

INTRODUCTION

Through this brief, Plaintiffs Center for Biological Diversity, Dine Care, and Center for Native Ecosystems (collectively Plaintiffs or the "Center") oppose Defendants' U.S. Fish and Wildlife Service's et al. (collectively "FWS" or the "Service") Rule 60(b) Motion to stay or extend the Court-ordered deadline to designate critical habitat for the Mexican spotted owl. FWS has not met its burden under Rule 60(b)(5) and (6) because (1) FWS simply re-argues its prior Motion to Amend/Alter Judgment, (2) FWS did not file its Motion within a reasonable time, (3) there are no changed circumstances warranting equitable relief, and (4) FWS took no action to ensure compliance with this Court's Order.

Not only is FWS not entitled to relief under Rule 60(b), but FWS's deliberate violation of a direct order of this Court warrants a finding of contempt. FWS admits that "[d]ue to the Service's severe budget situation," which is the same situation that existed when the Court ruled on Defendant's Rule 59(e) Motion, "the Service has not been able to conduct any work on the MSO critical habitat designation this fiscal year." FWS Brief at 20; Declaration of Craig Manson at ¶ 30 (emphasis added). FWS's actions highlight the agency's complete disregard for this Court's Order establishing the October 13, 2203 deadline. A civil contempt finding will provide a means to coerce FWS to designate a legally-sufficient critical habitat designation for the Mexican spotted owl and protect the owl and its habitat in the meantime. Accordingly, Plaintiffs request the Court to enjoin FWS from completing biological opinions or written concurrences under ESA section 7 for actions that that "may affect" the owl or its habitat. In addition, the Court should order FWS to submit a detailed work plan that includes dates for completing specific tasks during the designation process and order FWS to submit weekly status reports to Plaintiffs and the Court detailing the agency's progress.

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BACKGROUND

I. THE ENDANGERED SPECIES ACT

The ESA requires that FWS designate a species' critical habitat "concurrently" with listing. 16 U.S.C. § 1533(a)(3); 16 U.S.C. § 1533(b)(6)(C). Critical habitat includes those areas occupied and unoccupied by a listed species. Id. at § 1532(5)(A). In deciding what habitat is critical, FWS must rely on the "best scientific and commercial data available" and "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." Id. at § 1533(b)(2); 50 C.F.R. § 424.19. Importantly, Congress did not make this duty or deadline subject to the availability of appropriated funds.

II. THE MEXICAN SPOTTED OWL AND ITS CRITICAL HABITAT

On March 16, 1993, FWS determined that the Mexican spotted owl warranted listing under the ESA. 58 Fed. Reg. 14248. The primary cause of the owl's decline is habitat loss. 66 Fed. Reg. 8530. Logging and livestock grazing are the primary threats to the Mexican spotted owl and its habitat. 58 Fed. Reg. at 14251. Over ninety percent (90%) of remaining owl habitat occurs in the eleven National Forests in the Southwest. Center for Biological Diversity v. Norton, 240 F.Supp.2d 1090, 1092 (D. Arizona 2003). Nonetheless, upon listing the owl, FWS violated its mandatory duty to concurrently designate critical habitat. As the Court is aware, several lawsuits and court orders later, the owl still awaits legally-sufficient critical habitat protection. Center for Biological Diversity, 240 F.Supp.2d at 1091 (recognizing earlier decision "summarizing Plaintiffs' valiant and persistent attempts to extend federal protection to the Mexican spotted owl, . . . [which] evidence[] years of delay relating to FWS's compliance obligations").

III. THE COURT'S JANUARY 13, 2003 RULING ON SUMMARY JUDGMENT

In the current case, Plaintiffs challenged FWS's exclusion of all 11 National Forests in Arizona and New Mexico and all tribal lands from the designation. Id. On January 13, 2003, the Court held FWS could not exclude lands under the ESA's critical habitat definition simply due to the existence of a management plan. Id. The Court found FWS's interpretation of the ESA was not entitled to deference and its application of the ESA unlawful. Id. at 1096-1103. In addition, the Court ruled that the Forest Service's land management plans were inadequate to protect the owl and were not being implemented. Id. at 1104-05. The Court ordered a new proposed critical habitat rule by April 13, 2003 and a final designation by July 13, 2003.

Significantly, in the ruling, the Court recognized the role critical habitat plays in the section 7 consultation process. As the Court held, by not designating critical habitat for the Mexican spotted owl, "FWS eliminated a crucial part of the consultation requirements of the ESA, namely the 'adverse modification' prong." Id. at 1102. The Court goes on to explain "if and when a project arises on owl habitat on federal land in Arizona or New Mexico, the agency responsible for the project is under no obligation to consult with FWS regarding the possible adverse modification of the habitat." Id.

IV. THE COURT'S RULING OF FWS'S RULE 59(e) MOTION FOR MORE TIME

On January 27, 2003, FWS filed a Motion to Alter/Amend Judgment pursuant to Rule 59(e), seeking to extend the designation deadline. Citing budget constraints and the inability to complete the tasks within the time provided, FWS sought deadlines of May 1, 2006 for the proposal and March 1, 2007 for the final rule.¹ The Court flatly rejected FWS's excuses for more time. February 18, 2003 Order at 2. However, the Court

¹ In the Motion, FWS falsely claimed that it did not have the opportunity to address the appropriate remedy during summary judgment briefing. However, because Plaintiffs requested in their summary judgment motion a six-month deadline for a final designation, FWS had the opportunity, but simply chose not to address it in their court filings.

extended the proposal deadline until October 13, 2004 and the final until April 2004 "with the hope that some additional time will increase the odds of Defendants complying with the ESA as well as this Court's Order." Id. These new deadlines were not subject to available funding.

