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Via Priority Certified U.S. Mail, Signature Required

Public Comments Processing
Attn.: FWS-R2-ES-2011-053
Division of Policy and Directions Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

Re: Comments on the Proposal of the FWS to Revise Critical Habitat for the Southwestern Willow Flycatcher (Empidonax trailli extimus), Docket No. FWS-R2-ES-2011-0053

These comments, submitted on behalf of each of the Arizona Cattle Growers' Association (ACGA), Southern Arizona Cattlemen's Protective Association (SACPA), Gila County Cattle Growers', Mohave Livestock Association, Yavapai Cattle Growers', Cochise Graham Cattle Growers', Greenlee County Cattle Growers', Pima Natural Resources Conservation District (Pima NRCD), the AZ NRCD State Association, the Coalition of Arizona New Mexico Counties for Stable Economic Growth, the Arizona Farm Bureau Federation, the Hidalgo Soil and Water Conservation District, the Hidalgo County Cattle Growers' Association, and the New Mexico Cattle Growers' Association (NMCGA) respond to the proposed rule promulgated by the FWS in the Federal Register (Vol. 76, No. 157 / Monday, August 15, 2011 / p. 50542 et seq.) to expand the designation of critical habitat for Willow flycatchers in the American Southwest. Due to the many scientific, legal and factual infirmities contained therein, as detailed below, it is the conclusion of each of the parties on whose behalf these comments are submitted that the FWS must immediately withdraw this proposed rule because, as currently written, it is arbitrary, capricious and unlawful.

A. There is Neither Legal Nor Scientific Basis for the Designation of Critical Habitat Outside of Areas Occupied by the "Southwestern" Willow Flycatcher at the Time of its Listing

Critical Habitat is defined by the Endangered Species Act (ESA) Section 3, 16 U.S.C. Sec. 1532 as:

> (i) the specific areas within the geographical area occupied by the

> species at the time it is listed . . . on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management consideration or protection, and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

As a result, the ESA, by its plain wording, limits the designation of critical habitat to those areas occupied by the "Southwestern" willow flycatcher at the time of its listing, and other areas ***only*** upon a determination that those other areas are "essential" for its conservation as a species. This limitation against designating critical habitat in areas outside those occupied by this species at the time of its listing is also carried forward in regulation at 50 CFR 424.12(e), which provides that the "Secretary shall designate critical habitat areas outside the geographical area presently occupied by the species ***only*** when a designation limited to its present range would be ***inadequate*** to ensure the conservation of the species." (Emphasis added). Additionally, Section 4 of the ESA requires the Secretary to base that determination solely on the best scientific and commercial information available.

These legal constraints placed on the FWS by the ESA are of imperative importance where, as here, the proposal of additional critical habitat for the Willow flycatcher includes virtually its entire southwestern range of occurrence (76 FR at p. 50552, 5058-78), the FWS is alleging virtually every human activity (76 FR at p. 50552-53) and natural phenomena (76 FR at p. 50547-48) are threats to its continued existence, and where the potentially devastating economic consequences of such drastic critical habitat expansion during the worst economic recession since 1929 far outweigh any benefit that such designation could possibly provide this species. As shown below, the proposal of this sweeping rule is also scientifically unjustified.

Here, the FWS is claiming that Willow flycatchers have declined so precipitously from a former state of historic abundance in the Southwest that the designation of expanded critical habitat far beyond specific areas occupied by them at the time of their listing is "essential" to their collective conservation as a species, despite any and all drastic economic consequences that may result and have yet to be properly addressed. (76 FR at p. 50543-44). In reaching that conclusion, the FWS relied nearly entirely, as it did in listing this species in 1995, on an examination of museum specimens and historical records of "southwestern" willow flycatchers conducted by Unitt (1987).

From that examination of museum specimens and records, Unitt (1987) speculated, in the absence of any reasonable attempt at field verification, that "southwestern" Willow flycatchers had "declined precipitously," that "although the data reveal no trend in the past few years, the population is clearly much smaller now than 50 years ago, and that no change in the factors responsible for the decline seem likely." (60 FR at p. 10697). Unitt (1987) further speculated that "[s]ynergy between loss and degradation of riparian habitat and brood-parasitism by the invading Brown-headed Cowbird seems responsible for the Southwestern Willow Flycatcher's decline."

As shown below, Unitt's (1987) speculations about alleged declines of and threats posed to "Southwestern" willow flycatchers, and the FWS's adoption of those speculations both here and in the 1995 final rule listing the flycatcher under the ESA, have been shown by actual, scientifically-conducted field work to be inaccurate. Nonetheless, here the FWS nevertheless attempts to improperly insulate those same, disproven speculations as biological truths by interposing a stale and inaccurate guidance document based in large part on those same speculations, its 2002 recovery plan, between itself and its ESA mandated responsibility to base all critical habitat designations solely on the best scientific and commercial information available. By doing so, the FWS also attempts to evade objective analysis of both the historic and recent scientific record of this species' occurrence in the Southwest in contravention of the letter and intent of the ESA in the promulgation of this proposed rule.

Using this tactic, the FWS claims, citing its 2002 recovery plan, that although "the flycatcher's current range is similar to the historical range . . . the quantity of suitable habitat within that range is reduced from historical levels." (76 FR at p. 50543). That claim, however, is both clearly wrong and convincingly contradicted by the best scientific and commercial information available.

