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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
Las Vegas Division

CENTER FOR BIOLOGICAL DIVERSITY 351 California Street, Suite 600 San Francisco, CA 94104,	)	
MARICOPA AUDUBON SOCIETY 4619 East Arcadia Lane Phoenix, AZ 85018,	)	
DR. ROBIN SILVER 1333 North Oracle Tucson, AZ 85705, Plaintiffs,	)	
v.	)	Civ. No.
TOM VILSACK, Secretary U.S. Department of Agriculture 1400 Independence Avenue SW Washington, DC 20250,	)	

GREGORY PARHAM, ADMINISTRATOR)
Animal and Plant Health Inspection Service)
4700 River Road, Unit 84)
Riverdale, MD 20737,)
)
EDWARD KNIPLING, ADMINISTRATOR)
Agricultural Research Service)
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Washington, DC 20250,)
)
SALLY JEWELL, SECRETARY)
U.S. Department of the Interior)
1849 C Street NW)
Washington, DC 20240,)
)
DAN ASHE, DIRECTOR)
U.S. Fish and Wildlife Service)
1849 C Street NW)
Washington, DC 20240,)
)
Defendants.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This case challenges the Animal and Plant Health Inspection Service's ("APHIS") 2010 decision to terminate, without taking necessary remedial action, the agency's program authorizing wide-scale release of an invasive species known as the tamarisk leaf-eating beetle ("beetle") that is having, and will continue to have, devastating effects on the highly endangered Southwestern willow flycatcher ("flycatcher") and its habitat, including designated critical habitat. Not only did APHIS's failure to implement any mitigation measures to address the ongoing harm to the flycatcher directly caused by APHIS's beetle release program violate the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, in myriad ways – namely the ESA's affirmative duties (1) to avoid jeopardizing the continued existence of a listed species, and (2) to carry out programs for the conservation of the federally endangered flycatcher – but the agency's attempt to wash its hands of the ecological catastrophe that it caused also violates the National

Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h; APHIS's regulations, *see* 7 C.F.R. § 372.9(f); and the agency's own Environmental Assessment and Record of Decision in which the agency expressly committed to developing and implementing a mitigation plan if the beetle release program was found to have any effects on the flycatcher, as the agency has since conceded.

2. In addition to the ESA and NEPA violations committed by APHIS in terminating its beetle release program without implementing any mitigation measures to reverse or at least reduce the ongoing harm to listed flycatchers and their critical habitat, APHIS and the U.S. Fish and Wildlife Service ("FWS" or "Service") are also in violation of the ESA and its implementing regulations for failing to pursue formal consultation concerning APHIS's decision to suspend its beetle release program without implementing any mitigation measures to conserve the flycatcher and its habitat (including critical habitat). Alternatively, by significantly narrowing the scope of the agencies' 2010 reinitiated consultation to focus only on the effects to flycatchers of terminating the beetle release program – but avoiding any consideration of what mitigation steps must in conjunction with program termination be taken to actually conserve the flycatcher and its critical habitat consistent with the ESA – the agencies conducted an artificially and unlawfully narrow consultation that failed to analyze all present and future effects of the beetle release program in violation of the ESA and its implementing regulations.

JURISDICTION

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

PARTIES

4. Plaintiff Center for Biological Diversity ("the Center") is a non-profit 501(c)(3) corporation headquartered in San Francisco, California, with offices in Nevada, Florida, Arizona, New Mexico, Washington, Oregon, Minnesota, and Washington, D.C. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including protection of plant and animal species from the impacts of global warming. In addition to more than 625,000 supporters and online activists, the Center has more than 48,000 members throughout the United States and the world, including at least 6,376 members and supporters in Nevada. The Center brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities concerning the flycatcher and its habitat, including critical habitat, harmed by the decisions challenged in this case. The Center petitioned for ESA protection for the flycatcher on January 25, 1992. The interests of the Center and its members in observing, studying, and otherwise enjoying the flycatcher have been harmed by Defendants' actions and will continue to be harmed by the diminished numbers of flycatchers in Nevada and elsewhere, as well as a diminution in the amount of suitable flycatcher habitat in Nevada and elsewhere in which to observe the species.

5. Plaintiff Maricopa Audubon Society ("MAS") is a non-profit organization dedicated to the enjoyment of birds and other wildlife with a primary focus on the protection and restoration of southwestern riparian habitat through fellowship, education, and community involvement. MAS is a chapter of the National Audubon Society. MAS has over 2,300 members, primarily in central Arizona. MAS has undertaken continuous ongoing activist efforts

to protect flycatcher habitats of the arid Southwest. MAS has played a strong role in protecting endangered species in the Southwest through public education efforts, field surveys, public field trips, and position papers. MAS leads field trips with members and non-members of the public to critical habitat areas of the flycatcher. MAS brings this action on behalf of itself and its adversely affected members. Defendants' ESA violations facilitate the decline of this species and its habitat. Accordingly, the educational, scientific, aesthetic, conservation, and recreational interests of MAS's members have been and are being harmed, and unless the Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' failures to comply with the law.

6. Plaintiff Dr. Robin Silver is the Vice-President of MAS and a Co-founder and Board Member of the Center. He is a member of both organizations. He works with Center staff and others to advance the Center's mission of conserving native plants and animals and their natural habitats through education, scientific research, advocacy, and land stewardship. Dr. Silver is a frequently published professional photographer specializing in threatened and endangered species and their habitat. He is a co-author of the January 25, 1992 ESA petition to protect the flycatcher by listing it as endangered. He has studied and been involved in flycatcher conservation for decades. Dr. Silver regularly travels to various locations in the Southwest, including in Nevada, to view, observe, and enjoy flycatchers and their habitat. For example, he has definite plans to travel to the Pahranagat National Wildlife Refuge in Nevada in July 2014, which contains designated flycatcher critical habitat, and is part of the Basin and Mojave Recovery Unit for the species. Dr. Silver's interests in the flycatcher have been and are being harmed by Defendants' actions and failures to comply with the law because these actions and

failures are threatening the continued existence of the flycatcher and destroying its critical habitat, including in locations where Dr. Silver observes, studies, and enjoys the flycatcher.

7. Defendant Tom Vilsack is the Secretary of the U.S. Department of Agriculture ("USDA"), the parent agency of APHIS, and, accordingly, is ultimately responsible for APHIS's decisions challenged here.

8. Defendant Gregory Parham is the Administrator of APHIS, and, accordingly, is ultimately responsible for APHIS's decisions challenged here.

9. Defendant Edward Knipling is the Administrator of the USDA's Agricultural Research Service ("ARS"), which is the principal research agency within USDA and has been involved in the decisions to authorize USDA's beetle release program. Accordingly, Mr. Knipling is ultimately responsible for APHIS's decisions challenged here.

