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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY, DINÉ CARE, and CENTER FOR NATIVE ECOSYSTEMS, Plaintiffs, vs. GALE NORTON, Secretary of the Department of the Interior, Defendant.	Case No. CIV 01-409-TUC-DCB **DEFENDANT'S MEMORANDUM IN SUPPORT OF RULE 60(b) MOTION TO MODIFY FEBRUARY 18, 2003 ORDER**

I. INTRODUCTION

Defendant Gale Norton, in her official capacity as Secretary of the United States Department of the Interior, respectfully requests, pursuant to Fed. R. Civ. P. 60(b)(5) and 60(b)(6), that the Court modify the compliance schedule set forth in the Court's February 18, 2003 Order.[1]

As explained in the attached Declarations of Craig Manson, Assistant Secretary for Fish, Wildlife, and Parks at the U.S. Department of the Interior ("Manson Declaration"), and John Trezise, Budget Director of the U.S. Department of the Interior ("Trezise Declaration"), and accompanying exhibits, the appropriations ultimately provided by Congress for fiscal year 2003 are insufficient to cover all of the critical habitat actions that the United States Fish and Wildlife Service ("FWS" or the "Service") is presently under court order to do, including re-proposing critical habitat for the Mexican spotted owl and working on a final critical habitat designation. By the end of July 2003, FWS had spent, obligated, or otherwise committed nearly all of its allowable appropriations for work on critical habitat actions, and any expenditure of funds on the Mexican spotted owl critical habitat designation will be unlawful. The Service has diligently notified Congress of its budget shortfall, and on May 9, 2003, the Executive branch formally sought a technical budget amendment from Congress to allow the re-programming of appropriations. However, to date Congress has not provided any relief. FWS's lack of appropriations presently precludes it from completing the actions required by this Court's Order, and, under such circumstances, the Court is required to modify its injunction to provide FWS with relief.

Accordingly, the FWS asks the Court to stay the current schedule for re-proposing and finalizing a new critical habitat designation for the Mexican spotted owl pending further order of the Court and the Service's receipt of sufficient appropriated funds from Congress to

[1] The Court's Order mandates that the United States Fish and Wildlife Service re-propose critical habitat for the Mexican spotted owl within nine months of the Court's January 13, 2003 Order (i.e., by October 13, 2003), and publish a new final designation of critical habitat for the Mexican spotted owl within fifteen months of the Court's January 13, 2003 Order (by April 13, 2004).

complete the required designation,[2] or, in the alternative, to extend the deadlines for re-proposing critical habitat and publishing a final designation of critical habitat to January 5, 2004, and January 5, 2005, respectively. With respect to the latter alternative, because the level of funding for fiscal year 2004 (and 2005) is uncertain, and the Service is already subject to a number of court orders requiring work in FY 2004, the Service also requests that the Court explicitly acknowledge that it will entertain a motion to amend the deadline, if necessary, when Congress finalizes the Service's fiscal year 2004 and 2005 budgets.

II. BACKGROUND

A. Statutory Background

1. The Endangered Species Act

Section 4 of the ESA directs the Secretary to determine whether a given species should be listed as endangered or threatened. 16 U.S.C. § 1533. An "endangered species" is a "species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is a "species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

ESA Section 4 also directs the Secretary to designate critical habitat to "the maximum extent prudent and determinable" at the time of species listing. 16 U.S.C. § 1533(a)(3)(A). Critical habitat encompasses the geographical areas that the listed species occupies with the "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Critical habitat may extend outside the geographical area occupied by the species only if such areas are essential for that species' conservation. 16 U.S.C. § 1532(5)(A)(ii). The Secretary is required to designate critical habitat "after taking into consideration the economic impact,

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[2] If the Court adopts a stay, FWS would propose to report back to the Court within 30 days of receipt of the fiscal year 2004 budget to advise the Court as to whether it believes it has sufficient funds to complete the proposed and final critical habitat designation for the Mexican spotted owl and what it believes to be a reasonable compliance schedule.

and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The Secretary may exclude a particular area if she determines that the economic and other benefits of excluding that area outweigh the benefits of its inclusion, unless excluding the area would result in the extinction of the species. Id.

A critical habitat designation provides protection for threatened and endangered species only through triggering the "destruction or adverse modification" standard of review during inter-agency consultation under ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2). Section 7(a)(2) requires each federal agency, in consultation with FWS, 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 habitat of such species." 16 U.S.C. § 1536(a)(2). If an agency action may adversely affect a listed species or its critical habitat, the action agency and FWS enter into a formal consultation process, at the conclusion of which the Service issues a biological opinion as to the effect of the federal agency action. If FWS concludes that the action is likely to jeopardize the continued existence of any listed species or adversely modify critical habitat, FWS will set forth any reasonable and prudent alternatives to the action. See 50 C.F.R. § 402.14; 16 U.S.C. § 1536(b)(3)(A).