For example, unmentioned by the FWS in its proposal of this wildly expansive critical habitat rule is the fact that in New Mexico, the species the FWS now recognizes as the "Southwestern" willow flycatcher (then known as the Traill's flycatcher) was historically acknowledged by Florence Merriam Bailey in her 1928 treatise, *"Birds of New Mexico"* (for which she received the Brewster Award in 1931), as one of the rarest of all flycatchers found in that state at that time. In fact, that treatise cites only 3 documented, historic records of Willow flycatchers in New Mexico prior to 1928; two from the Rio Grande prior to 1900, and one from Fort Baird in 1903. As of 2007, however, over 600 "Southwestern" willow flycatcher territories were documented to be supported by existent riparian habitats in New Mexico, 303 of which were documented along the Rio Grande alone. (Sogge, et al., 2008).

Accordingly, because the FWS's claim of precipitous decline of "Southwestern" willow flycatchers from historic distribution and numbers in New Mexico is clearly refuted by the best scientific and commercial information available, and therefore fails the test of scientific evidence, that claim cannot serve as a basis under the ESA for proposing the designation of more expansive critical habitat for this species in that State. Moreover, because the best scientific and commercial information available also conclusively shows that Willow flycatchers have increased exponentially in both numbers and distribution in New Mexico over time, the designation of additional critical habitat for them in New Mexico, as promulgated by the FWS in proposed this rule, is clearly not "essential" to their collective conservation as a species either.

The same situation is also found to exist in Arizona, where the FWS similarly claims such dire and precipitous declines over historic population numbers, distribution and quantity of habitat that even areas where the Willow flycatcher has ***never*** been known to breed and only rarely has been encountered as a transient – the upper Santa Cruz River and Cienega Creek (76 FR at p. 50574) in the southeastern portion of the state, and the West Fork of the Little Colorado River (76 FR at p. 50569) in the northern part of the state, for example -- are nonetheless areas claimed to be "essential" to this species' conservation. Again, the historic and recent records of

"Southwestern" willow flycatcher numbers, distribution and habitat quantity in Arizona simply do not support that factually contradicted speculation. Instead, the best scientific and commercial information clearly shows that Willow flycatcher distribution and numbers have also increased exponentially in Arizona over time (see Sogge, 2008), and that the quantity of riparian habitat suitable to this species has also substantially increased over time as well. (Webb, Leake, and Turner, 2007).

For example, at Roosevelt Lake alone, 75 Willow flycatcher territories were confirmed in 2007 (Sogge, 2008), making that area the only habitat management area exceeding the minimum numbers of territories arbitrarily called for in the "Southwestern" willow flycatcher recovery plan (76 FR at p. 50573). Moreover, on the lower Colorado, where the vast majority of historic records for Willow flycatchers exist for the state of Arizona, there is no indication of the "precipitous decline" from historic numbers and distribution alleged by both Unitt (1987) and the FWS. While 36 Willow flycatcher nests were collected by famed Tucson specimen collector, Herbert Brown, from a site along the lower Colorado River near Yuma in 1902 (60 FR at p. 10699), only a handful of historical specimen records exist for the remainder of the lower Colorado River watershed, and the rest of the state as a whole for that matter. (see Phillips et al., 1964). No nests have been reported south of the Bill Williams River on the lower Colorado since about 1921 (Unitt, 1987; McLeod et al., 2009). Therefore, that area was not occupied at the time of listing for purposes of critical habitat designation.

Recently, however, Willow flycatchers have been detected in considerable numbers during the breeding season at multiple sites along the Colorado River south of the Bill Williams River to the Mexican border, with over 200 detections recorded in 2003, over 600 in 2004, over 300 in 2005, and over 450 detections in both 2006 and 2007 (McLeod et al., 2008). These numbers strongly suggest that colonial nesting of the type Brown encountered in 1902 may be currently occurring within this area at locations that have not yet been identified or surveyed. Additionally, 66 young from 53 nests were documented to have fledged at known breeding sites from the Bill Williams River northward in 2008 (McLeod et al., 2009). In short, these numbers do not support either Unitt's (1987) , the recovery plan's, or the FWS's unsupported speculation of precipitous decline of Willow flycatchers over time, or the latter's claim that the designation of additional critical habitat along the lower Colorado not occupied by this species at the time of its listing is "essential" to the Willow flycatcher's overall conservation.

Similarly, designation of areas outside of those occupied at the time of this species' listing is not supported on the Verde River either. Again, the recent record of Willow flycatcher occurrence along the Verde exceeds the entirety of historical records of its numbers and distribution in that area (see Phillips et al., 1964), or the very basis on which the FWS alleges it is now proposing this rule. (76 FR at p. 50543). As of 2007, at least 7 breeding sites were known and spread out from the Verde Valley near the towns of Clarksdale and Camp Verde and downstream to and immediately below Horseshoe Lake. (Sogge et al., 2008). A high of 23 territories were documented within this area in 2005 (Sogge et al., 2008), the majority of which were located along the Verde River's inflow into Horseshoe Lake.

Accordingly, because the historic record of Willow flycatcher numbers and distribution within Arizona is limited, other than on the lower Colorado, to a mere handful of specimen

records and locations (see Phillips et al., 1964), because Willow flycatcher survey efforts and detections in Arizona from 1996 through 2006 reveal an average of 45 sites with territorial flycatchers, an average of 624 territorial flycatchers, and an average of 381 total territories each year over that time period (Ellis et al., 2008), and because riparian habitats suitable to these flycatchers have also increased substantially along the Verde River over time (Webb, Leake, and Turner, 2007), the designation of additional critical habitat for these flycatchers in Arizona, as promulgated by the FWS in this proposed rule, is clearly both arbitrary and capricious and not "essential" to this species' conservation based on the best scientific and commercial information available.