ARGUMENT

I. FWS IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)

There are only limited circumstances under which a party may seek relief from a court's order. Rule 60(b) provides that "upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding." Fed.R.Civ.P. 60(b).

FWS moves under Rule 60(b)(5) and (6) for an indefinite stay of the injunction or, alternatively, an extension until January 5, 2004 for the proposed designation and January 5, 2005 for the final designation, and requests the Court to accept the likelihood of another motion when future years' budgets are inadequate. FWS Motion at 1-2. The only reason FWS offers for its non-compliance with the Court-ordered October 13, 2003 deadline, and in support of its Rule 60(b) Motion, is an insufficient appropriation in this current Fiscal Year and the expenditure of all appropriated funds on other critical habitat designations as of July 28, 2003. FWS Memo at 1.

A. FWS'S MOTION SHOULD BE REJECTED BECAUSE IT RE-ARGUES ITS PREVIOUS RULE 59(e) MOTION

As initial matter, FWS's motion should be denied because it merely re-argues points made in the Rule 59(e) Motion, which the Court largely rejected in its February 19, 2003 Order. In that motion, FWS asked the Court for an extension until January 2007 to designate critical habitat for the owl due to "budgetary constraints." See February 19, 2003 Order at 2. FWS claimed seventeen months were needed to complete the designation "from the time it has the funds available." FWS Rule 59(e) Motion at 5. FWS

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also speculated that it did "not expect to have sufficient funds in Fiscal Year 2003, 2004 or 2005." Id at 6. Citing the pending FY 2003 appropriations bill, FWS argued all anticipated funds were devoted to compliance with other court orders. Id. FWS cited the Anti-Deficiency Act as justification for delay beyond FY 2003. Id. at 7. The agency also claimed funds for FY 2004 and 2005, although not yet appropriated, were already committed to other critical habitat designations. Id. Even though this Court explicitly rejected these exact arguments in the February 19, 2003 ruling, FWS presents to same justifications for more time in its Rule 60(b) Motion. FWS Rule 60(b) Motion at 13-18.

FWS simply may not make these same arguments again, and the Court should not consider them. Crateo v. Intermark, 536 F.2d 862, 870 n. 15 (9th Cir 1976) (pet. for reh'g denied) ("reargu[ment] . . . is not the proper function of a Rule 60(b) motion"), cert. denied 429 U.S. 896 (1976); Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985) (denial of motion upheld where it "presented no new arguments that had not already been raised"); see also Jones v. United States, 255 F.3d 507, 511 (8th Cir 2001) (Rule 60(b) motions may not be used to get "a second bite at the apple"). If FWS wanted to change the Court's deadline or stay compliance, its only option after the Court's ruling on its Rule 59(e) motion was to appeal, with a concurrent motion to stay the injunction and request for expedited treatment of the appeal. Although FWS initially filed an appeal, the agency never moved for a stay and did not seek expedited treatment. In fact, FWS has now voluntarily dismissed its appeal. Having done so, FWS may not choose the improper strategy of a Rule 60(b) motion to re-argue its claims about insufficient funds. Accordingly, FWS's request for an extension and a stay is not appropriate before this Court.

B. UNDER LAW OF THE CASE DOCTRINE, THE COURT SHOULD REJECT FWS'S MOTION

Similarly, because FWS makes the same arguments this Court already rejected, the law of the case doctrine applies and precludes FWS from raising these same issues. Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (quoting Thomas v. Bible, 983 F.2d 152, 154 (9th Cir.1993)). The doctrine is grounded in the need for litigation to come to an end. Disimone v. Browner, 121 F.3d 1262, 1267 (9th Cir. 1999). As one court ruled, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." Zdanok v. Glidden, 327 F.2d 944, 953 (2nd Cir. 1964). The doctrine applies when the question was "decided explicitly or by necessary implication in [the] previous disposition." Milgard Tempering v. Selas, 902 F.2d 703, 715 (9th Cir. 1990). As stated above, the Court has already explicitly rejected FWS's budgetary constraints to delay a critical habitat designation for the Mexican spotted owl. None of the exceptions to this doctrine apply. The law has not changed nor are there changed factual circumstances since the Court's February 19, 2003 ruling on FWS's Rule 59(e) Motion. The law of the case doctrine precludes FWS from making the same budgetary arguments in the present motion. See Disimone, 121 F.3d at 1267.

C. FWS'S RULE 60(b) MOTION IS UNTIMELY

Motions for relief from judgment under Rule 60(b)(5) and (6) must be made within a "reasonable time." Fed.R.Civ.P. 60(b). In determining what is a "reasonable time," courts consider "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981).

FWS's Rule 60(b) Motion should have been filed months ago. FWS was certainly aware that funding was inadequate to comply with the Court's Order before funds actually ran out. Suckling Decl., Att. F (May 29, 2003 news article provided: "[Assistant Interior Secretary] Manson said the agency expects to runs out of funds to designate critical habitat for threatened and endangered species within two months"). FWS claimed funds were inadequate in January 2003, when the agency made the same argument in its Rule 59(e) Motion. Further, the expenditure of all appropriated funds had no effect on FWS's compliance with this Court's order. It is not as if the agency was working of the critical habitat proposal and had to stop when funds ran out July 28, 2003; rather, FWS boldly admits it took no steps to comply with this Court's February 19, 2003 Order. See FWS Brief at 20. Accordingly, there was no reason to delay this Motion until funds were actually depleted.

