

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-cv-01544-WYD

FRIENDS OF ANIMALS, and  
AUDUBON SOCIETY OF GREATER DENVER,

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,  
GREG SHEEHAN, in his official capacity as Principal Deputy Director of the U.S. Fish and  
Wildlife Service, and  
RYAN ZINKE, in his official capacity as Secretary of the Interior,

Defendants.

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**FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

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**INTRODUCTION**

1. Ryan Zinke in his official capacity as Secretary of the Interior, the U.S. Fish and Wildlife Service (FWS), and Greg Sheehan in his official capacity as Principal Deputy Director of FWS (collectively “Defendants”) failed to timely designate critical habitat for the western distinct population segment of yellow-billed cuckoo (hereinafter “western yellow-billed cuckoo”) as required by the Endangered Species Act (ESA). 16 U.S.C. §§ 1533(a)(3)(A)(i), (b)(6)(C)(ii). Defendants’ inaction risks the extinction of this unique, threatened population of yellow-billed cuckoos.

2. The yellow-billed cuckoo, also known as the “rain crow” for its habit of calling loudly on hot summer days, often preceding a storm, is a beloved species that spends the warmer months of the year in the United States and Mexico and winters in South America.

3. Unfortunately, the western yellow-billed cuckoo faces severe threats from the loss and degradation of the delicate riparian habitat on which it depends for its survival. Western yellow-billed cuckoo populations have declined by several orders of magnitude over the past 100 years, and this precipitous rate of loss continues today. As of 2013, there were estimated to be fewer than 500 breeding pairs north of the Mexican border.

4. Conservationists' fight to protect yellow-billed cuckoos from this rampant habitat destruction has been ongoing for more than twenty years now. Though the Center for Biological Diversity and numerous local conservation groups petitioned FWS to list the yellow-billed cuckoo as endangered on February 2, 1998, only the western distinct population segment was finally listed as threatened more than fifteen years later on October 3, 2014.

5. Now, more than three years have passed since the western yellow-billed cuckoo was listed as threatened under the ESA, and Defendants have taken no final action to designate the critical habitat that must be protected in order for this distinct population segment to survive.

6. Defendants are legally obligated under the ESA to delimit a listed species' critical habitat in a final rule at the time the species is listed, and their failure to designate critical habitat for the western yellow-billed cuckoo for more than three years after its listing is a violation of a non-discretionary duty.

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 16 U.S.C. §§ 1540(c) and (g) (Endangered Species Act citizen-suit provision), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

8. This Court may grant the relief requested under 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief), 16 U.S.C. § 1540(g) (Endangered Species Act), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

9. Friends of Animals and the Audubon Society of Greater Denver (collectively, “Plaintiffs”) provided Defendants with written notice of their intent to file this suit more than sixty days prior to the commencement of this action and in the form and manner required by the ESA. A copy of this notice letter is attached as Exhibit A to this Amended Complaint.

10. Defendants have not corrected their violations of law in response to Plaintiffs’ written notice.

11. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A), as this civil action is brought against officers and employees of the United States acting in their official capacities and under the color of legal authority, Plaintiffs have their principal offices in this District, and a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District.

### **PARTIES**

12. Plaintiff FRIENDS OF ANIMALS sues on behalf of itself and its adversely affected members. Friends of Animals is a not-for-profit international animal advocacy organization incorporated in the state of New York since 1957. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living, and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues as well as the organization’s progress in addressing these issues through its quarterly journal *Action Line*, its website, and other reports. Friends of Animals has a long-standing commitment to protecting animals imperiled due to habitat destruction and exploitation by commercial interests.

13. Friends of Animals maintains its Wildlife Law Program offices in Centennial, Colorado. Its employees and local members across the west enjoy hiking and camping around Colorado's numerous river systems and viewing birds and wildlife in their natural habitat.

14. Many of Friends of Animals' members enjoy recreating in and near yellow-billed cuckoo habitat and viewing the birds. These members fear that the birds will go extinct if FWS does not designate adequate critical habitat for their conservation.

15. The Audubon Society of Greater Denver is a grassroots environmental conservation organization with approximately 3,000 members in the Denver metro area. Its mission is to advocate for the environment, connecting people with nature via education, research and conservation. The Audubon Society of Greater Denver publishes a bi-monthly newsletter, *The Warbler*, which provides information about conservation issues, field trips, education programs for all ages, birding trips in Denver, and research projects. The Audubon Society of Greater Denver has members who enjoy recreating in and near cuckoo habitat and viewing the birds. These members fear that the birds will go extinct if FWS does not designate adequate critical habitat for their conservation.

