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* Application for admission pending

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

_____)	
FOREST GUARDIANS)	
)	
Plaintiff,)	Civil No. _____
)	
v.)	
)	
ANN M. VENEMAN, SECRETARY OF)	COMPLAINT FOR
AGRICULTURE OF THE UNITED STATES,)	DECLARATORY AND
and GALE NORTON, SECRETARY OF THE)	INJUNCTIVE RELIEF
INTERIOR OF THE UNITED STATES)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

The spikedace and the loach minnow are two critically imperiled fish native to the mountain streams of eastern Arizona and Western New Mexico. Both are listed as threatened species under the Endangered Species Act, 16 U.S.C. § 1531, et seq., and have critical habitat designated under the terms of that act. Under the ESA, these endangered fish are entitled to protection from actions by federal agencies that will adversely affect both their survival and their recovery and eventual removal from the endangered species list.

The majority of the habitat for the spikedace and loach minnow is found on lands managed by defendant Ann Veneman through the United States Forest Service. This case

involves the Forest Service's authorization of continued livestock grazing on 15 grazing allotments covering over 279,000 acres in the Blue and San Francisco River watersheds on the Apache Sitgreaves National Forest. The Blue River and San Francisco River watersheds are designated as critical habitat for both the spikedace and the loach minnow.

According to the defendant Gale Norton, acting through the U.S. Fish and Wildlife Service, continued grazing on the terms authorized by the Forest Service will delay or even prevent altogether the survival and recovery of the spikedace and loach minnow. Despite this fact, the Forest Service has determined that it will go forward with grazing on these allotments, and the FWS has found that grazing as proposed will not result in jeopardy to the species or adverse modification of critical habitat for these species. These actions and findings are in clear violation of the terms of the Endangered Species Act and its implementing regulations, and these agency decisions must be reversed.

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over this action, and Forest Guardians has a right to bring this action, pursuant to 16 U.S.C. § 1540(g) (the ESA's citizen suit provision), 28 U.S.C. § 1331 (federal question jurisdiction), and 5 U.S.C. § 706 (APA review).

Venue in this Court is proper under 28 U.S.C. § 1391(e) on the grounds that a substantial part of the actions giving rise to this claim occurred in this District.

III. PARTIES

2. Plaintiff Forest Guardians is a conservation organization dedicated to the preservation of native species, biodiversity, and natural ecosystems. Forest Guardians has approximately 2,000 members in New Mexico and Arizona. Members of Forest Guardians

engage in wildlife viewing, outdoor recreation, and other activities in the Blue River watershed on the Apache-Sitgreaves National Forest. The health and survival of the spikedace and loach minnow is an important part of the members' aesthetic, scientific, and recreational enjoyment of this area. As a result, members of Forest Guardians are injured by the actions of the Forest Service that adversely impact the resources of this watershed, including the spikedace and the loach minnow.

3. Defendant Ann Veneman is the Secretary of the United States Department of Agriculture, and in that role is charged with the duty of managing national forest lands. This duty is carried out by the United States Forest Service. The Secretary is further charged with the duty of taking steps to protect and conserve threatened and endangered species.

4. Defendant Gale Norton is the Secretary of the Interior of the United States. The Secretary of the Interior has delegated her duties under the ESA to the U.S. Fish and Wildlife Service ("FWS"), and this complaint refers generally to the FWS in describing the facts surrounding this case.

IV. BACKGROUND OF THE SPIKEDACE, THE LOACH MINNOW AND THE BLUE AND SAN FRANCISCO RIVERS

5. The loach minnow and the spikedace are both small fish that were originally found throughout the Gila, San Francisco and Blue River systems of southern New Mexico and Arizona. Both species have gone through population crashes, and occupy only a small fraction of their former habitat. The loach minnow now inhabits only about 15-20% of its historical habitat, and the spikedace only about 10-15% of its historical range. The populations of both fish are small and isolated; many continue to decline. Destruction of their habitat through poorly managed grazing has played a large role in the decline of these

species. The Fish and Wildlife Service listed the Loach Minnow as threatened in October of 1986, 51 Fed. Reg. 39468 (Oct. 28, 1986), and the spikedace as threatened in July 1986. 51 Fed. Reg. 23769 (July 1, 1986). The FWS has recognized since 1994 that their declining populations warrant listing as endangered. 65 Fed. Reg. at 24330.

