ATTACHMENT "E"

Applied Ecosystem Management, Inc.

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April 28, 1995

Mr. Sam Spiller
State Supervisor
Arizona Ecological Services
U.S. Fish and Wildlife Service
2321 Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

Re: Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher

Dear Mr. Spiller,

Please accept these comments from Applied Ecosystem Management, Inc. (AEM), regarding both critical habitat and the "Final Rule Determining Endangered Status for the Southwestern Willow Flycatcher" (FR 60, 10694-10715), submitted on behalf of the Arizona Mining Association.

Although we are aware that the Service has found for this rule, we find it impossible to conclude that this finding is either legally proper or scientifically warranted. To the contrary, the failure of the Fish and Wildlife Service to base its finding for this rule on the best scientific and commercial data available (by excluding all 1994 survey data from any consideration) and its failure to respond to or consider many of the comments received from interested persons, is arbitrary and capricious and in clear violation of both 50 CFR § 424.11 and 50 CFR § 424.13.

Because the Service's finding for this rule is arbitrary and capricious and not based on the best scientific and commercial data available, we find it necessary to respond to the Service's treatment, and non-treatment, of the comments it received. Because so much of the information actually relied upon by the Service in support of this finding is out of date, inaccurate, not based on substantial scientific data, or is indicative of willful omissions and misrepresentations, we find it necessary to refer in comment to specific pages and columns of this Federal Register Notice. For the sake of clarity, we have listed the Federal Register page number along with the number of the column (FRs have 3 columns/page) to which our comments pertain.

FR 10696, Column 1:

The Fish and Wildlife Service claims that "extimus" is distinguished from other Willow flycatcher subspecies by subtle differences in color and morphology, and cites Unitt (1987) as support for this claim. The Service claims that Browning (1993) also found "extimus" to be distinguishable by color.

Problem: Unitt (1987) could not separate "extimus" from other alleged Willow flycatcher subspecies based on color. Unitt (1987 at page 140) states: "I saw no consistent difference in color between **extimus** and **traillii** and cannot confirm Aldrich's (1951) statement that "**campestris**" (i.e. **traillii**) is "somewhat more greenish" than **extimus**."

Unitt could not separate "**extimus**" from all other alleged Willow flycatcher subspecies on the basis of morphology (i.e., wing formula). Unitt's (1987) data does not confirm any difference in wing chord length between "**extimus**" and "**brewsteri.**" In fact, Unitt (1987) did not even compare wing formula difference between "**extimus**" and "**brewsteri.**" Further, Unitt (1987) found that wing chord difference between the alleged Willow flycatcher subspecies he did compare is more reliable for females than than it is for males.

Browning (1993) found measurement of wing chord not to be useful for purposes of distinguishing between alleged subspecies of **E. traillii.** According to Browning (1993 at page 247): "Analysis of measurements (i.e. g., wing chord, tail, bill) revealed no taxonomically important differences in size between populations." Although Browning (1993) claims that the five, nominate subspecies **E. traillii** are recognizable on the basis of color, his use of Munsell Color Charts as the basis for determining color values (pale vs. dark) of the crowns and backs of most specimens, compromises the scientific validity of this conclusion. Browning (1993) freely concedes (at page 246) that his use of Munsell Color charts "present many of the same problems" (of Smithe's (1975) color standard). Three criteria, any of which if met, render color comparison by the use of color charts impossible: color swatches do not match actual colors; color swatches do not match plumage colors of Willow flycatchers; and, color swatches do not have the same texture, gloss, and colorants as the plumage being compared (Browning, 1993). Since Browning acknowledges that the use of Munsell Color Charts is compromised by at least 2 of these 3 criteria (by his use of the word "many") in regard to Willow flycatchers, it is not scientifically possible to conclude, as Browning (1993) has, that 5 subspecies of **E. traillii** are validly recognizable by color differences established by the use of Munsell Color Charts.