In the interim period between the issuance of a proposed critical habitat designation and finalization of the designation, consultation under section 7(a)(2), 16 U.S.C. § 1536(a)(2), is not triggered. However, during this interim period section 7(a)(4) still requires each Federal agency to "confer with the Secretary on any agency action which is likely . . . to result in the destruction or adverse modification of critical habitat proposed to be designated for such species." 16 U.S.C. § 1536(a)(4). In this "conferencing" process, FWS makes advisory recommendations to the Federal agency on ways to avoid or minimize adverse effects. 50 C.F.R. § 402.10(b). If the proposed critical habitat action is subsequently finalized prior to completion of the Federal action, the Federal agency must review the Federal action to determine if re-initiation of formal consultation is required. Id. Thus, while not binding, the conference process provides some additional protection for species with proposed critical

habitat, especially since, if the recommendations are not followed and the critical habitat is subsequently finalized, an agency that did not follow FWS's recommendations may need to re-initiate consultation and alter its action at a later date.

Critical habitat applies only in the context of ESA section 7 consultation and provides no protections on private lands unless there is a nexus to an action of a federal agency (e.g., a federal permit is required to undertake some type of activity). It thus has no formal legal significance for the other protections of the ESA, such as the prohibition against take contained in ESA section 9. See 16 U.S.C. § 1538 (no provision prohibiting the take of "critical habitat"). Moreover, where a Section 7 consultation has been otherwise triggered (because a listed species is present in an area), consideration is given to potential effects on habitat even if no habitat has been designated as "critical habitat." That is, if consultation is triggered based on potential effects to *the species*, the Service will, in the course of analyzing whether jeopardy is likely to occur, examine impacts to the species' *habitat* (whether or not designated as critical). See 50 C.F.R. § 17.3 (harm "may include significant habitat modification or degradation where it actually kills or injures wildlife"); Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 696-97 (1995) (upholding FWS's definition of harm).

2. The Appropriations Clause of the Constitution and the Anti-Deficiency Act

The Appropriations Clause of the United States Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. This represents an explicit command that "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." Office of Personnel Management v. Richmond, 496 U.S. 414, 424 (1990) (citing Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937)).

Consistent with the Appropriations Clause, Congress has enacted the Anti-Deficiency Act. The Anti-Deficiency Act, inter alia, prohibits any officer or employee of a federal agency from making or authorizing any expenditure or obligation exceeding the amount that Congress has appropriated. 31 U.S.C. § 1341(a)(1)(A). A violation of this restriction by any

federal officer or employee is punishable by up to two years in prison. 31 U.S.C. § 1350. Moreover, a federal agency may use funds appropriated for one program to fund another program only when expressly authorized by law. 31 U.S.C. § 1532.

3. The Fiscal Year 2003 Omnibus Appropriations Act

The Service's final appropriation bill for fiscal year 2003 (which started October 1, 2002) was enacted on February 20, 2003, with the signing into law of the Fiscal Year 2003 Omnibus Appropriations Act ("Omnibus Act"). Manson Decl. at ¶ 3.[3] The Omnibus Act includes an appropriation for the Service's ESA section 4 listing and critical habitat program for the period October 1, 2002, through September 30, 2003. Id. As relevant here, the Omnibus Act capped the Service's appropriations for carrying out both listing and critical habitat actions under ESA section 4 at a total amount of $9.077 million, and directed that of this amount, no more than $6.0 million could be spent on any activity regarding the designation of critical habitat:

> Provided further, That not to exceed $9,077,000 shall be used for implementing subsections (a), (b), (c), and (e) of section 4 of the Endangered Species Act, as amended, for species that are indigenous to the United States . . . of which not to exceed $6,000,000 shall be used for any activity regarding the designation of critical habitat, pursuant to subsection (a)(3) [16 U.S.C. 1533(a)(3)], excluding litigation support, for species already listed pursuant to subsection (a)(1) as of the date of enactment of this Act.

Pub. L. No. 108-7, Division F, Title I, 117 Stat. 11, 220-21 (Feb. 20, 2003).[4]

B. Factual Background

1. Administrative and Judicial Proceedings to Date

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[3] As with much of the federal government, prior to that time, FWS had been operating under a series of continuing resolutions providing piecemeal funding.

[4] The intended fiscal year 2003 Listing Program appropriation level of $9,077,000 contained in the Appropriations Committee report was subject to an across-the-board cut of .65%, and was therefore reduced to $9,018,000. Manson Decl. at ¶ 4 n.1. However, since the across-the-board cut did not apply to spending limits, the Service was allowed to reprogram funds up to the total $9,077,000 spending limit on listing funds. Id. To ensure that the Service has as much funding as possible to comply with the existing court orders and settlement agreements, it has reprogrammed funding from other resource management accounts to the Listing Program accounts up to the total spending limit. Id.; Attachment 1 to Manson Decl.

By opinion dated January 13, 2003, this Court granted Plaintiffs' Motion for Summary Judgment and denied Defendant's Cross-Motion for Summary Judgment. The Court ordered Defendant to re-propose critical habitat for the Mexican spotted owl ("MSO") within three months of the Order and to publish a final designation of critical habitat within six months of the Order, and stated that the current critical habitat designation for the MSO shall remain in effect and be enforced until the new final designation is published.

