

1 Brian Segee (Cal. Bar No. 200795)
2 Center for Biological Diversity
3 660 S. Figueroa Street, Suite 1000
4 Los Angeles, CA 90017
5 Tel: (805) 750-8852
6 Email: bsegee@biologicaldiversity.org
7 *Pro Hac Vice Application Pending*

8 Marc Fink (Minn. Bar No. 343407)
9 Center for Biological Diversity
10 209 East 7th Street
11 Duluth, MN 55805
12 Tel: (218) 464-0539
13 Email: mfink@biologicaldiversity.org
14 *Pro Hac Vice Application Pending*

15 Attorneys for Plaintiff

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE DISTRICT OF ARIZONA**
18 **TUCSON DIVISION**

19 Center for Biological Diversity, a non-
20 profit organization,

21 Plaintiff,

22 v.

23 U.S. Forest Service; and U.S. Fish and
24 Wildlife Service,

25 Defendants.

Case No.: _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff Center for Biological Diversity (“Center”) brings this action against the U.S. Forest Service (“USFS”) and U.S. Fish and Wildlife Service (“FWS”) (collectively, “the Agencies”) for violations of the Endangered Species Act (“ESA”) arising from USFS final agency actions authorizing domestic livestock grazing on more

1 than 30 grazing allotments within the upper Gila River watershed on the Apache-
2 Sitgreaves and Gila National Forests.

3 2. The aquatic and streamside riparian habitats of the upper Gila River
4 watershed within the Apache-Sitgreaves and Gila National Forests are occupied by listed
5 threatened and endangered species including the yellow-billed cuckoo, southwestern
6 willow flycatcher, Chiricahua leopard frog, Gila chub, narrow-headed and northern
7 Mexican garter snakes, spikedace, and loach minnow.

8 3. Like the large majority of Federal public lands within the arid west, the
9 Apache-Sitgreaves and Gila National Forests routinely authorize domestic livestock
10 grazing on individual grazing allotments through the issuance of term grazing permits,
11 allotment management plans (“AMPs”), and allotment annual operating instructions
12 (“AOIs”).

13 4. Scientific study of the impacts of livestock grazing on aquatic and riparian
14 habitats in the Southwest is extensive and universally shows severe and lasting negative
15 impacts such that near complete exclusion of cattle is widely accepted as an essential
16 cornerstone for preserving stream health, water quality and quantity, and endangered
17 species habitat within grazed areas.

18 5. For two decades, the Agencies have committed to the exclusion of cattle
19 from riparian areas—typically through fencing—as a foundation for meeting their
20 obligations under the Endangered Species Act to ensure that USFS’s grazing
21 authorizations do not jeopardize the continued existence of endangered species, or result
22 in the destruction or adverse modification of their designated critical habitat.
23 Specifically, in carrying out their consultation duties pursuant to section 7 of the ESA for
24 the individual grazing allotment authorizations challenged in this action, the Agencies
25 have determined that the effects of domestic livestock grazing are not likely to adversely
26 impact endangered species dependent on aquatic and riparian habitat based largely on
27 commitments to exclude this streamside habitat from cattle and to have USFS regularly
28 monitor riparian areas to ensure that the fencing exclusions remain intact and effective.

1 6. Plaintiff Center for Biological Diversity conducted on-the-ground
2 assessments to determine if cattle are present within riparian areas excluded from cattle
3 on grazing allotments in the Apache-Sitgreaves and Gila National Forests in 2017, 2018,
4 and 2019. These assessments documented that the purported fencing exclusions were
5 frequently in disrepair or simply nonexistent, resulting in widespread unauthorized cattle
6 presence with associated damage to riparian areas and occupied or suitable endangered
7 species habitat. The Center provided these assessments to USFS.

8 7. The ESA places ongoing obligations on federal agencies to ensure that their
9 actions do not jeopardize the continued existence of endangered species or adversely
10 modify or destroy their designated critical habitat, including the duty to reinitiate section
11 7 consultations in four circumstances. 50 C.F.R. § 402.16(a)(1)-(4). Agencies must
12 reinitiate consultation, for example, “[i]f the amount or extent of taking specified in the
13 incidental take statement is exceeded,” when “[n]ew information reveals effects of the
14 action that may affect listed species or critical habitat in a manner or to an extent not
15 previously considered,” or when “[t]he identified action is subsequently modified in a
16 manner that causes an effect to the listed species or critical habitat that was not
17 considered in the biological opinion.” *Id.* § 402.16(a)(1)-(3).

18 8. The Agencies were required to reinitiate and complete consultation when
19 presented with evidence documenting extensive cattle use and associated lack of USFS
20 monitoring within the riparian streamside areas of specific allotments within the upper
21 Gila River watershed in the Apache-Sitgreaves and Gila National Forests. The USFS’s
22 failure in fact to exclude domestic livestock from occupied threatened and endangered
23 species habitat, and designated critical habitat, or to take immediate corrective action to
24 remedy these failures, undermines the Agencies’ conclusions regarding the impact of
25 those specific grazing allotment authorizations on listed species and their designated
26 critical habitat, and specifically triggers the reinitiation thresholds at 50 C.F.R.
27 § 402.16(a).

28

1 9. Plaintiff provided sixty (60) days' Notice of its Intent ("NOI") to file this
2 suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g), by letter to the
3 Agencies dated July 17, 2019.

4 10. On October 16, 2019, the USFS Southwestern Regional Forester responded
5 to Plaintiff's NOI. The response does not resolve the ESA violations alleged in
6 Plaintiff's NOI. Accordingly, Plaintiff seeks declaratory and injunctive relief to enforce
7 the ESA's requirements with respect to USFS agency actions authorizing grazing on the
8 specific allotments discussed further below and listed in **Table 1** (organized by National
9 Forest, and then by river or stream).

10 JURISDICTION AND VENUE

11 11. This Court has jurisdiction over this action pursuant to 16 U.S.C.
12 § 1540(c),(g) (action arising under ESA citizen suit provision); 5 U.S.C. § 702 (APA
13 review); and 28 U.S.C. § 1331 (federal question jurisdiction).

14 12. The Court may grant the relief requested under the ESA, 16 U.S.C.
15 § 1540(g); the APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201-2202 (declaratory and
16 injunctive relief).

17 13. Plaintiff provided sixty (60) days' NOI to file this suit pursuant to the
18 citizen suit provision of the ESA, 16 U.S.C. § 1540(g), by letter to the Agencies dated
19 July 17, 2019. Defendants have not taken action to remedy their continuing ESA
20 violations by the date of this complaint's filing. Therefore, an actual controversy exists
21 between the parties under 28 U.S.C. § 2201.

22 14. Venue is proper in the United States District Court for the District of
23 Arizona pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because a
24 substantial part of the events or omissions giving rise to the Center's claims occurred in
25 Greenlee and Graham Counties, which are within this District. Additionally, the Center's
26 primary office is located in Tucson, Arizona.

PARTIES

1
2 15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit
3 environmental organization dedicated to the protection of endangered species and wild
4 places through science, policy, and environmental law. The Center is headquartered in
5 Tucson, Arizona, with offices throughout the United States, including in California, the
6 District of Columbia, Florida, Hawai‘i, Minnesota, New Mexico, North Carolina,
7 Oregon, and Washington. The Center has more than 70,000 members and more than 1.6
8 million supporters and online activists.

9 16. The Center and its members have protectable interests in the conservation
10 of imperiled species and their streamside riparian habitat, including the yellow-billed
11 cuckoo, southwestern willow flycatcher, Chiricahua leopard frog, narrow-headed and
12 northern Mexican garter snakes, Gila chub, spikedace, and loach minnow, and in the full
13 and effective implementation of the Endangered Species Act.