16. Plaintiffs and their members have been, are being, and unless the relief requested herein is granted, will continue to be adversely affected by the challenged actions.

17. Defendant UNITED STATES FISH AND WILDLIFE SERVICE (FWS) is an agency of the United States government housed in the U.S. Department of the Interior. Through delegation of authority from the Secretary of the Interior, FWS administers and implements the ESA and is legally responsible for listing and critical habitat designation decisions for species such as the western distinct population segment of yellow-billed cuckoo. In doing so, FWS must comply with the ESA and all other applicable laws.

18. Defendant GREG SHEEHAN is the Principal Deputy Director of the United States Fish and Wildlife Service and is sued in his official capacity. Generally, as Principal Deputy Director, and through delegation of authority from the Secretary of the Interior, Deputy Director Sheehan is the FWS official charged with primary responsibility for complying with and implementing the statutory requirements of the ESA, including the listing and designation of critical habitat for species such as the western distinct population segment of yellow-billed cuckoo.

19. Defendant RYAN ZINKE is the United States Secretary of the Interior and is sued in his official capacity. Secretary Zinke is the federal official ultimately responsible for complying with the statutory requirements of the ESA, including the listing and designation of critical habitat for species such as the western distinct population segment of yellow-billed cuckoo.

### **LEGAL BACKGROUND**

20. The ESA is a federal statute enacted to conserve species in danger of extinction and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

21. The purposes of the ESA are “to provide a program for the conservation of . . . endangered and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

22. To this end, Section 4 of the ESA requires that the Secretary protect such species by listing them as either “threatened” or “endangered.”

23. Under the statutory definition, a species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is considered to be “threatened” under the statute if it is “likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

24. The ESA makes it unlawful for any person to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a listed species, or attempt to engage in any of the foregoing actions, unless the action is specifically permitted by a special rule or permit issued by the Secretary. 16 U.S.C. §§ 1538–1539. The ESA also requires that all federal agencies “carry out programs for the conservation” of threatened and endangered species and consult with the Secretary in order to ensure that their actions are “not likely to jeopardize the continued existence” of such species or “result in the destruction or adverse modification” of their critical habitat. 16 U.S.C. §§ 1536(a)(1), (2).

25. A species receives mandatory substantive protections under the ESA only when it is listed as endangered or threatened.

26. The Secretary must list a species under the ESA if it is threatened or endangered by any one or more of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1).

27. The ESA defines the term “species” to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

28. Under the ESA, FWS may list a vulnerable distinct population segment (DPS) of a vertebrate species for protection, even if the species, when taken as a whole, would not be considered threatened or endangered. The independent listing of a threatened DPS is intended to be a preemptive measure to “protect and conserve species and the ecosystems upon which they depend before largescale decline occurs that would necessitate listing a species or subspecies throughout its entire range.” 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996).

29. Any interested person can begin the listing process by filing a petition with Defendants to list a species. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

30. Upon receipt of a petition to list a species, Defendants have ninety days, to the maximum extent practicable, to make a finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1).

31. After issuing a positive ninety-day finding, Defendants have twelve months from the date they received the petition to complete a status review of the species and make one of three findings: (1) the petitioned listing is not warranted; (2) the petitioned listing is warranted; or (3) the petitioned listing is warranted but presently precluded by work on other pending proposals for listing species of higher priority. 16 U.S.C. §§ 1533(b)(3)(A)-(B); 50 C.F.R. § 424.14(b)(3).

32. If Defendants find that listing the species is warranted, they must publish a proposed rule to list the species as endangered or threatened in the Federal Register. 16 U.S.C. § 1533(b)(5). Within one year of the publication of a proposed rule to list a species, Defendants must make a final decision on the proposal. *Id.* § 1533(b)(6)(A).

33. When a species is listed as threatened or endangered, the ESA requires that the Secretary designate critical habitat concurrently with the listing. 16 U.S.C. §§ 1533(a)(3), (f).

34. To the maximum extent prudent and determinable, Defendants must, concurrent with the listing of a species, designate critical habitat. *Id.* § 1533(a)(3)(A)(i).