10. Defendant Sally Jewell is the Secretary of the Department of the Interior, the parent agency of the Service, and, accordingly, is ultimately responsible for the Service's decisions challenged here.

11. Defendant Dan Ashe is the Director of the Service, and, accordingly, is ultimately responsible for the Service's decisions challenged here.

STATUTORY AND REGULATORY FRAMEWORK

A. Endangered Species Act

12. Recognizing that certain species of plants and animals "have been so depleted in numbers that they are in danger of or threatened with extinction," Congress enacted the ESA to provide both "a means whereby the ecosystems upon which endangered 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. The ESA reflects "an explicit congressional

decision to afford first priority to the declared national policy of saving endangered species." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). The ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180.

13. Under the ESA, a species may be listed as endangered or threatened. An endangered species – a status which is reserved for species in the most perilous condition – is one that is "in danger of extinction throughout all or a significant portion of its range . . . ." 16 U.S.C. § 1532(6).

14. Section 9 of the ESA makes it unlawful for any person to "take" an endangered species without express authorization from the Service. 16 U.S.C. § 1538(a)(1). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm" is further defined by FWS regulations to encompass habitat modification or degradation that injures an endangered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering, *see* 50 C.F.R. § 17.3, and "harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." *Id.*

15. Section 7(a)(1) of the ESA directs all federal agencies, in consultation with the Secretary of Interior, to "utilize their authorities . . . by carrying out programs for the conservation of endangered species." 16 U.S.C. § 1536(a)(1). "Conservation" means "to use and the use of all methods and procedures which are necessary to bring any endangered species

. . . to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* at § 1532(3).

16. Section 7 of the ESA further requires all federal agencies 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." 16 U.S.C. at § 1536(a)(2). To carry out this obligation, before undertaking any action that may have direct or indirect effects on listed species, an action agency must engage in consultation with the FWS in order to evaluate the impact of the proposed action. *See id.* § 1536(a). The FWS has defined the term "action" for the purposes of Section 7 broadly to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02, "in which there is discretionary federal involvement or control." *Id*. § 402.03.

17. The purpose of consultation is to ensure that the action at issue "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] habitat of such species." 16 U.S.C. § 1536(a)(2). As defined by the ESA's implementing regulations, an action will cause jeopardy to a listed species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Notwithstanding this definition of jeopardy, during consultation the action agency and the Service must consider not only the loss of critical habitat necessary to survival, but also the loss of critical habitat necessary to recovery of a listed species. *See Gifford Pinchot Task Force v. FWS*, 387 F.3d 968, 1071 (9th Cir. 2004). The evaluation of the effects of the proposed action on listed species during consultation must use "the best scientific . . . data available." 16 U.S.C. § 1536(a)(2).

18. Consultation under Section 7 may be "formal" or "informal" in nature. Informal consultation is "an optional process" consisting of all correspondence between the action agency and the Service, which is designed to assist the action agency, rather than the Service, in determining whether formal consultation is required. *See* 50 C.F.R. § 402.02. During an informal consultation, the action agency requests information from the FWS as to whether any listed species may be present in the action area. If listed species may be present, the action agency is required by Section 7(c) of the ESA to prepare and submit to the Service a "biological assessment" that evaluates the potential effects of the action on listed species and critical habitat. As part of the biological assessment, the action agency must make a finding as to whether the proposed action may affect listed species and submit the biological assessment to the Service for review and potential concurrence with its finding. 16 U.S.C. § 1536(c). If the action agency finds that the proposed action "may affect, but is not likely to adversely affect" any species listed species or critical habitat and the Service concurs with this finding, then the consultation process is terminated. 50 C.F.R. § 402.14(b).

19. On the other hand, if the action agency finds that the proposed action "may affect" listed species or critical habitat by having any potentially adverse effect that may occur and is not insignificant or discountable, then formal consultation is required. *See* 50 C.F.R. § 402.11. Following completion of the biological assessment, the action agency must initiate formal consultation through a written request to the Service. *See* 50 C.F.R. § 402.14(c). The result of a formal consultation is the preparation of a biological opinion ("BiOp") by the Service, which is a compilation and analysis of the best available scientific data on the status of the species and how it would be affected by the proposed action. When preparing a BiOp, the Service must: (1) "review all relevant information;" (2) "evaluate the current status of the listed

species;" and (3) "evaluate the effects of the action and cumulative effects on the listed species." 50 C.F.R. § 402.14(g)–(h). Additionally, a BiOp must include a description of the proposed action, a review of the status of the species and critical habitat, a discussion of the environmental baseline, and an analysis of the direct and indirect effects of the proposed action and the cumulative effects of reasonably certain future state, tribal, local, and private actions. *Id.*

20. At the end of the formal consultation process, the FWS issues either a no-jeopardy or a jeopardy BiOp. With a no-jeopardy BiOp, the Service determines that the proposed action is not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. If, as part of a no-jeopardy BiOp, the Service determines that the proposed action will nevertheless result in the incidental taking of listed species, then the Service must provide the action agency with a written Incidental Take Statement ("ITS") specifying the "impact of such incidental taking on the species" and "any reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact" and setting forth "the terms and conditions . . . that must be complied with by the [action] agency . . . to implement [those measures]." 16 U.S.C. § 1536(b)(4). With a jeopardy BiOp, the Service may offer the action agency reasonable and prudent alternatives ("RPAs") to the proposed action that will not result in jeopardy to a listed species or adverse habitat modification, if they exist. *Id.* § 1536(b)(3)(A).

21. Where a BiOp has been issued and "discretionary Federal involvement or control over the action has been retained or is authorized by law," the action agency is required by regulation to reinitiate consultation with the Service in certain circumstances, including: (1) "[i]f 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 (2) "[i]f 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." 50 C.F.R. § 402.16. Notably, an action agency is required to reinitiate consultation if the above circumstances are met and it has discretion to "influence [public] or private action" or simply an "ability to implement measures that inure to the benefit of the protected species." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). If an action agency fails to reinitiate consultation when either of these conditions is triggered, it is a violation of Section 7, 16 U.S.C. § 1536.

22. The scope of reinitiated consultation must be consistent with and tailored to the nature and scope of the federal action that triggered reinitiation – i.e., the reinitiated consultation must, at minimum, consider and analyze the harms to listed species resulting from the action agency's activities that serve as the basis for the "new information" or project modification that trigger reinitiation of consultation. The failure to include such activities or potential mitigation measures designed to ameliorate the harms caused by those activities within the scope of reinitiated consultation would be inconsistent with Section 7 and its implementing regulations.

