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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff vs. LARRY D. VOYLES, in his official capacity as Director, Arizona Game and Fish Department; ARIZONA GAME AND FISH DEPARTMENT, Defendants.	Case No. CV 09-543-TUC-CKJ (JJM) **RESPONSE IN OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION**

INTRODUCTION

In this case, Plaintiff Center for Biological Diversity (the "Center") alleges that Defendants Larry D. Voyles and the Arizona Game and Fish Department (collectively, the "Department") have violated, and continue to violate, the Endangered Species Act ("ESA") by authorizing activities that "take" the jaguar – a federally protected endangered species. As evidence of this violation, the Center points to the February 2009 capture of the jaguar "Macho B" in connection with the Department's Large Carnivore Habitat Connectivity and Population Persistence Study ("bear and mountain lion study"). Macho B was radio-collared, released, and subsequently recaptured when he appeared to be in ill health. Macho B was euthanized on the day of his recapture after tests indicated he was suffering from acute kidney failure. Necropsy evidence indicates that the stress of capture and sedation may have contributed to the jaguar's ailment. The capture (and killing) of Macho B constitute the "taking" of an endangered species – an act that is prohibited by the ESA unless expressly authorized. 16 U.S.C. § 1538(a)(1). The Center's suit seeks to enjoin future Department actions that may take jaguars.

The Department now moves to dismiss the Center's action for lack of subject matter jurisdiction. The Department contends that the case is barred by the Eleventh Amendment and moot, but both arguments are derived from the same claim – that the Department has voluntarily suspended trapping and snaring associated with the bear and mountain lion study. The Department, however, has failed to demonstrate that the Eleventh Amendment bars the Center's action. The Center requests prospective relief

consistent with the *Ex Parte Young* exception to the Eleventh Amendment's bar against federal court jurisdiction in suits against states. In addition, the Department's Eleventh Amendment Argument represents an inappropriate attempt to argue the merits of the case in the context of a motion to dismiss. The Department has similarly failed to meet its heavy burden of demonstrating that the Center's claims are moot.

ARGUMENT

I. THE ELEVENTH AMENDMENT IS NOT A JURISDICTIONAL BAR TO THE CENTER'S ACTION

The Center brought this action under the citizen suit provision of the ESA, which authorizes any person to commence a civil suit "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of [the ESA]." 16 U.S.C. § 1540(g)(1)(A). The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. In broad terms, the Eleventh Amendment has been interpreted as an extension of sovereign immunity to states. *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 267 (1997).

The Center's suit, however, falls squarely within the commonly recognized *Ex Parte Young* exception to the Eleventh Amendment, which provides that the Court has

jurisdiction over cases requesting prospective equitable relief against state officials where there is alleged a continuing violation of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985), citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908). In particular, the *Ex Parte Young* exception has been held to establish jurisdiction for suits against state officials alleged to have violated the ESA's prohibition against "taking" endangered species. *Strahan v. Coxe*, 127 F.3d 155, 166-67 (1st Cir. 1997).

The Center's suit seeks purely prospective relief. It requests an order enjoining Defendants, including Department Director Voyles acting in his official capacity, from "continuing to violate Section 9 of the ESA by authorizing, administering, and allowing activities that take jaguars" and from "violating Section 9 of the ESA by capturing and/or collaring any jaguar unless and until the Department obtains a permit expressly authorizing such capture." Complaint at 12. In addition, the Center's suit seeks declaratory relief as to Defendants' assertion that they have the continuing authority to take jaguars. Complaint at 11.

The Department nonetheless contends that the Center has not alleged an ongoing ESA violation because the Department has voluntarily suspended trapping and snaring in connection with the bear and mountain lion study. Motion to Dismiss at 13. The Department's argument fails because it is based on the mistaken premise that the voluntary cessation of the trapping component of the bear and mountain lion study – the action responsible for the past take of the jaguar Macho B – will necessarily avoid the future take of jaguars. The Center's allegations of future take, however, are not based solely, or even primarily, on the continuation of trapping and snaring associated with