Moreover, the timing of FWS's Motion prejudices the Court and Plaintiffs. In moving for relief so close to the designation deadline, FWS has not ensured a ruling on its Rule 60(b) Motion before the deadline or provided sufficient time for FWS to comply with the October 13, 2003 deadline should the Court deny its Rule 60(b) Motion. By waiting until August 28, 2003 to file a Motion, FWS was able to effectively preclude the possibility of judicial enforcement until after the deadline passes.² Accordingly, FWS failed to file its Motion within a reasonable time under the circumstances.

² Plaintiffs suggest the late filing of FWS's Motion may be a deliberate tactic, which provides courts with few practical options. In another critical habitat lawsuit, FWS moved under Rule 60(b) to extend the deadline for a final critical habitat rule for the Topeka shiner on August 7, 2003, with a September 12, 2003 deadline looming. Biodiversity Legal Foundation v. Morganweck, Civ. No. 00-D-1180 (D.Colo.). Briefing is scheduled to conclude on September 5, 2003, one week before the deadline.

D. RELIEF FROM THE DEADLINE UNDER RULE 60(b)(5) IS NOT APPROPRIATE

Rule 60(b)(5)'s equity provision provides relief when "it is no longer equitable that the judgment should have prospective application." Fed.R.Civ.P. 60(b)(5). The movant must demonstrate "either a significant change in either factual conditions or in the law" to warrant consideration under this provision. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992); see also Agostini v. Felton, 521 U.S. 203, 216 (1997) ("Obviously, if neither the law . . . nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion"). Assuming a significant change is demonstrated, then the movant must show compliance has been made "substantially more onerous," "unworkable because of unforeseen obstacles," detrimental to the public interest, or legally impermissible. Rufo, 502 U.S. at 384; Securities & Exchange Comm'n v. Coldicutt, 258 F.3d 939, 942 (9th. 2001).

1. FWS's Claim Of Insufficient Funds Is Not A Changed Circumstance

Most importantly, the equity provision of Rule 60(b)(5) does not relieve FWS from the October 13, 2003 deadline because there have been no changed circumstances. FWS cannot claim that it no longer has the requisite funds. Rather, FWS claimed funds were inadequate in its January 27, 2003 Rule 59(e) Motion, and makes the exact same claim in its current Motion. FWS repeats the argument that Congress did not appropriate sufficient funds in Fiscal Year 2003, appropriated funds were obligated to other critical habitat rules and other court orders, and ordering compliance absent an appropriation will violate the Anti-Deficiency Act. As the Court held in the February 19, 2003 Order, however, "Defendant's 'budgetary constraints' argument is equally unavailing." February 19, 2003 Order at 2. The Court similarly rejected FWS's concerns of complying with "too many court orders." Id. The current funding shortage and the existence of competing court orders are not changed circumstances that caused "unexpected obstacles." Because

a Rule 60(b)(5) Motion requires a changed factual or legal circumstance, FWS's Motion fails.³

2. FWS's Actions Do Not Warrant Equitable Relief

Even assuming FWS's ongoing budget limitations constitutes a new circumstance, FWS actions do not justify the equitable relief FWS seeks under Rule 60(b)(5). The court orders and budget woes are of FWS's own making. FWS has used the budget process to limit the ESA and, in this case, to not only violate the Court's Order, but to ignore it entirely.

As this Court previously held, Defendant will not be rewarded "for shirking its duties under the ESA." February 19, 2003 Order at 2. FWS argues it must comply with too many court orders and does not have enough funds to do so. This Court previously addressed this issue. Citing a Tenth Circuit ruling, the Court found

Defendant typically puts off designating critical habitat for endangered and threatened species until forced to do so by court order. Defendants does not get to delay fulfilling its statutory obligations until a court orders it to do so and then seek relief on the basis that it has too many orders to satisfy.

Id. (internal citations omitted). Accordingly, equitable relief is not appropriate due to FWS long history of non-compliance with its duty to designate critical habitat.

Moreover, for the "lack of funds" excuse to have some credibility, FWS must take a more realistic approach when making its budget requests and ask Congress for enough to fulfill all court orders requiring the designation of critical habitat. As one commentator noted over ten years ago, "[t]he problem is not money if one refuses to ask for the money . . . In this light, funding for listing [and critical habitat] -- particularly in such small

³ FWS also argues, again, that 15 months is necessary to complete the work. FWS Memo at 20. FWS cites to the January 27, 2003 Frazer Declaration that was submitted with the agency's Rule 59(e) Motion. Id. Like FWS's budgetary constraints, this Court rejected this excuse as well, which does not amount to a new circumstance warranting relief. February 19, 2003 Order at 2 (finding FWS "already acquired and developed the majority of the data and information").

amounts -- is not a genuine constraint. It becomes, rather, an opportunity to limit the Act." Oliver A. Houck, The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce, 64 U. Colo. L. Rev. 277, 293-94 (1993). FWS's budget requests for the past several years have been wholly inadequate. Since at least 1990, FWS has known it needs a much larger budget to perform its mandatory duties to list species and designate critical habitat. A 1990 Report from the Inspector General of the U.S. Department of the Interior states that as much as \$144 million was necessary to fully fund this ESA program. See Decl. of Kieran Suckling at ¶ 7, Att. B at 7.⁴ In 2001, FWS acknowledged that it still required \$120 million to comply with the ESA and existing court orders. Id., Att. C. Accordingly, FWS's request for \$6 million in Fiscal Year 2003 and over \$8 million in Fiscal Year 2004 for critical habitat designations, even if these requests represent an increase over prior years, pale in comparison to what is needed and does not represent a good faith attempt at compliance with this Court's Order.