Because the parties had not briefed the remedy aspects of this case prior to the Court's Order and the Service would be unable to meet the Court's compliance deadlines, Defendant filed a timely Rule 59(e) Motion to Alter or Amend Order and Judgment seeking modification of the deadlines set by the Court. On February 18, 2003, the Court issued an Order granting in part and denying in part Defendant's motion. The deadlines were modified to require that Defendant re-propose critical habitat for the MSO within nine months of the Court's January 13, 2003 Order (i.e., by October 13, 2003), and publish the final designation of critical habitat within fifteen months of the Court's January 13, 2003 Order (i.e., by April 13, 2004).

2. The Service's Budget Limits and Efforts to Seek Additional Appropriations

Congressional limits on the funding of the ESA section 4 listing program historically has limited the Service's ability to comply with the ESA's listing mandates. See, e.g., Environmental Defense Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995); Center for Biological Diversity v. Norton, 212 F. Supp. 2d 1217, 1222-23 (S.D. Cal. 2002); Center for Biological Diversity v. Norton, 2001 WL 1602696 (N.D. Cal. 2001). This problem has continued into fiscal year 2003, despite the fact that FWS has made Congress expressly aware of the issue. In February 2002, based on Service estimates of its then-outstanding obligations, the President requested $9.077 million for the listing program for fiscal year 2003, with a $5 million sub-cap for critical habitat actions. At that time, FWS believed this would be sufficient to comply with its pre-existing court-ordered obligations and allow for some additional funding to work on other mandatory items not subject to court order. See Trezise Decl. at ¶ 10. However, as the budget process continued, a number of additional court orders requiring critical habitat work in fiscal year 2003 were issued. Manson Decl. at ¶¶ 11, 12; Trezise Decl. at ¶ 11.

Accordingly, as part of the continuing budget process, the Director of Budget of the Department of the Interior submitted an Effect Statement to the conference managers about the impacts of these additional requirements and the need for increased funding for the listing program. Manson Decl. at ¶ 12; FY 2003 Effects Statement attached as Attachment 6 to Manson Decl. This statement explicitly informed Congress that the ESA section 4 listing and critical habitat program faced a substantial shortfall for fiscal year 2003 and that "the amount of funding needed for listing work has increased dramatically from the time of the President's budget request in February 2002 [almost one year earlier]." Id. The Service explained that it needed substantially more funds to cover numerous additional court orders that had arisen since the February 2002 budget submission. Effect Statement at 3-4. FWS informed Congress that it believed it now needed a total of $11.8 million, $2.7 million over its February 2002 request, to meet its overall ESA section 4 listing obligations, and that $8.6 million of this amount was now necessary to complete required critical habitat actions. Id. at 5.

Nonetheless, Congress did not appropriate these additional funds. Congress provided the Service with a total of $9.077 million, with a critical habitat sub-cap of $6.0 million. Pub. L. No. 108-7, 117 Stat. 11, 220-21 (Feb. 20, 2003). The Conference Report accompanying the appropriations bill reflected Congress' understanding of FWS's concern that the appropriations it was providing were not sufficient to address all of the Service's ESA section 4 listing obligations, yet Congress did not see fit to provide the additional funding at that time:

> The managers understand that the Department believes additional funding, beyond that requested in the budget, will be needed for the listing program in fiscal year 2003 and the managers will consider a supplemental request for additional funds if one is submitted later this year.

H. Conf. Rep. 108-10, Division F, Title I, 311-12 (Feb. 13, 2003).

On April 4, 2003, the Department of Interior notified the Office of Management and Budget ("OMB") of the budgetary shortfall for critical habitat work and requested that OMB seek a $2.0 million supplemental appropriation for fiscal year 2003 to meet court-ordered deadlines to complete critical habitat designations. Trezise Decl. at ¶ 18. On May 9, 2003, albeit not in the form of a formal supplemental appropriations request, the President acted on

OMB's recommendation and submitted a technical budget amendment request to Congress seeking to have the overall ESA section 4 appropriations cap increased by $2 million, with a corresponding $2 million increase in the critical habitat sub-cap to $8.0 million. Manson Decl. at ¶ 13; Attachment 5 to Manson Decl. If this technical amendment were enacted, FWS would be able to reprogram funds to the critical habitat program (after informing Congress of its intent to do so). Manson Decl. at ¶ 13. However, to date, Congress has not acted on the technical budget amendment request. Id.

3. The Service's Critical Habitat Work and Expenditures in Fiscal Year 2003

FWS has issued 32 proposed or final critical habitat designation rules for more than 400 threatened or endangered species in fiscal year 2003. Manson Decl. at ¶ 18 and Attachment 2. All of these actions were taken to comply with court orders or court-approved settlement agreements. Manson Decl. at ¶ 18. As demonstrated in the attached declarations and exhibits, as of August 21, 2003, the Service has expended, obligated, or otherwise committed $5,928,822 of the $6.0 million appropriated for critical habitat actions for this fiscal year. Manson Decl. at ¶ 7. Despite FWS's best efforts to accurately record critical habitat expenditures around the country as accurately and as quickly as possible, there may be additional costs, such as travel costs and salary, that have been incurred but not yet reported and which are not reflected in these figures. Manson Decl. at ¶¶ 24-27. Accordingly, FWS expects that there will be no available appropriated funds to carry out any additional critical habitat actions for this fiscal year. Id. at ¶ 28. This lack of available funding will require FWS to defer work on approximately 21 critical habitat actions for 30 species, including the MSO critical habitat designation. Manson Decl. at ¶ 19. As it has done here, FWS has approached Plaintiffs in these other actions to seek extensions and has or will be approaching the other courts to seek a similar modification of those court orders as it seeks here. Manson Decl. at 21.