the bear and mountain lion study. On the contrary, the Department has asserted that it currently has the authority to take jaguars pursuant to Section 10(a)(1)(A) of the ESA. Motion to Dismiss at 8; Motion to Dismiss Ex. C at 2 ("The Department's decisions to suspend using snares, to continue to not pursue the capture of a jaguar, and to suspend funding associated with camera traps is not an acknowledgment that the Department lacked authority under the ESA to capture Macho B … In accordance with a cooperative agreement under Section 6 of the ESA, the Department has operated under a valid 10(a)(1)(A) permit issued by the Service authorizing the take of threatened and endangered species for purposes consistent with conservation objectives.") The Center's suit seeks to enjoin future activities authorized, administered, or allowed by the Department pursuant to this purported authority, and requests a declaration that the Department does not, in fact, have authorization to take jaguars pursuant to its 10(a)(1)(A) permit. Complaint at 11-12.

Although the Department contends that it "has initiated an application with the [U.S. Fish and Wildlife Service] to amend its ESA Section 10(a)(1)(A) permit to clarify its authority to 'take' specific listed species, including the jaguar," there is no indication that it has renounced or modified its position that it *currently* has the authority under Section 10(a)(1)(A) to take jaguars. Motion to Dismiss at 9. On the contrary, by "clarifying" its permit authority, the Department merely seeks to ratify the authority it believes it already has. *Id*. (trapping and snaring under bear and mountain lion study suspended until Department has coordinated with the U.S. Fish and Wildlife Service

and "confirmed the scope of the Department's existing permit authority to capture a jaguar in the course of its work.")

In addition, documents available on the Department's website indicate both a continuing intent to capture jaguars and an ongoing risk of inadvertent take associated with activities other than the bear and mountain lion study.[1] The Draft Final Jaguar Conservation Assessment for Arizona, New Mexico, and Northern Mexico prepared by Terry B. Johnson and William E. Van Pelt of the Department, together with James N. Stuart of the New Mexico Department of Game and Fish, expressly recommends that the Department "should authorize and commit to capturing and GPS-collaring any age and condition-appropriate jaguar" occurring in the state. Declaration of John Buse in Support of Response in Opposition to Motion to Dismiss ("Buse Declaration"), Ex. A at 50; *see id.* at iv (future jaguar capture efforts "will be made" and "must be made"). As the Department asserts that it currently has "take" authority under ESA Section 10(a)(1)(A), and as these future capture efforts would presumably be made under this authority, the Department recognizes no legal barrier to its announced intent of resuming jaguar captures.

[1] The Department incorrectly claims that "[t]he allegation that Defendants may now be or in the future authorizing activities 'besides the [bear and mountain lion study]' was not raised in the Center's sixty-day notice." Motion to Dismiss at 13 n.1. The Center's May 12, 2009 notice of intent to sue letter, however, plainly states that "[i]t is reasonably foreseeable that future activities permitted by AZGFD will result in additional prohibited take of jaguars unless and until such activities are enjoined." Motion to Dismiss Ex. B at 5. Accordingly, the Department's suggestion that the Court lacks subject matter jurisdiction over this claim because it was not raised in the notice letter is without merit.

While it states that it is voluntarily suspending the bear and mountain lion study, the Department also continues to authorize other activities that could result in taking jaguars. The Department is conducting a study of mountain lions in areas surrounding Tucson, Payson, and Prescott. Buse Declaration, Ex. B. These areas contain potential jaguar habitat. Buse Declaration, Ex. C at 21, 24. The study involves the capture and collaring of mountain lions, and as with the bear and mountain lion study, the potential exists for the capture (and take) of a jaguar. The Department is also currently carrying out a study of mountain lion predation on bighorn sheep in the Kofa National Wildlife Refuge in southwestern Arizona. Buse Declaration, Ex. D. As part of this study, mountain lions are captured by snaring, radio collared, and released. *Id*. This area is potential habitat for jaguars, and is within range of confirmed historical jaguar habitat. Buse Declaration, Ex. C (locations 32, 25, 14, and 30 are within about 120 miles of Kofa National Wildlife Refuge; 32 and 35 are in similar habitat). Jaguars, like the mountain lion subjects of the Kofa monitoring, prey on bighorn sheep. Buse Declaration, Exs. D and E. The potential exists for a wide-ranging jaguar to be snared, as Macho B was snared in the bear and mountain lion study. And as was the case with the bear and mountain lion study, if a jaguar was captured as part of the Kofa study or similar activity, the Department would likely rely on its asserted take authority under ESA Section 10(a)(1)(A).