14 17. Plaintiffs’ members include individuals who regularly visit specific areas of
15 the Apache-Sitgreaves and Gila National Forests on the upper Gila River watershed that
16 are directly within, or impacted by, the individual grazing authorizations challenged in
17 this case. Plaintiffs’ members can demonstrate consistent and longstanding use and
18 enjoyment of the rivers and streams being degraded by unauthorized riparian grazing,
19 including the Blue River, Eagle Creek, and San Francisco River on the Apache-
20 Sitgreaves National Forests in Arizona, and the Gila River Headwaters (West, Middle,
21 and East Forks), Gila River, Tularosa River, and San Francisco River on the Gila
22 National Forest in New Mexico, as well as areas within those rivers’ larger watershed
23 that are impacted by unlawful grazing. Plaintiff has members who have concrete plans to
24 return to these areas during the next year.

25 18. Plaintiff’s members also specifically seek to observe or study the yellow-
26 billed cuckoo, southwestern willow flycatcher, Chiricahua leopard frog, narrow-headed
27 and northern Mexican garter snakes, Gila chub, spikedace, and loach minnow in their
28 natural habitat in the upper Gila River watershed within the Apache-Sitgreaves and Gila

1 National Forests, including the Blue River, Eagle Creek, and the San Francisco River in
2 the Apache-Sitgreaves National Forests in Arizona, and the Gila River Headwaters
3 (West, Middle, and East Forks), Gila River, Tularosa River, and San Francisco River in
4 the Gila National Forest in New Mexico.

5 19. Plaintiffs' members and staff derive recreational, professional, scientific,
6 educational, aesthetic, spiritual and other benefits from their use of the specific areas of
7 the upper Gila River watershed within the Apache-Sitgreaves and Gila National Forests
8 described above. These interests of Plaintiff's members, have been, are being, and will
9 continue to be adversely harmed by the Agencies' failure to meet their procedural and
10 substantive duties under section 7 of the ESA. Through the Agencies' actions and failures
11 to act, domestic livestock are being allowed to use streamside riparian areas, resulting in
12 streambank trampling, soil compaction, removal of riparian vegetation, and deposition of
13 cattle feces, resulting in water quality degradation, dewatering of streams, habitat
14 destruction, and related adverse impacts to endangered species and other natural resource
15 values, which in turn significantly and directly harms Plaintiff's members. The injuries
16 described are actual, concrete injuries presently suffered by Plaintiff and its members,
17 and they will continue to occur unless this Court grants relief. The relief sought herein—
18 an Order compelling the Agencies to reinitiate and complete section 7 consultations for
19 the challenged actions while taking immediate corrective actions to effectively exclude
20 cattle from streamside and riparian areas and remedy the damage caused by those
21 cattle—would redress those harms. Plaintiffs and their members have no other adequate
22 remedy at law.

23 20. Defendant UNITED STATES FOREST SERVICE is an agency within the
24 Department of Agriculture. Like all federal agencies, the USFS must comply with all
25 applicable requirements of the ESA.

26 21. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the
27 agency within the Department of the Interior that is charged with implementing the ESA,
28 and shares responsibility for reinitiation and completion of consultation under section 7.

LEGAL BACKGROUND

1
2 22. The Endangered Species Act, 16 U.S.C. §§ 1531-1544, is “the most
3 comprehensive legislation for the preservation of endangered species ever enacted by any
4 nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes
5 are “to provide a means whereby the ecosystems upon which endangered species and
6 threatened species depend may be conserved [and] to provide a program for the
7 conservation of such endangered species and threatened species” 16 U.S.C.
8 § 1531(b).

9 23. To achieve these objectives, the ESA directs the Secretary of the Interior,
10 through FWS, to determine which species of plants and animals are “threatened” and
11 “endangered” and place them on the list of protected species. *Id.* § 1533. An
12 “endangered” or “threatened” species is one “in danger of extinction throughout all or a
13 significant portion of its range,” or “likely to become endangered in the near future
14 throughout all or a significant portion of its range,” respectively. *Id.* § 1532(6), (20).

15 24. Once a species is listed, the ESA provides a variety of procedural and
16 substantive protections to ensure not only the species’ continued survival, but its ultimate
17 recovery, including the designation of critical habitat, the preparation and implementation
18 of recovery plans, the prohibition against the “taking” of listed species, and the
19 requirement for interagency consultation. *Id.* §§ 1533(a)(3), 1533(f), 1536, 1538.

20 25. The ESA recognizes that federal agencies such as USFS have a critical role
21 to play in meeting these statutory purposes. The ESA establishes that it is “the policy of
22 Congress that all Federal departments and agencies shall seek to conserve endangered
23 species and threatened species and shall utilize their authorities in furtherance of the
24 purposes” of the ESA. *Id.* § 1531(c)(1).

25 26. To implement this policy, section 7(a)(1) of the ESA requires that “Federal
26 agencies shall, in consultation with and with the assistance of [FWS], utilize their
27 authorities in furtherance of the purposes of this Act by carrying out programs for the
28 conservation of endangered species and threatened species.” *Id.* § 1536(a)(1).

1 27. In addition to this mandate, the ESA requires that “[e]ach Federal agency
2 shall, in consultation with . . . [FWS], [e]nsure that any action authorized, funded, or
3 carried out by such agency . . . is not likely to jeopardize the continued existence of any
4 endangered species or threatened species or result in the destruction or adverse
5 modification of [critical habitat].” *Id.* § 1536(a)(2).

6 28. FWS’ regulations define an agency “action” to mean “all activities or
7 programs of any kind authorized, funded, or carried out, in whole or in part, by Federal
8 agencies.” 50 C.F.R. § 402.02.

9 29. Section 7(a)(2) of the ESA contains both procedural and substantive
10 mandates. Substantively, it requires that all federal agencies avoid actions that: (1)
11 jeopardize the continued existence of listed species; or (2) destroy or adversely modify
12 their designated critical habitat. Procedurally, to ensure compliance with the substantive
13 standards, the federal agency taking action and FWS take part in a cooperative analysis of
14 potential impacts to listed species and their designated critical habitat known as the
15 consultation process. 16 U.S.C. § 1536(a)(2). The consultation process has been
16 described as the “heart of the ESA.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d
17 472, 495 (9th Cir. 2011).

18 30. If listed or proposed species may be present in the project area, the action
19 agency must prepare a “biological assessment” to determine whether the listed species
20 may be affected by the proposed action. 50 C.F.R. § 402.12.

21 31. If the action agency determines that its proposed action may affect any
22 listed species or critical habitat, the agency must normally engage in “formal
23 consultation” with FWS. *Id.* § 402.14. However, the agency need not initiate formal
24 consultation if, as a result of the preparation of a biological assessment or as a result of
25 informal consultation with FWS, the agency determines, with the written concurrence of
26 FWS, that the proposed action is not likely to adversely affect any listed species or
27 critical habitat. *Id.* §§ 402.13, 402.14(b)(1).
28

1 32. Through the formal section 7 consultation process, FWS prepares a
2 “biological opinion” as to whether the action is likely to jeopardize the species or destroy
3 or adversely modify critical habitat and, if so, suggests “reasonable and prudent
4 alternatives” to avoid that result. *Id.* § 402.14; 16 U.S.C. § 1536(b)(3)(A). If the
5 biological opinion concludes that the action is not likely to jeopardize the continued
6 existence of a listed species, and will not result in the destruction or adverse modification
7 of critical habitat, FWS must provide an “incidental take statement,” specifying the
8 amount or extent of such incidental taking on the species and any “reasonable and
9 prudent measures” that FWS considers necessary or appropriate to minimize such impact,
10 and setting forth the “terms and conditions” that must be complied with by the action
11 agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

12 33. Agencies must reinitiate consultation on agency actions over which the
13 action agency retains, or is authorized to exercise, discretionary involvement or control,
14 if: (a) the amount or extent of taking specified in the incidental take statement is
15 exceeded; (b) new information reveals effects of the action that may affect listed species
16 or critical habitat in a manner or to an extent not previously considered; (c) the identified
17 action is subsequently modified in a manner that causes an effect to the listed species or
18 critical habitat that was not considered in the biological opinion or written concurrence;
19 or (d) a new species is listed or critical habitat designated that may be affected by the
20 identified action. 50 C.F.R. § 402.16(a)(1)-(4).