Conclusion: Unitt (1987) could not separate "**extimus**" based on either color or wing chord difference. The Fish and Wildlife

Service misrepresents the findings of Unitt's work in the final rule. Browning (1993) could not separate "**extimus**" based on wing chord difference and his claim that nominate "subspecies" are distinguishable on the basis of color is not possible by the use of the methodology he employed. Neither Unitt (1987) nor Browning (1993) establish "**extimus**" as a separate and distinct subspecies of **E. traillii**. Browning provides evidence to the contrary. According to Browning (1993, at page 244): "Traylor (1979) stated that the subspecific taxonomy of **E. traillii** cannot be worked out without long series of fresh specimens of known song type. Although perhaps it was not his intent, Traylor implied that because the original descriptions of subspecies of **E. traillii** did not include information on song, and thus specific identity, each of the subspecific names could be construed as being **nomen dubium** (i.e., name of unknown or doubtful application)."

FR, 10697, Column 3:

The Fish and Wildlife Service claims that **E. t.** "**extimus**" is a valid taxon on the basis of "a majority opinion" to that effect found by the Service to exist among authorities who have critically examined the taxonomy of **E. traillii**, and cites 5 authorities as support for this claim.

Problem: Two of the five authorities cited by the Service (Unitt, 1987, and Browning, 1993) do not establish "**extimus**" as a valid (subspecific) taxon. A third authority (Hubbard, 1987) offers only a qualified endorsement of the validity of **E. t.** "**extimus**," and recommends that there be further examination of the taxonomy. Although two authorities (Phillips, 1948 and Aldrich, 1951) recognize "**extimus**" as a valid taxon, substantial disagreement exists between the two over the range inhabited by this race.

While Aldrich (1951) considers "**extimus**" to include all pale-colored southwestern populations, including those found in the southern Great Basin and the southern Great Plains, Phillips (1948) assigns both the southern Great Basin and the southern Great Plains areas primarily to "**brewsteri**." Although Aldrich (1951) viewed populations of **E. traillii** from west of the Sierra Nevada in southern California as intergrades between "**extimus**" and "**brewsteri**," Phillips (1948) attributes this geographic region to inhabitance by "**brewsteri**" alone.

Conclusion: The Service's "majority opinion" consists of two authorities whose work recognizes "**extimus**" as a valid and distinct taxon, but is in substantial disagreement over the area of geographic range the taxon inhabits.

FR, 10697, Column 3:

"The AOU (1983) did not list subspecies of any bird, including the willow flycatcher, in its 1983 Checklist of North American Birds. However, this does not indicate a lack of recognition of **E. t. extimus**".....

Problem: Neither "**adastus**" nor "**extimus**" was accepted in the 1957 AOU Check-list (1957: 343-344). In the thirty-second supplement to the AOU Check-list (1973: 415-416) the flycatchers formerly grouped in the species **E. traillii** are divided into two species based on a difference in vocalization. The species and subspecies in the West are listed as **E. traillii brewsteri** under the common name of Willow flycatcher. While the 1983 AOU Check-list does not include any subspecies, it does state (1983: 541-452) that the species **alnorum** (Alder flycatcher) and **traillii** (Willow flycatcher) are "virtually indistinguishable morphologically, differing primarily in vocalizations and ecology; formerly recognized as a single species." Additionally the 1983 Check-list goes on to state that "the two are now considered as constituting a superspecies (= "**trailli complex**")."

Conclusion: The Fish and Wildlife Service misrepresents the American Ornithologists' Union and is guilty of willful ommission. The American Ornithologists' Union Check-list is regarded as <u>the</u> authority on recognizing and identifying bird species throughout North America. Neither "**adastus**" nor "**extimus**" were accepted for inclusion by the AOU in its 1957 Check-list. No AOU supplement or Check-list since that time has included either "**adastus**" or "**extimus.**" The 1983 AOU Check-list advances the concept of "superspecies" in application to the Willow/Alder flycatcher group. The "superspecies" concept is the direct antithesis of the subspecific approach taken by the Fish and Wildlife Service in regard to the Willow flycatcher group. The AOU and Traylor are in general agreement, and neither recognizes **E. t. "extimus"** as a valid taxon.

FR 10698, Column 1:

While acknowledging that McCabe's (1991) consideration of the Willow/Alder flycatcher group as a "superspecies" is based on a thorough review of the history, taxonomy, ecology, morphology, and song type distinction of this group, the Service then rejects McCabe's argument because it "contrasts with the majority opinion regarding taxonomy of the willow and alder flycatchers."