Despite the existence of several court orders, FWS has requested Congress to place a "cap" on the appropriation for listing and critical habitat designation activities: "Per the administration's request, the Committee included bill language capping the amount of funding available for endangered species listing programs." S. 106-213, 106th Cong. 2d Sess. (June 22, 2000) (emphasis added); see also H.R. Conf. Rep. No. 105-337, at 56 (1997); H.R. Rep. No. 105-609, at 24 (1998); H.R. Rep. No. 106-222, at 24 (1999); H. Conf. Rep. 108-10 at 311-312 (Feb. 13, 2003) (using "no more than" language to limit critical habitat funding). This tactic strongly suggests the agency is not acting in good faith. The cap prevents FWS from using appropriated funds assigned to other ESA

⁴ Notably, this DOI Report also calls for a significant increase in funding for the recovery program, which in 1989 was \$8.4 million. Suckling Decl., Att. B at 11. Since then, FWS has increased its budget requests and funding for recovery actions rose to 65.8 million in Fiscal Year 2003. Id., Att. A at 2. Thus, Congress will appropriate more funds when FWS makes the request.

programs for critical habitat designations and compliance with court orders. As these appropriations bills demonstrate ("per the administrations request"), the cap has been FWS's idea. Having urged adoption of the spending cap, FWS may not, in good faith, invoke the "lack of sufficient funds" excuse to justify relief from this Court's Order.⁵

In its brief, FWS makes the misleading statement that it requested additional monies from Congress for Fiscal Year 2003 to comply with Court orders. FWS Motion at 7, 8 (stating FWS sought a "technical budget amendment"). In fact, FWS requested Congress to allow the agency use some of the money appropriated for other ESA mandatory duties, such as preparing recovery actions under section 4(f) and performing section 7 consultations, for critical habitat designations. *Id.* at 8. Reprogramming funds, however, is not what Congress told FWS to do if critical habitat funding was inadequate. Rather, Congress expressly invited FWS to submit a supplemental appropriation request to ensure compliance with court orders. Indeed, the FY 2003 appropriation legislation provides that Congress would "consider a supplemental request for additional funds if one is submitted later this year." H. Conf. Rep. 108-10 at 311-312, 2003 WL 394983 (Feb. 13, 2003). In that legislation, Congress recognized that "additional funding, beyond that requested in the budget, will be needed for the listing program in fiscal year 2003." *Id.* (emphasis added). Nonetheless, inexplicably, FWS never submitted a request for a supplemental appropriation. In fact, Interior Assistant Secretary Manson stated publicly "that the Administration has not requested supplemental funding for this year [FY 2003] even though Congress suggested this because that would not solve the long term problem

⁵ Putting the blame on Congress is disingenuous. Congress defers, in large part, to the agency's ESA budget requests. Congress has funded the listing and critical habitat program at or near the amount FWS has requested since 1979. *See* Decl. of Suckling at ¶ 8. Similarly, other ESA programs concerning recovery, permitting and consultations are fully funded, far exceed the listing and critical habitat budget, and contain no cap of funds to be spent. *Id.* at ¶¶ 10, 11. Accordingly, it has been FWS actions in the budget process that have limited Congressional funding.

of critical habitat." Suckling Decl., Att. F (Environmental News Service (May 29, 2003)) (emphasis added); Suckling Decl., Att. E (Endangered Species & Wetlands Report, July/August 2003 ("They didn't submit a supplemental request, as they were asked to last year,' said a House staffer")). In short, it is FWS's antipathy to critical habitat, and not a lack of funds, that has caused the situation. Suckling Decl. at ¶ 17.⁶ As this Court noted, "[p]erhaps it is time for FWS to reassess its 'long held policy position'" that disfavors critical habitat designations. Center for Biological Diversity, 240 F. Supp. 2d at 1103.

Accordingly, FWS is using its self-created funding problems to escape compliance with court orders and to repeat arguments the Court has already rejected. If the Court were to adopt FWS's Motion, a court order requiring agency action can be rendered meaningless through the appropriations process and an agency's allocation of such funds. An agency can avoid compliance with a court order by not requesting sufficient funds from Congress or by spending all appropriated funds on other actions, as FWS has done here. Without a doubt, such tactics do not warrant equitable relief from this Court's February 19, 2003 Order. This is particularly unacceptable when endangered species are involved and even more so in the case of the Mexican spotted owl. The Supreme Court has clearly stated that the public interest favors protection of endangered species, at "whatever the cost" and that endangered species are afforded the "highest of priorities." TVA v. Hill, 437 U.S. 153, 173, 174 (1978); see also National Wildlife Federation v. Burlington Northern Railroad, 23 F.3d 1508, 1510-11 (9th Cir. 1994); Sierra Club v. Marsh, 816 F.2d 1376, 1383-84 (9th Cir. 1987). Any additional delay contradicts the

⁶ Certainly, FWS may make policy choices when it comes to implementing and funding the ESA. However, those policy choices must comply with the mandates of the ESA, conform to judicial decrees, and be scientifically valid. Political choices are not above the rule of law. To the extent FWS chooses to request less money than is needed for political reasons, it does so at its own peril. Cf. Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998) (FWS may choose alternative management schemes based on political factors provided it avoids 'jeopardy' and is based on 'best commercial and scientific data available,' as the ESA requires); NWF v. Babbitt, 128 F.Supp.2d 1274, 1297 (E.D. Cal. 2000).