21 34. After the initiation or reinitiation of section 7 consultation, the action
22 agency is prohibited from making any irreversible or irretrievable commitment of
23 resources with respect to the agency action. 16 U.S.C. § 1536(d).

24 35. During the consultation process, federal agencies must “use the best
25 scientific and commercial data available.” *Id.* § 1536(a)(2); 50 CFR § 402.14(d).

26
27
28

BACKGROUND

A. The National Forests of the Upper Gila River Watershed

36. 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 (thirty-seven percent) and public lands administered by the Bureau of Land Management (twenty percent).

37. The Apache-Sitgreaves and Gila National Forests administer the large majority of national forest lands within the upper Gila River watershed. Within the Gila National Forest, the West Fork, Middle Fork, and the East Fork Headwaters of the Gila River begin the river's journey down from the heights of the rugged Mogollon Mountains, as well as the Black Range along the continental divide. These headwaters join together to form the mainstem of the Gila River within the Gila Wilderness. After emerging from the Gila Wilderness near the town of Glenwood, New Mexico, the river then flows south and west across the Arizona state line.

38. 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 River has its headwaters in Arizona, much of it flows through the Gila National Forest in New Mexico before flowing back into Arizona. These combined waters then flow into the larger Gila River.

39. Together, the upper Gila River, the San Francisco River, the Blue River, and their tributaries define an expansive undeveloped 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 River watershed and adjacent areas contain one of the world's

1 largest ponderosa pine forests (and one of the first areas to successfully reintroduce fire to
2 the landscape), which sustains abundant wildlife including wild turkeys, eagles, deer,
3 pronghorn, elk, bighorn sheep, javelina, cougars, and black bears, as well as the
4 reintroduced population of Mexican gray wolves.

5 40. In addition to the pervasive impacts of domestic cattle grazing, persistent
6 drought, dewatering, global warming, invasive species, and other impacts have in recent
7 years taken an increasing toll on southwestern ecosystems, resulting in the recent listing
8 of numerous threatened or endangered species dependent on southwestern riparian areas.
9 Reflecting these impacts, and the looming threat of a major diversion project, the Gila
10 was named the nation's most endangered river in 2019.

11 **B. Public Lands Grazing is a Primary Threat to Endangered Species**
12 **Dependent on Southwestern Streams**

13 41. Due in part to their undeveloped nature and remoteness, the national forests
14 of the upper Gila River watershed are refugia for many listed threatened and endangered
15 species, including the yellow-billed cuckoo, southwestern willow flycatcher, Chiricahua
16 leopard frog, narrow-headed and northern Mexican garter snakes, Gila chub, spikedace,
17 loach minnow, and more. However, land use within the national forests often negatively
18 impacts these species. Like the large majority of public lands within the arid west, the
19 Gila and Apache-Sitgreaves National Forests routinely authorize domestic livestock
20 grazing that poses significant environmental risks to arid Southwestern ecosystems,
21 particularly to streamside and riparian areas but also including adjacent upland areas.

22 42. Scientific study on the impacts of livestock grazing on aquatic and riparian
23 habitats in the Southwest is extensive and universally shows severe and lasting negative
24 impacts such that near complete exclusion of cattle is widely accepted as a minimum
25 baseline management strategy in preserving stream health. Livestock grazing has both
26 direct and indirect effects on streams. Livestock directly affect riparian habitat through
27 removal of riparian vegetation. Loss of riparian vegetation in turn raises water
28

1 temperatures, reduces bank stability, and eliminates an important structural component of
2 the stream environment that contributes to the formation of pools. Grazing physically
3 alters streambanks through trampling and shearing, leading to bank erosion. In
4 combination, loss of riparian vegetation and bank erosion can alter channel morphology,
5 including increased erosion and deposition, downcutting and an increased width/depth
6 ratio, all of which lead to a loss of pool habitats and shallow side and backwater habitats
7 used by several of the listed species that are the subject of this lawsuit.

8 43. Livestock also indirectly impact aquatic and riparian habitats by
9 compacting soils, altering soil chemistry, and reducing vegetation cover in upland areas,
10 leading to increased severity of floods and sediment loading, lower water tables, and
11 altered channel morphology.

12 44. One consequence of these impacts to watersheds is a reduction in the
13 quantity and quality of pool habitat. A lowered water table, for example, results in direct
14 loss of pool habitats, simply because water is not available to form pools. Increased
15 erosion and sedimentation results in filling of pools with sediments. Channel incision and
16 increased flood severity both can scour out pools, reducing habitat complexity and
17 resulting in shallow, uniform streambeds, all of which harms the species at issue in this
18 suit.

19 45. Because of the severity and broad array of these impacts, livestock grazing
20 is one of the most prevalent causes of the federal listing of species in this region,
21 including the following eight threatened and endangered species, all of which are
22 specifically dependent on aquatic and streamside riparian habitat: **Yellow-billed cuckoo**
23 **(western DPS)**: listed as threatened October 3, 2014 (79 Fed. Reg. 59,992); proposed
24 critical habitat November 12, 2014 (79 Fed. Reg. 67,154); **Southwestern willow**
25 **flycatcher**: listed as endangered February 27, 1995 (60 Fed. Reg. 10,694); final critical
26 habitat January 3, 2013 (78 Fed. Reg. 344); **Gila chub**: listed as endangered and final
27 critical habitat November 2, 2005 (70 Fed. Reg. 66,664); **Loach minnow and spikedace**:
28 uplisted to endangered and final critical habitat February 23, 2012 (77 Fed. Reg. 10,810);

1 **Chiricahua leopard frog**: listed as threatened June 13, 2002 (67 Fed. Reg. 40,657,
2 40,665); final critical habitat March 30, 2012 (77 Fed. Reg. 16,324); **Northern Mexican**
3 **garter snake and narrow-headed garter snake**: listed as threatened July 8, 2014 (79
4 Fed. Reg. 38,678); proposed critical habitat July 10, 2013 (78 Fed. Reg. 41,550).

5 **C. Two Decades Ago, USFS Committed to Remove Cattle from**
6 **Southwestern Streams**

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

10 47. In *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, the Center sued
11 USFS for its failure to fulfill its Endangered Species Act section 7 consultation duties
12 with respect to the impacts of 158 grazing allotments on southwestern willow flycatcher,
13 loach minnow, and spikedace. No. CV-97-666-TUC-JMR (D. Ariz. Oct. 23, 1997).

14 48. Under a resultant April 1998 settlement agreement, USFS agreed to
15 immediately remove cattle from ninety-nine percent of riparian habitats within the
16 allotments at issue until FWS issued a biological opinion pursuant to section 7 of the
17 ESA.

18 49. These obligations catalyzed USFS, in cooperation with FWS, to develop
19 “Grazing Guidance Criteria,” to guide ESA section 7 consultations regarding grazing and
20 to apply those criteria to all 962 grazing allotments within USFS Region 3 (Southwestern
21 Region.). *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, Nos. CV-97-666-
22 TUC-JMR, CV-97-2562-PHX-SMM, 2001 U.S. Dist. LEXIS 25027, *6-8 (D. Ariz. Mar.
23 30, 2001) (emphasis added).