35. The ESA requires such designation to be based on the best scientific data available. *Id.* § 1533(b)(2).

36. Critical habitat may include “specific areas outside of 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 well as “specific areas within the geographical area occupied by the species, at the time it is listed,” if they contain those physical or biological features “essential to the conservation of the species” and “may require special management considerations or protection . . .” *Id.* § 1532(5)(A)(i), (ii).

37. If Defendants find that critical habitat is not determinable at the time of listing, they may extend the one-year deadline to designate critical habitat by “not more than one additional year.” *Id.* § 1533(b)(6)(C)(ii). By the close of the second year, the ESA requires FWS to publish a final rule designating critical habitat based on the best data available at that time. *Id.*

### **FACTUAL BACKGROUND**

38. The western yellow-billed cuckoo is a rare and beloved bird, with brilliant white spots on the underside of its tail.

39. It is a reclusive bird, but its characteristic call makes it instantly identifiable. Its call often coincides with thunder, giving the bird the nickname of the “rain crow.”

40. The western yellow-billed cuckoo lives along rivers in diverse and nutrient-dense riparian habitat, making its home primarily in cottonwoods and willows.



41. As of 2013, there were fewer than 500 breeding pairs of western yellow-billed cuckoos north of the Mexican border, with fewer than ten pairs in Colorado.

42. Development along rivers has destroyed much of the western yellow-billed cuckoo's prized cottonwood habitat—by as much as 90%.

43. In the West, riparian areas make up less than one percent of all land, but they are some of the most important habitat areas for many species, including the western yellow-billed cuckoo.

44. Moreover, food availability for the western yellow-billed cuckoo is highly dependent on the health, density, and types of vegetation in an area.

45. Western yellow-billed cuckoos typically have large home ranges during the breeding season. As a result, a large amount of habitat is required to support even a small population of western yellow-billed cuckoos.

46. The western yellow-billed cuckoo faces threats from disruption of hydrological processes, loss of habitat from grazing, loss of habitat from development and mineral extraction, loss of habitat from wildfires, and loss of the insect prey base from pesticide use.

47. Principal causes of riparian habitat destruction, modification, and degradation in the range of the western yellow-billed cuckoo have occurred from alteration of hydrology due to dams, water diversions, management of river flow that differs from natural hydrological patterns, channelization, and levees and other forms of bank stabilization that encroach into the floodplain. These losses are further exacerbated by conversion of floodplains for agricultural uses, such as crops and domestic animal grazing. In combination with altered hydrology, these threats promote the conversion of existing primarily native habitats to monotypic stands of nonnative vegetation, which reduce the suitability of riparian habitat for the western yellow-billed cuckoo. Other threats to riparian habitat include long-term drought and climate change.

48. The most important elements of habitat for the yellow-billed cuckoo are riparian woodlands, an adequate prey base, and dynamic riverine processes.

49. The protection of riparian cottonwoods and willows is especially important to ensure a viable yellow-billed cuckoo population.

50. Any critical habitat designation should include: all current and recently-occupied habitat; areas for stopover, foraging, and shelter habitat; and areas with restoration potential to form large blocks of suitable nesting cuckoo habitat. Each recovery unit should also include a minimum of 1,000 acres of intact riparian habitat, as is necessary to support the cuckoo.

51. On February 2, 1998, FWS received a petition to list the yellow-billed cuckoo as endangered.

52. On October 3, 2013, Defendants proposed to list the western U.S. population of yellow-billed cuckoo as a threatened distinct population segment (“DPS”) under the ESA.

53. On August 15, 2014, Defendants published notice of a proposed critical habitat designation for the western DPS of yellow-billed cuckoo (or “western yellow-billed cuckoo”), with a public comment period closing on October 14, 2014.

54. On October 3, 2014, Defendants published a final rule listing the western yellow-billed cuckoo as a threatened DPS under the ESA. The rule went into effect on November 3, 2014.

55. When they listed the western yellow-billed cuckoo as threatened, Defendants determined that riparian habitat loss and degradation are the primary causes of its decline.

56. Defendants determined that the adverse impacts of habitat curtailment, degradation, fragmentation, and loss on the western yellow-billed cuckoo are ongoing and anticipated to continue for decades to come.

57. However, Defendants did not designate critical habitat for the western yellow-billed cuckoo when they issued the Final Rule listing the DPS as threatened on October 3, 2014.

58. Though ESA Section 4(b)(6)(C) allows FWS to delay critical habitat designation by an additional year if it finds that critical habitat is not determinable at the time of the listing decision, no such finding was made regarding the western yellow-billed cuckoo.