ESA's mandate, this Court's order and is contrary to the public interest. Butte Environmental Council v. White, 145 F.Supp.2d 1180, 1184-86 (E.D. Cal. 2001).

Further, as this Court is aware, the Mexican spotted owl has been waiting since March 16, 1993 for FWS to complete a legally-sufficient critical habitat designation. Center for Biological Diversity, 240 F.Supp.2d at 1091-1094 (summarizing the "history of delay").

Furthermore, in arguing that compliance with the Court-ordered deadline is impermissible, FWS overstates the effect of the governing funding laws. Appropriations legislation and the Anti-Deficiency Act do not exonerate FWS from fulfilling the terms of the Court's Order. As courts have held, the lack of funds does not allow FWS to escape liability for violating the ESA, a court order or contract. Forest Guardians v. Babbitt, 174 F.3d 1178, 1192 (10th Cir. 1999); see also Wetsel-Oviatt Lumber Company, Inc. v. U.S., 38 Fed. Cl. 563, 571 (1997) ("[i]nsufficient appropriations at the agency level . . . [do] not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties"); San Carlos Irrigation and Drainage District v. U.S., 23 Cl. Ct. 276, 282-83 (Cl. Ct. 1991) ("The United States cannot escape liability under the contract because the BIA did not attempt to obtain appropriations from Congress to repair the spillway gates"). In addition, courts must still issue an injunction for an ESA violation despite an agency's claims of a lack of resources. Forest Guardians, 174 F.3d at 1192. Moreover, although the Anti-Deficiency Act contains a provision authorizing civil and criminal penalties against the governmental official who violates the statute, FWS's concerns about the statute's enforcement is not a legitimate concern. See FWS Memo at 5. As one court noted when considering the possibility of such penalties,

[T]here is no such threat. Quite the opposite: the government at oral argument not only stated that 'no one has ever suggested that there would be [a prosecution],' but also conceded 'formally for the record that the existence of a judgment [from a court] during that time would be a complete and adequate defense to any prosecution.' The concession gives formality to the obvious--the nonviability of

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any such prosecution. Our research has failed to turn up a single prosecution under the Anti-Deficiency Act in its entire existence since 1905.

Clarke v. U.S., 915 F.2d 699, 701 (D.C. Cir. 1990) (emphasis added).

FWS argues compliance with the Court's Order is impossible based on its interpretation of FY 2003 appropriations legislation and the Anti-Deficiency Act. FWS Memo at 14. To the extent the Court applies these laws in the manner FWS suggests, such legislation is fraught with Constitutional Separation of Powers problems. See Plaut v. Spendthrift Farm, 514 U.S. 211 (1995). As one Arizona district court held in another Mexican spotted owl critical habitat case,

if the Court were to interpret the [appropriations] rider as defendants suggest to vacate the final [court-ordered] deadline, the rider would be an unconstitutional violation of separation of powers because it would reverse this Court's decision.

Silver v. Babbitt, 924 F.Supp. 972, 975 (D. Ariz. 1995) (upholding court order requiring critical habitat designation by date certain). The Court should apply the FY 2003 appropriations legislation and the Anti-Deficiency Act so as to avoid these constitutionality problems. See NLRB v. Jones & Laughlin, 301 U.S. 1, 30 (1937).

FWS's concern about violating the Anti-Deficiency Act and appropriations legislation is rather ironic. FWS speaks of the grave consequences associated with violating these statutes and how completing a critical habitat designation for the Mexican spotted owl would run afoul to prohibitions found in those laws. Yet, at the same time, FWS is perfectly content with violating the ESA's mandatory duty to designate critical habitat concurrently with listing and has lived with this continuing violation since March 16, 1993, even though the ESA should be its primary concern. See TVA v. Hill, 437 U.S. at 185 (reasoning that Congress made "a conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies"). In addition, the agency does not seem the least bit concerned with violating this Court's order enforcing the ESA and establishing a deadline for completing a proposed rule designating critical habitat by

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October 13, 2003. The Court should not sanction FWS's cavalier attitude to the ESA and court orders, and should deny the agency's Motion under Rule 60(b)(5).

E. EXTRAORDINARY CIRCUMSTANCES ARE NOT PRESENT JUSTIFYING RELIEF UNDER RULE 60(B)(6)

Under Rule 60(b)(6), a court may modify a judgment for "any other reason justifying relief from operation of judgment." Klapprott v. United States, 335 U.S. 601, 615 (1949). Relief under Rule 60(b)(6) is only available is "extraordinary circumstances" and the moving party must be faultless. Ackerman v. United States, 340 U.S. 193, 199 (1950); In re Pacific Far East Lines, 889 F.2d 242, 249-50 (9th Cir. 1989). A court may only grant relief "when it offends justice to deny such relief." Yapp v. Excel Corp., 186 F.3d 1222, 1232 (10th Cir. 1999). This "catch-all" provision cannot be used to raise any of the excuses for additional delay provided by Rule 60(b)(1)-(5). Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863 (1988). Rule 60(b)(6) may be "available only where extraordinary circumstances prevented a litigant from seeking earlier, more timely relief." U.S. v. Alpine Land & Reservoir, 984 F.2d 1047, 1049 (9th Cir. 1993). A moving party must demonstrate that "both injury and circumstance beyond its control prevented timely action to protect its interests." Id.