Problem: "Majority opinion" is not "scientific or commercial data." The two authorities cited by the Service in support of its "majority opinion" cannot be used to support this claim. Unitt (1987) does not confirm any wing chord difference between "**extimus**" and "**brewsteri**," and could not distinguish "**extimus**"

from "**traillii**" on the basis of color. Browning's (1993) claim that "**extimus**" is distinguishable by color must be dismissed because the methodology he employed to reach this conclusion (i.e., the use of Munsell Color Charts) is not scientifically credible.

Conclusion: The listing of **E. t. "extimus"** as a distinct subspecies is not supported by the authorities cited by the Service. Neither the AOU, Traylor or McCabe recognize subspecies of Willow flycatchers. Both the AOU and McCabe advance the concept of "superspecies" in regard to taxonomic treatment of the Willow/Alder flycatcher group. "**extimus**" is not a valid subspecies and has been listed in error, in violation of 50 CFR § 424.02(k). The Fish and Wildlife Service violates 50 CFR § 424.11(c) by basing its finding on opinion rather than on the best scientific and commercial data available only, as is required of it by law.

FR 10698, Column 3 - 10699, Column 1

"..the Service believes it is not a misrepresentation to state that up to 90 percent of southwestern riparian ecosystems have been lost or modified" ..."No data, or elaboration, were presented to support statements that riparian regeneration is approaching 1000 percent in southeasteastern Arizona."

Problem: The Service presents no supporting documentation for its "90%" loss and modification of riparian habitat claim. The Fish and Wildlife Service was cognizant of a study by Friedman (1989) which established a 233% increase of cottonwood/willow on the upper San Pedro River over a period of 50 years. Elaboration of cottonwood/willow regeneration on the upper Santa Cruz River far in excess of 1000% was directly provided to the Service through its active participation in the Santa Cruz River Corridor Planning Process sponsored by Arizona State Parks. The Service learned that the upper Santa Cruz has extended its flow by about 2.5 miles over that known in presettlement times.

Conclusion: The Service has misrepresented the trend of riparian condition and has engaged in willful omission by failing to acknowledge its awareness of Friedman's (1989) study of the San Pedro or the elaboration it was provided on the upward trend of upper Santa Cruz River riparian condition. The Service presents no support for its claim that southwestern riparian trend is downward.

FR 10699, Columns 1 & 2:

"As this final rule discusses, **E. t. extimus** sometimes nests in tamarisk, but does so at lower densities ..... than in native

vegetation." "The southwestern willow flycatcher was described as a common nester in Glen Canyon prior to inundation."

Problem: The largest known population of Willow flycatchers in Arizona is that which inhabits groves of tamarisks at Roosevelt Lake (Bureau of Reclamation, 1994). 42 of 60 Willow flycatcher nests found in Arizona during 1994 were located in Tamarisks. The literature reveals that the Willow flycatcher was always rare in southern Utah. Behle (1969, 1975) identifies only one locale for the Willow flycatcher ("**extimus**") in southeastern Utah along the Colorado River.

Conclusion: The Service's claims regarding tamarisk and Willow flycatcher status in Utah are false. The Service failed to rely on the best and most recent scientific and commercial data available (1994 survey results) and misrepresents the literature in arriving at its determinations. The Service has clearly violated 50 CFR § 424.

FR 10699, Columns 2 & 3:

"Comprehensive, long-term population data are not necessarily required for making listing determinations. Rather, these decisions often rest upon data on loss and modification of habitat and other threats, which are reasonably assumed to result in population declines. In many cases, population declines are inferred from decline in habitat availability.....The reports published by government agencies, academic institutions, and professional journals on which this determination is based are accepted as credible."

Problem: The Service is required by 50 CFR § 424 to base its determinations **soley** on the basis of the best scientific and commercial data available; not on "assumption." Most of the reports, et al., that the Service obscurely refers to have been discredited by scientific peer review (Arizona Chamber of Commerce, 1992). The 1990 State of Arizona report that the Service relies upon in large part for support is among those thoroughly refuted by peer review. The Service misrepresents current population trend data by excluding 1994 survey results from consideration.

Conclusion: The Service is in violation of 50 CFR § 424.

FR 10698, Column and 10699, Column 3:

"The Service recognizes that some diversions, particularly unmaintained irrigation ditches, sometimes support riparian vegetation. However, the Service believes diversion and irrigation result in a net loss of riparian habitat." .....

"The Service believes that some livestock grazing regimes are likely to be found compatible with rehabilitation and maintenance of **E. t. extimus** habitat."