Further, inclusion of steep, narrow canyons in this proposed rule as critical habitat not occupied by "Southwestern" willow flycatchers, but nevertheless now alleged by the FWS to be "essential" to their conservation as a species (76 FR at p. 50548-49), is also clearly arbitrary and capricious because that allegation is not supported but is in fact contradicted by the best scientific and commercial information available. According to the FWS, its inclusion of relatively steep, confined-stream canyons in this proposed rule is based on the example provided by a portion of the San Luis Rey River in California where the FWS alleges that a substantial flycatcher population exists in a "confined, fairly narrow, steep-sided valley" (76 FR at p. 50548, citing its 2002 recovery plan). Examination of the report and maps showing Willow flycatcher breeding locations along the San Luis Rey River in 2002 (Peterson et al., 2002), however, reveal that allegation to be a blatant misrepresentation.

Contrary to the FWS's claim in its 2002 recovery plan and in this proposed rule, no breeding Willow flycatchers were found to be located in the confined, fairly narrow, steep-sided portion of the valley of the San Luis River in 2002. Instead, the maps conclusively show that the valley is, in fact, nearly ½ mile to well over 3/5 of a mile wide where Willow flycatchers were documented to have bred along the San Luis Rey River in 2002.

Moreover, the maps and report also conclusively show that only a single, transient Willow flycatcher was observed in the narrower portion of the valley referred to by the FWS in this proposed rule, and that this transient was observed on only a single occasion during the May 15 – May 31 migratory period (see Peterson et al., 2002, attached). Accordingly, because the FWS's claim of the contrary in both this proposed rule and its 2002 recovery plan is, in fact, both blatantly misrepresentative and wholly inaccurate, because such inaccurate information does not qualify as the best scientific and/or commercial information available under the ESA, and because speculation based on false premise cannot serve as a basis (let alone the sole basis, as here) to trigger the extension of critical habitat designation for "Southwestern" willow flycatchers under the ESA to include steep, narrow canyons not occupied by this species at the time of its listing, such habitat is clearly not "essential" to the conservation of Willow flycatchers under both the letter and intent of the ESA.

Finally, although the FWS claims that "the areas proposed for designation as critical habitat are designed to provide sufficient riparian habitat for breeding, non-breeding, territorial, dispersing, and migrating flycatchers in order to reach the geographic distribution, abundance, and habitat-related recovery goals described in its Recovery Plan," (76 FR at p.50546-47), those

guidance goals are not the legal standard that the FWS must meet in order to designate additional habitat as critical outside of that occupied at the time of this flycatcher's listing.

Instead, the legal standard that the FWS must meet in order to designate critical habitat for Willow flycatchers as it proposes in this rule, consists of the meeting of two mandatory conditions: 1) that the designation of the areas proposed is essential to the conservation of the flycatcher (16 U.S.C. Sec. 1532); and 2), that the designation of those areas currently occupied by the flycatcher would be inadequate for the conservation of the species (50 CFR Sec. 424.12(e)).

Here, however, the FWS does not claim reliance on fulfillment of either of these mandatory, legal conditions. Instead, the FWS bases its claim that designating critical habitat for the Willow flycatcher outside the areas occupied by the flycatcher at the time of its listing is "essential" because:

> "Our goal is to propose stream segments as critical habitat within 29 of the 32 Management Units (which are geographic areas clustered within 6 Recovery Units) in order to meet the specific numerical flycatcher territory and habitat-related recovery goals (Service 2002, pp. 84-85), which are the same criteria that we are using to identify physical or biological features and designate areas that are essential to flycatcher conservation." (76 FR at p. 50554).

Moreover, here, the FWS further attempts to side-step its mandatory legal obligations under the ESA by failing to provide any studies or scientific data in support of its claim that protection of this proposed critical habitat is "essential" for the conservation of Willow flycatchers in the Southwest. Nor does the FWS provide any data supportive of its finding that the designation of the area currently occupied by Willow flycatchers in the Southwest is "inadequate" for its conservation as a species. Instead, the FWS attempts to rely solely on a stale, nine-year-old guidance document as a surrogate for not doing so. Accordingly, the designation of critical habitat outside the area occupied by the flycatcher, as proposed by the FWS in this rule, would be arbitrary, capricious and unlawful in the face of these multiple fatal deficiencies.

B. The Proposed Rule Fails to Specifically Define Lateral Boundaries of the Areas Proposed for Critical Habitat Designation as Required by Law

50 CFR Sec. 424.12(c) requires that critical habitat be defined "by ***specific*** limits using reference points and lines as found on ***standard topographic maps of the area***," and that . . . "***Ephemeral reference points shall not be used in defining critical habitat***." (Emphasis added). Nonetheless, the FWS states (76 FR at p. 50542) that the 2,090 linear miles it is proposing for critical habitat designation by this rule "are being proposed as stream segments, with the lateral extent including the riparian areas and streams that occur within the 100 year flood-plain or flood-prone areas," and, that it is using a variety of "surrogates," rather than standard topographic maps, to delineate the lateral extents of those areas. (76 FR at p. 50557). The FWS

elaborates about its use of "surrogates" to delineate lateral boundaries at 76 FR, p. 50557, where it states the following:

> "In this proposal, we consider the riparian zone to be the area surrounding the select river segment that is distinctly influenced by river functions. The present boundaries, for mapping purposes, of the lateral extent or riparian zone (in other words, the surrogate for the delineation of the lateral boundaries of critical habitat within proposed stream segments) were derived by one of two methods. The area was either captured from existing digital data sources (listed below) or created through expert interpretation of remotely sensed data (aerial photographs and satellite imagery – also listed below). . . . The riparian zone is anticipated to occur within the 100 year floodplain. Where pre-existing data may not have been available to readily define riparian zones, visual interpretation of remotely sensed data was used to define the lateral extent."

While the FWS lists eleven "surrogate means" by which it claims to have "defined" the lateral extent of the critical habitat it is proposing for Willow flycatchers here, conspicuous by absence is any mention or use of the standard topographic maps specifically required of it by 50 C.F.R. Sec. 424.12(c) to define such lateral boundaries. Moreover, here, as shown below, the resulting areas proposed for critical habitat designation based on the use of surrogates are also both vague and imprecise relative to their lateral extents, in further contravention of 50 CFR Sec. 424.12(c).

