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*Sent via electronic and certified mail*

**RE: Sixty-day Notice of Intent to Sue for Violations of Endangered Species Act Consultation Requirements Regarding the Impacts of Domestic Livestock Grazing on Streamside and Aquatic Species and their Critical Habitat on National Forest Lands Within the Upper Gila River Watershed**

Dear Secretary Bernhardt, Chief Christiansen, Acting Director Everson, Regional Director Lueders, and Forest Supervisors Best and Mendonca:

On behalf of the Center for Biological Diversity (“Center”), this letter provides the U.S. Forest Service (“USFS”) and U.S. Fish and Wildlife Service (“FWS”) with Notice, pursuant to section 11(g) of the Endangered Species Act (“ESA”), that the Center intends to sue the agencies for not meeting their obligations under the ESA in relation to USFS’s authorizations of domestic livestock grazing within the Upper Gila River Watershed on the Apache-Sitgreaves and Gila National Forests. As detailed herein, this Notice alleges violations pertaining to USFS’s and FWS’s failures to reinitiate and complete consultation on actions approving grazing on individual allotments, as well as the Land and Resource Management Plan (“LRMP”) for each forest, in order to ensure that those decisions do not jeopardize the continued existence of the

many threatened or endangered species impacted by those grazing decisions, or adversely modify those species' designated critical habitat. Specifically, USFS and FWS have violated their ESA duties to reinitiate and complete consultation on decisions concerning 57 individual grazing allotments—37 on the Gila National Forest, and 20 on the Apache National Forest.

The Center is initiating this legal action after conducting intensive on-the-ground surveys (“rapid assessments”) documenting widespread and significant cattle damage within riparian areas ostensibly excluded from livestock.<sup>1</sup> For two decades, USFS has consistently met its ESA obligations to protect southwestern rivers and streams, their riparian areas, and the many imperiled species dependent upon those habitats from the impacts of domestic livestock grazing by committing to exclude those areas from grazing. The results of the rapid assessments, however, demonstrate a fundamental breakdown in the agencies' maintenance and monitoring of riparian exclosures that requires reinitiation of formal consultation and immediate measures to remove cows from occupied endangered species habitat.

## BACKGROUND

### A. The National Forests of the Upper Gila River Watershed

The Gila River originates in southwestern New Mexico and flows westward across Arizona to its confluence with the Colorado River north of Yuma (although much of the lower watershed is commonly dry). The upper portion of the watershed—defined as all of the land drained by that portion of the river and its tributaries east of Coolidge Dam—is largely comprised of federal lands, including National Forests (37%) and public lands administered by the Bureau of Land Management (20%).<sup>2</sup>

The Apache-Sitgreaves and Gila National Forests administer the large majority of national forest lands within the upper Gila River watershed.<sup>3</sup> Within the Gila National Forest, the West Fork, Middle Fork, and the East Fork Headwaters of the Gila River begin the river's journey from the heights of the rugged Mogollon Mountains, and the Black Range along the

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<sup>1</sup> Rapid Assessment of Cattle Impacts in Riparian Exclosures on the Gila National Forest (March 2018)(“Gila Assessment”)

[https://www.biologicaldiversity.org/programs/public\\_lands/grazing/pdfs/Gila-NF-Rapid-Assessment-of-Cattle-Impacts-Center-for-Biological-Diversity-March-2018.pdf](https://www.biologicaldiversity.org/programs/public_lands/grazing/pdfs/Gila-NF-Rapid-Assessment-of-Cattle-Impacts-Center-for-Biological-Diversity-March-2018.pdf);

Rapid Assessment of Cattle Impacts in Riparian Exclosures on the Apache-Sitgreaves National Forests (December 2018)(“Apache-Sitgreaves Assessment”)

[https://www.biologicaldiversity.org/programs/public\\_lands/grazing/pdfs/ASNF-Riparian-Cattle-Impacts-Survey-Dec-2018.pdf](https://www.biologicaldiversity.org/programs/public_lands/grazing/pdfs/ASNF-Riparian-Cattle-Impacts-Survey-Dec-2018.pdf).

The Center is currently finalizing a third rapid assessment conducted in 2019 on the Gila National Forest, which shows that conditions have not substantially improved since the 2017 survey.

<sup>2</sup> Atlas of the Upper Gila River Watershed, at p. 50. The remainder of the watershed is comprised of Indian lands (14%), private lands (16%), and state lands (13%).

<sup>3</sup> Relatively small areas of the Coronado National Forest and a tiny portion of the Tonto National Forest are also within the watershed.

continental divide. These headwaters join together to form the mainstem of the Gila River near the town of Glenwood, New Mexico. The river then flows south and west across the Arizona state line.

In Arizona, the Blue River drains a large portion of the Blue Range within the Apache National Forest as it flows southward, eventually joining the waters of the San Francisco River at the southern end of the range (although the San Francisco has its headwaters in Arizona, much of it flows through the Gila National Forest in New Mexico). These combined waters then flow into the larger Gila River.