B. National Environmental Policy Act and USDA's Implementing Regulations

23. NEPA was enacted more than four decades ago "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA is "intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

24. In achieving NEPA's substantive goals, Congress created two specific mechanisms whereby federal agencies must evaluate the environmental and related impacts of a particular federal action – an environmental assessment ("EA") and an environmental impact

statement ("EIS"). *See* 42 U.S.C. § 4332(c). These procedural mechanisms are designed to inject environmental considerations "in the agency decisionmaking process itself," and to "'help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.'" *Pub. Citizen*, 541 U.S. at 768–69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)). Therefore, "NEPA's core focus [is] on improving agency decisionmaking," *id.* at 769 n.2, and specifically on ensuring that agencies take a "hard look" at potential environmental impacts and environmentally enhancing alternatives "as part of the agency's process of deciding whether to pursue a particular federal action." *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983). NEPA compliance must take place *before* decisions are made in order to ensure that those decisions take environmental consequences into account. 40 C.F.R. §§ 1500.1(b)-(c) (explaining that the NEPA process "insure[s] that environmental information is available to public officials and citizens before decisions are made and before actions are taken").

25. An EIS must be prepared by an agency for every "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). Among other requirements, an adequate EIS must contain a discussion of: (1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; and (3) alternatives to the proposed action. *Id*. By requiring adequate discussion of any adverse environmental effects which cannot be avoided in an EIS, NEPA and the Council on Environmental Quality's ("CEQ") regulations implementing NEPA implicitly require a detailed discussion of measures to mitigate such adverse environmental effects. *See* 40 C.F.R. § 1502.14(f) (requiring that agencies "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives"); 1505.2(c) (requiring

inclusion of mitigation measure discussion in the record of decision that accompanies the NEPA document). Likewise, APHIS's regulations require that "APHIS will implement mitigation and other conditions established in environmental documentation and committed to as part of the decisionmaking process." 7 C.F.R. § 372.9(f).

26. Prior to formulating an EIS, a federal agency may prepare an EA, which is a "concise public document" that serves to "[b]riefly provide sufficient evidence and analysis for determining" whether a federal action is significant enough to require preparation of an EIS. 40 C.F.R. § 1508.9. An EA must contain "brief discussions of the need for the proposal, of alternatives [to the action], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." *Id*. An agency prepares a "finding of no significant impact" ("FONSI") if it determines that an EIS is not required. § 1501.4(e).

C. Administrative Procedure Act

27. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, provides for judicial review of agency action. Under the APA, the reviewing court must "hold unlawful and set aside agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court must also set aside agency action, findings, and conclusions found to be without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

A. The Endangered Flycatcher and Its Use of Saltceder

28. The flycatcher is a small, Neotropical migrant, mid-summer breeding, riparian-obligate bird. The flycatcher was listed as endangered in 1995 due to the adverse effects of riparian habitat loss caused by urban and agricultural development, hydrological modifications,

fires, invasive plants, and overgrazing by domestic livestock. The breeding range of the flycatcher extends from southern Nevada, central and southern California, Utah, and Colorado, to central and southeastern Arizona and central New Mexico. The traditional nesting habitat of the flycatcher includes native tree and shrub species such as willows, box elder maple, and cottonwood. However, because such native habitats have been decimated by human activities, the flycatcher now extensively nests in saltcedar in mid-elevational areas on the Virgin River in southern Nevada, in various locations in central Arizona, occasionally on the Rio Grande in New Mexico, and on the Santa Margarita River in southern California.

29. On January 3, 2013, the Service issued a final rule revising designated critical habitat for the flycatcher to include 1,227 stream miles in Nevada, California, Arizona, and New Mexico, and Utah. *See* 78 Fed. Reg. 344 (Jan. 3, 2013). Designated critical habitat for the flycatcher includes habitat in Clark Country where this Court is located, as well as in Lincoln and Nye Counties in Nevada.

30. Saltcedar *(Tamarix* spp.*)* is a long-lived, dense, deep-rooted, and deciduous shrub or small tree that can grow to thirty feet in height. Native to Asia and the Mediterranean, saltcedar was introduced to the United States in the latter part of the 19th century. After successfully establishing populations along most of the major southwestern rivers, saltcedar rapidly invaded and replaced vast areas of native lowland riparian habitats that already were suffering from numerous human-caused hydrological changes. This transformation has had particularly significant implications for the survival and recovery of the flycatcher. In essence, stripped of much of its native riparian habitat in Nevada and elsewhere, the flycatcher has become dependent on saltcedar stands in places where little or no natural plant communities remain. Consequently, eradicating saltcedar without also engaging in strenuous efforts to restore

native plant communities has severe adverse impacts on the flycatcher, compounding the destruction of the species' natural habitat by *also* destroying the substitute habitat to which the species has struggled to adapt.

B. APHIS's Permitting of Tamarisk Beetle Releases and Its 2005 Saltcedar Biocontrol Program

31. In an effort to control the spread of saltcedar, APHIS, along with ARS, another component of USDA, first proposed to release the tamarisk-defoliating leaf beetle (the "beetle") in the late 1990s. The Service "raised concerns that if the beetle were generally released and rapidly killed all saltcedar, native vegetation would not return or would not return rapidly enough, leaving the [flycatcher] without nesting substrate and causing further decline of the species." USDA, *Program for the Biological Control of Saltcedar: Environmental Assessment* (June 2005) (hereafter "2005 EA") at 4; *id*. at 29 ("In a letter from FWS to APHIS regarding release of agents for the biological control of saltcedar, dated June 3, 1999, FWS indicated that the [flycatcher] was nesting in saltcedar near the Rio Grande in New Mexico and was concerned that the nests of flycatchers may be affected by saltcedar control as a result of temperature increases and parasitism by the brown-headed cowbird."). Nevertheless, APHIS "issued permits in 1999 for release of [the beetle] into field cages at specific locations approved by" the Service, including locations in Nevada, Texas, Colorado, Wyoming, Utah, and California. *Id.* at 4. In 2001, APHIS issued permits "to release [beetles] outside of the cages at or near the cage sites." *Id*. The Service subsequently approved additional "experimental releases" at sites in New Mexico, Oregon, and Montana, among other locations. *Id*.

32. In 2005, APHIS adopted a significant expansion of its Saltcedar Biocontrol Program in which it decided on the further release of beetles at "selected field 'insectary' or 'nursery' sites in up to 13 western and midwestern states, north of 38 [degrees] north latitude."