24 50. Since that time, grazing exclusions, as well as annual monitoring to ensure
25 the effectiveness of those exclusions, have served as a cornerstone for USFS ESA
26 compliance in relation to its grazing program and individual decisions authorizing
27 grazing on individual grazing allotments.
28

1 **D. The Center Conducted Assessments Documenting Widespread and**
2 **Significant Streamside Damage from Cattle on Apache-Sitgreaves**
3 **and Gila National Forest Grazing Allotments**

4 51. In 2017, the Center conducted an on-the-ground assessment to determine if
5 cattle are present within riparian areas excluded from grazing on twenty-seven allotments
6 in the Gila National Forest, and to document the extent and intensity of impacts from
7 cattle grazing where present. As stated in the survey’s summary:

8 “Across the Gila National Forest there are widespread examples of fences down
9 and in disrepair between private property and Forest Service land. This presents
10 virtually unlimited access for cattle to cross into excluded areas ... Throughout the
11 majority of these riparian areas that are supposed to be excluded from grazing there
12 is intense pressure on native grasses resulting in their displacement with non-
13 palatable invasive plants. Soil compaction and denuded soils are widespread across
14 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.”

15 52. In 2018, the Center conducted a similar assessment on twenty allotments in
16 the Apache-Sitgreaves National Forest. As stated in the survey’s summary:

17 “Cattle signs were recent in over half the allotments and cattle were seen and
18 documented in restricted riparian areas in 11 out of the 20 allotments. In almost
19 half of all riparian areas surveyed, there is intense pressure on native grasses
20 resulting in their replacement with non-palatable invasive plants. Soil compaction
21 and denuded soils are widespread across these impacted landscapes and trampled
22 streambanks are common. Browsing pressure by cattle is suppressing woody plant
23 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.”

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

1 **E. The Challenged USFS Grazing Authorizations Rely Upon Exclusion of**
2 **Cows from Southwestern Streams and Consistent Monitoring of Such**
3 **Exclusions as a Basis for Endangered Species Act Compliance**

4 54. Today, the Agencies continue to utilize an iteration of the Grazing Criteria,
5 now called “Master Framework for Streamlining Consultation on Livestock Grazing
6 Activities” (December 2015) (hereinafter referred to as “Grazing Criteria”). The Grazing
7 Criteria presumes that cattle have been excluded from major waterways, and that USFS
8 will conduct regular monitoring to ensure the continuing efficacy of such exclusions. *See,*
9 *e.g.*, p. 68 (“Riparian areas on National Forest System lands have been excluded from
10 livestock grazing to protect habitat along the Gila, San Francisco, Tularosa River, Negrito
11 Creek, Verde, Blue, North Fork East Fork Black Rivers, and Campbell Blue and Eagle
12 Creeks”).

13 55. The Grazing Criteria provides that the Agencies can only determine that
14 domestic livestock grazing is not likely to adversely affect aquatic and riparian dependent
15 threatened and endangered species, or destroy or adversely modify their designated
16 critical habitat, through robust protection of streamside riparian habitats, typically
17 achieved through year-long exclusion of cattle. Notably, these riparian exclusions are
18 only one component of a not likely to adversely affect determination and the USFS must
19 also meet specific standards with respect to grazing in adjacent upland areas:

20 * **Listed Fish (including Gila chub, spikedace, and loach minnow):** requiring
21 “yearlong exclusion of livestock from occupied ... habitats in the action area,” as
22 well as a determination that impacts from upland livestock grazing “are
23 determined to be insignificant or discountable ...” (p. 80).

24 * **Chiricahua leopard frog:** requiring “no livestock use or livestock management
25 activities where the species is reasonably certain to occur or there is occupied
26 aquatic habitat,” as well as determinations that impacts from upland livestock
27 grazing are “insignificant or discountable,” and that “[p]roposed livestock
28

1 management activities ... do not increase the likelihood that non-native predators
2 ... will colonize or be introduced to such aquatic sites.” (p. 16).

3 * **Southwestern willow flycatcher and yellow-billed cuckoo**: requiring that
4 grazing activities “do not measurably or detectably reduce the suitability or
5 regeneration” of riparian streamside habitat, as well as determinations that
6 potential indirect effects are “insignificant or discountable” (p. 31, 34).

7 * **Narrow-headed and northern Mexican garter snake**: requiring that there
8 “will be no livestock use or livestock management activities where the species is
9 reasonably certain to occur or where there is occupied habitat,” as well as
10 determinations that the impacts from upland livestock grazing are “insignificant or
11 discountable,” with “particular attention given to potential impacts to native fish,”
12 and that proposed livestock management activities “will not increase the
13 likelihood that bullfrogs, non-native, spiny-rayed fish, brown trout, or crayfish will
14 colonize, be introduced, or improve their status.” (p. 127, 132).

15 56. The Apache-Sitgreaves and Gila National Forest allotments listed in **Table**
16 **1** have most recently been considered in separate (though sometimes batched) section 7
17 consultations. In accordance with the Grazing Criteria and substantive ESA obligations to
18 avoid jeopardizing the continued existence of listed species, or destroy or adversely
19 modify designated critical habitat, these consultations have relied upon USFS
20 commitments to exclude livestock from riparian areas, ensured through consistent USFS
21 monitoring, to justify conclusions of no effect or not likely to adversely affect
22 determinations in relation to aquatic or riparian dependent endangered species.

23 **Apache National Forest Allotments (Overview)**

24 57. The thirteen Apache National Forest allotments at issue in this suit were
25 considered together in separate section 7 consultations. Several of these consultations
26 involved “likely to adversely affect” findings, and thus concluded with a Biological
27 Opinion issued by FWS. Others were informal and concluded with FWS concurrences on
28 not likely to adversely affect findings documented in USFS Biological Assessments.

1 Unlike the Gila National Forest, grazing consultations for the Apache-Sitgreaves
2 National Forests have not clearly relied on the Guidance Criteria for determining effects
3 to listed species.

4 Apache National Forest Allotments (Blue River)

5 58. The Blue River's headwaters start in New Mexico and flow for
6 approximately fifty miles through Arizona into its confluence with the San Francisco
7 River. This undammed, remote stream is fed by numerous tributaries, many of which are
8 also occupied by endangered species. The Blue River runs almost entirely within the
9 Apache National Forest, and is surrounded by the 200,000-acre Blue Range Primitive
10 Area, which is managed the same as a congressionally designated wilderness. Although
11 several native fish species have been extirpated, the Blue River harbors one of the highest
12 diversity of native fishes in Arizona.

13 59. On February 2, 2017, FWS issued a Biological Opinion concluding section
14 7 consultation for the reissuance of a ten-year grazing permit for the **Wildbunch**
15 **allotment**. The San Francisco and Blue Rivers form the western and southern boundary
16 of the allotment, respectively, which also contains additional perennial tributaries to the
17 Blue River including Johnson, Cienega, and Indian Creeks. These waters and tributaries
18 contain designated critical habitat for the southwestern willow flycatcher, loach minnow,
19 and spikedace, and proposed critical habitat for the yellow-billed cuckoo and narrow-
20 headed garter snake. FWS concluded that continued grazing would not jeopardize the
21 continued existence of the loach minnow and spikedace, and was not likely to adversely
22 affect the yellow-billed cuckoo and narrow-headed garter snake, based on the USFS
23 commitment that it "shall protect the riverine and riparian habitat from significant
24 livestock grazing and effects from livestock crossing of the Blue River." (p. 16).

25 60. The Center's A-S Grazing Assessment found 0.9 miles of moderate cattle
26 impacts and 4.8 miles of significant cattle impacts on the Blue River within the
27 **Wildbunch allotment**, including heavy cattle trailing and resultant erosion and shearing
28 of streambanks, no functional fencing, and numerous cattle in the river.

1 61. These findings contradict the Agencies’ commitment in their ESA section 7
2 consultation to exclude cattle from the Blue River, San Francisco River, and other
3 riparian areas on this allotment and demonstrate that USFS has not been conducting
4 required monitoring or taken required corrective action.

5 62. The USFS October 17, 2019 NOI response letter acknowledges
6 “compliance issues” with the **Wildbunch allotment** but does not commit to reinitiation
7 of consultation, and USFS is not ensuring that cattle are removed from riparian areas.