Together, the upper Gila River, the San Francisco River, the Blue River, and their tributaries define an incomparable area that includes the first designated Forest Service wilderness (the Gila) and the last remaining Forest Service primitive area (the Blue Range). In addition to its high concentration of endangered species, the upper Gila and adjacent areas contain one of the world's largest ponderosa pine forests (and one of the first areas to successfully reintroduce fire to the landscape), which sustains abundant wildlife including wild turkeys, eagles, deer, pronghorn, elk, bighorn sheep, javelina, cougars, and black bears.

Unfortunately, persistent drought, dewatering, global warming, invasive species, and other impacts have taken an increasing toll on southwestern ecosystems, resulting in the recent listing of several additional threatened or endangered species dependent on southwestern riparian areas. Reflecting these impacts, and the looming threat of a major diversion project, the Gila was named the nation's most endangered river in 2019.<sup>4</sup>

## **B. Domestic Livestock Grazing Is a Primary Threat to Threatened and Endangered Species Dependent on Southwestern Streams and Riparian Areas**

Due in part to their undeveloped nature and remoteness, the national forests of the upper Gila River watershed are a refugia for many listed threatened and endangered species, including the yellow-billed cuckoo, southwestern willow flycatcher, Chiricahua leopard frog, narrow-headed and northern Mexican garter snakes, spikedace, loach minnow, and more. However, land use within the national forests often negatively impacts these species. Like the large majority of public lands within the arid west, the Gila and A-S National Forests routinely authorize domestic livestock grazing that poses significant environmental risks, particularly to streamside and riparian areas.

The literature on the impacts of livestock grazing on aquatic and riparian habitats in the Southwest is extensive and universally shows severe and lasting negative impacts such that near complete exclusion of cattle is widely accepted as the primary means of preserving stream health (Fleishner 1994, Ohmart 1996, Belsky et al. 1999). Livestock grazing has both direct and indirect effects on streams. Livestock directly affect riparian habitat through removal of riparian vegetation (Clary and Webster 1989, Clary and Medin 1990, Schulz and Leininger 1990, Armour et al. 1991, Fleishner 1994). Loss of riparian vegetation in turn raises water temperatures,

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<sup>4</sup> American Rivers, "America's Most Endangered Rivers of 2019 Spotlights Climate Change Threats." Available at: <https://endangeredrivers.americanrivers.org/>.

reduces bank stability and eliminates an important structural component of the stream environment that contributes to the formation of pools (Meehan et al. 1977, Kauffman and Krueger 1984, Minckley and Rinne 1985, Platts 1990, Fleishner 1994, Belsky et al. 1999). Grazing physically alters streambanks through trampling and shearing, leading to bank erosion (Armour 1977, Platts and Nelson 1989, Trimble and Mendel 1995). In combination, loss of riparian vegetation and bank erosion can alter channel morphology, including increased erosion and deposition, downcutting and an increased width/depth ratio, all of which lead to a loss of pool habitats and shallow side and backwater habitats used by several of the listed species that are the subject of this notice (see Trimble and Mendel 1995, and Belsky et al. 1999).

Livestock also indirectly impact aquatic and riparian habitats by compacting soils, altering soil chemistry and reducing vegetation cover in upland areas, leading to increased severity of floods and sediment loading, lower water tables and altered channel morphology (Cooperrider and Hendricks 1937, Sartz and Tolsted 1974, Gifford and Hawkins 1976 and 1978, Blackburn et al. 1982, Ohmart and Anderson 1982, Harper and Marble 1988, Marrs et al. 1989, Orodho et al. 1990, Schlesinger et al. 1990, Elmore 1992, Belsky et al. 1999). One consequence of these impacts to watersheds is a reduction in the quantity and quality of pool habitat. A lowered water table, for example, results in direct loss of pool habitats, simply because water is not available to form pools. Increased erosion and sedimentation results in filling of pools with sediments. Channel incision and increased flood severity both can scour out pools, reducing habitat complexity and resulting in shallow, uniform streambeds, all of which harms the species included in this notice (see Trimble and Mendel 1995, Belsky et al. 1999).