2005 EA at 10. In doing so, APHIS recognized that the flycatcher "now nests extensively in saltcedar," including in "mid-elevational areas of central Arizona," as well as in "locations on the Rio Grande in New Mexico, on the Santa Margarita River in southern California, and on the Virgin River in southern Nevada." *Id*. at 15; *id*. at 30 (the flycatcher is "nesting in saltcedar frequently in Arizona"). APHIS also acknowledged that it is "possible" that "in the short run, saltcedar may be killed but native vegetation will not reestablish rapidly, *leaving areas temporarily with no vegetation*" whatsoever; in addition, "it is possible that in certain areas . . . revegetation may not occur naturally" *at all* "after [the beetle] has suppressed saltcedar." *Id*. at 26 (emphasis added).

33. APHIS's NEPA document concluded that the beetle release program would have "no effect" on the flycatcher because the flycatcher "is not known to nest in saltcedar in the areas included in the proposed program," and because beetle "releases in the States included in the proposed program will be north of 38 [degrees] north latitude" whereas the "areas where [flycatchers] are nesting in saltcedar are south of 38 [degrees] north latitude." *Id*. at 30. Further, according to APHIS's EA, even if the beetle "were to reach these areas in Arizona and New Mexico," the beetle would "fail to overwinter" and hence "fail to establish populations" harmful to the flycatcher. *Id.* This assumption was based on an expectation by APHIS that the beetle would enter "diapause," which is a state of suppressed development and reproduction, in response to the shorter summer daylengths south of the 38th parallel. In particular, APHIS asserted that "[i]n regions south of 38 [degrees] north latitude where day length and temperature induce premature diapause," the particular strain of beetle that APHIS proposed to release (*D. e. deserticola*, originating from Fukang, China) would not be able to survive the winter and hence would pose no risk to the flycatcher. 2005 EA at 30.

34. Significantly, however, in a section of the 2005 EA discussing the "degree" of adverse environmental impacts of its proposed program, and also in the "vertebrate monitoring" section of a "management plan" for implementation of its program attached as an appendix to the EA, APHIS committed itself to a "[m]itigation strategy for D. e. deserticola." *Id*. at 27, 51. In this provision, APHIS stated the following:

> In the unlikely event that released [beetle] populations present a real or potential hazard to human health *or to nontarget plants and animal species*, [APHIS] *will* make an immediate site visit to assess the situation, in conjunction with local cooperators and land managers. If reduction or removal of the beetle population is warranted, a mitigation plan *will be developed*. Possible strategies to be incorporated in such a plan include: (1) use of appropriate, approved insecticides; (2) destruction of host plants or plant material; (3) caging or other confinement of *D. e. deserticola* or threatened organism(s); and (4) *other tactics as needed*.

2005 EA at 27 (emphasis added); *see also* 70 Fed. Reg. 44,554 (Aug. 3, 2005) (adopting the final EA and a FONSI based on the EA).

35. In addition to preparing an EA, in March 2005, APHIS initiated informal ESA consultation with the Service regarding its Saltcedar Biocontrol Program. On July 11, 2005, the FWS issued a letter of concurrence in which it found that the impact of the APHIS Saltcedar Biocontrol Program on ESA-listed species would be "insignificant, discountable, or otherwise beneficial, because the impacts to listed species or critical habitat would not be measurable or detectable." The FWS's concurrence was based on several key assumptions similar to those in APHIS's 2005 EA, including that there was a low likelihood of successful reproduction of beetles in areas south of the 38th parallel.

36. Since 2005, APHIS has established a total of fifty tamarisk beetle nursery sites in cooperation with federal, state, and local agencies. From 2005 to 2008, APHIS collected and released more than 180,000 adult tamarisk beetles at these nursery sites. By 2009, twenty-five of

the nursery sites had established tamarisk beetle populations, and, of those, approximately ten sites had populations large enough for collection and redistribution.

37. In July 2006, APHIS's actions led directly to the release of beetles into flycatcher critical habitat in St. George, Utah, by St. George city employees. An APHIS employee had specifically advised the St. George City Council of the "benefits of using the beetle to control tamarisk," and in effect authorized the City to obtain and release beetles from a USDA-permitted facility by representing to a City official that "there are no legal restrictions that preclude STATE or PRIVATE entities from moving 'already permitted' saltcedar leaf beetles within the same state and releasing them on NON-federal lands." The same APHIS employee subsequently approved specific "beetle collection dates" for the City to "collect 30,000-40,000 beetles" for release, and worked with the City on a "work plan" on a "three-year process to kill the plants."

38. The APHIS-assisted and promoted release into Utah took place on July 12, 2006. According to e-mails between Service employees obtained by Plaintiffs via the Freedom of Information Act – which described the situation in Utah as one that "doesn't seem to be good" – "APHIS played an underhanded role in the introduction of the beetle in Utah, and USDA is very concerned." Service employees further explained that the APHIS employee involved in the release "essentially" extended an "open invitation to circumvent Federal regulations," and APHIS was eager to avoid having "attention brought to their circumvention of Federal regulations, which in any other agency might be cause for dismissal." *Id.* As a result, a Service employee stated that "[t]he actions of Utah APHIS, with concurrence and support of the state and local agencies, have been the fear all along and reinforce the need for completing Section 7 and NEPA," because "[t]hese types of actions compromise both the good science and the good

working relationship that is essential to effective development and use of biological control agents to achieve ecological goals."

C. New Information Regarding Adverse Effects of the Beetle on the Flycatcher and Its Habitat, and APHIS's Reinitiation of Consultation with the Service

39. On September 10, 2008, the Service contacted APHIS to inform the agency that tamarisk beetles had been found in formally designated critical habitat of the flycatcher in Arizona. According to the agencies, this occurrence was caused by the collection and release of beetles from one of the APHIS-permitted research sites in Utah. On December 12, 2008, Plaintiff the Center submitted a formal notice to the agencies that they were in violation of Section 7 of the ESA for failing to reinitiate consultation in connection with the beetle releases. In response to the Center's letter, Service employees internally stated that "remedies were in place in the 1999 consultation to develop wildlife monitoring plans and control the leaf beetle should it reach [flycatcher habitat]," and thus, in the Service's view, "USDA simply needs to carry out their commitments – they have not." On March 27, 2009, the Center filed suit concerning APHIS's failure to reinitiate consultation with the Service.

40. In February 2009, APHIS staff attended a saltcedar research conference in Reno, Nevada, in which they received additional information regarding the beetles and their impacts on flycatcher habitat. This information included: (1) data indicating that tamarisk beetles in Pueblo, Colorado, were in fact capable of successfully reproducing south of the 38th parallel, and (2) a presentation that beetles defoliated three sites on the Virgin River near St. George, Utah, which were occupied by the flycatcher at the height of their breeding season, and that the defoliation might have a large impact on nesting flycatchers.