6. Critical habitat under the Endangered Species Act was designated for the spikedace and the loach minnow on May 25, 2000. This critical habitat includes the Blue River upstream from the San Francisco River to the confluence of Campbell Blue and Dry Blue Creeks. Parts of the tributary creeks of the Blue River are also included. The San Francisco River in its lower reaches is also designated as critical habitat for the spikedace and loach minnow. The Blue and San Francisco Rivers make up a substantial part of what is referred to as “Complex 6” of the critical habitat for the loach minnow and spikedace. These areas are currently occupied by the loach minnow, but the spikedace has been extirpated from them. This complex is considered especially important for the survival and recovery of the two species because it is the largest unbroken stretch of occupied or potentially occupied habitat available to them. As the FWS recognized in the designation of critical habitat for these species, “[b]ecause of the species’ precarious status, mere stabilization of spikedace and loach minnow at their present levels will not achieve conservation. Recovery through protection and enhancement of existing populations, plus reestablishment of populations in suitable areas of historical range, are necessary for their survival.” 65 Fed. Reg. at 24330.

7. Despite their importance to the loach minnow and spikedace, the Blue River and San Francisco rivers are in very bad shape today. As early as 1921, Aldo Leopold, a prominent U.S. ecologist, called the Blue “ruined,” and in the past year the FWS has

characterized it as a “seriously degraded ecosystem.” The San Francisco is likewise in a highly altered and degraded condition, with a channel consisting of a “sparsely vegetated expanse of cobble, gravel, boulder, and sand” in its lower reaches. On both rivers one of the key factors leading to this degraded condition has been poorly managed livestock grazing, which has contributed to loss of riparian vegetation, loss of upland plant cover, soil erosion and changes in hydrology. In order for these rivers to play the role they must play if the spikedace and loach minnow are to survive, recover and be removed from the endangered species list, these rivers must be rehabilitated. Unfortunately, Forest Service grazing practices like those at issue in this case will prevent that occurring.

8. The majority of the land in the Blue and San Francisco watersheds is National Forest land managed by the U.S. Forest Service. A substantial part, including the areas at issue here, are within the Apache-Sitgreaves National Forest, and livestock grazing on those lands takes place under permits issued by the Forest Service. At issue in this case are the 15 Forest Service grazing allotments shown on the map included on the following page as Figure 1. These allotments are the Stone Creek, Upper Campbell Blue, Turkey Creek, Bobcat-Johnson, Foote Creek, Red Hill, Bush Creek, Fishhook-Steeple Mesa, Cow Flat, KP-Raspberry, Pigeon, Wildbunch, Sardine, and Hickey. Collectively they cover over 279,000 acres in these watersheds, and they affect well over one third of the stream mileage making up the important Complex 6 of critical habitat for the spikedace and loach minnow.

9. On May 31, 2001, the Forest Service initiated the ESA consultation process with the FWS on authorization or reauthorization of grazing on these allotments, among others. On January 31, 2003 the FWS delivered its Biological Opinion on the proposed agency action. In

the January 2003 BO the FWS reviews the condition of the watersheds and the proposed grazing regime, and concludes “we believe that range, soil and riparian conditions are severely deteriorated, and that components of the proposed action, such as utilization levels and/or herd size, exceed those that would promote sustainable and healthy rangelands given current range conditions. Because of the degraded range condition and the proposed utilization levels, the FWS believes that degradation of the various watersheds, and ultimately Campbell Blue Creek, the Blue River and the San Francisco River, will continue.” January 2003 BO at 105. The BO concludes that the proposed action will adversely affect the survival and recovery of the spokedace and the loach minnow. BO at 125, 128. Finally, the Forest Service concludes that “continued grazing of this area will perpetuate current conditions or preclude or prevent recovery.”