Because of the severity and broad array of these impacts, livestock grazing is one of the most prevalent causes of species being federally listed in this region, and has documented negative impacts on the eight (8) threatened and endangered species at issue in this Notice, all of which are specifically dependent on aquatic and riparian habitat: *Yellow-billed cuckoo (western DPS)*: Listed as threatened October 3, 2014 (79 Fed. Reg. 59991); proposed critical habitat November 12, 2014 (79 Fed. Reg. 67154); *Southwestern willow flycatcher*: Listed as endangered February 27, 1995 (60 Fed. Reg. 10695); final critical habitat January 3, 2013 (78 Fed. Reg. 343); *Gila chub*: Listed as endangered November 2, 2005 (70 Fed. Reg. 66664); final critical habitat November 2, 2005 (70 Fed. Reg. 66664); *Loach minnow and spikedace*: Uplisted to endangered February 23, 2012 (77 Fed. Reg. 10810); final critical habitat February 23, 2012 (77 Fed. Reg. 10810); *Chiricahua leopard frog*: Listed as threatened June 13, 2002 (67 Fed. Reg. 40657); final critical habitat March 30, 2012 (77 Fed. Reg. 16324); *Northern Mexican garter snake and narrow-headed garter snake*: Listed as threatened July 8, 2014 (79 Fed. Reg. 38677); proposed critical habitat July 10, 2013 (78 Fed. Reg. 41549).

### **C. Two Decades Ago, USFS Committed to Remove Cattle from Southwestern Riparian Areas In Order to Meet Its Endangered Species Act Duties**

Prior to the late 1990s, USFS routinely authorized cattle grazing on Southwestern streams and riparian areas despite the mounting evidence of its devastating impacts on those areas and the imperiled species that depend upon them.

In *Southwest Center for Biological Diversity v. U.S. Forest Service*, the Center sued USFS for its failure to fulfill its Endangered Species Act section 7 consultation duties with respect to the impacts of 158 grazing allotments on southwestern willow flycatcher, loach minnow, and spikedace.<sup>5</sup> Under the resultant April 1998 settlement agreement, USFS agreed to immediately remove cattle from 99 percent of riparian habitats within the allotments at issue until FWS issued a biological opinion.

These obligations catalyzed USFS, in cooperation with FWS, to develop “Grazing Guidance Criteria,” and to apply those criteria to all 962 grazing allotments within USFS Region 3 (Southwestern Region).<sup>6</sup> For nearly two-thirds of these allotments (619), USFS conducted no consultation with FWS at all, but instead concluded that there would be no effect to listed species or their critical habitat. The remaining 321 allotments concluded with not likely to adversely affect determinations.<sup>7</sup>

USFS made likely to adversely affect findings for only 22 allotments (comprising just over 2 percent of all allotments in USFS R3). All of these findings were made in relation to one species, the loach minnow. In 1999, “FWS concluded that the impacts of grazing on 21 of the 22 allotments reviewed would not jeopardize the continued existence of the loach minnow.”<sup>8</sup>

The Center challenged the ‘no jeopardy’ finding. While the court granted USFS a voluntary remand to improve its analysis on eleven of those allotments<sup>9</sup>, it denied the Center’s motion to enjoin grazing pending the completion of that analysis. The court’s denial was based primarily on USFS’s commitment to prohibit cattle from riparian areas:

Injunctive relief is not warranted as to these allotments because there has not been a sufficient showing of irreparable harm ... [*USFS*] has taken numerous measures to ensure that cattle grazing will have little, if any, impact on the loach minnow and spikedace while formal consultation is taking place. These measures include exclusion of livestock from watersheds and frequent monitoring and enforcement of these livestock exclusions. Exclusion of livestock from [*streams*] in the national forests has eliminated any direct adverse effects to the loach minnow and/or spikedace and minimized any indirect adverse impacts to these species. Exclusion of livestock has also resulted in improved conditions on the allotments and along the [*streams*]. These improvements, which have taken place despite

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<sup>5</sup> D. Ariz. CV-97-TUC-JMR.

<sup>6</sup> See *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 2001 U.S. Dist. LEXIS 25027, \*6-8 (D. Ariz. Mar. 30, 2001)(emphasis added).

<sup>7</sup> *Id.*, at \* 9-10.

<sup>8</sup> *Id.*, at \* 11.

<sup>9</sup> *Id.*, at \*120. Ten of the eleven allotments are again at issue in this Notice (Alma, Black Bob, Devil’s Park, Dry Creek, Frisco Plaza, Kelly, Roberts Park, Harve Gulch, Hickey, and Mud Springs).

continued cattle grazing, demonstrate that irreparable harm is not likely to occur while formal consultation is taking place.<sup>10</sup>

Since that time, grazing exclusions, as well as annual monitoring to ensure the effectiveness of those exclusions, have served as a cornerstone for USFS ESA compliance in relation to its grazing program and individual decisions.