Further, because the critical habitat designations proposed in this rule also include "flood-prone areas" beyond the vaguely defined "100 year floodplain area," or use of precisely the kind of ephemeral reference points also specifically forbade by 50 C.F.R. Sec. 424.12(c), the FWS is also additionally and specifically precluded from using "flood-prone areas" in defining the lateral extent of critical habitat as well. Similarly vague, imprecise and contradictory, is the FWS's inclusion of "developed," agricultural lands within these proposed critical habitat designations, despite its direct assertion of the contrary in the text of this rule. (76 FR at p. 50557).

For example, while the FWS claims that "riparian developed" lands, including those used for agricultural production, are excluded from critical habitat designation proposed in this rule (76 FR at p. 50557), its maps of the critical habitat it is proposing on the upper Santa Cruz River -- where the Willow flycatcher has ***never*** been known to breed and has but rarely been encountered as a transient -- make no provision whatsoever for any such exclusion. Instead, the FWS's maps of the critical habitat it is proposing along the Santa Cruz River, both in this proposed rule (76 FR at p. 50623) and in attachment (at p. 26), show that proposed habitat as running uninterrupted over 16 linear miles from the Sonoita Creek / Santa Cruz River confluence downstream where nothing but developed agricultural lands and fully three communities – Carmen, Tumacacori, and Tubac – actually exist within and immediately adjacent to the 100 year

floodplain and other "flood-prone" areas these maps vaguely, inaccurately, and imprecisely claim to depict.

The adverse effects of this contradiction between the text of this proposed rule and its less than definitive maps are two-fold. First, landowners are left in a precarious position because they have no certain idea of what portions of their properties would be designated as critical habitat and what portions would not be. Second, should the Service give more shrift to its maps than its printed word in the text of this rule, as appears highly likely here, the proposed designation would adversely affect a much broader area and therefore would have far greater adverse economic and private property impacts than could be reasonably or rationally understood or anticipated based on the claims of the FWS made in the text of this proposed rule.

The Santa Cruz is not alone in either these mapping deficiencies or potentially broad range of adverse effects wrought by their use. In fact, every map depicting proposed critical habitat in this proposed rule is also fatally compromised in similar manner by the FWS's improper use of ephemeral points to vaguely delineate those habitats' lateral extents and its use of "surrogates" to vaguely depict those areas, rather the topographic maps specifically required of it, in direct contradiction of 50 C.F.R. Sec. 424.12(c). Because of these fatal deficiencies alone, the FWS must withdraw this proposed rule.

C. The Proposed Designation of Critical Habitat Contains No Indication of Consultation with the Affected States and No Economic Analysis in Violation of the ESA, 50 C.F.R. Section 424.13 And Executive Orders 12866 And 12630

The language of 50 C.F.R. Sec. 424.13 is mandatory – not elective. According to 50 C.F.R. Sec. 424.13, "When ***considering*** any revision of the lists, the Secretary ***shall*** consult as appropriate with affected States . . ." (Emphasis added), and further indicates that the information that is to be considered in a proposed rule to list or to designate critical habitat (as here) should also include that provided by "interested persons and organizations, [and] other affected Federal agencies" before that rule is proposed. (*Id.*). By its use of the word "considering," this regulation attempts to ensure that the affected States, interested persons and organizations (such as those on whose behalf these comments are written), and other affected Federal agencies are able to provide valuable information to the Secretary while the Secretary is considering, but has not yet promulgated, a proposed rule revising either the species or critical habitat lists under the ESA. (see Budd-Falen 2010 letter, attached).

Thus, the clear purpose of 50 C.F.R. Sec. 424.13 is to ensure that decisions to promulgate proposed rules under the ESA, such as this one, are fully informed and neither arbitrary nor capricious. This purpose is also consistent with that of Executive Order 12866, which reformed the regulatory process to make it "more accessible and open to the public," and with the purpose of Executive Order 12630, which requires federal agencies to identify proposed regulatory actions, and discuss in notices of proposed rulemaking, the extent to which that rulemaking may interfere with constitutionally protected rights. Parallel in intent, is ESA Sec. 4, 16 U.S.C. Sec. 1533(b)(2), which requires that the Secretary designate critical habitat only "after taking into

consideration the economic impact and any other relevant impact of specifying any particular area as critical habitat."

Here, however, there is no indication that the FWS consulted at all with the affected States prior to proposing this rule -- despite the facts that this rule would increase critical habitat designation for the Willow flycatcher in the Southwest exponentially, would also include substantial areas not occupied at the time of its listing, would dramatically impact both private property rights and economic activity, and would have the unprecedented effect of subordinating State-held water rights to federal primacy in substantial areas of each of the affected States. (76 FR 50542 et seq.). Nor is there any indication to be found within this proposed rule that the FWS consulted with interested persons, organizations or other affected federal agencies before proposing this rule as is also required by 50 C.F.R. 424.13.

Neither can the FWS evade this requirement by claiming that it is merely "considering" whether to propose additional habitat for "Southwestern" willow flycatchers in this proposed rule. This is because the FWS has already foreclosed any possibility of such consideration here by already specifically proposing the designation of 2,090 linear miles of streams, 100 year floodplains and other "flood-prone" areas, as stream segments either occupied or unoccupied by these flycatchers at the time of their listing in Nevada, Arizona, California, New Mexico, Utah, and Colorado as critical habitat "essential" to their collective conservation in this proposed rule, where federal, "special management" is also alleged to be necessary. (76 FR 50542 et seq.).