8 63. On January 31, 2003, FWS issued a Biological Opinion addressing multiple
9 grazing allotments along the Blue and San Francisco Rivers, including the **Pigeon**
10 **allotment**, which contains portions of the Blue River (which primarily flows just outside
11 its boundaries within the Wildbunch allotment) along its northeastern and southeastern
12 boundary, and is occupied by loach minnow and Chiricahua leopard frog. FWS
13 concluded that continued grazing would not jeopardize the continued existence of these
14 species based on the exclusion of seven miles of riparian habitat from grazing (p. 92).

15 64. The Center’s A-S Grazing Assessment found 0.6 miles of significant cattle
16 impacts on the Blue River within the **Pigeon allotment**, including heavy cattle trailing
17 and resultant erosion and shearing of streambanks, no functional fencing, and numerous
18 cattle in the river.

19 65. These findings contradict the Agencies’ commitment in their ESA section 7
20 consultation to exclude cattle from the Blue River on this allotment and demonstrate that
21 USFS has not been conducting required monitoring or taken required corrective action.

22 66. The USFS October 17, 2019 NOI response letter acknowledges
23 “compliance issues” with the **Pigeon allotment**, and states that the allotment is “currently
24 in consultation with the FWS or will be initiated by the end of the calendar year and
25 completed in Fiscal Year 2020,” but USFS is not ensuring that cattle are removed from
26 riparian areas pending completion of this consultation.

27 67. On January 31, 2003, FWS issued a Biological Opinion addressing grazing
28 allotments within the Blue and San Francisco River watersheds, including the **Sandrock**

1 **allotment.** The Sandrock allotment includes an extensive sixteen-mile reach of the Blue
2 River containing designated critical habitat for the loach minnow and spikedace and
3 proposed critical habitat for the yellow-billed cuckoo and narrow-headed garter snake.
4 FWS stated that “grazing was suspended on the Sandrock Allotment in 1984 due to
5 concerns over watershed conditions.” (p. 105).

6 68. The Center’s A-S Grazing Assessment found 8.2 miles of moderate cattle
7 impacts and 7.8 miles of significant cattle impacts on the Blue River within the
8 purportedly retired **Sandrock allotment**, including abundant cattle trails and sign,
9 trampled streamside herbaceous vegetation, and diminished streamside vegetative cover.

10 69. These findings contradict the Agencies’ commitment in their ESA section 7
11 consultation to exclude cattle from the Blue River on this allotment, as well as the
12 USFS’s characterization of this allotment as retired, and demonstrate that USFS has not
13 been conducting required monitoring or taken required corrective action.

14 70. On August 28, 2015, FWS issued a concurrence on USFS Biological
15 Assessments concluding section 7 consultations for the renewal of ten-year grazing
16 permits and associated issuance of AMPs for four allotments including the **Raspberry**
17 **allotment.** The Raspberry allotment includes designated critical habitat for loach minnow
18 and proposed critical habitat for the narrow-headed garter snake, as well as additional
19 perennial riparian habitat along Strayhorse and Raspberry Creeks. The allotment also
20 contains KP Creek, which is occupied by Apache trout. Although USFS had initially
21 determined that continued grazing was likely to adversely affect these species, “[u]pon
22 further review and discussion with [USFS] staff,” FWS instead made a not likely to
23 adversely affect finding. (p. 2). This finding was based on a commitment to exclude
24 cattle from the Blue River. (p. 9.). The Raspberry allotment had been in non-use since
25 2002.

26 71. The Center’s A-S Grazing Assessment found 0.5 miles of moderate cattle
27 impacts and 5.6 miles of significant cattle impacts on the Blue River within the
28

1 **Raspberry allotment**, including the trampling of several seeps and springs, shearing and
2 erosion of streambanks, and downed fencing.

3 72. These findings contradict the Agencies' commitment in their ESA section 7
4 consultation to exclude cattle from the Blue River and other riparian areas on this
5 allotment and demonstrate that USFS has not been conducting required monitoring or
6 taken required corrective action.

7 73. On December 10, 2015 FWS issued a concurrence with a USFS Biological
8 Assessment concluding ESA section 7 consultations for the renewal of ten-year grazing
9 permits and associated issuance of AMPs for eight allotments including the **Cow Flat**,
10 **Fishhook-Steeple Mesa**, and **Red Hill allotments**. The portion of the Blue River
11 flowing through these allotments contains designated critical habitat for loach minnow
12 and spikedace and proposed critical habitat for the narrow-headed garter snake. FWS
13 concluded that the grazing on these allotments will not adversely affect loach minnow or
14 spikedace based on the repeatedly stated commitment to exclude the Blue River from
15 cattle grazing.

16 74. The Center's A-S Grazing Assessment found the following with respect to
17 these allotments:

18 * 0.6 miles of significant cattle impacts on the Blue River within the **Cow Flat**
19 **allotment**, including bare, denuded ground, sheared and trampled banks from consistent
20 cattle trailing, and cattle feces evident in the water;

21 * 0.8 miles of moderate cattle impacts and two miles of significant cattle impacts
22 on the Blue River within the **Fishhook-Steeple Mesa allotment**, including cattle entering
23 riparian areas from the road, fresh cattle feces and tracks at water's edge, and bare
24 denuded ground; and

25 * 0.7 miles of significant cattle impacts on the Blue River within the **Red Hill**
26 **allotment**, including cows seen in river and throughout public use area, severe trampling
27 of streambanks from intensive grazing, and heavy contamination of surface water by cow
28 feces.

1 75. These findings contradict the Agencies' commitment in their ESA section 7
2 consultation to exclude cattle from the Blue River on these allotments and demonstrate
3 that USFS has not been conducting required monitoring or taken required corrective
4 action.

5 **Apache National Forest Allotments (Eagle Creek)**

6 76. With headwaters originating in high-elevation mixed-conifer forests along
7 the southern slope of Arizona's White Mountains, Eagle Creek is an eighty-three mile
8 long tributary to the Gila River. After passing through a broad, grassy valley into deep,
9 steep-walled canyons, the lower portions flow through desert grasslands and desert before
10 meeting with the Gila River. Eagle Creek retains more native fish than any other stream
11 in the Gila River basin.

12 77. On February 26, 2002, FWS issued an Eagle Creek Watershed Biological
13 Opinion addressing the **East Eagle, Mud Springs, Double Circle, Tule, and Dark**
14 **Canyon allotments**. Among other findings, FWS concluded that the continued grazing
15 authorized by USFS would not jeopardize the continued existence of loach minnow and
16 spikedace because "[t]he Forest has implemented fencing around the riparian corridor"
17 and USFS also pledged "to take action to ensure that range condition does not
18 deteriorate" on upland areas and "to improve range condition in areas of fair or poor
19 condition." (p. 52). In addition, FWS directed that USFS "shall prevent overuse of
20 riparian areas by livestock" by performing "random checks of fencing on Eagle Creek to
21 ensure that trespass cattle are not using these areas." (p. 57). The Biological Opinion did
22 not address the Gila chub and narrow-headed garter snake, both of which are present on
23 Eagle Creek but were not yet listed at that time.