**D. USFS Grazing Authorizations Continue to Rely upon the Full and Effective Exclusion of Cows from Riparian Areas as a Basis for Endangered Species Act Compliance**

For two decades, the agencies have continued to rely upon the purported exclusion of cattle from riparian areas and consistent USFS monitoring as a foundation for their section 7 process addressing livestock generally, and for the specific decisions authorizing grazing on the individual allotments identified in this Notice. Today, USFS and FWS continue to utilize the Grazing Criteria developed in the late 1990s, now called “Master Framework for Streamlining Consultation on Livestock Grazing Activities” (December 2015). Like past consultations, the impacts of domestic livestock grazing on endangered riparian species are determined to be insignificant based largely on the presumption that their streamside habitat is excluded from cattle, including the specific waters at issue in this Notice. *See, e.g.*, Master Framework, at p. 68 (“Riparian areas on National Forest System lands have been excluded from livestock grazing to protect habitat along the Gila, San Francisco, Tularosa River, Negrito Creek, Verde, Blue, North Fork East Fork Black Rivers, and Campbell Blue and Eagle Creeks”).<sup>11</sup> This presumption is also reflected in FWS documents. *See, e.g.*, Final Rule uplisting loach minnow and spikedace to endangered. 77 Fed. Reg. at 10817 (“Livestock grazing has been one of the most widespread and long-term causes of adverse impacts to native fishes and their habitat, but is one of the few threats where adverse impacts to species such as spikedace and loach minnow are decreasing, due to improved management on Federal lands. This improvement occurred primarily by discontinuing grazing in the riparian and stream corridors.”).

**E. The Center Conducted Assessments Documenting Intensive Riparian Degradation by Cattle Throughout the Upper Gila Watershed on the Apache and Gila National Forests**

In 2017, the Center conducted a rapid assessment to determine if cattle are present within riparian areas excluded from grazing on twenty-seven (27) allotments in the Gila National Forest, and to document the extent and intensity of impacts from cattle grazing across those ecosystems. This survey encompassed 17 allotments included in the 1998 settlement, 10 allotments containing proposed yellow-billed cuckoo critical habitat, and four allotments formally classified by USFS as vacant or retired (but which contained cows). The survey documented:

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<sup>10</sup> *Id.*, at \*120-121 (emphasis added); *see also id.*, at \*123 (again repeating finding that injunction is not warranted because exclusion of livestock will protect watersheds generally, and loach minnow and spikedace in particular).

<sup>11</sup> Master Framework, at p. 68.

Across the Gila National Forest there are widespread examples of fences down and in disrepair between private property and Forest Service land. This presents virtually unlimited access for cattle to cross into excluded areas ... Throughout the majority of these riparian areas that are supposed to be excluded from grazing there is intense pressure on native grasses resulting in their displacement with non-palatable invasive plants. Soil compaction and denuded soils are widespread across the landscape and there are sheared streambanks along many miles of both the Gila and San Francisco Rivers. Browse pressure by cattle is causing the full suppression of woody generation along miles of waterways and preventing the restoration of critical habitat.”<sup>12</sup>

In 2018, the Center conducted a similar rapid assessment on twenty (20) allotments in the Apache-Sitgreaves National Forest. This survey encompassed 19 allotments included in the 1998 settlement, and 4 allotments containing proposed yellow-billed cuckoo critical habitat. The survey documented:

Cattle signs were recent in over half the allotments and cattle were seen and documented in restricted riparian areas in 11 out of the 20 allotments. In almost half of all riparian areas surveyed, there is intense pressure on native grasses resulting in their replacement with non-palatable invasive plants. Soil compaction and denuded soils are widespread across these impacted landscapes and trampled streambanks are common. Browsing pressure by cattle is suppressing woody plant regeneration along the majority of surveyed waterways, thus preventing the natural renewal of critical wildlife habitats and threatening the recovery of listed species. By far the most severely impacted streams are on the Clifton Ranger District, especially the Blue and San Francisco Rivers and Eagle Creek.<sup>13</sup>

The Center has provided both the Gila and Apache-Sitgreaves Rapid Assessments to USFS, but the agency has not taken remedial action.

## **VIOLATIONS OF THE ENDANGERED SPECIES ACT**

### **A. Failure to Reinitiate and Complete Consultation (Section 7(a)(2))**

Section 7(a)(2) of the Endangered Species Act contains both procedural and substantive mandates. Substantively, it prohibits federal agencies from taking actions that: (1) jeopardize the continued existence of listed species; or (2) destroy or adversely modify designated critical habitat.<sup>14</sup> Agency “action” is defined broadly under the ESA implementing regulations to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.”<sup>15</sup>

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<sup>12</sup> Gila Assessment, at p. 7.

<sup>13</sup> Apache-Sitgreaves Assessment, at p. 4.

<sup>14</sup> 16 U.S.C. § 1536(a)(2).

<sup>15</sup> 50 C.F.R. § 402.02 (emphasis added).