Moreover, here, the rule proposed at 76 FR 50542 et seq. does not contain the economic analysis required by ESA Sec. 4, 16 U.S.C. Sec. 1533(b)(2). In fact, no such analysis exists because it has yet to be done by the FWS. The failure of the FWS to provide and expose the economic analysis to public scrutiny and comment with the proposal of this rule violates the provisions of the ESA cited above, 50 C.F.R. Sec. 424.13, and Executive Order 12866.

D. Executive Order 12630 Requires Completion of a Property Takings Analysis Prior to the Promulgation of this Proposed Rule to Designate Critical Habitat

As stated previously, Executive Order 12630 requires federal agencies, such as the FWS here, to identify proposed regulatory actions, and to discuss in notices of rulemaking, the extent to which that rulemaking may amount to an interference with constitutionally protected property rights. Both Executive Order 12360 and the Department of Justice Guidelines require that a Takings Implication Assessment (TIA) be performed by the federal agency to identify takings issues and to provide estimates of potential costs to the government arising there from. The TIA necessary for the designation of private lands as critical habitat, such as proposed here by the FWS, must include: a) a legal assessment of the likelihood that the proposed designation of private land will result in government taking of private property; b) the identification of known alternatives to reduce the impact on private property; and c) evaluation in dollars of the degree of the government's exposure from the proposed action.

Here, the proposed rule contains no Takings Implication Analysis (TIA) whatsoever, despite the many uses of private property it seeks to restrict over an immense geographic area.

Instead, the FWS claims that because it has not yet completed the economic analysis for this proposed rule, it will not prepare a Takings Implication Assessment for this proposed rule until after its "revised" economic analysis is available. (76 FR at p. 50595). Nonetheless, the FWS speculates, without more, that this proposed rule is not anticipated to have significant takings implications, despite the fact that it failed to quantify but is nevertheless proposing the designation of literally hundreds of thousands of acres of private lands throughout the Southwest as critical habitat for Willow flycatchers in this proposed rule (see maps) where a federal nexus may or may not exist, and where livestock, other agricultural production activities, and virtually every use of water for beneficial purpose are also claimed to require "special management" by the FWS on behalf of this flycatcher. (76 FR at p. 50552). In short, because of the FWS's failure to publish a TIA with this proposed rule, the public, and landowners in particular, are deprived of the ability to rationally or reasonably comment thereon in direct violation of the letter and intent of Executive Orders 12630 and 12866.

E. The Proposed Rule Violates NEPA

When applicable to a proposed rule to designate critical habitat, as is admitted to be the case here by the FWS, NEPA requires the performance of an Environmental Impact Statement (EIS) ***up-front***, not as an after-the-fact afterthought as erroneously claimed by FWS. (76 FR at p. 50596). This requirement of up-front NEPA performance is not only the law of the 10th Circuit Court of Appeals (*Catron County Board of Commissioners v. U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), but the law of the 9th Circuit Court of Appeals as well (*Center for Biological Diversity v. U.S. Forest Service,* 349 F.3d 1157 (9th Cir. 2003)).

The 9th Circuit's instruction on the need for up-front performance of NEPA analysis is particularly relevant here: "NEPA emphasizes the importance of coherent and comprehensive ***up-front*** environmental analysis to insure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Center for Biological Diversity,* 349 F.3d at 1166. (Emphasis added). Moreover, such up-front performance of NEPA analysis provides the Secretary with critical information regarding the "other impacts" of the proposed designation that also require evaluation under the ESA Sec. 4, 16 U.S.C. Sec. 1532(b)(2).

Contrary to the position taken by the FWS in this proposed rule (76 FR at p. 50596), where applicable as admitted by the FWS here, NEPA requires the FWS to take a hard look at the environmental consequences of the actions it proposes up-front and before it is too late. (*Robertson v. Methow Valley Citizen's Counsel,* 490 U.S. 332, 350 (1989). That "hard look" obligates federal agencies, such as the FWS here, to prepare an environmental impact statement (EIS) for all "major federal actions significantly affecting the quality of the human environment." (42 U.S.C. Sec. 4332(2)(C)). Despite the unprecedented designation of critical habitat for the Willow flycatcher sought by the FWS and despite the sweeping restrictions on land, water, and recreational use on the alleged behalf of a single species it also seeks by use of proposed rule, which constitute a major federal action here, the FWS has not performed an EIS in a timely manner or at all under NEPA.

Here, the FWS's failure to perform an EIS under NEPA prior to proposing this rule prevented the required reasonable evaluation, analysis, "hard look at," and disclosure of the harms of implementing the designation of critical habitat for "Southwestern" willow flycatchers to human health and safety, the human environment, and other environmental values. Where required, as here, an EIS is intended to disclose environmental effects of a proposed action and consider alternative courses of action. (42 U.S.C. Sec. 4332(2(C)).

Moreover, here, the FWS has completely abdicated its responsibility to consider reasonable alternatives (to the sweeping and unprecedented critical habitat designation it is currently proposing) that would not only protect Willow flycatchers, but would also minimize the adverse impacts that the adoption of this now-pending rule would inflict on humans and the human environment. The result is the promulgation of a one-sided, single-purpose proposed rule that would inflict drastic consequences on human water, land, and recreational use in no less than six States, a situation that NEPA specifically prohibits. As a result, this proposed rule must be withdrawn because it is also in fundamental violation of NEPA.