The Manson Declaration sets out in detail the Service's fiscal year expenditures for the listing program. Manson Decl. at 24-27; Attachments 3, 9, 10. The primary expenditures are payroll costs for employee (principally biologists) salaries and benefits, contractor costs

related to conducting required economic analyses and National Environmental Policy Act ("NEPA") documentation (where required),[5] Federal Register printing costs, and other miscellaneous costs such as travel costs, public hearing expenses, and other operating expenses. Id. The Service has in place strict internal measures to account for the expenditure and commitment of funds related to critical habitat actions to ensure that total expenditures do not exceed appropriated amounts. Manson Decl. at ¶¶ 6, 24-26. These measures included creating for the first time in fiscal year 2003 a separate expenditure account tracking system for all critical habitat expenditures, the "1117 account." Manson Decl. at ¶ 25. Among other things, the 1117 account tracks all time expended by any Field, Regional, or Washington office employee working on critical habitat actions, as well as all non-payroll costs attributable to critical habitat actions. Id.

Upon enactment of the fiscal year 2003 budget in February 2003, FWS recognized that, absent further relief from Congress, it would be unable to fund all of the required critical habitat work for the remainder of fiscal year 2003. In addition to the efforts described above related to obtaining more funds from Congress and the institution of stricter accounting measures usually reserved for the end of the fiscal year, Manson Decl. at ¶¶ 11-14, 24-26, FWS developed a priority strategy to ensure maximum use of the limited available funds. Id. at ¶¶ 15-20. In brief, FWS determined, in chronological order by due date, which designations it would have sufficient funds to complete, devoted all of its remaining resources to those designations, and deferred work on all designations due later that would require expenditure of fiscal year 2003 funds to meet the due dates. Id. at ¶¶ 15, 16. This strategy was intended to: (1) maximize the number of court orders and court-approved settlement agreements with which the Service would be able to comply given the available funding; (2) defer until later any actions that could not be completed due to lack of funding, with the

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[5]As noted earlier, the Service is required to designate critical habitat "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Because FWS does not have sufficient economists on staff, it contracts with economists to assist the agency in this regard.

hope that, if Congress allows additional funds to be expended on critical habitat, the Service could work diligently towards completing those actions as close as possible to the deadlines; and (3) minimize the extent to which resources expended in fiscal year 2003 were devoted to work that did not directly lead to a published proposed or final rule. Id. at ¶ 16.

4. The Fiscal Year 2004 Outlook

The Service does not yet know the level of its funding or the full scope of its workload for fiscal year 2004. However, for fiscal year 2004, the President submitted a budget request for the ESA section 4 listing program of $12,286,000, representing a $3,209,000, or more than 35%, increase over the fiscal year 2003 appropriation. Manson Decl. at ¶ 23. This request includes $8,900,000 for critical habitat work on already-listed species (representing a near 50% increase over the fiscal year 2003 critical habitat sub-cap), and $3,386,000 to conduct other ESA section 4 listing action work. Id. Of course, there is no way at this time for the Service to know whether Congress will appropriate this amount, significantly less, or, theoretically, more. In fact, Congress has funded the listing program at a level lower than requested in the President's budget in four out of the last seven budget years. Id.

III. STANDARD FOR MODIFICATION

Under Federal Rule of Civil Procedure 60(b), a party is entitled to relief from a judgment if, inter alia,

> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; . . . .

Fed. R. Civ. P. 60(b)(5) (emphasis added).

The Ninth Circuit has applied the "flexible standard" set forth in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), to motions for equitable relief from judgment under Fed. R. Civ. P. 60(b)(5).[6] Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1255-56 (9th Cir. 1999); Hook v. Arizona, 120 F.3d 921, 924 (9th Cir. 1997). Under this standard, a

[6] Although Rufo concerned a consent decree, the Ninth Circuit has applied the same general principles to court orders or final judgments, such as in this case. Bellevue Manor, 165 F.3d at 1255.; SEC v. Coldicutt, 258 F.3d 939 (9th Cir. 2001).

party seeking a modification of a court order need only establish that a "significant change in facts or law warrants a revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." Rufo, 502 U.S. at 393; SEC v. Coldicutt, 258 F.3d 939, 942 (9th Cir. 2002). Specifically, modification may be warranted when "changed factual conditions make compliance with the decree substantially more onerous" or "when a decree proves to be unworkable because of unforeseen obstacles." Rufo, 502 U.S. at 384; Coldicutt, 258 F.3d at 942; Agostini v. Felton, 521 U.S. 203, 215 (1997) ("It is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show 'a significant change either in factual conditions or in law.'") (citing Rufo). "Modification is also appropriate . . . when enforcement of the decree without modification would be detrimental to the public interest." Rufo, 502 U.S. at 384 (citations omitted).