The consultation process is the vehicle for ensuring the substantive protections of section 7 are achieved.<sup>16</sup> During the consultation process, both agencies must “use the best scientific and commercial data available.”<sup>17</sup> The formal consultation process culminates with FWS preparing a “biological opinion” as to whether the action is likely to jeopardize the species or destroy or adversely modify critical habitat and, if so, suggests “reasonable and prudent alternatives” to avoid that result.<sup>18</sup>

Agencies must reinitiate consultation on agency actions if:

- (a) The amount or extent of taking specified in the incidental take statement is exceeded;
- (b) New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) The identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) A new species is listed or critical habitat designated that may be affected by the identified action.<sup>19</sup>

The reinitiation duty applies equally to formal and informal consultation (*i.e.* including not likely to adversely affect determinations made in a USFS Biological Assessment).<sup>20</sup> During the consultation process, USFS is prohibited from making any irreversible or irretrievable commitment of resources with respect to domestic livestock grazing decisions which may foreclose the formulation or implementation of any reasonable and prudent measures.<sup>21</sup>

For two decades, the agencies have relied on the purported exclusion of cattle from southwestern rivers and streams as a foundation for their section 7 process addressing livestock generally, and the specific individual allotments identified in this Notice. As described in detail above, the Center has provided USFS with documentation of extensive riparian use by cattle, undermining the legality of these assumptions.

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<sup>16</sup> See *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011) (describing consultation process as “the heart of the ESA.”)

<sup>17</sup> 16 U.S.C. § 1536(a)(2); 50 CFR § 402.14(d).

<sup>18</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>19</sup> 50 C.F.R. § 402.16(a)-(d)

<sup>20</sup> *Wild Equity Inst. v. United States Env'tl. Prot. Agency*, 147 F. Supp. 3d 853, 862 n. 4 (N.D. Cal. 2015) (“Although § 402.16 is entitled ‘Reinitiation of Formal Consultation,’ the reinitiation requirement applies to both formal and informal consultation.”).

<sup>21</sup> 16 U.S.C. § 1536(d).



The USFS and FWS were required to reinitiate and complete consultation when presented with evidence documenting extensive cattle use (and associated apparent lack of USFS monitoring) within the riparian streamside areas of specific allotments within the upper Gila River watershed on the Apache-Sitgreaves and Gila National Forests. The USFS's failure in fact to exclude domestic livestock from occupied threatened and endangered species habitat undermines the agencies' conclusions regarding the impact of those specific grazing authorizations on listed species and their designated critical habitat, and specifically triggers the reinitiation thresholds at § 402.16(a), (b), and (c).

Accordingly, the Center provides USFS and FWS Notice that their failure to reinitiate and complete consultation on final agency actions, including the issuance of term grazing permits, allotment management plans ("AMPs") and annual operating instructions ("AOIs") or plans ("AOPs"), authorizing grazing on the fifty-six (56) allotments identified in the following Tables is in violation of section 7(a)(2) of the Endangered Species Act. With limited exceptions, all of the individual allotments identified in this Notice were found to have significant riparian impacts from cattle during the Center's assessments. Conversely, individual allotments found to have absent or light impacts are not included in this Notice.<sup>22</sup>

### ***1. Apache-Sitgreaves National Forests Allotments (AZ)***

USFS and FWS must reinitiate and complete consultation on each of the individual allotments identified in the below Tables, organized by watershed (Blue River, Eagle Creek, and San Francisco River) and indicating the critical habitat designations for the 8 threatened and endangered species identified in this Notice.

On information and belief, the 20 Apache National Forest allotments identified in this Notice have most recently been considered in separate (though sometimes batched) consultation decisions.<sup>23</sup> In these consultations, the agencies reached "may affect, not likely to adversely affect" findings based on the presence of livestock enclosures. These decisions include:

*FWS Biological Opinion for the Wildbunch allotment (May 16, 2016):* "The Blue River remains fenced and excluded from grazing except for transport of cattle on an as-needed basis" (p. 3);

*FWS concurrence on USFS Biological Assessment for allotments including Raspberry (August 28, 2015):* "To protect loach minnow and its critical habitat, livestock were excluded from the Oak Creek Pasture and the Raspberry Holding Pasture on Raspberry Allotment for the term of the permit, thereby excluding

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<sup>22</sup> In addition, this Notice does not include surveyed allotments outside of the Upper Gila River watershed on the Apache-Sitgreaves National Forests, including allotments in the Little Colorado River and Salt River watersheds.

<sup>23</sup> On information and belief, USFS and FWS are conducting consultation on batched allotments including Dark Canyon, Double Circle, East Eagle, Mud Springs, and Tule, as well as a separate consultation on batched allotments including Pleasant Valley and Pigeon, but a final Biological Opinion has not yet been issued concluding either consultation.

cattle from the Blue River” (p.5); concurring in NLAA finding for narrow-headed gartersnake based on statement that both Blue River and Campbell Blue Creek “are excluded from livestock grazing” (p. 9);

FWS concurrence letter with USFS Biological Assessment for allotments including Cow Flat, Fishhook/Steeple Mesa, and Red Hill (December 12, 2015): “Livestock will not access ASNFs-administered lands on the Blue River, including 300 feet on either side of the river.” (p. 7); “Approximately 10 miles of the Blue River are also on these allotments. There is no current riparian condition information for any of the riparian areas on the allotment. However, the Blue River has been excluded from livestock grazing since 1995.” (p.8).

