Southern Arizona Livestock Protective Association

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Public Comments Processing
Attn: FWS–R8–ES–2013-0104
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

December 1, 2013

Dear Responsible Officers of the U.S. Fish and Wildlife Service:

Subject: Western yellow-billed cuckoo (Coccyzus americanus) Docket Number for the proposed listing rule is FWS–R8–ES–2013-0104

Bennett v. Spear

The listing of the yellow-billed cuckoo (cuckoo) will cause profound economic dislocation due to restrictions set forth in the threat section of the proposed listing. Ranching and mining will become a target for radical environmental organizations to attempt to eliminate grazing of cattle and other livestock on behalf of the cuckoo The U.S. Fish and Wildlife Service (FWS) is either purposely or inadvertently laying the groundwork for dozens of lawsuits by radical environmental corporations which will in the near future cost current land owners and Federal grazing permit holders millions to defend their current and future uses on both federal and private land. At the same time, law factory environmental corporations will demand that the federal government pay their fees and expenses for filing lawsuits against the FWS and others. There is a fundamental inequity created by the FWS pursuit of the listing of the cuckoo.

The FWS must consistently and meticulously follow the decision of the United States 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 or 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).

FWS Code of Ethics

In addition each FWS officer must follow the published FWS code of ethics (the FWS code of ethics is included by reference). Science must drive observations and decisions made by FWS officers. Science must drive the process rather than be driven by political objectives unrelated to current on-the-ground data.

Distinct Vertebrate Population Segment (DPS)

Humans have different features based on their ethnic inheritance, but those external features do not make different ethnic groups into different species. More specifically, Asians, Africans, Anglos and many other population groups spread across the seven continents have on average different heights, skin tones, eye color, hair characteristics and many other visibly distinct features, yet we are all the same species. To argue that any ethnic group is a subspecies would be rejected immediately. Similarly, such features may differ in animals and do not necessarily establish that the animals are of different species: consider the visible differences among cows, horses, cats or among dog varieties.

We fundamentally disagree with the conclusion of the FWS that the cuckoo, whether eastern or western, is a distinct population segment (DPS). The morphological and DNA analysis set forth in the federal register is not persuasive. We are concerned that the February 7, 1996 FWS policy that establishes the definition of a DPS works to the expansion and funding advantage of the agency rather than to the furtherance of actual species conservation. The proposed listing is likely unwarranted because FWS created a DPS definition that *elevates superficial differences* giving them scientifically unsupportable weight.

We observe that FWS has a built-in *conflict of interest* resulting from the fact that the more species listed, the more land use control is transferred from private citizens to the federal

bureaucracy, the more money is allocated to enlarge their agency, to increase the number of employees and to raise the pay of supervisors. The entire reward structure is flawed because it strongly motivates agency power expansion and is a serious disincentive to impartial evaluation of scientific data. The result is a continual flood of listings, each of which places an unjust time and money cost upon any member of the public who is forced to research, write and respond in order to attain legal standing while that member of the public is also having to fund the listing proponents in the agency and then incur the legal costs of both his own defense of his property interest and the tax-funded, overwhelming legal army of the federal agency.

Recent Habitat Loss Claim is Unfounded

Approximately eighty-seven percent (87%) of the land in Arizona is owned by either the federal government (including Indian reservations) or the State of Arizona. During the last ten to twenty years desirable cottonwood and willow habitat conditions for the cuckoo have been documented to have improved within both U.S. Bureau of Land Management and U.S. Forest Service management areas. Agency data showing an upward trend in range and riparian condition including cottonwood and willow habitat has been consistently documenting improvement during the last few decades. As a consequence, there is no reason to list the cuckoo in Arizona and especially in southern Arizona. Furthermore, critical habitat for numerous other bird, frog and fish species has already been identified in most riparian areas in Arizona. The yellow-billed cuckoo utilizes the same riparian habitat.

The following objective research by Stuart Bengston clearly demonstrates that the asserted loss of 90% of Arizona riparian habitat is like a child's game of "Telephone" in which the original data is skewed and further deformed with each successive misrepresentation:

A Big Misquote:

"90% of Arizona's Riparian Areas Have Been Destroyed"

By Stuart Bengson, February 19, 1992

In October, 1990 the final report and recommendations of the Governor's Riparian Habitat Task Force stated, *"according to most estimates, over 90% of the riparian areas along Arizona's major desert water courses have been lost, altered, or degraded as a result of man's activities."* This statement is based on authorities which have been grossly misrepresented.

The authorities for this statement are referenced as the State Comprehensive Outdoor Recreation Plan (SCORP), 1989; the Arizona Nature Conservancy, 1987; and Warner, 1979.

These references support no such statement, as the following analysis details:

– SCORP did no independent study but used the Arizona Nature Conservancy as its authority.

– The Arizona Nature Conservancy did no independent study but used Warner as its authority.