Moreover, "[p]rospective relief *must* be 'modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law.'" Miller v. French, 530 U.S. 327, 347 (2000) (quoting Rufo, 502 U.S. at 388) (emphasis added); Coldicutt, 258 F.3d at 942 ("an order *must* be modified if compliance becomes legally impermissible") (emphasis added). Indeed, refusal to modify an injunction under such circumstances constitutes reversible error. Agostini, 521 U.S. at 215; Railway Employees Dep't v. Wright, 364 U.S. 642, 647 (1961). This is due in part to the fact that a court cannot order an executive officer to take action in defiance of an act of Congress based on its own re-weighing of the equities. INS v. Pangilinan, 486 U.S. 875, 883 (1988).

Court orders regulating the conduct of government agencies require a particularly flexible approach. As the Supreme Court stated in Rufo, such decrees "'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" Rufo, 502 U.S. at 381 (quoting Heath v. DeCourcy, 888 F.2d 1105, 1109 (6th Cir. 1989)). "[T]he public interest is a particularly significant reason for applying a flexible modification standard." Rufo, 502 U.S. at 381; see also Still's Pharmacy, Inc. v. Cuomo, 981 F.2d 632, 636-37 (2nd Cir. 1992) (applying flexible standard to consent decree relating to New York State's compliance with federal Medicaid regulations); Plyler

v. Evatt, 846 F.2d 208, 212 (4th Cir. 1988). Moreover, in determining whether a particular modification to a court's judgment is tailored to resolve the problems created by the changes in circumstances, the courts "give significant weight to the views" of the agency that must implement the judgment. Rufo, 502 U.S. at 393 & n.14.

Even if the Court does not apply Rule 60(b)(5), the Court can exercise its equitable discretion in this case pursuant to Rule 60(b)(6). Rule 60(b)(6) provides, in relevant part, that:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

Fed. R. Civ. P. 60(b)(6). Courts typically apply Rule 60(b)(6) only in circumstances that are not addressed by the first five numbered clauses of the Rule. See Pierce v. United Mine Workers, 770 F.2d 449, 451 (6th Cir. 1985). As the Ninth Circuit has noted, "Rule 60(b)(6) does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" United States v. Washington, 98 F.3d 1159, 1163 (9th Cir. 1996) (citation omitted). While the rule should be applied only in "extraordinary circumstances," id., district courts may employ subsection (b)(6) as a means to achieve substantial justice when "something more" than one of the grounds contained in Rule 60(b)'s first five clauses is present. See 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2864 (1995). Accordingly, a Rule 60(b)(6) motion is addressed to the trial court's discretion, which is "especially broad" given the underlying equitable principles involved. Cf. Overbee v. Van Waters & Rogers, 765 F.2d 578, 580 (6th Cir. 1985); Matter of Emergency Beacon Corp., 666 F.2d 754, 760 (2nd Cir. 1981).

IV. ARGUMENT

Pursuant to Rule 60(b), the Court should modify the judgment in this case because, as of the end of July 2003, the Service expended or obligated virtually all of the $6.0 million appropriated by Congress for work in fiscal year 2003 on ESA section 4 critical habitat actions. The Service does not have sufficient appropriated funds available for the remainder

of fiscal year 2003 for work on the Mexican spotted owl critical habitat action. Any requirement to expend additional resources in FY 2003 to perform work on the MSO critical habitat action would violate the Anti-Deficiency Act and is, therefore, impermissible under federal law as well as unworkable, if not impossible, as a matter of fact. Under these circumstances, the Court is required to modify its February 18, 2003, Order. However, even if the Court finds that modification of the Court's Order is not required, the Court should exercise its equitable discretion to modify the current deadlines for the Service to complete the actions required here and specify that it will entertain a motion to amend the deadlines, if necessary, when Congress finalizes the Service's fiscal year 2004 and 2005 budgets.

A. Modification of the Deadline In the Court's Order Is Required In View Of The Lack Of Available Appropriations To Carry Out The Critical Habitat Action Currently Required By The Court's Order.

As demonstrated above, a court *must* modify a prospective injunction where changed circumstances since issuance of the Court's original order have made compliance legally impermissible. Coldicutt, 258 F.3d at 942; Rufo, 502 U.S. at 384. There has been a significant change in circumstances in this case, both factually and as a matter of law, since the Court's February 18, 2003 Order, such that compliance with the current deadlines is not only unworkable, but impermissible under federal law. See generally Manson and Trezise Declarations. At the time this Court issued its February 18, 2003 Order, Congress had not yet finalized the Service's fiscal year 2003 budget for critical habitat actions. The fiscal year 2003 budget was subsequently enacted on February 20, 2003, and, as demonstrated in the Manson Declaration, Congress's appropriation was insufficient to enable the FWS to comply with all of the court orders and settlement agreements requiring work during this fiscal year.[7]

[7]As explained earlier, this is the case despite the fact that on January 7, 2003, the Service expressly advised the relevant Congressional appropriations committees that the then-proposed funding level would not be sufficient to meet FWS's needs and would make it unlikely that FWS would be able to comply with numerous court orders. Congress nonetheless did not provide additional funding, nor has it done so to date in response to the Executive Branch's request, on May 9, 2003, that FWS be allowed to re-program funds to do work on this Court's order and other similarly situated orders in fiscal year 2003.