41. Consequently, on May 15, 2009, Dr. Kenneth R. Seeley, Chief of Environmental Services for APHIS, sent a letter to the Service stating that "based on new information, APHIS

believes there may be adverse effects of the release of [the beetle] on listed species and critical habitat that were not previously available or considered in the 2005 consultation." On that basis, and in light of the criteria for reinitiation of consultation set forth in the Service's regulations, APHIS formally requested reinitiation of consultation, and also requested the Service's "technical assistance in preparation of a revised BA including an up-to-date status of the [flycatcher] and environmental baseline for the flycatcher." Dr. Seeley's letter also referred to APHIS's "understanding," following the October 15, 2008 discussion between APHIS and the Service, that the Service "would prepare an internal memo to set forth guidance for the actions APHIS needed to carry out, and would contact APHIS with its recommendation."

42. On May 13, 2010, APHIS submitted a Biological Assessment ("2010 BA") to the Service that covered its beetle release permitting activities and expanded Saltcedar Biocontrol Program. As subsequently characterized by the Service, contrary to the assumption in the 2005 consultation that the beetle was "unlikely to be capable of reproducing south of 38 [degrees] North latitude," new evidence summarized in the 2010 BA "has indicated that [the beetle] may be capable of reproducing south of this limit, possibly to as far south as 32 [degrees] North, *and that the beetles are now present in and adversely affecting habitat, including designated critical habitat, of the [flycatcher]* in the Virgin River drainage."

43. APHIS advised the Service that it was taking three actions in response to this development and it requested the Service's concurrence that *these specific actions* were "not likely to adversely affect" the flycatcher or its designated critical habitat, and thus that formal consultation regarding the ongoing adverse effects of its permitting activities and Saltcedar Biocontrol Program on the SWWF was not required. These three actions by APHIS included: (1) terminating its Saltcedar Biocontrol Program, "except for monitoring of sites;" (2)

discontinuing issuance of new permits for release of tamarisk beetles and studies using tamarisk beetles outside of a containment facility, as well as cancelling active permits for interstate movement and release of tamarisk beetles; and (3) "discouraging" intrastate movement of tamarisk beetles by means of an "information memorandum" to various federal and state agencies.

44. APHIS also "indicated that it will participate in an interagency effort organized by the National Invasive Species Council to address issues arising from the effects of [beetle] releases on the flycatcher," *id*., but APHIS did not identify any specific actions that it would commit to undertaking – such as restoring with native vegetation saltcedar habitat destroyed or impaired by beetles – in order to mitigate past, present, and future damage associated with the beetle release activities. The National Invasive Species Council ("NISC") is an interagency, cabinet-level body established by Executive Order to coordinate national policy designed to "prevent the introduction of invasive species and provide for their control and to minimize the economic, ecological, and human health impacts that invasive species cause." E.O. 13112 (Feb. 3, 1999). Accordingly, by representing that the beetle's adverse impacts on the flycatcher would be reviewed by the NISC, APHIS was, in effect, conceding that the beetle is now an "invasive species," which is defined by the Executive Order as an "alien species whose introduction does or is likely to cause . . . environmental harm." *Id*.

45. On June 15, 2010, the Director of Invertebrate and Biological Control Programs for APHIS sent a memorandum to various state and federal officials advising them that "[c]oncerns about the potential effects to the critical habitat of the federally-listed, endangered flycatcher have resulted" in various actions by APHIS, including terminating the "saltcedar biological control program" and discontinuing the issuance of new permits for beetle releases.

The memorandum further stated that until "these concerns [involving impacts on the flycatcher] are alleviated and the program activities are officially reinstated, any unauthorized human-assisted movement [of the beetle], particularly into the critical habitat of the southwestern willow flycatcher, is not authorized by APHIS, and may constitute a violation of the Endangered Species Act which could result in criminal punishment and/or fines." However, other than asserting that it would "continue to assess the impact on saltcedar density and reestablishment of native vegetation," APHIS again failed to specify any particular remedial steps it was committing to take in order to mitigate the impact of the beetle releases.

46. In reviewing the 2010 BA, the Service raised serious concerns with APHIS's proposed termination of its beetle release permitting program without developing and implementing any mitigation measures. For example, an August 5, 2010 memorandum from a Service biologist to the Service's national and regional offices stated that "it is important to ask/encourage APHIS to develop a 7a1 program under the [ESA] that will contribute to flycatcher conservation/recovery." The memorandum also highlighted the Service's concern regarding APHIS's failure in its 2010 BA to develop and implement the mitigation measures to which it had previously committed in its 2005 EA:

> There appears to be considerable differences in the approaches described in APHIS's 2005 Environmental Assessment and their 2010 Biological Assessment. For example, in 2005 they described quick and alert identification of beetles in locations where native vegetation is not becoming re-established, developing and implementing a restoration plan to ensure that revegetation occurs, amelioration of site conditions, and/or planting or salinity or drought tolerant species. Additionally, if there was any real or potential hazards to non-target plant or animal species, mitigation plans and strategies, including eradication, caging, and/or other tactics would be implemented. *In contrast, the 2010 Biological Assessment suggests little commitment (beyond writing a memo and participating in an interagency group) toward being responsible for unanticipated actions or that their proposed eradication program was an actual viable option.*

47. Nevertheless, on October 6, 2010, the Service sent a letter to APHIS in which the Service simply concurred with APHIS that the narrow actions specified in APHIS's BA – *i.e.*, discontinuing *further* releases of the beetle and "discouraging any human-assisted intrastate movement" of the beetle – "may affect, but are not likely to adversely affect" the flycatcher. Other than merely acknowledging APHIS's representation that it would "participate" in the "interagency effort organized" by NISC "to address issues arising from the effects of [beetle] releases on the flycatcher," and stating that the Service would like to "better understand the measures being taken to mitigate adverse effects on the flycatcher," the Service's cursory concurrence letter delineated no specific measures that APHIS had committed to or would be required to take, let alone analyze the efficacy of those measures. Instead, the Service merely asserted that "[t]his concludes informal consultation under section 7 of the [ESA] on these actions."

48. In failing to meaningfully address the *ongoing* and future adverse impacts associated with APHIS's activities the Service ignored the fact that the Center sent the Service and APHIS a letter on June 18, 2010, setting forth in detail what must be done in order to ameliorate the impacts of the beetle releases. The Center explained that "USDA and APHIS actions have already resulted in the taking of an endangered species and in the adverse modification of critical habitat. The beetles are already in Grand Canyon National Park and are poised to move below Lake Mead in the very near future." The Center also explained that "[s]ince most surviving flycatchers now nest in tamarisk, movement below Lake Mead and into central Arizona will be disastrous" unless "additional, emergent creation and/or restoration of riparian willow habitat . . . take[s] place in the immediate path of the invading beetles." *Id*. The Center identified specific locations along the Lower Colorado River within the immediate path

of the invading beetle that are "suitable for [such] emergent creation and/or restoration of willow habitat." *Id*.