24 78. The Center's A-S Grazing Assessment found:

25 * 0.8 miles of moderate cattle impacts and 1.2 miles of significant cattle impacts
26 on Eagle Creek within the **East Eagle allotment**, as well as moderate to severe impacts
27 on the riparian habitat of East Eagle Creek. The East Eagle allotment includes designated
28 critical habitat for Gila chub, spikedace, and loach minnow, and proposed critical habitat

1 for the narrow-headed garter snake, as well as occupied Apache trout habitat within
2 Chitty Creek;

3 * 0.2 of moderate cattle impacts and 1.1 miles of significant impacts on Eagle
4 Creek within the **Mud Springs allotment**, including large swaths of heavily grazed
5 grasses within the floodplain, severely compromised streambanks, and heavy browsing of
6 streamside woody vegetation. The Mud Springs allotment includes designated critical
7 habitat for Gila chub, spikedace, and loach minnow, and proposed critical habitat for the
8 narrow-headed garter snake;

9 * 2.7 miles of significant cattle impacts on Eagle Creek within the **Double Circle**
10 **allotment**, including intense grazing pressure on streambanks. The Double Circle
11 allotment includes designated critical habitat for spikedace and loach minnow, and
12 proposed critical habitat for the narrow-headed garter snake;

13 * 0.9 miles of significant cattle impacts on Eagle Creek within the **Tule allotment**,
14 including severe trampling of streambanks and fencing in disrepair. The Tule allotment
15 includes designated critical habitat for spikedace and loach minnow, and proposed critical
16 habitat for the narrow-headed garter snake; and

17 * 4.4 miles of significant cattle impacts on Eagle Creek within the **Dark Canyon**
18 **allotment**, including severe trampling of streamside vegetation, sharing of banks, heavy
19 near-channel browsing, and fencing in disrepair. The Dark Canyon allotment includes
20 designated critical habitat for spikedace and loach minnow and proposed critical habitat
21 for the narrow-headed garter snake.

22 79. These findings contradict the Agencies' commitment in their ESA section 7
23 consultation to exclude cattle from Eagle Creek and other riparian areas on these
24 allotments and demonstrate that USFS has not been conducting required monitoring or
25 taken required corrective action.

26 80. The USFS October 17, 2019 NOI response letter acknowledges the
27 presence of unauthorized cattle on the **East Eagle, Mud Springs, Double Circle, Tule,**
28 **and Dark Canyon allotments**, and states that some unauthorized livestock have been

1 removed. The NOI response also acknowledges that ESA reinitiation is required on
2 grazing allotments within the Eagle Creek watershed, but this consultation has not yet
3 resulted in a final Biological Assessment or Biological Opinion, and USFS is not
4 ensuring that cattle are removed from riparian areas pending completion of such
5 consultation.

6 **Apache National Forest Allotments (San Francisco River)**

7 81. With headwaters originating near Alpine, Arizona, the San Francisco River
8 flows for nearly 100 miles through western New Mexico before reentering Arizona and
9 meeting with the Gila River south of Clifton, Arizona. This portion of the San Francisco
10 River is occupied by loach minnow and is the site of a 2008 reintroduction for spikedace.
11 It contains designated critical habitat for both species, as well as Gila chub, Chiricahua
12 leopard frog, and southwestern willow flycatcher, and proposed critical habitat for the
13 yellow-billed cuckoo and narrow-headed garter snake.

14 82. On November 30, 2001, FWS issued a Biological Opinion for the **Pleasant**
15 **Valley allotment**, concluding that the continued grazing authorized by USFS would not
16 jeopardize the continued existence of spikedace or loach minnow because “[n]o livestock
17 from the Pleasant Valley allotment will be permitted to access spikedace critical habitat
18 [along the San Francisco River].” (p. 57-58). The biological opinion did not address the
19 Gila chub, Chiricahua leopard frog, yellow-billed cuckoo, or narrow-headed garter snake,
20 which were listed subsequent to its preparation.

21 83. The Center’s A-S Grazing Assessment found 1.1 miles of moderate cattle
22 impacts and 1.4 miles of significant cattle impacts on the San Francisco River within the
23 **Pleasant Valley allotment**, including prolific cow pies, large trampled areas and
24 wallows along the water’s edge, and numerous well-worn paths within the flood plain.

25 84. The USFS October 17, 2019 NOI response letter states that a Biological
26 Assessment was submitted to FWS on April 29, 2019 regarding the **Pleasant Valley**
27 **allotment**, but this consultation has not yet resulted in a final Biological Assessment or
28

1 Biological Opinion, and USFS is not ensuring that cattle are removed from riparian areas
2 pending completion of such consultation.

3 Gila National Forest Allotments (Overview)

4 85. Nearly all of the Gila National Forest allotments at issue in this suit were
5 considered together in an informal section 7 consultation on USFS Biological
6 Assessments prepared for forty-four allotments within the forest that concluded with a
7 July 11, 2016 FWS concurrence. The Agencies used the Master Framework Guidance
8 Criteria for determining effects to listed species, all of which are “may affect, not likely
9 to adversely affect.” In order for these findings to remain in effect for the life of the term
10 permits, USFS committed to conducting annual monitoring of exclosures.

11 Gila National Forest Allotments (Tularosa River)

12 86. The Tularosa River is a free-flowing, approximately thirty-two mile long
13 tributary of the San Francisco River in western New Mexico. The Tularosa River is
14 largely free of nonnative fish and contains loach minnow and Chiricahua leopard frog
15 critical habitat, as well as one of few remaining currently viable populations of narrow-
16 headed garter snakes.

17 87. The July 11, 2016 FWS concurrence concluding section 7 consultation
18 included USFS Biological Assessments for the renewal of ten-year grazing permits and
19 associated issuance of AMPs for allotments which include the Tularosa River or its
20 tributaries within their boundaries including the **Corner Mountain, Negrito/Yeguas,**
21 **Govina, Alexander, Deep Canyon, and Lower Canyon allotments.** In conformance
22 with the Grazing Criteria, all of these Biological Assessments committed USFS to the
23 exclusion of cattle from the Tularosa River and its tributaries in order to issue not likely
24 to adversely affect findings for impacted species and critical habitat.

25 88. The **Corner Mountain allotment** includes approximately 5.3 miles of
26 South Fork Negrito Creek, a tributary of the Tularosa River containing proposed critical
27 habitat for the narrow-headed garter snake.
28

1 89. Under the Grazing Criteria, a not likely to adversely affect finding for the
2 narrow-headed garter snake requires that there “will be no livestock use or livestock
3 management activities” where the species is reasonably certain to occur.

4 90. The USFS Biological Assessment states that the Corner Mountain
5 allotment term grazing permit was relinquished in 1992 but that the allotment is
6 sometimes used as a swing or support allotment on an as-needed basis. USFS states that
7 unauthorized livestock use has occurred but that “corrective actions taken by the District
8 have kept livestock utilization of forage and riparian vegetation to a minimum.”

9 91. The Gila Grazing Assessment found 2.4 miles of moderate cattle impacts
10 on South Fork Negrito Creek within the Corner Mountain allotment, including long
11 stretches of streambanks impacted by wallowing, creating dusty and barren terraces,
12 heavy grazing of riparian grasses, and overall severe and sustained cattle impacts on the
13 river corridor, contradicting the Agencies’ commitment to exclude cattle.

14 92. The **Negrito/Yeguas allotment** includes approximately 3.5 miles of South
15 Fork Negrito Creek, a tributary of the Tularosa River occupied by the narrow-headed
16 garter snake, and containing proposed critical habitat for the species, as well as three
17 miles of North Fork Negrito Creek and 3.5 miles of Negrito Creek.

18 93. Under the Grazing Criteria, a not likely to adversely affect finding for the
19 narrow-headed garter snake requires that there “will be no livestock use or livestock
20 management activities” where the species is reasonably certain to occur.

21 94. The USFS Biological Assessment states that the South Fork Negrito Creek
22 “runs through the middle of the allotment and is excluded.”

23 95. The Center’s Gila Grazing Assessment found 4.3 miles of significant cattle
24 impacts on South Fork Negrito Creek within the **Negrito-Yeguas allotment**, including
25 extreme, severe, and pervasive negative impacts that exceeded the scale for the survey,
26 soil compaction, severe and extensive bank degradation, and creation of a potentially
27 unlawful diversion ditch, contradicting the Agencies’ commitment to exclude cattle.
28

1 96. The **Govina allotment** includes approximately one mile of the Tularosa
2 River containing designated critical habitat for the Chiricahua leopard frog and proposed
3 critical habitat for the narrow-headed garter snake.