59. On October 6, 2014—three days after the threatened listing had been published—eighteen members of Congress sent a letter to the FWS Director requesting that FWS extend its public comment period for the critical habitat designation of the western yellow-billed cuckoo by at least sixty more days (to December 14, 2014) and allow opportunities for public hearings in the areas affected.

60. In response, FWS published notice in the Federal Register on November 12, 2014, that it was reopening and extending the public comment period for an additional sixty days until January 12, 2015.

61. FWS published notice two weeks later that it would hold a public hearing on the matter on December 18, 2014, in Sacramento, California.

62. The comments received during this reopened public comment period included an 80-page letter sent on behalf of the American Petroleum Institute, joined by the Utility Air Regulatory Group and Utility Water Act Group, which attempted to cast doubt on the predicted effects of climate change discussed in the proposed critical habitat designation and FWS's cost-benefit analysis.

63. Afterwards, no further notices or rules were published in the Federal Register regarding the critical habitat designation.

64. FWS never made a finding that the critical habitat of the western yellow-billed cuckoo was not determinable.

65. FWS never withdrew its proposed critical habitat rule for the western yellow-billed cuckoo.

66. The requirement to timely designate critical habitat for listed species is a mandatory, nondiscretionary duty under the ESA.

67. Plaintiffs sent a letter giving Defendants notice of their intent to sue over FWS's failure to designate critical habitat for the western yellow-billed cuckoo on November 17, 2017.

68. The letter provided notice that Defendants' failure to issue a final rule designating critical habitat for the western yellow-billed cuckoo is in violation of ESA Section 4(b)(6).

69. At the time this notice letter was sent, more than three years had passed since the western yellow-billed cuckoo was listed as threatened and since the Secretary published the proposed critical habitat rule.

70. Friends of Animals received confirmation via a U.S. certified mail return receipt that Defendant Zinke received the notice letter on November 24, 2017.

71. Friends of Animals received confirmation via a U.S. certified mail return receipt that Defendant Sheehan received the notice letter on November 27, 2017.

72. Friends of Animals has since received no communication from Defendants regarding the western yellow-billed cuckoo or any efforts being made towards the designation of its critical habitat.

73. No final rule designating critical habitat for the western yellow-billed cuckoo has been issued to date.

74. Defendants have not remedied the legal violations described in the notice letter.

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## **CAUSE OF ACTION**

### **(Failure to Timely Designate Critical Habitat for the Western Yellow-Billed Cuckoo)**

75. Plaintiffs incorporate by reference all preceding paragraphs.

76. In the final rule proposed on October 3, 2013 and published on October 3, 2014, Defendants listed the western yellow-billed cuckoo distinct population segment as threatened. The ESA requires that Defendants designate critical habitat at the time of listing. Though Defendants proposed critical habitat for the western yellow-billed cuckoo on August 15, 2014, Defendants have yet to issue a final rule designating critical habitat for the western yellow-billed cuckoo.

77. Defendants' failure to designate critical habitat for the western yellow-billed cuckoo violates 16 U.S.C. § 1533(b)(6)(C)(ii) and thereby constitutes a "failure of the Secretary to perform any act or duty under [16 U.S.C. §] 1533 . . . which is not discretionary with the Secretary." 16 U.S.C. § 1540(g)(1)(C). Defendants' failure to perform this mandatory, non-discretionary duty also constitutes arbitrary and capricious agency action under the Administrative Procedure Act, 5 U.S.C. §§ 706(1)-(2).

## **REQUESTED RELIEF**

Plaintiffs respectfully request that this Court enter judgment providing the following relief:

A. Declare that Defendants' failure to designate critical habitat for the western yellow-billed cuckoo is a violation of a non-discretionary duty under the ESA, 16 U.S.C. § 1533(b)(6)(C)(ii);

B. In the alternative, declare that Defendants' failure to designate critical habitat for the western yellow-billed cuckoo is arbitrary and capricious under the APA, 5 U.S.C. §§ 706(1)-(2);

C. Order Defendants to make and publish in the Federal Register a final rule designating critical habitat for the western yellow-billed cuckoo by a date certain;

- D. Award Plaintiffs their costs and reasonable attorneys' fees;
- E. Grant such additional and further relief as the Court deems just and proper.

Respectfully submitted this 2nd day of August, 2018.

By: /s/ Michael Harris  
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