USFS’s failure in fact to exclude domestic livestock from occupied threatened and species habitat undermines the agencies’ conclusions regarding the impact of final agency actions, including the issuance of term grazing permits, AMPs, and AOIs or AOPs, authorizing grazing on the 20 Apache National Forest allotments identified in the following tables on listed species and their designated critical habitat, and specifically triggers the reinitiation thresholds at § 402.16(a), (b), and (c).

## 2. *Gila National Forest Allotments (NM)*

USFS and FWS must reinitiate and complete consultation on each of the individual allotments identified in the below Tables, organized by watershed (Gila Headwaters, Gila River, Tularosa River, and San Francisco River) and indicating the critical habitat designations for the 8 threatened and endangered species identified in this Notice.

Nearly all of the 37 Gila National Forest allotments identified in this Notice were considered together in a batched consultation on USFS Biological Assessments prepared for 44 allotments within the forest that concluded with a July 11, 2016 FWS concurrence. The agencies used the Guidance Criteria for determining effects, all of which are “may affect, not likely to adversely affect.”<sup>24</sup> As summarized by FWS, “we find that the management of these 44 grazing allotments analyzed in the grazing forms will adhere to the Guidance Criteria, and we anticipate that allowable use guidelines and utilization monitoring will provide a mechanism for livestock use adjustments.”<sup>25</sup> USFS states that it will conduct “annual confirmation . . . to ensure the criteria for the findings continues to be met.”<sup>26</sup>

The Guidance Criteria premises “may affect, not likely to adversely” affect findings for aquatic and riparian species on the exclusion of cattle from their habitat. For example, in addressing listed fish species “reasonably certain to occur in the action area,” the Guidance Criteria directs that a “may affect, not likely to adversely affect” finding may only be made if

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<sup>24</sup> July 12, 2016 FWS concurrence letter, at p. 2 (“For the ‘may affect, not likely to adversely affect’ determinations to remain in effect for the life of the term permits, annual confirmation must take place to ensure the criteria for the findings continue to be met.”).

<sup>25</sup> July 12, 2016 FWS concurrence letters, at p. 3.

<sup>26</sup> July 12, 2016 FWS concurrence letters, at p. 2.

“[d]irect effects to listed species will be avoided by *yearlong exclusion of livestock from occupied [] species habitats in the action area.*”<sup>27</sup> Similar criteria are established for the narrow-headed garter snake (“may affect, not likely to adversely affect” finding may only be made if “[t]here will be no livestock use or livestock management activities where the species is reasonably certain to occur or where there is occupied habitat”)<sup>28</sup> and northern Mexican garter snake (same).<sup>29</sup>

Moreover, these assumptions of exclusions are the foundation of the biological assessment packets provided by USFS to FWS. *See, e.g.*, Kelly allotment BA, at p.1 (“The San Francisco River continues to be excluded to livestock grazing with the exception of four waterlanes”); *id.* at p. 6 (“Fencing of the San Francisco to exclude livestock started in 1998 and was completed in 2000.”); *id.* at p. 8 (“Direct effects to narrow-headed gartersnake will be avoided by yearlong exclusion of livestock from occupied species habitat in the action area”).

USFS’s failure in fact to exclude domestic livestock from occupied threatened and species habitat undermines the agencies’ conclusions regarding the impact of final agency actions, including the issuance of term grazing permits, AMPs, and AOIs or AOPs, authorizing grazing on the 37 Gila National Forest allotments identified in the following tables on listed species and their designated critical habitat, and specifically triggers the reinitiation thresholds at § 402.16(a), (b), and (c).

### ***3. Apache-Sitgreaves and Gila National Forests Land and Resource Management Plans***

Similar to the consultation decisions on individual allotments, the section 7 consultation processes for both the Apache-Sitgreaves National Forests and Gila National Forest—as those processes pertain to domestic livestock grazing—also rest on a foundation that assumes effective enclosure of cattle from riparian areas.

For example, in a recent ESA section 7(d) determination, USFS concluded that continued implementation of the Gila LRMP will not result in an irreversible or irretrievable commitment of resources foreclosing implementation of conservation measures for the western yellow-billed cuckoo. Its conclusion was based on the continued exclusion of cattle from riparian areas. *See* Memorandum, at p. 2 (“[I]n 1998 the Forest completed Section 7 consultations on all grazing

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<sup>27</sup> Guidance Criteria, at p. 80 (emphasis added). In addition, USFS must also demonstrate that “[i]ndirect effects to listed species occurring within the action area which result from upland livestock grazing are determined to be insignificant or discountable as measured through quantitative or qualitative measures such as watershed health and condition, use levels, or sedimentation in critical habitat.”

<sup>28</sup> Guidance Criteria, at p. 127.