4 97. Under the Grazing Criteria, a not likely to adversely affect finding for both
5 the Chiricahua leopard frog and the narrow-headed garter snake requires that there “will
6 be no livestock use or livestock management activities” where the species is reasonably
7 certain to occur or there is occupied aquatic habitat, or within critical habitat.

8 98. The USFS Biological Assessment states that the Tularosa River is excluded
9 on NFS lands except for a water access point at an existing road crossing.

10 99. The Center’s Gila Grazing Assessment found 0.5 miles of significant cattle
11 impacts on the Tularosa River within the **Govina allotment**, including severe impacts
12 from cattle trails, trampling, and shearing of the river bank, contradicting the Agencies’
13 commitment to exclude cattle.

14 100. The **Alexander allotment** includes approximately 1.5 miles of the Tularosa
15 River containing designated critical habitat for the loach minnow and Chiricahua leopard
16 frog and proposed critical habitat for the narrow-headed garter snake.

17 101. Under the Grazing Criteria, a not likely to adversely affect finding for the
18 loach minnow, Chiricahua leopard frog, and narrow-headed garter snake requires that
19 there “will be no livestock use or livestock management activities” where the species is
20 reasonably certain to occur or there is occupied aquatic habitat, or within critical habitat.

21 102. The USFS Biological Assessment states that the Tularosa River runs
22 through portions of the western side of the Alexander allotment, but that the river is
23 excluded from livestock grazing through riparian enclosure fencing.

24 103. The Center’s Gila Grazing Assessment found 1.1 miles of significant cattle
25 impacts on the Tularosa River within the **Alexander allotment**, including complete
26 degradation, trampling, and shearing of streambanks, and downed fences, contradicting
27 the Agencies’ commitment to exclude cattle.

28

1 104. The **Deep Canyon allotment** includes approximately 3.2 miles of the
2 Tularosa River containing designated critical habitat for the loach minnow and
3 Chiricahua leopard frog and proposed critical habitat for the narrow-headed garter snake.

4 105. Under the Grazing Criteria, a not likely to adversely affect finding for the
5 loach minnow, Chiricahua leopard frog, and narrow-headed garter snake requires that
6 there “will be no livestock use or livestock management activities” where the species is
7 reasonably certain to occur or there is occupied aquatic habitat, or within critical habitat.

8 106. The USFS Biological Assessment states that the Tularosa River runs
9 through portions of the western side of the Deep Canyon allotment, but that the river is
10 excluded from livestock grazing through riparian enclosure fencing.

11 107. The Center’s Gila Grazing Assessment found two miles of significant cattle
12 impacts on the Tularosa River within the **Deep Canyon allotment**, including trailing
13 corridors and severe trampling, soils converted to dust, and little to no woody
14 regeneration, contradicting the Agencies’ commitment to exclude cattle.

15 108. The **Lower Plaza allotment** includes approximately 0.3 miles of the
16 Tularosa River, as well as a small portion of San Francisco River, containing designated
17 critical habitat for the loach minnow and proposed critical habitat for the narrow-headed
18 garter snake.

19 109. Under the Grazing Criteria, a not likely to adversely affect finding for the
20 loach minnow and narrow-headed garter snake requires that there “will be no livestock
21 use or livestock management activities” where the species is reasonably certain to occur
22 or there is occupied aquatic habitat, or within critical habitat.

23 110. The USFS Biological Assessment states that the Tularosa River and San
24 Francisco River are excluded from livestock grazing on the Lower Plaza allotment
25 through riparian enclosure fencing.

26 111. The Center’s Gila Grazing Assessment found 0.5 miles of significant cattle
27 impacts on the Tularosa River within the **Lower Plaza allotment**, including severe
28

1 browsing, trampling, and trailing creating wallows and bare soil, contradicting the
2 Agencies' commitment to exclude cattle.

3 112. These findings contradict the Agencies' commitment in their ESA section 7
4 consultation to exclude cattle from the Tularosa River and other riparian areas on the
5 **Corner Mountain, Negrito/Yeguas, Govina, Alexander, Deep Canyon, and Lower**
6 **Plaza allotments**, and demonstrate that USFS has not been conducting required
7 monitoring or taken required corrective action.

8 113. The USFS October 17, 2019 NOI response letter acknowledges compliance
9 issues on the **Alexander and Deep Canyon allotments**, stating that an "adjacent
10 landowner's unauthorized livestock were present" on each of the allotments and that
11 some fencing was repaired, but does not state any intention to reinitiate or complete
12 consultation to address the extensive and severe riparian damage documented by the
13 Center's assessment.

14 **Gila National Forest Allotments (San Francisco River)**

15 114. The San Francisco River flows for approximately 100 miles in a general
16 southerly direction through western New Mexico before turning westward and reentering
17 Arizona. The New Mexico stretch of the San Francisco River contains occupied and
18 designated critical habitat for yellow-billed cuckoo, southwestern willow flycatcher,
19 loach minnow, spikedace, and narrow-headed garter snake.

20 115. The July 11, 2016 FWS concurrence concluding section 7 consultation
21 included USFS Biological Assessments for the renewal of ten-year grazing permits and
22 associated issuance of AMPs for allotments containing the San Francisco River or its
23 tributaries within their boundaries including the **Luna, Black Bob, Frisco Plaza, Kelly,**
24 **Devil's Park, Alma, Citizen/Roberts Park, Harve Gulch/Bighorn, and Dry Creek**
25 **allotments**. In conformance with the Grazing Criteria, all of these Biological
26 Assessments committed USFS to the exclusion of cattle from the San Francisco River
27 and tributaries containing endangered species habitat in order to issue not likely to
28 adversely affect findings for impacted species and critical habitat.

1 116. The **Luna allotment** includes approximately four miles of the San
2 Francisco River containing designated critical habitat for the southwestern willow
3 flycatcher and proposed critical habitat for the narrow-headed garter snake, as well as
4 four miles of Dry Blue Creek, two miles of Frieborn Creek, and one mile of Pace Creek
5 containing designated critical habitat for the spikedace and loach minnow.

6 117. Under the Grazing Criteria, a not likely to adversely affect finding for the
7 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
8 livestock use or livestock management activities” where the species is reasonably certain
9 to occur.

10 118. The USFS Biological Assessment states that livestock are excluded from
11 four miles of the San Francisco River, four miles of Dry Blue Creek, two miles of
12 Frieborn Creek, and one mile of Pace Creek on the Luna allotment

13 119. The Center’s Gila Grazing Assessment found 0.8 miles of moderate cattle
14 impacts and three miles of significant cattle impacts on the riparian areas of the **Luna**
15 **allotment**, including heavy grazing along the San Francisco River streambank, severe
16 and pervasive cattle trails, and cattle observed in the San Francisco River, contradicting
17 the Agencies’ commitment to exclude cattle from the San Francisco River and other
18 riparian areas within the Luna allotment.

19 120. The **Black Bob allotment** includes approximately 5.4 miles of the San
20 Francisco River containing designated critical habitat for the loach minnow and proposed
21 critical habitat for the narrow-headed garter snake, as well as three miles of Cienega
22 Creek.

23 121. Under the Grazing Criteria, a not likely to adversely affect finding for the
24 narrow-headed garter snake and loach minnow requires that there “will be no livestock
25 use or livestock management activities” where the species is reasonably certain to occur.

26 122. The USFS Biological Assessment states that livestock are excluded from
27 the San Francisco River on the Black Bob allotment, with the exception of “livestock
28 water access points.”

1 123. The Center’s Gila Grazing Assessment found 3.5 miles of significant cattle
2 impacts on the San Francisco River within the **Black Bob allotment**, including trampling
3 causing compaction along the water’s edge with sheared banks, and areas of wallowing
4 and bare ground, contradicting the Agencies’ commitment to exclude cattle from the San
5 Francisco River and other riparian areas within the Black Bob allotment.