10. The Endangered Species Act provides that each federal agency shall insure that its actions do not jeopardize the continued existence of any listed species. In its regulations implementing the ESA the FWS has defined “jeopardize the continued existence of” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Despite its finding that the Forest Service’s approval of grazing as proposed will adversely affect survival and recovery of the spokedace and loach minnow, the FWS nonetheless found that the action would not jeopardize the continued existence of those species. This finding is arbitrary, capricious, contrary to law, and violates the Endangered Species Act and its implementing regulations.

11. The ESA further provides that all federal agencies shall utilize their authorities to carry out programs for the conservation of listed species, and shall insure that their actions do not destroy or adversely modify critical habitat. Under the ESA, critical habitat for species like the spikedace and loach minnow is defined as that habitat necessary for conservation of the species. The ESA further defines conservation as the recovery of the species. Although the FWS promulgated a regulation defining “destruction or adverse modification,” see 50 C.F.R. § 402.02, that definition was invalidated in 2001 by the United States Court of Appeals for the Fifth Circuit, and no other regulatory definition has been promulgated. In the January 2003 BO the FWS finds that the proposed grazing action will not cause adverse modification of critical habitat, but it never explains that finding, nor does it make any finding as to how the action will affect the recovery of the species. Such a finding is necessary in order to determine whether there will be adverse modification of critical habitat. Further, the agency expressly finds that the proposed action will adversely affect survival and recovery, and delay or preclude recovery of the species. The FWS finding that the proposed action will not result in the destruction or adverse modification of critical habitat is arbitrary, capricious, contrary to law, and violates the Endangered Species Act and its implementing regulations.

12. The Endangered Species Act citizen suit provision entitles any person to bring an action in federal district court to enjoin any person alleged to be in violation of the Act. See 16 U.S.C. § 1540(g). Written notice of the alleged violations must be sent to all potential defendants and to the Department of Interior at least 60 days prior to bringing a citizen suit.

See 16 U.S.C. § 1540(g)(2)(A). Proper notice has been supplied to the Forest Service of the violations explained above and summarized below.

13. As set forth above, the Forest Service has authorized an action that, according to the U.S. Fish and Wildlife Service, will result in adverse effects on the survival and recovery of the spikedace and the loach minnow. This violates the prohibition on causing jeopardy and adverse modification in the ESA, and Forest Guardians is entitled to declaratory and injunctive relief against this action. This further violates the agency's duty to use its authority to carry out programs for the recovery of listed species.

14. The U.S. Fish and Wildlife Service's determination that the Forest Service's proposed action will not cause adverse modification or jeopardy is, as set forth above, arbitrary, capricious, contrary to law, and violates the terms of the ESA and the Administrative Procedures Act. This further violates the agency's duty to use its authority to carry out programs for the recovery of listed species.

XII. PRAYER FOR RELIEF

WHEREFORE, Forest Guardians, respectfully prays that this Court enter judgment in its favor and against the Honorable Ann Veneman and the Honorable Gale Norton:

- (1) Declaring that their actions are in violation of the Endangered Species Act and its implementing regulations and the Administrative Procedure Act as set forth above;
- (2) Remanding the matter to the agencies for appropriate action using the correct legal standards;
- (3) Awarding appropriate injunctive relief, including ordering the Forest Service to take such action as the law requires to protect listed species in the interim;

- (4) Retaining jurisdiction to insure that the terms of its orders are carried out;
- (5) Awarding Forest Guardians the costs incurred in pursuing this action, including attorneys' fees, as authorized by the ESA, and other applicable provisions; and
- (6) Granting such other and further relief as is proper.

Dated this 4th day of September, 2003.

Respectfully submitted,

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