– Warner did no independent study but relied upon two further studies, which he misquoted. Those two studies were Ohmart, 1977 and Lacey, 1975. (The Warner report is an in-house document prepared by the California Game and Fish Department to prepare for and assist in designing research on riparian areas in the central California desert; it was basically a compilation of data available on nearby geographic areas.

– The Ohmart study, the first of Warner's references, was limited to a selected ten mile strip on the Colorado River near Yuma. Based primarily on diary references dated 1699 through 1877, Ohmart postulated a "dense" and "majestic stand" of such "celebrated splendid" cottonwood trees along the Colorado River. He mapped what that plant community may have been like in 1879. After describing the historic changes that have taken place along the Colorado River, Ohmart concluded that of the original 5,000 acres of cottonwood community, 2,800 acres of cottonwood and willow plant community still remained. There were, however, only 500 acres of "pure cottonwood." The balance of the original 5,000 acres had been taken over by salt cedar, less desirable, but still riparian vegetation. Ohmart attributes the demise of the cottonwood riparian community to the invasion of salt cedar and states that *"even without the dams it appears highly unlikely that the cottonwood communities could have maintained their dominance along the Lower Colorado River over the aggressive and fire-adapted salt cedar."* Ohmart further acknowledges that *"as we swim through a sea of qualitative data there is little quantitative information available,"* and there really is no way of knowing how much riparian community existed in historical times.

– The other Warner reference is Lacey 1974. Warner selectively cites one further report referenced by Lacey which is misquoted and one independent study done by Lacey the conclusions of which Warner misrepresents. Each was on a single selected geographic area and neither could be construed as having statewide application. The report (Haase, 1972) is quoted by Lacey as saying that along the Lower Gila River, " '*when the total acreage of this exotic* [salt cedar] *is subtracted from the riparian total, only 5,285 acres of native riparian communities remain. This represents about 5% of the theoretical 1860 riparian base* [of the lower Gila River].'" When the original paper by Haase was researched, no such quotation could be found. The closest Haase comes to such a statement is that "*more than 50% of the area covered by*

floodplain plant communities was dominated by Tamarisk petandra [salt cedar.]" Salt cedar is a riparian plant, albeit non-native. Haase never mentions anything about a "theoretical 1860 base."

The study quoted by Warner from Lacey states that as to a 22-mile stretch of the San Pedro River from St. David to Cascabel Road, "*riparian communities have declined from 10,690 acres in 1936 to 5,500 acres in 1972, nearly a 50% reduction.*" This statement was made on the basis of Lacey's review of USSCS aerial photos. What Warner does not mention is that the "riparian communities" referred to are not riparian communities generally but mesquite riparian communities. The balance of those acreages had been taken over by more competitive riparian species. Warner also failed to refer to any of the rest of Lacey's work, which cites several conflicting references.

REFERENCES

Brown, D.E. and C.H. Lowe; "A Digitized Computer-Compatible Classification for Natural and Potential Vegetation in the Southwest with Particular Reference to Arizona", *J. of the Arizona Academy of Science*, 9 (suppl. 2), May, 1974, 11p. .

Haase, E. F.; "Survey of Floodplain Vegetation Along the Lower Gila River in Southwestern Arizona", *J. of the Arizona Academy of Science*, 7(2): June, 1972, pp. 75-81.

Lacey, J. R., P. R. Ogden and K. E. Foster; "Southern Arizona Riparian Habitat: Spatial Distribution and Analysis", Office of Arid Land Studies (CALS) Bulletin 8, August 1975, University of Arizona.

Ohmart, R. D., W. O. Deason and C. Burke; "A Riparian Case History: The Colorado River, pp. 35-47, in: "Importance, Preservation and Management of Riparian Habitat: A Symposium," Tucson, July 9, 1977, Rocky Mountain Forest and Range Experiment Station, Fort Collins, Colorado 80521, USDA Forest General Technical Report RM-43.

Warner, R. E.; "California Riparian Study Program: Background Information and Proposed Study Design", State of California, the Resources Agency, Department of Fish and Game, Planning Branch, Sacramento, December 1979.

State Comprehensive Outdoor Recreation Plan (SCORP), 1989.

Final Report and Recommendations of the Governor's Riparian Habitat Task Force (Exec. Order 89-16 Streams and Riparian Resources) October, 1990.

As a consequence, post-original claims of 90% or 95% riparian habitat loss generalized to the entire state from a specific small research area unrepresentative of scarcely any other Arizona habitat is at the best speculative. Even the original lacks hard data pre-1850 to serve as an original survey baseline from which the purported "loss" can be extrapolated. The claim in the listing document of 95% loss of riparian areas across the 11 Western states is supposedly a citation from Ohmart 1994, taken to a citation in Rosenberg et al. 1991 (and et al. includes Ohmart) that makes this claim entirely without data or citation to data (a.k.a. direct violation of Section 4 of ESA). Therefore, the claim that 95% of riparian area along Arizona's major desert water courses has been lost, altered, or degraded as a result of man's activities, is made without any baseline information other than a claim, also made entirely without citation to even one source.