Problem: The Service offers no support for its claim that the diversion of surface water for agricultural purposes results in a net loss of riparian habitat. The FWS also infers, inaccurately, that all areas where livestock and Willow flycatchers both occur are in need of "rehabilitation and maintenance." In regard to the former, water diversion for agricultural purpose in the Gila Valley, New Mexico, was found to be of benefit to Willow flycatchers (Parker and Hull, 1994). Riparian stringers along the irrigation ditches of this area were found to be inhabited by Willow flycatchers; up to 300 meters removed from the Gila River proper (Parker and Hull, 1994). Eight pairs of Willow flycatchers were found to occupy territories along these irrigation ditch stringers by Parker and Hull in 1994. On a follow-up survey (July 29, 1994), Parker and Hull, accompanied by S. Williams III of NMGF and Bill Maynard of the FWS, found that water had stopped flowing through some of these ditches, but some Willow flycatchers were still present in the riparian vegetation found along them.

Conclusion: The Service fails to acknowledge that the largest populations of Willow flycatchers known in either Arizona or New Mexico are those populations which occur where livestock are present (Bureau of Reclamation, 1994; Parker and Hull, 1994), The Service also fails to acknowledge that the largest population of Willow flycatchers known in the Southwest is that found in the Gila Valley of New Mexico, where both water diversion for agricultural purpose and the grazing of livestock are the two principal land/water resource uses practiced (Parker and Hull, 1994). The Fish and Wildlife Service fails to base its determinations to the contrary on the best scientific and commercial data available, in direct violation of 50 CFR § 424.

FR 10699, Column 3 & 10700, Column 1:

"Montgomery et al. (1985) did not determine whether the willow flycatchers they detected on grazed land were resident **E. t. extimus** or migrating individuals of other subspecies. Further, neither grazing intensity nor nesting success were quantified, so that no correlations can be made."

Problem: The Service willfully misrepresents this issue and excludes from consideration the best and most recent scientific and commercial data available, in violation of 50 CFR § 424. Parker and Hull (1994) estimated 81 pairs of Willow flycatchers in residence in 1994 on the same lands surveyed by Montgomery in 1983. Parker and Hull established that these flycatchers were not migrants. Parker and Hull (1994) also quantified

grazing intensity on these lands. Willow flycatcher presence on these lands was verified by the Fish and Wildlife Service by on-site visit, July 29, 1994.

Conclusion: By excluding all 1994 survey data from any consideration, the Service has failed to base its determinations on the best scientific and commercial data available, in contravention of 50 CFR § 424. The Service's claims regarding both Willow flycatcher status and the quantification of grazing intensity in this area are false.

FR 10701, Column 1:

"The Service found no information ..... that tamarisk is primarily a successional stage vegetation type"...

Problem: Tamarisk was described to the Service as a "successionist," not as a "successional stage," in comment. Tamarisk is not shade tolerant, therefore it cannot "invade" and take over healthy cottonwood/willow communities. Tamarisk colonizes areas after cottonwood/willow communities are removed.

Conclusion: The Service misrepresents both tamarisk and the comments it received.

FR 10703, Column 2:

"In early 1993, catastrophic floods in southern California and Arizona destroyed much of the remaining occupied or potential breeding habitat."

Problem: The Service offers no support for this claim. In Arizona, 60 nests of the Willow flycatcher were found in 1994, while less than a dozen were found in 1993 (AGFD, 1994).

Conclusion: The Service willfully misrepresents flooding and its actual impact on Willow flycatcher populations by excluding the best and most recent scientific and commercial data from consideration, in violation of 50 CFR § 424.

FR 10704, Column 1:

"The Service believes it used the best available information and has determined that this information is adequate to support listing."

Problem: The Service, arbitrarily, capriciously and willfully excluded all 1994 survey results from consideration. These surveys reveal significantly more Willow flycatchers in Arizona

and New Mexico than numbers found in 1993.

Conclusion: The Service's determination is in error and in direct violation of 50 CFR § 424.

FR 10706, Column 1:

"Extensive surveys in New Mexico and Arizona in 1993 located **E. t. extimus** numbers that do not significantly change the total population estimates made in the proposed rule."