None of these circumstances – the Department's assertion that it currently has authority under ESA Section 10(a)(1)(A) to take jaguars, the recommendation (and intent) to capture a jaguar in the future, nor the ongoing mountain lion studies – are

hypothetical or conjectural. The Department nonetheless suggests that the Center's allegations regarding the Department's ongoing violations of the ESA are "mere conjecture," insufficient to establish the *Ex Parte Young* exception to the sovereign immunity afforded by the Eleventh Amendment. Motion to Dismiss at 13. But the Department is confusing two distinct arguments – the jurisdictional claim that the Center has not alleged a continuing violation of law, and the claim on the merits that the Center has not adequately demonstrated that the continuing activity will violate the ESA. Here, the Center's complaint cites non-conjectural ongoing actions that it alleges may result in the unauthorized take of jaguars action, and thus falls within the *Ex Parte Young* exception. The Department may, and indeed does, contend that it is conjectural whether these actions will result in the take of jaguars. This contention, however, concerns the merits of the Center's action, and is not properly the province of a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *Proyecto San Pablo v. Immigration and Naturalization Serv.*, 189 F.3d 1130, 1138 (9th Cir. 1999). In contrast, in *Debauche v. Trani*, the Fourth Circuit case cited by the Department, the future events giving rise to the alleged ongoing violations were themselves purely conjectural; adjudication of the jurisdictional issues did not require consideration of the merits of the plaintiffs claims. 191 F.3d 499, 505 (4th Cir. 1999).

The facts that the Department has placed in dispute concern whether the Department's future actions will result in the unauthorized taking of jaguars. Motion to Dismiss at 13. These facts, however, are inextricably linked to the merits of the Center's claims. Adjudication of these claims will require the Court to determine

whether the Department's ongoing and future actions establish liability for the prohibited take of jaguars pursuant to Section 9(a)(1)(B) of the ESA, and whether the Department is authorized to take jaguars pursuant to Sections 10(a)(1)(A) and 10(a)(1)(B) of the ESA. 16 U.S.C. §§ 1538(a)(1)(B); 1539(a)(1)(A)-(B). Accordingly, the presumption of truthfulness still applies to all but the purely jurisdictional facts alleged by the Center. *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1196-97 (9th Cir. 2008), citing *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("a district court is permitted to resolve disputed factual issues bearing upon subject matter jurisdiction in the context of a Rule 12(b)(1) motion unless 'the jurisdictional issue and the substantive issues are so intermeshed that the question of jurisdiction is dependent on decision of the merits.'") The Department may not make a stealth attack on the merits of the Center's claims in the guise of a motion to dismiss for lack of jurisdiction.

The Center seeks prospective relief against a state official based on allegations that the Department's ongoing and future actions may result in the unauthorized take of jaguars. It has fully met its obligation of establishing subject matter jurisdiction in light of the Eleventh Amendment bar on suits against states to address wholly retrospective violations, and the Department's motion must fail. The Department's Eleventh Amendment argument, however, is misplaced on an even more fundamental level. This argument is founded on the Department's voluntary suspension of its bear and mountain lion study. But recognizing no legal impediment to its authority to capture, collar, and even kill jaguars as part of its conservation program, the Department may

resume trapping and snaring under the bear and mountain lion study at any time at the Department's discretion. Indeed, Department staff have recommended that the Department authorize the capture and collaring of "any age- and condition-appropriate jaguar" that occurs in the state, and the Department acknowledges that it intends to develop protocols to handle the capture of a jaguar in connection with large animal studies. Buse Declaration, Ex. A at 50; Motion to Dismiss at 9. It is thus reasonably foreseeable that the bear and mountain lion study will be resumed, tainted with the same legal deficiencies alleged in the Center's complaint. The Department's voluntary suspension of the study has not and cannot cure these deficiencies.

