed NEPA processes and a new consultation.

For these reasons, the BLM must reinitiate consultation. Further, BLM is not insuring that its actions are not likely to jeopardize these species or adversely modify their critical habitat, in violation of section 7(a)(2) of the ESA, and are failing to utilize the best available scientific information. 16 U.S.C. § 1536(a)(2). Section 7 requires agencies to insure they are not impairing the survival *or* the recovery of species, yet livestock grazing on many grazing allotments continues to degrade critical habitat. Until the agencies complete a new consultation, they must comply with the requirement to avoid jeopardy and adverse modification, as well as the requirement under section 7(d) to avoid making irreversible or irretrievable commitments of resources. 16 U.S.C. § 1536(d). Furthermore, livestock access to streams that contain listed fish or their spawning areas, and excessive use in other species’ critical habitat, causes “take” of these species in violation of ESA section 9. *Id.* § 1538. There is every indication that these violations will continue in 2009 and future years.

CONCLUSION

As set forth above, we intend to pursue litigation in federal court for these ESA violations following sixty days after this notice and will seek injunctive, declaratory and other relief, including an award of attorneys’ fees, expert witness fees, and other expenses incurred in investigating and prosecuting this action. Because the BLM has been forewarned of its non-compliance, and because BLM is apparently aware that it is out of compliance with ESA requirements, we expect and hope that this matter can be solved by simply withdrawing all annual and ten-year grazing authorizations for livestock grazing within the Mid-Gila 18 until the requisite analyses, developments, and monitoring plans are completed.

If you have any questions, wish to discuss this matter further, or believe this notice is in error, please feel free to contact me at the address on the letterhead.

Sincerely,

Greta Anderson
Arizona Director
Western Watersheds Project

cc:

Secretary Ken Salazar
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