Because the fiscal year 2003 budget expressly limits the expenditure of appropriations for critical habitat actions to $6.0 million and FWS now has exhausted virtually all of those funds, it is legally impermissible under the 2003 Omnibus Appropriations Act, the Anti-Deficiency Act, and the Appropriations Clause for FWS to expend any further funds for the remainder of this fiscal year on preparing and issuing a new proposed critical habitat designation for the Mexican spotted owl as presently required by this Court's February 18, 2003 Order. Because compliance with the Court's order therefore is presently legally impermissible, the Court's injunction must be modified.

This result is dictated by the Ninth Circuit's decision in Environmental Defense Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995), which involved the Service's failure to comply with an ESA deadline for making a final determination as to whether the red-legged frog should be listed as endangered. A rider in the Department of the Interior's appropriation act at the time expressly barred the Service from expending funds on making any final listing determinations under ESA section 4. Environmental Defense Ctr., 73 F.3d at 869. The Ninth Circuit held that the appropriations rider did not repeal the Service's underlying mandatory duty imposed under ESA section 4 and therefore did not relieve FWS of liability for missing a nondiscretionary deadline imposed by the statute. Id. at 871. Nonetheless, citing the Anti-Deficiency Act, the Ninth Circuit found that the "the lack of available appropriated funds prevents the Secretary from complying with the [ESA]." Id. at 872. Thus, while a technical violation may have existed, no present remedy could issue. Indeed, the Ninth Circuit found that, because no appropriated funds were available to the Service to make the required finding pursuant to the then-operative annual appropriations law, the Service was prohibited by law from taking the required final action at that time. Id.[8] Accordingly, the Ninth Circuit

[8]The Ninth Circuit also made clear that the fact that the expenditures at issue, as here, were salaries and other related costs was not material:

> The use of any government resources – whether salaries, employees, paper, or buildings – to accomplish a final listing would entail government expenditure. The government cannot make expenditures, and therefore cannot act, other than

instructed "the district court to modify its order" to provide that compliance with the requirement to make a final determination as to the frog's status "is delayed until a reasonable time after appropriated funds are made available." Id. Likewise, here FWS is now prevented from complying with this Court's order because of the lack of appropriations, and thus modification of the Order is required.[9] See Center for Biological Diversity, 212 F. Supp. 2d at 1226 (finding that forcing the Service to violate the Anti-Deficiency Act would be unreasonable).

Consistent with this conclusion, the Supreme Court and the Ninth Circuit also have made clear more generally that the Appropriations Clause precludes district courts from granting or enforcing equitable remedies that would require the expenditure of funds in a manner that is not authorized by Congress. Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 424-26 (1990); Flick v. Liberty Mut. Fire Ins. Co., 205 F.3d 386, 391 (9th Cir. 2000). As the Supreme Court noted, it is a fundamental purpose of the Appropriations Clause "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to . . . the individual pleas of litigants." Richmond, 496 U.S. at 428. Thus, "[i]t is an axiomatic principle of constitutional law that the judiciary's power is limited by a valid reservation of congressional control over public funds." Flick, 205 F.3d at 391. Moreover, this principle "is not limited to the relief available in a judicial proceeding seeking payment of public funds," Richmond, 496 U.S. at 425, but applies with full force to any equitable remedy that will require the draw down of funds from the

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by appropriation.

Environmental Defense Ctr., 73 F.3d at 872.

[9] The fact that Environmental Defense Ctr. involved a complete funding moratorium, while here FWS initially had some funding for this year but has now exhausted that funding, also is not material. Center for Biological Diversity v. Norton, 208 F. Supp. 2d 1044, 1051 (N.D. Cal. 2002) ("While technically true that the moratorium is now gone, there is still little difference in the financial situation facing the Service; there is still too little money too meet overwhelming demand. . . . [T]he Court stands by its citation to the Ninth Circuit's recognition [in Environmental Defense Ctr.] that a government agency cannot act without funding.").

Treasury. Id.; Flick, 205 F.3d at 391 (the Richmond holding is not limited to the context presented there but applies generally "to preclude a court from granting a remedy that draws funds from the Treasury in a manner that is not authorized by Congress").[10]

And so it is here. FWS no longer has appropriations available to work on critical habitat actions for the remainder of this fiscal year, including the MSO critical habitat proposal. The Court's present Order, as it currently stands, would require FWS to draw funds from the Treasury in a manner that is not authorized by Congress, and, accordingly, any such expenditures would be in violation of the Appropriations Clause, Anti-Deficiency Act, and Fiscal Year 2003 Omnibus Appropriations Act.[11] Compliance with the Court's February 18, 2003 Order thus is presently legally impermissible and, under controlling Rule 60(b) standards, modification of the Court's Order is required.