II. THE CENTER'S ACTION IS NOT MOOT

For reasons similar to those discussed in opposition to the Department's Eleventh Amendment argument, the Center's action is not moot. Federal courts lack jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. United States*, 506 US 9, 12 (1992). "A claim is moot if it has lost its character as a present, live controversy." *American Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997). Events occurring after a case is filed may render the case moot if they have "'completely and irrevocably eradicated the effects of the alleged violation.'" *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007), quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The party alleging mootness, however, bears a "heavy burden" in seeking

dismissal. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189 (2000). The moving party "must show that it is 'absolutely clear' that the allegedly wrongful behavior will not recur if the lawsuit is dismissed. *Rosemere Neighborhood Ass'n v. United States Environmental Protection Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009), citing *Laidlaw*, 528 U.S. at 189. "[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief." *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244-1245 (9th Cir. 1988).

Courts have long recognized an exception to mootness where a defendant voluntarily ceases the activity or behavior at issue. *Rosemere Neighborhood Ass'n*, 581 F.3d at 1173. The Supreme Court addressed this issue in *Laidlaw*:

> It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S. at 289. "If it did, the courts would be compelled to leave 'the defendant … free to return to his old ways.'" 455 U.S. at 289, n. 10 (citing *United States v. W. T. Grant Co.,* 345 U.S. 629, 632 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968). The "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Ibid*.

528 U.S. at 189 (parallel citations omitted).

Here, the Department has not met its heavy burden of showing that the Center's claims are moot, and in particular, it has failed to make it absolutely clear that the

activity it has voluntarily suspended will not be resumed. An actual case or controversy exists between the parties, and all the Center's requested relief is still available. As discussed in connection with the Department's Eleventh Amendment argument, the Department still asserts the authority to take jaguars in connection with its conservation program, and continues to authorize activities that may result in take of jaguars. Accordingly, the Court may still enjoin Defendants from violating Section 9 of the ESA by authorizing, administering, and allowing activities that take jaguars, and by capturing and/or collaring any jaguar unless and until the Department obtains a permit expressly authorizing such capture, as the Center requested. Complaint at 11-12. In addition, the Court may still issue a declaratory judgment that the Department does not have valid authority to take jaguars in connection with the bear and mountain lion study or any other activity, as the Center also requested. Complaint at 11.

According to the Department, it has voluntarily suspended trapping and snaring activities associated with its bear and mountain lion study. Motion to Dismiss at 8-9. This suspension does not renounce or otherwise address the Department's assertion that it currently has authority under ESA Section 10(a)(1)(A) to capture jaguars. Motion to Dismiss at 8; Motion to Dismiss Ex. C at 2. Indeed, the Department states that it will suspend trapping and snaring in connection with the bear and mountain lion study only until it has "confirmed the scope of the Department's existing permit authority to capture a jaguar in the course of its work" with the U.S. Fish and Wildlife Service. Motion to Dismiss at 9. Thus, not only does the Department's voluntary suspension of trapping under the bear and mountain lion study not address the relief sought by the

Center – which focuses on the Department's purported authority to take jaguars – but the Department also expressly acknowledges that it will resume trapping and snaring once this "existing authority" is confirmed.

Moreover, the Department's voluntary cessation of trapping and snaring associated with the bear and mountain lion study does not address the Center's allegations that other activities authorized by the Department may take jaguars. As discussed above in connection with the Department's Eleventh Amendment argument, the Department has authorized other mountain lion capture programs, including those in potential jaguar habitat in areas surrounding Tucson, Payson, and Prescott, and in the Kofa National Wildlife Refuge. Buse Declaration, Exs. B and D.

The Department has failed to demonstrate that its voluntary action has "completely and irrevocably eradicated the effects of the alleged violation." *Porter v. Bowen*, 496 F.3d at 1017. It has manifestly failed to make "absolutely clear" that the behavior the Center alleges violates the ESA will not recur if the lawsuit is dismissed. *Rosemere Neighborhood Ass'n*, 581 F.3d at 1173. On the contrary, the Department has signaled that this behavior will resume at the first opportunity. Motion to Dismiss at 9. The Department has thus failed to meet its "heavy burden" of demonstrating that the Center's claims are moot.

CONCLUSION

For the foregoing reasons, this action is not barred by the Eleventh Amendment and is not moot. Accordingly, the Center requests that the Court deny Defendants' Motion to Dismiss for Lack of Jurisdiction.

Respectfully Submitted this 9th day of December, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2009, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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