There are no "exceptional circumstances" warranting the requested relief. In fact, "it offends justice" to grant FWS's requested relief. As stated above, the funding difficulties FWS describes are no different than when FWS filed its Rule 59(e) Motion. The Court already ordered the October 13, 2003 deadline despite FWS's claims of funding problems and existing court orders. Moreover, FWS chose to spend all FY 2003 appropriated funds on other actions that preclude compliance with the Court's deadline. FWS decided not to make a supplementation appropriation request, even though Congress expressly invited the agency to do so. Far from being beyond the agency's control, the lack of funds is a direct result of FWS's concerted effort to avoid compliance with the

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ESA and, in this case, not designate owl critical habitat. Accordingly, as the Supreme Court has ruled, when a party makes deliberate choices, like FWS has done in this case, Rule 60(b)(6) relief is not available. Ackerman, 340 U.S. at 198.

This case is very similar to a recent decision from the Tenth Circuit Court of Appeals. In considering a FWS Rule 60(b)(6) Motion, the Tenth Circuit held that exceptional circumstances were not present to relieve FWS from a court order establishing a deadline for designating critical habitat for the silvery minnow. Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1231 (10th Cir. 2002). FWS argued "budgetary constraints" made compliance with the deadline "impossible." Id. In rejecting FWS's request, the court agreed with the district court that "the agency's difficulties in meeting the deadline stemmed from its own delays in the past and were difficulties of its own making." Id. The court also reasoned that Rule 60(b)(6) was not appropriate due to the "urgent need for a new critical habitat designation." Id.

In sum, budgetary restraints do not amount to exceptional circumstances warranting relief from the October 13, 2003 deadline.

II. THE COURT SHOULD FIND FWS IN CONTEMPT OF COURT AND PROVIDE PLAINTIFFS WITH ADDITIONAL INJUNCTIVE RELIEF

Plaintiffs move this Court to find FWS in civil contempt of court for violating the Court's February 19, 2003 Order. The purpose of this Motion is to coerce compliance and protect the Mexican spotted owl and its forest habitat until critical habitat is designated. Plaintiffs seek contempt to ensure, once and for all, that a final designation is completed and, in the interim, no more habitat or owls are lost. Plaintiffs submit that only through civil contempt will FWS finally designate critical habitat for the owl.

A. THE STANDARDS FOR CIVIL CONTEMPT ARE MET

A federal court has the inherent power to enforce its orders, such as injunctions compelling an agency to act by a date certain, through civil contempt. Shillitane v. U.S.,

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384 U.S. 364, 370 (1966); United States v. Yacoubian, 24 F.3d 1, 5 (9th Cir. 1994) (there is "no question that courts have inherent power to enforce compliance with their lawful orders"). Civil contempt sanctions are "usually considered to be remedial" and are "designed to enforce compliance with a court order." United States v. Rylander, 714 F.2d 996, 1001 (9th Cir. 1983); Whittaker v. Execuair, 953 F.2d 510, 517 (9th Cir. 1992) ("civil sanctions are wholly remedial"). Contempt is appropriate upon a demonstration by the moving party that a specific and definite order of the court has been violated. Stone v. San Francisco, 968 F.2d 850, 856 (9th Cir. 1992); Go-Video v. The Motion Picture Assoc. of Am., 10 F.3d 693, 695 (9th Cir. 1993). Once it is clear that there is a violation, "the burden then shifts to the contemnors to demonstrate why they were unable to comply" and that they "took every reasonable step to comply." Stone, 968 F.2d at 856, n.9. In assessing whether the party took "every reasonable step," the court considers (1) the history of noncompliance, and (2) the failure to comply despite the pendency of the contempt motion. Id. at 857.

Finding FWS in contempt is appropriate in this case. First, FWS violated the Court's clear and definitive deadline. On January 13, 2003, the Court granted Plaintiffs' summary judgment motion and ordered a proposed designation within three months and a final designation within six months. "[W]ith the hope that some additional time will increase the odds of Defendants complying with the ESA as well as this Court's Order," the Court extended the deadlines until October 13, 2003 for a proposed designation and April 13, 2004 for the final. February 18, 2003 Order at 2. Nonetheless, as set forth in the Rule 60(b) Motion, FWS will not comply with the October 13, 2003 deadline. FWS Memo at 13.

Second, the stated reasons for FWS's non-compliance, budgetary shortages and other court orders, are same as those the Court already rejected. As the Court found in

the February 18, 2003 Order, "Defendant's 'budgetary constraints' argument is equally unavailing . . . This would essentially reward Defendant for shirking its duties under the ESA. February 19, 2003 Order at 2. Accordingly, FWS's non-compliance is inexcusable.

Third, FWS has not made substantial progress toward achieving compliance with the deadline and cannot demonstrate they "took every reasonable step to comply." Remarkably, as FWS admits, it has taken no steps to comply. FWS Motion at 20; Manson Decl. at ¶ 30. FWS did not even seek a supplemental appropriations request, as Congress explicitly suggested. Suckling Decl., Atts. E and F.

Fourth, FWS has a long history of non-compliance with the ESA regarding Mexican spotted owl critical habitat. See Stone, 968 F.2d at 857 (court considered fact of "City's history of non-compliance with the inmate population levels" in contempt setting). As this Court is well aware, FWS has delayed critical habitat for the Mexican spotted owl since March 16, 1993. There have been several court orders, including this Court's Order, requiring FWS to designate owl critical habitat. Center for Biological Diversity v. Norton, 240 F.Supp.2d at 1091-1092. Over ten years later, however, the owl still lacks significant critical habitat protection.