49. Since the Center sent its June 2010 letter – to which it received only a cursory response stating that the Service "appreciate[s] your concerns" and that "implementation of effective solutions will be complex and require extensive collaboration" – available scientific evidence shows that the beetle has continued to rapidly adapt to and thrive in occupied flycatcher habitat, including critical habitat.

50. For example, recent Bureau of Reclamation surveys have found that the "area of defoliation on the Virgin River has expanded downstream annually," with the "entire stretch of the Virgin River to Lake Mead [affected] by the end of the breeding season in 2011." *See* McLeod, M.A., and A.R. Pellegrini, *Southwestern Willow Flycatcher surveys, demography, and ecology along the lower Colorado River and tributaries*, at 3-4 (2012) (annual report submitted to the Bureau of Reclamation by SWCA Environmental Consultants); *see also id*. at 20 ("Mesquite, Nevada . . . Hafen Lane . . . Tamarisk beetles and heavily defoliated tamarisk were noted at the site in mid-June"); *id*. at 21 ("Mesquite West . . . Tamarisk beetles and defoliated tamarisk were noted within the site in mid- to late June"); *id*. ("Mormon Mesa, Nevada . . . Tamarisk beetles and heavy defoliation were noted throughout the study area by mid-July"); *id*. at 44 ("Defoliation will presumably occur earlier in the year in 2012 at the Mormon Mesa sites now that tamarisk beetles are established in the area and thus may have greater effect on flycatcher nesting next year."); *id*. at 81-82 (suggesting that the low number of breeding pairs of flycatchers at Mesquite is because the species' habitat "has been reduced by tamarisk beetle defoliation"). Indeed, as of 2012, the beetle was not only defoliating saltcedar along the Virgin

River and Nevada Wash, it is also doing so in and near the Little Colorado River, the Colorado River through the Grand Canyon to Lake Mohave, and the Rio Grande to Albuquerque.

51. As the Service has repeatedly recognized, including in its formal recovery plan for the species, flycatcher survival and recovery depends on the maintenance of sufficient habitat for small populations to survive, re-connect, and multiply. Yet APHIS and the other federal agencies responsible for release of the beetle have not only contributed directly to the impairment and degradation of the flycatcher's dwindling critical habitat, but they are compounding this problem by also failing to adopt any meaningful, timely measures to mitigate the adverse effects of their actions.

52. On information and belief, despite the fact that APHIS committed to participating in an NISC effort to address beetle impacts to the flycatcher – and the fact that the Service's October 2010 "not likely to adversely affect" concurrence was based on such participation and its ameliorative benefits for the flycatcher – the NISC effort has been ineffective to date, and the Service has thus "been hesitant about engaging on this" issue, according to internal Service correspondence.

D. Plaintiffs' March 7, 2013 Notice of Violations

53. On March 7, 2013, Plaintiffs submitted to Defendants, via certified mail, a 19-page formal notice letter and multiple attachments alleging violations of the ESA (and other laws), as required by 16 U.S.C. § 1540(g)(2)(A)(i), urging Defendants to initiate remedial steps to redress the devastating impacts of these actions on the flycatcher and its critical habitat. To date, Plaintiffs have received no response to the notice letter from any of the Defendants.

PLAINTIFFS' CLAIMS FOR RELIEF

Claim I – APHIS's Failure to Insure Against Jeopardy by Permitting Beetle Releases, without Any Mitigation Measures, Which Are Causing Ongoing Harm to Flycatchers and Their Habitat In Violation of the ESA

54. Except in extraordinary circumstances not present here, the ESA mandates that federal agencies, in consultation with the Service, "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species" that has been determined to be "critical." 16 U.S.C. § 1536(a)(2). Accordingly, with respect to *every* discretionary action undertaken by an agency, the ESA "requires that [the] agency 'insure' that the actions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666-67 (2007). APHIS (along with the ARS and other USDA components that have authorized, funded, and otherwise contributed to the beetle releases) is in flagrant violation of that overarching mandate. Through its beetle release permitting and other actions, APHIS is responsible for the release of beetles that are now decimating the critical habitat of the highly endangered flycatcher. Yet, beyond merely committing not to release or authorize the release of any *more* beetles into flycatcher habitat, APHIS has neither undertaken nor committed to implement any of the mitigation measures that are necessary to address the devastating impacts of these actions.

55. APHIS's mere declaration that it will not make an already intolerable situation even worse is not tantamount to avoiding species jeopardy or the destruction or adverse modification of critical habitat, as required by Section 7 and its implementing regulations. The Supreme Court has explained, to "'insure' something . . . means '[t]o make certain, to secure, to

guarantee (some thing, event, etc.).'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 667 (quoting 7 Oxford English Dictionary 1059 (2d ed. 1989)). APHIS has not made "certain" or "guaranteed" that its actions are unlikely to jeopardize the flycatcher or impair its critical habitat merely by announcing that it will not take even *more* actions that are harmful to the species' survival and recovery. Rather, APHIS can only satisfy the unequivocal statutory mandate of section 7(a)(2) by taking the concrete measures necessary to mitigate the impacts of its jeopardizing actions – most importantly, by replacing and restoring with native vegetation the flycatcher habitat that has been lost and is at future risk of being lost as a result of the beetle's impact on saltcedar – measures that APHIS simply has not taken here, nor has it even considered in formal consultation with the Service as required by section 7.

56. APHIS's complete failure to insure, through formal consultation with the Service, that its beetle release program and the devastating impacts it continues to cause to flycatchers and their critical habitat is not jeopardizing the continued existence of the flycatcher, destroying its critical habitat, and impairing its survival and recovery prospects, is arbitrary, capricious, and in contravention of Section 7(a)(2), 16 U.S.C. § 1536(a)(2), and the ESA's implementing regulations, 50 C.F.R. § 402.14(a).

Claim II – APHIS's Failure to Adopt a Mitigation Program Designed to Conserve Flycatchers and Their Habitat In Violation of the ESA

57. In addition to the obligation to avoid jeopardizing species under Section 7(a)(2), Section 7(a)(1) of the ESA imposes an obligation on all federal agencies, in consultation with the Service, to "carry[] out programs for the conservation" of listed species. 16 U.S.C. § 1536(a)(1). This provision imposes an affirmative duty on each federal agency to conserve each of the species listed. Congress defined "[c]onserve" in the ESA to mean *recovery*, *i.e.*, 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." *Id.* § 1532(3).