B. Even Assuming, Arguendo, That It Is Not Legally Impermissible To Comply With the Court's Order, Modification Is Warranted Because The Lack Of Appropriations Has Made It Substantially More Onerous, If Not Factually Impossible, To Comply With The Court's Present Order.

As set forth above, modification under Rule 60(b)(5) also is warranted when "changed factual conditions make compliance with the decree substantially more onerous" or "when a decree proves to be unworkable because of unforeseen obstacles." Rufo, 502 U.S. at 384; Coldicutt, 258 F.3d at 942; Agostini, 521 U.S. at 215. Even assuming, arguendo, that the Service's present lack of appropriated funds did not make it legally impermissible to comply with the Court's present Order, the lack of appropriated funds resulting from the fiscal year 2003 Omnibus Appropriations Act enacted on February 20, 2003, subsequent to this Court's issuance of its Order on February 18, 2003, makes compliance with the Order, at a minimum,

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[10] The Richmond court also noted "it would be most anomalous for a judicial order to require a Government official . . . to make an extrastatutory payment of federal funds" given that the Anti- Deficiency Act makes it a criminal offense for government employees to knowingly spend money in excess of that appropriated by Congress. 496 U.S. at 430.

[11] "Appropriations Acts, like any other laws, are binding because they are 'passed by both Houses and . . . signed by the President.'" Metro Broadcasting v. FCC, 497 U.S. 547, 578 n.29 (1990) (citations omitted).

"substantially more onerous" and "unworkable," if not factually impossible. It is therefore in the interests of justice to modify the current time schedule. See United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 496 (2001) (court has broad discretion to modify its injunction unless a statute clearly provides otherwise); A&M Records v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir. 2002) (district court has inherent authority to modify an injunction in consideration of new facts).

In January and February 2003, when the parties in this case were briefing the issue of how to structure an appropriate remedy, FWS did not know its fiscal year 2003 appropriation. Accordingly, FWS necessarily proffered a compliance schedule premised on its then-understanding of the tasks required to produce a biologically-sound and legally-defensible proposed and final critical habitat designation, its work load and existing court orders, and its predictions and expectations concerning the fiscal year 2003 budget. Even then, based on its review of these factors at the time, FWS believed that it would require significantly more time to complete the required tasks than the Court ultimately ordered. The Service subsequently received its final fiscal year 2003 budget on February 20, 2003, and the appropriated funds were substantially less than what the Service had informed Congress it needed. The enactment of a budget subsequent to the Court's February 18, 2003 Order that was substantially less than FWS had indicated it needed and which, when taken in combination with the Service's other pre-existing court-ordered critical habitat duties, is plainly insufficient to allow the Service to comply with this Court's present Order, clearly constitutes a significant change in conditions since issuance of the Court's Order that now makes compliance with the Court's present Order unworkable and factually impossible. Accordingly, the February 18, 2003 Order is no longer equitable within the meaning of Fed. R. Civ. P. 60(b)(5), and, alternatively, modification is appropriate to accomplish justice under Fed. R. Civ. P. 60(b)(6).

C. The Court Should Stay All Pending Deadlines Until Further Order of the Court.

Having established that modification is warranted, FWS asks that the Court stay all

pending deadlines until further order of the Court. FWS would propose to report back to the Court within 30 days of its receipt of the fiscal year 2004 budget[12] to advise the Court as to whether it believes it has sufficient funds to complete the outstanding actions and what a reasonable compliance schedule is at that juncture.[13] This proposed modification is not only "suitably tailored" to the changed circumstance, Rufo, 502 U.S. at 385, but consistent with Ninth Circuit law.

As discussed earlier, under similar circumstances, the Ninth Circuit found that the appropriate course is to stay compliance with the Service's outstanding duty until a reasonable time after sufficient appropriated funds are made available. Environmental Defense Ctr., 73 F.3d at 872. Moreover, as the Ninth Circuit has recognized, in re-setting the critical habitat compliance deadlines, the Court should be informed by a rule of reason. See Environmental Defense Ctr., 73 F.3d at 871-72; Center for Biological Diversity, 212 F. Supp. 2d at 1221; Appropriate considerations include the Service's budgetary shortfalls, workload constraints, and other relevant factors. Center for Biological Diversity, 212 F. Supp. 2d at 1221; Center for Biological Diversity v. Norton, 2001 WL 1602696 (N.D. Cal. 2001).

In this case, as demonstrated by the accompanying Declarations of Craig Manson and John Trezise, the Service has effectively exhausted its critical habitat funding for fiscal year 2003, and the level of funding that Congress will provide for fiscal year 2004 is still uncertain. Therefore, the reasonable course of action is to issue a stay of all pending deadlines until further order of the Court, with the proviso that the Service report back to the Court within 30 days of enactment of the fiscal year 2004 budget with an explanation of when it will have

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[12] While the hope is that the fiscal year 2004 budget will be finalized prior to the start of the 2004 fiscal year on October 1, 2003, as was demonstrated this year, it can not be assumed that Congress will complete an appropriations bill by a specific date.