Alleged Decline in Cuckoo Population

The alleged declines in population of the cuckoo are not scientifically established. More specifically, data regarding alleged population declines needs to be carefully presented `utilizing peer reviewed and agreed upon methodologies rather than, as set forth in the population section referring to the San Pedro river portion, "one to five surveys per year and with different methods used to determine population size." Science requires data collected by consistent peer reviewed techniques and the presentation of the data in an objective organized approach. This proposed listing rule offends the Data Quality Act (DQA) and fatally compromises both the relevance and reliability, or scientific validity, of the claim that the cuckoo is threatened as the FWS has proposed.

Tamarisk presence is not new

Mr. Dennis Parker, biologist and attorney, has stated the following:

"I learned something of possibly considerable interest to you this morning which is applicable not only to the proposal of critical habitat designation for willow flycatchers, but to other federal policies specific to the presence tamarisk or salt cedar. In reading the original 1821 description and survey for the Canoa land grant on the Santa Cruz (as quoted by Wagoner in *Early Arizona*), I found that tamarisk was identified by Ignacio Elias Gonzales as a major component of the vegetation found along the stretch of the river from Tubac to Sahuarita at that time in his description and survey of the lands petitioned for grant. Moreover, because surface water only existed in this stretch of the Santa Cruz during the rainy season, and but few cottonwoods and willows then existed there, the land was appraised at significantly lower value than comparable petitioned grants which had surface water. This revelation shows, among other things, that the feds' claim of tamarisk as an invasive species beginning in the late 19th century is arbitrary, capricious, and, most importantly, utterly false relative to the Santa Cruz watershed. Unfortunately, Wagoner doesn't supply Elia Gonzales's detailed description of the vegetation found on the other grants he surveyed (like the Babocomari in the San Pedro watershed), but this

information should be available somewhere if someone is willing to expend the time and possibly considerable detective work necessary to find and review his original descriptions."

Cattle Grazing

During the 1690s Father Eusebio Kino brought cattle to Southern Arizona. Cattle have been an important part of the Arizona ecosystem for hundreds of years and it is speculative and contrary to intensively well-documented decades of monitoring of southern Arizona grazing on state, BLM and Forest Service grazing allotments showing that the currently implemented controlled cattle grazing leads to quality wildlife habitat and conditions that would favor the cuckoo.

The best science available consistently demonstrates that controlled grazing, the widespread current state of grazing management, in riparian areas and in the uplands promotes plant vigor, biodiversity and range health. These studies consider critically relevant details that greatly influence experimental outcomes (i.e., grazing intensity, timing and frequency). (included by reference, *See:* Holechek, 2005, *Controlled Grazing Versus Grazing Exclusion Impacts on Rangeland Ecosystems: What We Have Learned*, attached; *See also:* Milchunas, D.G. 2006. *Responses of Plant Communities to Grazing in the Southwestern United States*. Gen. Tech. Rep. RMRS-CTR-169, USDA Forest Service, at ftp://ftp-fc.sc.egov.usda.gov/NHQ/nri/ceap/milchunasrmrs_gtrl169.pdf). Controlled cattle grazing in riparian areas with proper timing , intensity and frequency can improve cuckoo habitat.

Range scientists and ranchers have long acknowledged the severe grazing that occurred over much of the western United States in the late 1800's and early 1900's was damaging to soil and vegetation. That was at a time when the university knowledge or research on the subject of sustainable resource management was non-existent. But just like with medicine, vast changes were implemented many decades ago and citations to the shortcomings of medical knowledge can no longer cite the ignorance of a century ago to damn current medical treatments. This concept seems unlearned in the listing document where references to grazing describe management practices and conditions changed 50 or more years ago. Current documentation proves the course change has attained notable objectives well-documented in publicly available scientific reports and ignored by the listing authors.

Objective scientific information on controlled grazing is readily available. Relevant specialized textbooks include Branson et al. (1981) on rangeland watershed management,Vavra et al. (eds.) (1994) on grazing impacts on western plant communities, Krausman (ed.)(1996) on rangeland wildlife, and Heitschmidt and Stuth (eds.) (1991) on rangeland ecology. Another level of books and handbooks include Bell (1973), Savory (1999) and Sayre (2001).

On Page 61640 starting in middle column of the proposed listing, the data for the San Pedro River shows a significant cuckoo decline since **exclusion** of grazing took place. As with most native fish species, declines in cuckoo population numbers are probably a direct result of grazing exclusion, not current grazing management.

In conclusion, most of the statements regarding adverse impacts of grazing in the Federal Register regarding the cuckoo are speculative, not site-specific, unverifiable and do not reflect the latest best science. The studies cited by FWS do not compare controlled livestock grazing -- which is the only form of livestock grazing that occurs on federal lands or on those lands to which Endangered Species Act authority applies -- with grazing exclusion. Instead they generalize inappropriately from reports comparing grazing exclusion with a former intensive and unsustainable version of livestock management that is no longer in any way typical of current highly academically informed and controlled grazing.

Sincerely,

Jim Chilton, President

Southern Arizona Livestock Protective Association