58. APHIS has violated this affirmative obligation by carrying out a program that has had the *opposite* effect of conserving the flycatcher, *i.e.*, the beetle release program is significantly impairing the species' critical habitat and otherwise subverting the flycatcher's prospects for recovery. Under these unusual circumstances, Section 7(a)(1) mandates that APHIS rectify the situation by adopting, in coordination with the Service and other agencies, an effective and comprehensive "program" for ensuring the restoration of natural flycatcher habitat in areas that have been, are being, and likely will be harmed by the beetle's impacts – i.e., a program that, in contrast with APHIS's failed beetle release program, would actually conserve the flycatcher and its habitat.

59. Because APHIS failed, in response to its beetle release program, to offset at all the devastating impacts of the program on the flycatcher and its designated habitat, and, rather, has simply terminated issuance of *new* permits without developing any mitigation plan whatsoever to address ongoing harm to the flycatcher and its habitat, APHIS has violated and continues to violate Section 7(a)(1) of the ESA.

Claim III – APHIS's and the Service's Failure to Pursue Formal Consultation Concerning the Full Scope of APHIS's Termination of Its Beetle Release Program Without Committing to Any Mitigation Measures in Violation of the ESA

60. Under 50 C.F.R. § 402.16, an action agency is required to reinitiate consultation with the Service "[i]f 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." After receiving new information beginning in 2008 regarding the adaptation of tamarisk beetles to latitudes south of 38th parallel north and the adverse effects of tamarisk beetles on flycatcher critical habitat,

APHIS sought to reinitiate consultation with the FWS pursuant to 50 C.F.R. § 402.16 regarding both its tamarisk beetle permitting activities and its 2005 Saltcedar Biocontrol Program because this new information completely undercut several key assumptions regarding tamarisk beetles and their impacts to the flycatcher made during the informal consultation in 2005 covering the proposed Saltcedar Biocontrol Program. The Service could no longer find, as it did in its 2005 concurrence letter, that the impact of the APHIS Saltcedar Biocontrol Program and related actions on the flycatcher would be "insignificant, discountable, or otherwise beneficial, because the impacts . . . would not be measurable or detectable."

61. Rather than broadly consider the adverse effects to the flycatcher and its critical habitat of all of APHIS's actions, including the ongoing and future effects of the beetle releases that had already occurred, APHIS and the Service unlawfully narrowed the scope of the reinitiated consultation. The scope of the federal action triggering APHIS's need to reinitiate consultation on May 15, 2009 was APHIS's entire program of tamarisk beetle permitting, as well as its Saltcedar Biocontrol Program, which caused the new and unanticipated effects to flycatchers and their critical habitat. However, instead of formally consulting over the present and future adverse effects of tamarisk beetles released as a result of these activities – a consultation that, at minimum, would inexorably have led to the imposition of stringent mitigation measures – APHIS and the Service artificially and improperly narrowed the consultation to the discontinuation of *additional* permitting and releases and termination of the program, and in so doing avoided formal consultation.

62. By significantly narrowing the scope of the consultation in its October 6, 2010 concurrence letter, the Service improperly failed to consider, in light of the best available scientific data, the indirect and cumulative effects of APHIS merely discontinuing its permitting

and release actions *without committing to appropriate mitigation and remedial actions for past releases*. The Service is not permitted to wear blinders and ignore the indirect, but causally related effects of agency actions. In addition, the Service failed to consider the cumulative effects of potential future state, local, and private actions, including additional instances where state and private entities may collect, distribute, and release tamarisk beetles originally released under permits issued by APHIS or under its Saltcedar Biocontrol Program. Given the magnitude of such direct, indirect, and cumulative effects, APHIS and the Service were required to engage in formal consultation regarding the full complement of ongoing adverse effects associated with APHIS's permitting and other beetle release activities.

63. Although APHIS has now suspended any *new* permitting or other beetle release activities, any notion that APHIS lacks discretion or authority to take or pursue appropriate remedial actions is belied by the agencies' own documents, regulations, and obligations pursuant to Executive Order. APHIS's 2005 EA specifically provided that, in the "event that released [beetle] populations present a real or potential hazard . . . to nontarget plants and animal species" – which has now occurred – "a mitigation plan *will be developed*." 2005 EA at 10 (emphasis added). APHIS's own regulations also specifically require it to implement mitigation that the agency commits to in a NEPA document. *See* 7 C.F.R. § 372.9(f). In addition, the February 1999 Executive Order concerning invasive species such as the beetle provides that "[e]ach Federal agency whose actions may affect the status of invasive species shall, to the extent practicable and permitted by law . . . provide for restoration of native species and habitat conditions in ecosystems that have been invaded." E.O. 13112 (emphasis added).

64. APHIS has both "retained" and is "authorized by law" to engage in "discretionary Federal involvement or control" for the purposes of mitigating the adverse effects of the beetle

releases. 50 C.F.R. § 402.16. APHIS's decision to suspend future releases while committing to no concrete measures to mitigate ongoing and future impacts "may affect listed species or critical habitat in a manner or to an extent not previously considered." *Id*. Consequently, APHIS and FWS must reinitiate consultation, and the Service must produce a BiOp that fully addresses all of the direct, indirect, and cumulative effects associated with APHIS's activities.

65. The formal recovery plan for the flycatcher repeatedly stresses the vital importance of preserving and restoring flycatcher habitat. *See, e.g.*, Final Recovery Plan for the Southwestern Willow Flycatcher (August 2002) at 82 ("All efforts should focus on preventing loss of flycatcher habitat. However, where occupied, unoccupied, suitable, or unoccupied potential habitat is to be lost, modified, fragmented, or otherwise degraded, habitat should be replaced, permanently protected, and managed within the same Management Unit."). In terms that apply squarely to the situation here, the recovery plan provides that "[p]ermanent habitat loss, modification, or fragmentation resulting from agency action *should be offset with habitat that is permanently protected, including adequate funding to ensure that habitat is managed permanently for the protection of the flycatcher*." *Id*. at 82 (emphasis added). Yet, rather than apply that provision in its own recovery plan to the reinitiated consultation, the Service gave APHIS carte blanche to walk away from the severe and ongoing damage caused by the beetle release program. That is an arbitrary and unlawful application of the Service's authority in ensuring the consultation process is used in such a manner as to avoid species jeopardy and destruction of critical habitat, and also constitutes a violation of section 4(f) of the Act, which mandates that the Service "shall develop *and implement*" recovery plans for listed species. 16 U.S.C. § 1533(f)(1) (emphasis added). The Service is not "implement[ing]" the recovery plan where, as here, it is allowing a federal agency to ignore the devastating impacts its actions are

having, and will continue to have, on an endangered species by failing to take precisely the steps the Service determined in its recovery plan are vital for species survival and recovery.