Problem: 1993 survey results are not representative of the best and most recent scientific and commercial data available. 1994 survey results, which the Service has arbitrarily and capriciously excluded from consideration, reveal significantly increased Willow flycatcher populations in both Arizona and New Mexico over 1993 survey results.

Conclusion: The Service has refused to base its determination of unchanged population estimates on the best and most current scientific and commercial data available in clear violation of 50 CFR § 424.

FR 10706, Column 3:

"Much of the livestock grazing that may be affected by this rule takes place on Federal lands."

Problem: The largest Willow flycatcher population known in the Southwest occurs on privately owned lands in New Mexico. The Service offers no support for its conclusion that this rule would primarily affect grazing on federal lands.

Conclusion: The Fish and Wildlife Service misrepresents the affect of this rule on livestock grazing on private lands.

FR 10709, Column 3:

"The southwestern willow flycatcher has declined throughout Arizona."

Problem: Survey results reveal that 60 nests of this species were found in Arizona during 1994 (AGFD, 1994), a six-fold increase over 1993. Two new colonies of Willow flycatchers, representing the largest known concentration of Willow flycatchers in Arizona, were discovered in tamarisk at Roosevelt Lake in 1994 (Bureau of Reclamation, 1994). These flycatchers apparently chose tamarisk over suitable willow habitats present at these sites (Jakle, pers. comm., 1995). Of the 60 nests

of this flycatcher found in Arizona during 1994, 42 (or 70%) were in tamarisk.

Conclusion: The Service failed to use the best scientific and commercial data available in arriving at its determination of decline, in flagrant and willful violation of 50 CFR § 424. The claims of the Service in regard to this species' decline in Arizona are false.

FR 10710, Columns 2 & 3:

In New Mexico, the Service believes, among other things, that the overall range of **E. t. "extimus"** has not been reduced but its habitat and numbers have declined .... areas with 19 and 53 singing Willow flycatchers, not distinguished as nesting or migrants were found on the upper Gila River by Montgomery in 1985 .... preliminary data from 1994 surveys indicate that this breeding group (Montgomery, 1985) is still present, but that their breeding status and population trends over time has not been determined.

Problem: The two authorities cited by the Service cannot be used to support any of these claims and Willow flycatcher breeding status and population trends are established by Parker and Hull (1994) for the largest of these upper Gila River locations, in direct contradiction of the Service's personal communication source to the contrary. Unitt (1987) did not base his conclusions on field research, therefore is in no positon to offer valid statement regarding the current status of the Willow flycatcher in New Mexico. Additionally, Unitt's 1987 work, even if it did qualify for serious consideration, was accomplished eight years ago and is out of date. Reliance on Hubbard (1987) is also fatally compromised by the passage of time. Parker and Hull (1994) estimated 81 pairs of Willow flycatchers in their study area on the upper Gila River during the breeding season accorded to **"extimus"** by the Fish and Wildlife Service, in 1994. Parker and Hull (1994) also quantified population trends over a 26 year time period, and livestock grazing levels over a period of 11 years. Parker and Hull (1994) found that between 1983 and 1994, the Gila Valley population of Willow flycatchers increased by as many as 123 birds, or by as much as 232%. During this same time period, livestock numbers in this area have increased by 250 head, or by 167%. Between 1968 and 1994, detections of singing male, Willow flycatchers in this area have increased from 13+ in 1968 (Hubbard,1987), to 49 in 1981 (Egbert, 1981), to 53 in 1983 (Montgomery, 1985), and to 81 in 1994 (Parker and Hull, 1994). The only long term population trend data available to the Fish and Wildlife Service from New Mexico establishes an increase of Willow flycatchers in New Mexico over the last quarter century.

Conclusion: The Fish and Wildlife Service misrepresents the status and trend of the Willow flycatcher in New Mexico and is in flagrant violation of 50 CFR § 424 by failing to base its determinations **soley** on the basis of the best scientific and commercial data available.

SUMMARY:

The determination for the rule to list the southwestern willow flycatcher as endangered is in fundamental violation of the law. As has been conclusively shown in the preceding comments, the Service willfully excluded from consideration the best scientific and commercial data available to it; the results of 1994 population surveys, from any consideration in arriving at its determination for this rule in direct violation of 50 CFR § 424.