F. Protection of Invertebrate Prey as an Essential Physical or Biological Feature Of Southwestern Willow Flycatcher Habitat is Precluded by Current Fish & Wildlife Service Policy and Projects Relative to the Use of Aquatic Pesticides Within the Areas Proposed for Critical Habitat Designation in Both Arizona And New Mexico

Although the FWS claims (76 FR at p. 50549) that "the presence of a wide range of invertebrate prey, including flying and ground – and vegetation – dwelling species of terrestrial and aquatic organisms to be an essential physical or biological feature of flycatcher habitat," the presence of this wide range of invertebrate prey is, in fact, precluded by the FWS' sanctioning of past, current, and future widespread use of aquatic pesticides, particularly rotenone and antimycin A, on the alleged behalf of native fishes, throughout the stream segments of Arizona and New Mexico proposed as critical habitat for Willow flycatchers in this rule. (See FWS Biological Opinion, May 15, 2008, *Reinitiated Biological Opinon on Transportation and Delivery of Central Arizona Project Water to the Gila River Basin in Arizona and New Mexico*; see also Bureau of Reclamation (BOR) *Native Aquatic Species of the Gila River Basin in Arizona and New Mexico Task Schedule*, 2010 (attached); see also Arizona Game & Fish Department *Sport Fish Stocking Program, Final Environmental Assessment; FONSI*, August 2011; see further, New Mexico Department of Game & Fish *Annual Report 2008-2009*).

Both rotenone and antimycin A have been scientifically proven to decimate aquatic invertebrate taxa and assemblages, and the repeated use of these aquatic pesticides, as currently sanctioned and endorsed by the FWS in several of the stream segments it now also proposes as critical habitat "essential" for Willow flycatchers in the Southwest, has resulted and is continuing to result in the extirpation of unknown numbers of aquatic invertebrate taxa (Erman and Erman, 2006, 2007, attached). Thus, because the presence of a wide range of invertebrate prey is stated by the FWS to be an essential physical or biological feature of the flycatcher critical habitat it proposes here, and because the maintenance or attainment of that condition is not possible under either current FWS policy or the actions it has sanctioned and is continuing to sanction relative to

the widespread use of the aquatic pesticides identified above, the FWS must withdraw this proposed rule because it is arbitrary, capricious and unlawful, and then immediately and permanently prohibit the use of these aquatic pesticides anywhere within and adjacent to the stream segments it would designate as critical habitat for Willow flycatchers before proposing such a rule again.

G. The Proposed Rule is Fatally Compromised by its Reliance on Speculation and Surmise Rather Than the Best Scientific and Commercial Information Available as Required by the Endangered Species Act

As shown previously herein, the very rationale the FWS states for proposing this rule -- that the quantity of suitable habitat within the Willow flycatcher's southwestern range is so reduced from historical levels as to justify expansion of critical habitat to include virtually its entire geographic range – is sheer, unsupported speculation contradicted by the best scientific and commercial data available. Similarly, the FWS's further claim, made in this proposed rule in the absence of either necessary elaboration or citation to scientific study, that the flycatcher and its habitat are threatened by such a "multitude of factors occurring at once" as to justify unprecedented designation of critical habitat for it, is also nothing more than sheer speculation unsupported by scientific evidence.

Because neither of these claims is, in fact, supported by scientific evidence, use of either or both as the best scientific and commercial information available to justify designating additional critical habitat for Willow flycatchers in six southwestern States is clearly prohibited by the Endangered Species Act. This is because the use of such biased, inaccurate and unreliable information would amount to the kind of haphazard implementation of the ESA on the basis of speculation and surmise specifically prohibited by the U.S. Supreme Court in *Bennett v. Spear*:

> The obvious purpose of the requirement that each agency "use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation and surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

Bennett v. Spear, 520 U.S. 152, 176-77 (1997).

Such is precisely the case here. As previously shown herein, the FWS's claim that the quantity of the flycatcher's suitable habitat in the Southwest is reduced from historical levels is not supported but instead contradicted by the best scientific and commercial data available. That data shows that "Southwestern" willow flycatcher numbers, distribution, and habitat quantity have all substantially increased in Arizona and New Mexico over historical levels.

Moreover, no statistically significant change over the Willow flycatcher's historic state of occurrence exists in southern Utah, where Behle (1969, 1975, pers. comm., 1993) identified only ***one*** historic locale of "Southwestern" willow flycatcher occurrence (along the Colorado River in southeastern Utah). According to the FWS (76 FR at p. 50571) no Willow flycatcher breeding sites have yet to be detected in the Utah portion of its proposed "San Juan Management Unit," and no breeding sites have yet to be detected in the Utah portion of its proposed "Powell Management Unit" along the Paria River either. (76 FR at p. 50572).

Nonetheless, despite these facts, the FWS is nevertheless zealously but unintelligently proposing the designation of 11.8 miles of the Paria River as critical habitat for this flycatcher – where its "special management" of water, land use, and recreation may be necessary – as habitat unoccupied at the time of the flycatcher's listing but now nevertheless viewed by the FWS as "essential" to the Willow flycatcher's conservation. The Service states that its reason for proposing this never-occupied habitat as "essential" to the Willow flycatcher's conservation is its "anticipation," in the absence of supportive scientific evidence, that this unoccupied segment of the Paria River will nonetheless provide "metapopulation stability, gene connectivity through this portion of the flycatcher's range, protection against catastrophic population loss, and population growth and colonization potential." (76 FR at p. 50572). This is precisely the kind of zealous but unintelligent pursuit of environmental objectives based on speculation and surmise that is specifically prohibited by both the ESA and the U.S. Supreme Court in *Bennett v. Spear*.

The same situation exists on the Utah portion of the San Juan River. There, despite no scientific evidence of Willow flycatcher occupancy ***ever***, the FWS is also zealously but unintelligently pursuing its environmental objectives by haphazardly proposing 32.1 linear miles of critical habitat, nearly all of which is agriculturally developed, as "essential;" not to the conservation of this species, but as "essential" to meeting its flawed and speculative recovery plan goals. (76 FR at p. 50571). Clearly, this approach also fails to pass ESA muster as stated by the Supreme Court in *Bennett v. Spear*.