66. For these reasons, APHIS and the Service have acted arbitrarily, capriciously, and in violation of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and 50 C.F.R. §§ 402.14, 402.16, in refusing to engage in formal consultation, and the Service has also acted arbitrarily, capriciously, and in violation of Section 4(f) of the ESA, 16 U.S.C. § 1533(f), by concurring in a "not likely to adversely affect" determination that violates the Service's own Recovery Plan for the flycatcher.

Claim IV – APHIS's Failure to Implement Any Mitigation Measures to Offset the Harms Caused to Flycatchers by APHIS's Beetle Release Program In Violation of NEPA and APHIS's Own Regulations

67. APHIS's own 2005 EA unequivocally committed the agency to implementing a "mitigation plan" in the "unlikely event that released [beetles] present a real or potential hazard to . . . nontarget animals species." 2005 EA at 27. Having made that commitment in a formal NEPA document – and relied on it as a basis for avoiding preparation of an EIS – APHIS is legally obligated to fulfill that obligation. Agencies may rely on mitigation measures discussed in an EA as bases for avoiding preparation of an EIS but only "so long as significant measures are undertaken to mitigate the project's effects." *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985). The CEQ regulations implementing NEPA require that "[m]itigation and other conditions established in [a NEPA document] or during its review and committed as part of the decision *shall* be implemented by the lead agency or other appropriate consenting agency." 40 C.F.R. § 1505.3 (emphasis added). The CEQ has also stated that an EA and FONSI can be used to impose enforceable mitigation measures that are "adopted as part of the agency's final decision in the same manner mitigation measures are adopted in the formal

Record of Decision that is required in EIS cases." *See* Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,037–38 (Mar. 23, 1981). Accordingly, where APHIS has formally committed in a public NEPA process to developing and implementing a mitigation plan in the event that its beetle release program has any effects on the flycatcher or its habitat – and avoided preparation of an EIS on that basis – now that the precondition to that obligation has been satisfied, i.e., flycatchers are being adversely impacted at a rapid rate, APHIS is required by its own public commitment to carry out the mitigation measures to which it agreed in 2005.

68. APHIS's own binding regulations governing its NEPA procedures also explicitly require the agency to implement mitigation measures it commits itself to in an EA. 7 C.F.R. § 372.9(f) ("APHIS will implement mitigation and other conditions established in environmental documentation and committed to as part of the decisionmaking process."). This regulation requiring APHIS to implement mitigation measures committed to as part of an EA or EIS is similar to other agency NEPA regulations. *See e.g.*, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843, 3852 (Jan. 21, 2011) (noting that under Army Corps NEPA regulations, "the adoption of mitigation [in an EA] that reduces environmental impacts below the NEPA significance threshold is similarly binding upon the agency") (citing 32 C.F.R. § 651.15). Therefore, since the purportedly "unlikely event" triggering the need for a mitigation plan has in fact come to pass, and an endangered species is suffering severely as a result, APHIS is obligated by NEPA, its own implementing regulations, and the CEQ implementing regulations, to develop and implement an effective mitigation plan – a plan which APHIS never developed or implemented.

69. For these reasons, APHIS's failure to develop and implement a mitigation plan as specified in the 2005 EA is arbitrary, capricious, and in contravention of NEPA, the CEQ's implementing regulations, APHIS's own NEPA regulations, and the 2005 Record of Decision that was based on the 2005 EA. APHIS's failure to develop and implement a mitigation plan in accordance with its own regulations and prior commitments also constitutes agency action "unlawfully withheld or unreasonably delayed," in violation of 5 U.S.C. § 706(1).

Claim V – APHIS's Failure to Engage in Supplemental NEPA Review In Violation of NEPA

70. If, after preparing an EIS or EA, "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," the agency must, following solicitation of public comment, prepare supplemental NEPA review analyzing the environmental implications of the changes. 40 C.F.R. § 1502.9(c). This can take the form of a Supplemental EIS or a Supplemental EA, depending on the "significance" of the environmental impact of the "new circumstances or information."

71. Upon discovering in 2008 that tamarisk beetles had been found in occupied flycatcher critical habitat, APHIS was legally required to supplement its 2005 EA on the basis of the "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c). This obligation only became clearer in 2009 when APHIS learned that critical assumptions in the 2005 EA were fatally flawed in light of new information – e.g., that tamarisk beetles can in fact reproduce south of the 38th parallel. Indeed, this new information led APHIS in 2009 to concede that "based on *new information*, APHIS believes there may be adverse effects of the release of [the beetle] on listed species and critical habitat that were not previously available or considered in the 2005 consultation." May 15, 2009 Letter from APHIS to the Service. Yet, despite discovering this

new information concerning the devastating effects of the beetle release program on the flycatcher and its critical habitat, APHIS never conducted any supplemental NEPA review concerning that new information. Rather, more than a year later, without ever having conducted any supplemental NEPA review to consider and analyze what alternative mitigation strategies could best ameliorate the harm to flycatchers and their habitat, APHIS decided to simply terminate issuance of any *new* beetle release permits, which, due to its artificially and unduly narrow scope, APHIS did not subject to any NEPA review.

72. Because the new information discovered by APHIS since 2008 concerning the devastating effects to flycatchers and their critical habitat as a result of APHIS's beetle release program constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" thereby triggering APHIS's duty to supplement its 2005 EA, APHIS has acted arbitrarily, capriciously, and in violation of NEPA and its implementing regulations, 40 C.F.R. § 1502.9(c), and has unlawfully withheld and unreasonably delayed agency action in violation of 5 U.S.C. § 706(1), by failing to prepare any supplemental NEPA review whatsoever to analyze the new circumstances and information, and to consider alternative mitigation strategies to offset the harm caused by APHIS's beetle release program.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order:

1. Declaring that Defendants have violated the Endangered Species Act, the National Environmental Policy Act, and the Administrative Procedure Act;

2. Setting aside the 2010 reinitiated informal consultation between APHIS and the Service, and ordering the agencies to engage in formal consultation addressing all of the impacts of APHIS's and USDA's action on the flycatcher and its critical habitat;

3. Ordering APHIS to develop an appropriate mitigation plan to address the impacts of the beetle populations on flycatchers and their critical habitat;

4. Awarding Plaintiffs their attorneys' fees and costs in this action; and

5. Granting Plaintiffs any further relief as the Court may deem just and proper.

Respectfully submitted,

___/s/_____
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(Motion for Pro Hac Vice pending)

___/s/_____
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