B. THE COURT SHOULD ORDER PROTECTION OF THE OWL AND ITS HABITAT AS THE REMEDY FOR CONTEMPT

Plaintiffs request a remedy for civil contempt that will coerce compliance with the court-ordered deadline and protect the Mexican spotted owl and its habitat in the interim. Specifically, the Court should enjoin FWS from issuing "written concurrences," "biological opinions" and "incidental take statements" under ESA section 7 for projects that may affect Mexican spotted owls or critical habitat identified in the August 2000 Proposed Rule until FWS complies with the Court's Order. Absent Plaintiffs' requested relief, FWS would be allowed to subvert both the section 4 duty to designate critical habitat concurrently with listing and the section 7 prohibition against projects that

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adversely modify or destroy critical habitat. Unless this Court grants this injunction, FWS is free to disregard the ESA and the Court's Order with impunity and without meaningful judicial relief. The injunction is specifically tailored to remedy FWS's ongoing violation of the duty to designate critical habitat and this Court's Order.

As this Court is aware, until critical habitat is designated, "a crucial part of the consultation requirements of the ESA" is missing. Center for Biological Diversity v. Norton, 240 F.Supp.2d at 1101-02. Section 7(a)(2) of the ESA prohibits federal agency actions that (1) jeopardize the continued existence of a species or (2) destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Because critical habitat must be designated "concurrently" with listing, both these section 7 prohibitions apply upon listing. See id. at § 1533(a)(3). To ensure federal agencies comply with these prohibitions, federal agencies must consult with FWS for "agency actions" that "may affect" (1) a listed species or (2) designated critical habitat. Id. § 1536(a)(2). To facilitate the consultation process, an "action agency" must prepare a "biological assessment" that identifies the affected listed species and evaluates the potential effects of the proposed action. 50 CFR §§ 402.02, 402.12. Formal consultation is not required if FWS issues a "written concurrence" upon reviewing a biological assessment that concludes the agency's proposed action "is not likely to adversely affect the listed species or critical habitat." 50 C.F.R. § 402.14(a) & (b). When formal consultation is necessary, FWS provides the action agency with a "biological opinion" as to whether jeopardy to the species or adverse modification of the critical habitat is likely to occur. 16 U.S.C. § 1536(b)(3)(A). Absent critical habitat, however, FWS cannot fulfill its section 7 duty to consider, through the consultation process, whether a federal agency action will "adversely modify or destroy critical habitat" and the listed species does not receive the full compliment of ESA protections. See NRDC v. Dept. of the Interior, 113 F.3d 1121, 1123 (9th Cir. 1997)

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("Designation of critical habitat in turn triggers the protections of section 7"); see also Sierra Club v. Fish & Wildlife Service, 245 F.3d 434, 442 (5th Cir. 2001) ("critical habitat designation primarily benefits listed species through the ESA's consultation mechanism . . . If critical habitat has been designated, the statute imposes an additional consultation requirement where an action will result in the destruction or adverse modification of critical habitat"); Greenpeace v. NMFS, 55 F. Supp. 2d 1248, 1265 (W.D. Wash. 1999) (holding that jeopardy and adverse modification standards are two separate standards and not identical).

Section 7 biological opinions and written concurrence letters have "direct and appreciable legal consequences" and a binding effect on federal agencies. Bennett v. Spear, 520 U.S. at 169-70, 178. In Bennett, referencing the statute and regulations, the Supreme Court noted that "while the Service's Biological Opinion theoretically serves an advisory function, in reality it has a powerful coercive effect on the action agency." Id. at 169. The court reasoned that federal agencies are not free to ignore biological opinions. The court noted "the Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions." Id. at 170. Moreover, the court found that a "Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions" and "the Biological Opinion at issue here has direct and appreciable legal consequences." Id. at 178; see Sierra Club v. Marsh, 816 F.2d 1376, 1385-86 (9th Cir. 1987) (holding Corps' failure to carry out mitigation measures prescribed by FWS in biological opinion violates the ESA); Lone Rock Timber Co. v. United States Dep't of Interior, 842 F. Supp. 433, 437 (D. Or. 1994) ("[A]ction in the face of a critical [FWS] biological opinion will almost certainly be found to [have been taken] arbitrarily and capriciously and contrary to law.").

Accordingly, by eliminating FWS's ability to prepare biological opinions and issue concurrence letters, the Court can effectively limit federal agency actions that harm the Mexican spotted owl until critical habitat is designated. Because all Forest Service actions on the Southwest's eleven National Forests are subject to section 7, the Forest Service is essentially exempt from the prohibition against habitat destruction until habitat is designated. Similarly, the section 7 prohibition is not being applied to permits that FWS issues under section 10 to non-federal actors, such as to States, Tribes and local jurisdictions for activities that harm the Mexican spotted owl. See 16 U.S.C. § 1539. Congress never envisioned such de facto exemptions from section 7 compliance.

The requested injunctive relief is consistent with the remedial purpose of a civil contempt sanction by preventing harmful effects to owl habitat that otherwise would have been addressed while FWS is in breach of this Court's Order. Once the designation is complete, FWS can fully consider a project's impact on the owl, as the ESA requires.⁷

In addition to the injunction, as a means of ensuring compliance, the Court should order FWS to submit a detailed work plan that includes dates for completing specific tasks during the designation process and weekly status reports to Plaintiffs and the Court, to which Plaintiffs may respond. The weekly reports will insure FWS is progressing toward designating critical habitat. As seen to date, without accounting for the agency's day-to-day activities, there is little reason to believe FWS will comply with the Court's Order.