Similarly failing to pass ESA muster, are the FWS's zealous but unintelligent speculations about anthropologically-induced climate change and the potential effects of such on Willow flycatchers in the Southwest. While the FWS cites the IPCC (2007) models of climate change as support for those speculations, it specifically fails to mention that many of the projections made by those models have been shown to be inaccurate, and that the models themselves have been shown to be unreliable because they are incapable of replication (i.e., the underlying data used to create them is not available). Because those models are neither accurate nor reliable, they do not qualify as scientific evidence. Because they do not qualify as scientific evidence, they do not and cannot qualify as the best scientific and commercial information available, and are therefore reduced to mere speculations. As stated by the Court in *Bennett v. Spear*, speculation is insufficient to trigger implementation of the ESA. As a result, the FWS is also clearly precluded from using its speculations about climate change as justification for the proposal of this rule.

Similarly speculative and, in fact, contradicted by the best scientific and commercial information available, is the FWS's claim that the most common stream flow conditions where

Willow flycatchers occur in the Southwest are largely those with a "natural" hydrologic regime. (76 FR a p. 50549). In point of fact, however, less than 44% of all flycatcher territories are found in the "90% native vegetation" habitats the FWS exclusively associates with "natural" hydrologic regimes. However, in point of fact, a substantial percentage of 90% native riparian habitats, like those occurring on the U Bar Ranch in New Mexico for example, are associated with man-altered, rather than "natural," hydrologic regimes. Further, the best scientific and commercial data available additionally reveal that 50% of all Willow flycatcher territories in the Southwest are found to occur in mixed native / exotic vegetation habitats associated with human-altered hydrologic regimes, and that 6% of all territories are found in purely exotic vegetation also associated with human-altered hydrologic regimes. (76 FR at p. 50550).

Finally, the best scientific and commercial data available also show the largest concentrations of Willow flycatchers currently known in the Southwest occur within man-altered hydrologic regimes -- at the inflows of man-made lakes (such as Roosevelt in Arizona and Elephant Butte in New Mexico) and on or adjacent to agriculturally developed lands where both farming and livestock growing fed by diversion of surface water is practiced (such as the U Bar Ranch, a working cattle ranch in New Mexico) Thus, contrary to the claim of the FWS in this proposed rule, the best available scientific evidence (both historic and current) indicates that in the Southwest, Willow flycatchers are disturbance-oriented riparian generalists, rather than the native riparian obligates the FWS nonetheless attempts to portray them to be.

This distinction is critically important because the very activities the FWS speculates as threats to the Willow flycatcher's existence in the Southwest – surface water impoundment and diversion, the production of livestock, and farming of floodplains – are conversely shown by the best scientific and commercial data available to support the largest and most stable Willow flycatcher populations known to exist in the Southwest. Thus, because these "threats" alleged by the FWS are, in fact, merely unsupported speculations contradicted by the best scientific and commercial data available, those speculations cannot serve as a lawful basis under the ESA and *Bennett v. Spear* to justify either the unprecedented designation of critical habitat for Willow flycatchers or the extremity of "special management" actions sought on their alleged behalf by the FWS through its proposal of this rule.

Similarly, the "threat" allegedly posed to Southwestern willow flycatchers by Brown-headed cowbird nest parasitism, and the association of such with agricultural activities such as livestock presence, was and remains nothing more than zealous but unintelligent speculation contradicted by the best scientific and commercial data available. Although the FWS claimed that increasing cowbird populations and the threat of parasitism to Willow flycatchers there from necessitated this flycatchers listing in part (60 FR at p. 10700), that conclusion was and remains contradicted speculation because cowbird populations were, in fact declining in the Southwest at the time of this "species'" listing and are continuing to do so today based on the best scientific and commercial data available.

If the FWS had actually looked at the data, and this data was available to it, the FWS would have found that Breeding Bird Survey data establishes substantial decreases in cowbird population trend, not increases as falsely alleged by the FWS in both 1995 and today, over time in both Arizona and New Mexico. (Peterjohn et al., 2000). Nonetheless, this false speculation is

still promoted by the FWS in the face of contradiction by the best scientific and commercial data available relative to cowbird population trends and recent journal-published findings relative to cowbird parasitism rates on Willow flycatchers where livestock and flycatchers occur together or within immediate proximity to one another. (Brodhead, Stoleson, and Finch, 2007; see FWS's *Southwestern Willow Flycatcher Critical Habitat Proposal Questions and Answers*, 2011).

The FWS's attempt in this proposed rule to ignore the best scientific and commercial data available relative to cowbird parasitism where both livestock presence and willow flycatchers co-exist (Brodhead, Stoleson, and Finch, 2007) is critically important. This is because by doing so in this proposed rule, the FWS would implement micromanagement and exclusion of livestock presence from or anywhere near riparian floodplains during the flycatcher's breeding season under the guise of a necessary, "special management" action in the absence of scientific support. (76 FR at p. 50552, 50553l 50581).

Such zealous but unintelligent pursuit of environmental objectives and resultant haphazard implementation of the ESA, based solely on contradicted speculation, would adversely affect livestock producers and farmers enormously. This is because such haphazard implementation of the ESA would remove use of irrigated floodplain pastures and croplands on private lands having any kind of federal nexus during the growing season and driest time of the year, or at the time of the year when use of those pastures and croplands is most critical, thus crippling both livestock and farm management strategies and the economic viability of numerous ranches and farms for absolutely no rational or scientifically supported reason.