[13] At this time, the Service intends to allocate any available fiscal year 2004 appropriations first to those actions, like the MSO critical habitat re-proposal, deferred from fiscal year 2003. Manson Decl. at ¶ 22. Thus, while it is likely the Service will be able to fully fund work on the proposed and final critical habitat designation for the owl in fiscal year 2004, the timing of the work remains uncertain. Id.

sufficient funds to complete the remaining critical habitat decisions on the Mexican spotted owl and what it believes to be a reasonable compliance schedule. Should Plaintiffs object to the Service's explanation and proposed schedule, they should have an opportunity to voice their opposition at that time, and the Court can then make an informed decision on an appropriate modified schedule. Such a procedure is in accord with the Ninth Circuit's instructions where congressional funding for agency action is unavailable. See Environmental Defense Ctr., 73 F.3d at 872.

As noted above, for fiscal year 2004, the President submitted a budget request that seeks significantly more money for the ESA listing program, including a nearly 50% increase over the fiscal year 2003 critical habitat sub-cap. Of course, the ultimate funding decision is in Congress' hands, and there is a possibility that Congress will not appropriate the amount requested in the President's budget. Upon passage of the fiscal year 2004 budget, the Service will be able to comprehensively analyze the amount of work required to comply with the remaining critical habitat tasks for the Mexican spotted owl, as well as the amount of work required to meet work deferred from fiscal year 2003 due to the budget shortfall and the amount of work required to meet pre-existing court-ordered deadlines and court-approved settlement agreements in other cases. Based on staffing and resource considerations due to the location and type of those species, and with the use of an improved accounting system, the Service will be able to provide an accurate and reasonable estimate of when it will have sufficient funding to propose and finalize a scientifically sound and legally defensible critical habitat designation for the Mexican spotted owl.

D. In The Alternative, If The Court Does Not Stay The Deadlines, Then The Court Should Adopt The Service's Proposed Schedule Modifications.

If the Court declines to stay its February 18, 2003 Order but instead elects to modify it and set new compliance deadlines, the Court should provide FWS until January 5, 2004 to submit a new proposed critical habitat designation to the Federal Register for publication, and until January 5, 2005 to submit a new final critical habitat designation to the Federal Register for publication. See Manson Decl. at ¶ 32. This modified schedule takes into account FWS's

current budget and workload reality, as well as the Service's best estimates of its fiscal year 2004 budget and court-mandated workload. Moreover, the fifteen-month time period from October 1, 2003 to January 5, 2005 is consistent with the Court's prior Order to complete the new final critical habitat designation in fifteen months, while taking into account that money will not be available to work on the proposed and final designation until, at the earliest, the start of fiscal year 2004. Of course, these requested deadlines are contingent on the Service receiving adequate appropriations in fiscal years 2004 and 2005. Therefore, the Service also requests that the Court explicitly acknowledge that it will entertain a motion to amend the deadlines, if necessary, when Congress finalizes the Service's budget for subsequent fiscal years.

Due to the Service's severe budget situation, the Service has not been able to conduct any work on the MSO critical habitat designation this fiscal year. Manson Decl. at ¶ 30. Once sufficient funding becomes available, the Service will need to perform the steps to complete the proposed and final critical habitat designation for the MSO described in paragraphs 4 through 12 of the January 27, 2003 Frazer Declaration. Docket Entry # 71, attached as Exhibit A to Defendant's Memorandum in Support of Motion to Alter or Amend Order and Judgment. The Frazer Declaration states that the Service will need a total of 15 months to complete the designation, with 7 months required for the proposed rule and 8 months for the final rule. The 15-month calculation remains unchanged. However, the Service now intends to accelerate the issuance of the proposed rule so that it can be published 3 months after sufficient funds become available, and to complete the draft economic analysis and draft environmental analysis subsequent to publication of the proposed rule. Manson Decl. at ¶ 31; compare Frazer Decl. at ¶¶ 5, 6. During the 12 months between the issuance of the proposed rule and the final rule, the owl will benefit from the protections provided by the conferencing process. See 16 U.S.C. 1536(a)(4); Section II(A)(1) above.

Accordingly, if the Court declines to issue a stay and instead modifies the deadlines set forth in its Order, the January 5, 2004 (for proposed) and January 5, 2005 (for final) deadlines proposed by the Service are reasonable and should be adopted. However, should

the Court adopt this course, the Service also requests that the Court explicitly acknowledge that it will entertain a motion to amend the deadline, if necessary, when Congress finalizes the Service's fiscal year 2004 and 2005 budgets.

V. CONCLUSION

For the reasons set forth above, Defendant's respectfully request that the Court grant their Rule 60(b) Motion to Modify the Court's February 18, 2003 Order, and stay the pending deadlines for proposing and finalizing a new designation of critical habitat for the Mexican spotted owl. Alternatively, the Court should extend the deadline for the Service to re-propose critical habitat for the Mexican spotted owl until January 5, 2004, and extend the deadline for the Service to publish its final designation of critical habitat for the Mexican spotted owl until January 5, 2005, with the proviso that the Court will entertain a motion to amend these deadlines, if necessary, when Congress finalizes the Service's fiscal year 2004 and 2005 budgets.

Dated this ___ day of August, 2003.

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