When queried on April 12, 1995, as to the reason the Service had not considered the results of 1994 surveys in reaching its determination for this rule, Mr. Rob Marshall of the Fish and Wildlife Service stated that these surveys were not included for consideration in this final rule because the draft for the final rule was completed during the spring of 1994; or before the close of the public comment period regarding this species' proposed listing.

The obvious conclusion is that the Service acted arbitrarily and capriciously by finalizing its draft of this rule prior to the close of the public comment period and by refusing to base its determination for this rule on the best scientific and commercial data available as is required of it by 50 CFR § 424. Clearly, the listing of "**extimus**" by the Service is both legally and scientifically inappropriate.

COMMENTS ON CRITICAL HABITAT, FR 10713:

There are numerous and major problems with the FWS proposed critical habitat designation for the southwestern willow flycatcher. Some of the problems are direct violations of law and regulation, while others are more substantive in nature. Taken together, these problems make it very difficult, if not impossible for the public to comment on this Proposed Rule for Critical Habitat Designation (PRCHD).

For example, according to the Endangered Species Act (ESA) critical habitat is defined as those specific areas **on which are found** those physical and biological features essential to the conservation of the species (16 USCS § 1532 (5)(A)). These habitat features, such as nest sites, feeding sites, and vegetation type are usually described in greater detail using

quantifiable measurements of the characteristics of that habitat. These habitat characteristics include measurements of, for example, stem densities, canopy closures, and habitat structure. In other words, it is imperative and follows the intent of the law, to know what **specific** features compose critical habitat, i.e., the necessary and specific features that are actually and currently found on those designated areas. However, in this case there have been no quantifiable measurements of any of the specific features assumed to be critical habitat, and, to date, none of the species' habitat requirements, including vegetative structure, have been satisfactorily described or defined by the FWS. Hence, until such habitat is specifically defined it is impossible to designate any critical habitat for this species, as, according to law, those required features must actually be found on those areas.

In addition, because the FWS cannot describe what the critical habitat is, it is impossible for the public to comment on its designation. In short, no one can make meaningful comment on this critical habitat if the agency in charge doesn't even know what it is.

Furthermore, all areas being considered as **potential** habitat, by law, **cannot** be considered for CHD because those required features do not currently exist on those areas, i.e., they are not found there. Critical habitat can only be designated for those areas **on which are found** those essential biological and physical features. The "on which are found" phrase is not speculative to some point in the future. Rather, the intent and letter of this phrase in relation to critical habit is to designate areas which **currently possess** the essential features, thus any designation of potential or future habitat is illegal (16 USCS § 1532(5)(A)).

Another major problem with the PRCHD is **where** the critical habitat is located. On July 23, 1993, the FWS proposed designating critical habitat and found that it was determinable and supplied general maps of the areas considered for designation (58 FR, 39502). Now, however, the FWS is deferring the designation while finding that it is, in fact, not determinable because, among other things, the FWS is reconsidering the proper boundaries of the designation (60 FR, 10713). No maps were supplied to the public in the more recent notice. In other words, not only doesn't the FWS know what critical habitat is, but it also doesn't even know where it is. Obviously, this makes it impossible for the public to provide meaningful comment or input.

Furthermore, the exact location of **each** of the critical habitat areas is imperative to know if the economic analysis in regard to the exclusionary process is to be meaningful. According to the ESA, the economic impacts (and other relevant impacts)

must be viewed in relation to **"specifying any particular area"** as critical habitat and that the exclusion of CHD is meaningful only if "the benefits of such exclusion outweigh the benefits of **specifying such area** as part of the critical habitat ... (16 USCS § 1533(b)(2)) (emphasis added). Therefore, the FWS must analyze each of the areas of CHD individually in regard to economic and other relevant impacts.

Furthermore, as mentioned above and in compliance with law and regulation, the FWS must consider the economic impacts and any other relevant impacts before critical habitat is designated (16 USCS § 1533(b)(2). To date no analyses, economic or otherwise, are known to have been conducted or have been made available to the public. The FWS has, however, extended the final critical habitat rule pending an economic analysis and review of "new information." However, the public comment period closes on April 28, 1995, hence, the FWS will not disclose the findings of the economic analysis to the public nor will the general public have the opportunity to coment on this document. Furthermore, the public has not been made aware of the specific "new information" that in part led to this proposed rule being deferred.