H. The "Southwestern" Willow Flycatcher is Not Recognized as a Valid Subspecies by the American Ornithologists' Union and Recent Research Cited by the FWS in this Proposed Rule Cannot Separate It From Other Alleged "Subspecies" of Willow Flycatchers Where Their Alleged Ranges Overlap

The fundamentally fatal speculation contained in this proposed rule, as it was at the time of this "species'" listing, is the FWS's contradicted claim of "scientific" recognition of the "Southwestern" willow flycatcher as a distinct and valid subspecies, *Empidonax traillii* ***extimus***. (Emphasis added). In fact, however, the FWS's claim of such lacks scientific recognition by the official authoritative scientific source on the taxonomy of birds found in North America, the American Ornithologists' Union (AOU). In point of fact, both at the time of its improper listing and today, the AOU did not then and does not now recognize "*extimus*" as a scientifically valid subspecies of *Empidonax traillii*, or the Willow flycatcher. (American Ornithologists' Union. 1983. *Check-list of North American Birds.* 7th edition, 1998. American Ornithologists' Union, Washington, D.C.).

Although the FWS claims in both its 2002 recovery plan and in this proposed rule that the best scientific and commercial data available establishes the validity of "*extimus*" or the "southwestern" willow flycatcher as a subspecies, and therefore properly qualifies "*extimus"* for listing and critical habitat designation under the ESA, such is decidedly not the case. Instead, the best scientific and commercial information available clearly supports the opposite conclusion.

In fact, the AOU's current, scientifically accepted taxonomy treats all Willow flycatchers as one species without recognition of any subspecies. (AOU (1983, 1998). Nonetheless, the FWS speculates in both its recovery plan and this proposed rule that four subspecies of Willow flycatchers nonetheless exist, and that recent genetic research has established that "extimus" is genetically distinct from the "other willow flycatcher subspecies" it also claims are scientifically valid. (recovery plan at p. 6 citing Paxton (2000); 76 FR at p. 50544 citing Paxton et al. (2007b).

Paxton et al. (2007b), however, did not establish that such is the case genetically. Instead, according to the FWS (76 FR at p. 50544), Paxton et al. (2007b) found that a distinct genetic boundary between "extimus" and another of these reputed "subspecies" does not exist. Nonetheless, Paxton et al. (2007b) speculate from that finding that this non-existent boundary should be thought of as a "region of genetic overlap," and further speculate that this "region of genetic overlap" will likely widen and contract over time based upon undefined "habitat changes." Nevertheless, the FWS continues to currently recognize the northern geographic boundary of "extimus" as described in its 2002 recovery plan. As shown previously, such factually-contorted speculation is insufficient to trigger either the ESA's provisions or legal protections. (see *Bennett v. Spear*).

The 2002 recovery plan also states that the FWS's recognition of "extimus" as a scientifically valid subspecies of willow flycatcher is also confirmed by Unitt (1987), Hubbard (1987), and Browning (1993), among others. Hubbard (1987), however, did not confirm the existence of "extimus" as a subspecies. Instead, Hubbard (1987) offered only a qualified endorsement of that taxonomic arrangement and recommended further study. According to the recovery plan, Unitt (1987) and Browning (1993) were also able to confirm the existence of "extimus" based on subtle differences in color and morphology. Again, however, such is clearly not the case.

In fact, Unitt (1987) could not separate "extimus" from other reputed Willow flycatcher "subspecies" based on color. Instead, Unitt (1987 at p. 140) states: "I saw no consistent differences in color between extimus and traillii and cannot confirm Aldrich's (1951) statement that "campestris" (i.e., trailli) is "somewhat more greenish" than extimus." Neither could Unitt (1987) separate "extimus" from other reputed Willow flycatcher "subspecies" on the basis of morphology (i.e., wing formula). In fact, Unitt's (1987) data does not confirm any difference in wing chord length between "extimus" and "brewsteri." Further, Unitt (1987) found that wing chord difference between the reputed Willow flycatcher "subspecies" he did compare is more reliable for females than it is for males.

Similarly, Browning (1993) did not find measurement of wing chord to be useful for purposes of distinguishing between reputed "subspecies" of Willow flycatchers. Nor did Browning (1993) find other morphological measurements useful either. Instead, according to Browning (1993 at p. 247), "[a]nalysis of measurements (i.e., wing chord, tail, bill) revealed no taxonomically important differences in size between populations."

Although Browning (1993) nevertheless claimed that the reputed "subspecies" of Willow flycatchers are recognizable based on his problematic use of Munsell Color Charts, actual experience in the field, on the U Bar, conclusively disproves that conclusion. On the U Bar, the

large breeding population of Willow flycatchers located there runs the gamut of all colors alleged by the FWS to be exclusively associated with each of the supposed "subspecies" it (but not the AOU) recognizes. This condition has and can be verified by any responsible scientist or other authority willing to do so. It is telling that despite its knowledge and awareness of this irrefutable condition, the FWS nevertheless continues to arbitrarily, capriciously, and unlawfully advocate the opposite contention in both its 2002 recovery plan and in its proposal of this current rule.

Conclusion

For the many legal and scientific deficiencies stated herein, the FWS must withdraw this proposed rule because it is arbitrary, capricious and unlawful based solely on the use of the best scientific and commercial data available as required by the ESA. Moreover, the FWS must also immediately delist "extimus" or the "Southwestern" willow flycatcher because "extimus" is not now nor ever has been a scientifically recognized "subspecies" or taxon of the wide-ranging Willow flycatcher (*Empidonax traillii*) by the AOU.

Finally, the FWS must also withdraw this proposed rule because such obviously unlawful use of this rule and the ESA as a pretext to subordinate State-held water rights, private property rights, farming, livestock production, and virtually every other human recreational and economic activity within broad areas of six States to federal primacy clearly offends the practice of sound science, dual federalism, the ESA, NEPA, and both the 5th and 10th Amendments of the Constitution of the United States.