<sup>29</sup> Guidance Criteria, at p. 132.

allotments. In conjunction with this consultation livestock were removed from hundreds of miles of riparian habitats.”<sup>30</sup>

The May 13, 2015 biological opinion for the A-S LRMP makes similar assumptions regarding riparian exclosures throughout its text. For example, in addressing impacts to listed fish (including spikedace, loach minnow, and Gila chub), FWS states that “[l]ivestock access to occupied habitat is excluded or limited in many areas due to exclosures, pasture management, and rough terrain.”<sup>31</sup>

Similar to the duty to reinstate with respect to individual allotments, USFS’s failure in fact to exclude domestic livestock from occupied threatened and species habitat undermines the agencies’ conclusions regarding the impact of the Apache-Sitgreaves and Gila LRMPs on listed species and their designated critical habitat, and specifically triggers the reinstatement thresholds at § 402.16(a), (b), and (c).

## **B. Section 7(d) Violations**

Allowing livestock grazing on the identified allotments to continue, particularly grazing within riparian areas, is a violation of section 7(d) of the Endangered Species Act, which prohibits any irreversible or irretrievable commitment of resources that would foreclose the formulation or implementation of any reasonable or prudent alternative measures to minimize take of listed species.<sup>32</sup> Section 7(a)(1) “contains a congressional directive that agencies must act affirmatively in the interest of listed species.”<sup>33</sup>

## **C. Section 7(a)(1) Violations**

Section 7(a) of the Endangered Species Act requires federal agencies to “utilize their authorities in furtherance of the purposes [of the ESA] by carrying out programs for the conservation of endangered species and threatened species” listed under the Act.<sup>34</sup> A program carried out for the purpose of “conservation” is one that helps bring a listed species to the point of recovery and delisting.<sup>35</sup> Federal agencies do not satisfy their section 7(a)(1) duties when their conservation measures are not reasonably likely to help recover listed species.<sup>36</sup> An agency’s conservation efforts may be so ineffective that they amount to “total inaction” and violate section 7(d).<sup>37</sup> As detailed in this Notice, the widespread and significant cattle damage in

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<sup>30</sup> October 15, 2014 ESA 7(d) Determinations for the continued implementation of the Gila [LRMP] for Western yellow-billed cuckoo, *Coccyzus americanus*. (Memorandum from Gila National Forest Supervisor).

<sup>31</sup> A-S LRMP Biological Opinion, at p. 117.

<sup>32</sup> 16 U.S.C. § 1536(d).

<sup>33</sup> *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

<sup>34</sup> 16 U.S.C. § 1536(a)(1).

<sup>35</sup> 16 U.S.C. § 1532(3).

<sup>36</sup> *Fla. Key Deer v. Paulson*, 522 F.3d 1433, 1446-47 (11th Cir. 2008).

<sup>37</sup> *Id.*

riparian areas throughout the Apache-Sitgreaves and Gila National Forest allotments within the upper Gila River watershed, and the apparent associated lack of USFS monitoring of those exclusions, demonstrates that USFS is also not fulfilling its ESA section 7(1) obligations.

### **CONCLUSION**

This Notice is provided pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1140(g), on behalf of Center for Biological Diversity. If USFS and FWS do not remedy this violation within the next 60 days, the Center intends to file suit in federal court. Please contact me should you have any questions or if you would like to discuss this matter.

Sincerely,



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**TABLES OF GRAZING ALLOTMENTS**  
**REQUIRING REINITIATION OF CONSULTATION**  
 (Organized by sub-watersheds,  
 with critical habitats)

Blue River (Apache NF/AZ)								
Allotment	YB Cuckoo (PCHD)	SWWF	Gila chub	Loach minnow	Spike dace	C. leopard frog	NHG snake (PCHD)	NMG snake (PCHD)
Upper Campbell Blue**							X	
Red Hill				X	X		X	
Cow Flat				X	X		X	
Fishhook/ Steeple Mesa				X	X		X	
Raspberry				X	X		X	
Sandrock*	X			X	X		X	
Pigeon	X			X	X		X	

Eagle Creek (Apache NF/AZ)								
Allotment	YB Cuckoo (PCHD)	SWWF	Gila chub	Loach minnow	Spike dace	C. leopard frog	NHG snake (PCHD)	NMG snake (PCHD)
Strayhorse**			X					
East Eagle			X	X	X		X	
Mud Springs			X	X	X		X	
Double Circle				X	X		X	
Tule				X	X		X	
Dark Canyon				X	X		X	

<b>San Francisco River (Apache NF/AZ)</b>								
<b>Allotment</b>	<b>YB Cuckoo (PCHD)</b>	<b>SWWF</b>	<b>Gila chub</b>	<b>Loach minnow</b>	<b>Spike dace</b>	<b>C. leopard frog</b>	<b>NHG snake (PCHD)</b>	<b>NMG snake (PCHD)</b>
<b>Williams Valley**</b>		<b>x</b>					<b>x</b>	
<b>Alpine**</b>		<b>x</b>					<b>x</b>	
<b>Coyote-Whitmer**</b>		<b>x</b>					<b>x</b>	
<b>Copperas**</b>		<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>Wildbunch (also on Blue River)</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>Pleasant Valley</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>	<b>x</b>	<b>x</b>	