The FWS claims that substantial disagreement exists on the CHD and that this gives good cause to extend the period relative to the final rule. However, the FWS was made aware of similar disagreements on the listing, yet no extension was granted, even though an extension was specifically requested. This was a clear violation of law (16 USCS § 1533(b)(6)(B)(ii)).

As of October, 1993, when forming new regulations and as directed by Executive Order 12866, each federal agency shall "assess both the costs and the benefits of the intended regulation" and "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulations justify its costs" (58 FR, 51736). To date the FWS has provided nothing to show how and when it intends to comply with Executive Order 12866. This proposed rule is considered a significant regulatory action as it will in a material way effect the local economy and local communities. Hence, the FWS is obligated to follow the Executive Order.

Brown-headed cowbird, 60 FR 10700:

Because of the FWS' misrepresentation of this "threat" in the final rule, we are also compelled to revisit this issue.

The FWS maintains that cowbird populations in the United States appear to be declining only in the northeast and further states that the West has experienced a marked population increase over the last five years. However, the Service fails to point out

that neither of those two statements is true in relation to the Southwest -- which is the range of this species.

It is interesting to note that the FWS provides no actual data figures to support its statements that cowbirds have increased in the Southwest (see: 60 FR, 10712). If the FWS would have looked at the data, and this information **was** available to it, the Service would have found that cowbird populations over most of the range of this species have decreased according to Breeding Bird Survey (BBS) data.

The BBS database contains the most comprehensive bird population trend information available and has been used by the FWS as a source of information on other listings (see, for example, the proposed listing of the Mexican spotted owl, 56 FR 56351). The BBS information shows conclusively that throughout most of the southwestern Willow flycatcher's range, the population trend for the cowbird is declining -- not increasing as the FWS contends.

This information points out that for the years 1980-1994, populations of cowbirds have significantly declined by 2.4% annually in Arizona, and have declined by .3% annually in New Mexico. This data does not support the determination by the Service that cowbirds are increasing in population, nor does it show that cowbirds will be a threat to the flycatcher in the future -- again, because cowbird populations in the Southwest are declining.

The FWS further states that it is "the threat of parasitism, regardless of the cause, that in part necessitates listing." However, the criteria to list species never discusses nor even hints that **potential threats** in regard to "other natural or manmade factors affecting" the species' existence are to be given consideration (16 USCS § 1533(a)(1)(E)). Moreover, this criterion indicates that the factors must be <u>currently</u> occurring in order to be considered - not an unknown threat at some point in the future. Given that potential threats of parasitism cannot be used as a valid criteria for listing, coupled with the fact that cowbird populations are declining, clearly, this factor as support for listing this species, must be eliminated.

The FWS states that recent information continues to document high parasitism rates by cowbirds, citing both Sogge (1993) and Muzineks (1994). Both of these authors, however, monitored only a few nests. In Muzinek's citation (Table 3, p. 16), for example, only 9 nests were monitored of which 4 were parasitized (44%). This monitoring was conducted in 1993.

However, the data from 1994, a year in which many more nests were monitored, shows that of the 58 nests monitored, only 7, or **12%**, were parasitized by cowbirds (Arizona Partners In Flight,

Aug. 6, 1994). Instead of citing this data, the FWS discusses the high rates of cowbird parasitism on the Kirtland's warbler (72-83%) and falsely states that these high rates of parasitism are comparable for the Willow flycatcher in the Southwest. The 1994 Arizona figures do not support the notion that the available evidence documents a high parasitism rate by cowbirds as the FWS contends. Again, this information was available to the FWS, yet was not used. This is a direct violation of law (16 USCS § 1533 (b)).

There are other comments in regard to the listing criterion of "Other Natural or Manmade Factors Affecting Its Continued Existence" that merit attention (60 FR, 10711). As is stated very clearly in both law and regulation, the FWS **must solely use** the best scientific or commercial data available in its determinations (16 USCS § 1533(b) and 50 CFR § 424.11(c)). Conjecture, speculation and supposition do not constitute and are not part of the best scientific or commercial data available. Therefore, any statements made by the FWS which support the listing of a species that are not based on scientific or commercial data (and thusly cited) must be considered as illegal and irrelevant.

Thank you for your consideration of these comments made on behalf of the Arizona Mining Association by Applied Ecosystem Management, Inc.

cc.: Mr. David Ridinger, Arizona Mining Association