III. EVEN ABSENT A FINDING OF CONTEMPT, THE COURT SHOULD ENJOIN FWS FROM APPROVING PROJECTS THAT MAY AFFECT THE MEXICAN SPOTTED OWL

Even without a contempt finding, the Court has the discretion to enjoin FWS from issuing written concurrences and biological opinions for actions that may affect the Mexican spotted owl or its proposed critical habitat, as set forth in the 2000 Proposed

⁷ At that time, FWS will also be able to purge itself of contempt. See International Union, UMW v. Bagwell, 512 U.S. 821, 828 (1994).

Rule. Generally, in exercising its equitable discretion, courts consider whether (1) Plaintiffs have no adequate legal remedy and (2) the injunction is necessary to prevent irreparable harm. See Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495 (9th Cir. 1996). Here, these criteria are satisfied. In the absence of a critical habitat designation for the Mexican spotted owl, Plaintiffs have no other adequate remedy to redress the destruction or adverse modification of owl habitat from activities on the 11 National Forests. As set forth above, when FWS only lists a species but does not designate critical habitat, the species only receives half of the protections intended by Congress. Yet, at the same time, federal actions may proceed without review of, or accountability for, their impacts on the potential critical habitat that FWS has failed to designate. Because these federal actions can lead directly to the destruction or adverse modification of potential critical habitat that should already have been designated and subject to the protections conferred by Section 7 consultation, an injunction is needed to prevent irreparable harm to the Mexican spotted owl. TVA v. Hill, 437 U.S. at 194 (noting that "Congress has spoken in the plainest of words, making it abundantly clear that the balance [of equities] has been struck in favor of affording endangered species the highest of priorities").

The relief Plaintiffs request has previously been ordered by courts in similar circumstances, even without a finding of contempt. Faced with FWS's failure to designate critical habitat for the Santa Ana sucker, a sister district court enjoined FWS from approving potentially habitat-damaging actions until critical habitat is designated, in the same manner as requested here. California Trout v. Norton, C 97-3779 SI (N.D. Cal. Feb. 26, 2003) at 5-8 (Exhibit 1). This type of injunctive relief is even more appropriate here, where FWS has shown that it is willing to ignore the Court's direct order.

Similarly, in addressing FWS's failure to designate critical habitat for the Canada lynx, a D.C. district court held an injunction against future Section 7 actions "is essential

to fully and effectively carry out the will of Congress." Defenders of Wildlife v. Norton, 239 F.Supp.2d 9, 23 (D.D.C. 2002). The court reasoned:

As addressed above, by failing to designate Lynx critical habitat at the time of the Lynx's 'threatened' listing, FWS is in patent violation of an unequivocal statutory mandate. Moreover, the Service has asserted that it is unable to remedy this violation for an additional four years, six and one-half years after it was required by the ESA to do so. Therefore, absent the injunctive relief Plaintiffs seek, they will be without meaningful remedy for the Service's failure to comply with its nondiscretionary duty, and Defendants will not be held accountable for that failure. Most significantly, the Lynx, which the ESA was designed to protect, would continue to suffer the adverse effects of the Service's failure to protect its habitat. Without the designation of its critical habitat, and the protections which flow from such designation, the Lynx would be vulnerable to further extirpation and 'destruction or adverse modification of [its] habitat.' Plaintiffs' requested relief would, in part, ameliorate these negative consequences for the species.

Id. at 23-24 (citations omitted). That court also rejected any contention that remedies were limited to ordering compliance with the ESA's deadlines, concluding that "limiting the Court's authority to craft appropriate injunctive relief in the face of this prolonged failure to comply with a nondiscretionary duty would be directly contrary to the clearly expressed intent of Congress." Id. at 23. Citing the ESA's citizens provision, the court found "Congress did not limit district courts' authority to provide equitable relief under the ESA and, indeed, specifically reserved their traditional authority to fashion appropriate equitable relief." Defenders of Wildlife v. Norton, 239 F.Supp.2d 9, 25 (D.D.C. 2002).⁸

FWS continues to issue biological opinions on Forest Service actions without a critical habitat designation for the owl. On January 17, 2003, for example, FWS completed consultation on the Forest Service's delayed implementation of grazing

⁸ The ESA expressly contemplates injunctive remedies beyond those found in the citizens' suit provision:

The injunctive relief provided by this subsection shall not restrict any rights which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

16 U.S.C. § 1540(g)(5).

standards for the 11 National Forests in Arizona and New Mexico and issued a biological opinion. Exhibit 2. FWS concludes "the action does not affect any areas of critical habitat" and states the opinion will not address "the effects of the action on critical habitat." Exh. 2 at 1. The 11 National Forests in Arizona and New Mexico contain at least 509 livestock grazing allotments that contain owl habitat and all such habitat was designated as critical in the August 2000 Proposed Rule. Id. at 2. FWS acknowledges that grazing adversely modifies owl habitat by eliminating ground cover for prey species. Id. at 7. As this biological opinion highlights, FWS will analyze whether this Forest Service action is likely to "jeopardize the continued existence" of the Mexican spotted owl, but will not consider whether habitat is being destroyed or adversely modified, as the ESA requires.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny FWS's Rule 60(b) Motion, find FWS is civil contempt, and enjoin FWS from issuing written concurrences and biological opinions until critical habitat is designated for the Mexican spotted owl.

Respectfully submitted,

Dated: _____

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