<b>Headwaters (West, Middle &amp; East Forks of the Gila River) (Gila NF/NM)</b>								
<b>Allotment</b>	<b>YB Cuckoo (PCHD)</b>	<b>SWWF</b>	<b>Gila chub</b>	<b>Loach minnow</b>	<b>Spike dace</b>	<b>C. leopard frog</b>	<b>NHG snake (PCHD)</b>	<b>NMG snake (PCHD)</b>
<b>South Fork**</b>							<b>X</b>	
<b>Corduroy</b>						<b>X</b>		
<b>Jordan Mesa</b>				<b>X</b>	<b>X</b>		<b>X</b>	
<b>Diamond Bar**</b>				<b>X</b>	<b>X</b>	<b>X</b>	<b>X</b>	
<b>Taylor Creek</b>				<b>X</b>	<b>X</b>	<b>X</b>	<b>X</b>	
<b>XSX</b>				<b>X</b>	<b>X</b>		<b>X</b>	<b>X</b>

<b>Gila River (Gila NF/NM)</b>								
<b>Allotment</b>	<b>YB Cuckoo (PCHD)</b>	<b>SWWF</b>	<b>Gila chub</b>	<b>Loach minnow</b>	<b>Spike dace</b>	<b>C. leopard frog</b>	<b>NHG snake (PCHD)</b>	<b>NMG snake (PCHD)</b>
<b>Redstone*</b>				<b>X</b>	<b>X</b>		<b>X</b>	<b>X</b>
<b>Cow Creek*</b>				<b>X</b>	<b>X</b>		<b>X</b>	<b>X</b>
<b>Reading Mtn.</b>				<b>X</b>	<b>X</b>		<b>X</b>	<b>X</b>
<b>Brock Canyon*</b>		<b>X</b>	<b>X</b>	<b>X</b>	<b>X</b>		<b>X</b>	<b>X</b>
<b>Bear Creek**</b>				<b>X</b>				
<b>Gila River</b>	<b>X</b>	<b>X</b>		<b>X</b>	<b>X</b>		<b>X</b>	<b>X</b>



<b>Tularosa River (Gila NF/NM)</b>								
<b>Allotment</b>	<b>YB Cuckoo (PCHD)</b>	<b>SWWF</b>	<b>Gila chub</b>	<b>Loach minnow</b>	<b>Spike dace</b>	<b>C. leopard frog</b>	<b>NHG snake (PCHD)</b>	<b>NMG snake (PCHD)</b>
<b>Corner Mtn.</b>							<b>x</b>	
<b>Negrito/ Yeguas</b>						<b>x</b>	<b>x</b>	
<b>West Apache Creek**</b>						<b>x</b>		
<b>Govina</b>						<b>x</b>	<b>x</b>	
<b>Alexander</b>				<b>x</b>		<b>x</b>	<b>x</b>	
<b>Deep Canyon</b>				<b>x</b>		<b>x</b>	<b>x</b>	
<b>Lower Plaza</b>				<b>x</b>			<b>x</b>	

<b>San Francisco River (Gila NF/NM)</b>								
<b>Allotment</b>	<b>YB Cuckoo (PCHD)</b>	<b>SWWF</b>	<b>Gila chub</b>	<b>Loach minnow</b>	<b>Spike dace</b>	<b>C. leopard frog</b>	<b>NHG snake (PCHD)</b>	<b>NMG snake (PCHD)</b>
<b>Luna</b>		<b>x</b>					<b>x</b>	
<b>Laney</b>		<b>x</b>					<b>x</b>	
<b>Black Bob</b>				<b>x</b>			<b>x</b>	
<b>Frisco Plaza</b>				<b>x</b>	<b>x</b>		<b>x</b>	
<b>Pueblo Creek**</b>							<b>x</b>	
<b>Kelly</b>				<b>x</b>	<b>x</b>		<b>x</b>	
<b>Devil's Park</b>				<b>x</b>	<b>x</b>		<b>x</b>	
<b>Alma</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>White Rocks**</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>Citizen/Roberts Park***</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>Harve Gulch/Bighorn***</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>Pleasanton</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>Dry Creek</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>		<b>x</b>	
<b>Potholes</b>				<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>
<b>Harden Cienega**</b>			<b>x</b>	<b>x</b>	<b>x</b>		<b>x</b>	<b>x</b>

\* Allotments which are officially classified as vacant, unstocked, or closed by USFS, but which contained significant cattle impacts within riparian areas.

\*\* Allotments for which Center surveys are pending and will be conducted this year.

\*\*\* Allotments which border each other within a specific riparian area are listed together.

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