6 124. The **Frisco Plaza allotment** includes approximately five miles of the San
7 Francisco River containing designated critical habitat for the loach minnow and
8 spikedace and proposed critical habitat for the narrow-headed garter snake, as well as
9 0.75 miles of the Tularosa River containing designated critical habitat for the loach
10 minnow and proposed critical habitat for the narrow-headed garter snake.

11 125. Under the Grazing Criteria, a not likely to adversely affect finding for the
12 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
13 livestock use or livestock management activities” where the species is reasonably certain
14 to occur.

15 126. The USFS Biological Assessment states that livestock are excluded from
16 the San Francisco River and Tularosa River on the Frisco Plaza allotment except at
17 “livestock water access points.”

18 127. The Center’s Gila Grazing Assessment found 6.9 miles of significant cattle
19 impacts on the San Francisco River within the **Frisco Plaza allotment**, including an
20 almost complete loss of riparian edge vegetation, complete suppression of woody
21 vegetation, severe bank shearing and degradation, low plant diversity, and multiple points
22 of extreme bank erosion at the river’s edge, contradicting the Agencies’ commitment to
23 exclude cattle from the San Francisco River and Tularosa River within the Frisco Plaza
24 allotment.

25 128. The **Kelly allotment** includes approximately ten miles of the San Francisco
26 River containing designated critical habitat for the loach minnow and spikedace and
27 proposed critical habitat for the narrow-headed garter snake, as well as four miles of Saliz
28 Creek with proposed critical habitat for the narrow-headed garter snake.

1 129. Under the Grazing Criteria, a not likely to adversely affect finding for the
2 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
3 livestock use or livestock management activities” where the species is reasonably certain
4 to occur.

5 130. The USFS Biological Assessment states that livestock are excluded from
6 the San Francisco River on the Kelly allotment except for four livestock water access
7 points

8 131. The Center’s Gila Grazing Assessment found 1.1 miles of moderate cattle
9 impacts and 4.9 miles of significant cattle impacts on the San Francisco River within the
10 **Kelly allotment**, including riverbanks denuded of vegetation, frequent and severe
11 streambank shearing and compaction, and heavily trampled river banks, contradicting the
12 Agencies’ commitment to exclude cattle from the San Francisco River and other riparian
13 areas within the Kelly allotment.

14 132. The **Devils Park allotment** includes approximately 3.8 miles of the San
15 Francisco River containing designated critical habitat for the loach minnow and
16 spikedace and proposed critical habitat for the narrow-headed garter snake.

17 133. Under the Grazing Criteria, a not likely to adversely affect finding for the
18 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
19 livestock use or livestock management activities” where the species is reasonably certain
20 to occur.

21 134. The USFS Biological Assessment states that livestock are excluded from
22 the San Francisco River on the Devils Park allotment except at four livestock water
23 access points.

24 135. The Center’s Gila Grazing Assessment found 3.1 miles of significant cattle
25 impacts on the San Francisco River within the **Devils Park allotment**, including
26 numerous cattle observed wallowing in the river, with severe, pervasive, and sustained
27 impacts, heavy browsing of woody regeneration, and near-stream sand terraces denuded
28

1 of vegetation, contradicting the Agencies' commitment to exclude cattle from the San
2 Francisco River within the Devils Park allotment.

3 136. The **Alma allotment** includes approximately 3.8 miles of the San Francisco
4 River containing designated critical habitat for the southwestern willow flycatcher, loach
5 minnow, and spikedace and proposed critical habitat for the yellow-billed cuckoo and
6 narrow-headed garter snake.

7 137. Under the Grazing Criteria, a not likely to adversely affect finding for the
8 narrow-headed garter snake, loach minnow, and spikedace requires that there "will be no
9 livestock use or livestock management activities" where the species is reasonably certain
10 to occur, and for the yellow-billed cuckoo, the grazing cannot "measurably or detectably
11 reduce the suitability or regeneration of" cuckoo streamside habitat.

12 138. The USFS Biological Assessment states that livestock are excluded from
13 the San Francisco River on the Alma allotment except for a "less than 100 foot long"
14 livestock water access point.

15 139. The Gila Grazing Assessment found 2.7 miles of significant cattle impacts
16 on the San Francisco River within the **Alma allotment**, including abundant cattle sign
17 and heavy utilization of riparian enclosure areas, missing fence lines, well-worn cattle
18 trails, including wide trails indicating herd movement, sheared streambanks with deep
19 hoof depressions, abundant wallowing areas with soils completely denuded of vegetation,
20 and trampling of saplings, contradicting the Agencies' commitment to exclude cattle
21 from the San Francisco River within the Alma allotment.

22 140. The **Roberts Park allotment** includes approximately 4.6 miles of the San
23 Francisco River containing designated critical habitat for the southwestern willow
24 flycatcher, loach minnow, and spikedace and proposed critical habitat for the yellow-
25 billed cuckoo and narrow-headed garter snake.

26 141. Under the Grazing Criteria, a not likely to adversely affect finding for the
27 narrow-headed garter snake, loach minnow, and spikedace requires that there "will be no
28 livestock use or livestock management activities" where the species is reasonably certain

1 to occur, and for the yellow-billed cuckoo, the grazing cannot “measurably or detectably
2 reduce the suitability or regeneration of” cuckoo streamside habitat.

3 142. The April 8, 2016 USFS Biological Assessment states that livestock are
4 excluded from the San Francisco River on the Roberts Park allotment.

5 143. The Center’s Gila Grazing Assessment found 0.4 miles of moderate cattle
6 impacts and 1.7 miles of significant cattle impacts on the San Francisco River within the
7 adjoining **Roberts Park and Citizen allotments**, including fencing in disrepair, cattle
8 moving into and down the river corridor, and severe impacts with wallowing areas and
9 large grazed patches, contradicting the Agencies’ commitment to exclude cattle from the
10 San Francisco River within the Roberts Park and Citizen allotments.

11 144. The **Citizen allotment** includes approximately 2.4 miles of the San
12 Francisco River containing designated critical habitat for the southwestern willow
13 flycatcher, loach minnow, and spikedace and proposed critical habitat for the yellow-
14 billed cuckoo and narrow-headed garter snake.

15 145. Under the Grazing Criteria, a not likely to adversely affect finding for the
16 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
17 livestock use or livestock management activities” where the species is reasonably certain
18 to occur, and for the yellow-billed cuckoo, the grazing cannot “measurably or detectably
19 reduce the suitability or regeneration of” cuckoo streamside habitat.

20 146. The USFS Biological Assessment states that livestock are excluded from
21 the San Francisco River on the Citizen allotment.

22 147. The Center’s Gila Grazing Assessment found 0.4 miles of moderate cattle
23 impacts and 1.7 miles of significant cattle impacts on the San Francisco River within the
24 adjoining **Roberts and Citizen allotments**, including fencing in disrepair, cattle moving
25 into and down the river corridor, and severe impacts with wallowing areas and large
26 grazed patches, contradicting the Agencies’ commitment to exclude cattle from the San
27 Francisco River within the Roberts Park and Citizen allotments.
28

1 148. The **Harve Gulch/Bighorn allotment** includes approximately 6.5 miles of
2 the San Francisco River containing designated critical habitat for the southwestern
3 willow flycatcher, loach minnow, and spikedace and proposed critical habitat for the
4 yellow-billed cuckoo and narrow-headed garter snake, as well as 2.5 miles of Whitewater
5 Creek containing designated critical habitat for the southwestern willow flycatcher and
6 loach minnow and proposed critical habitat for the yellow-billed cuckoo and narrow-
7 headed garter snake.

8 149. Under the Grazing Criteria, a not likely to adversely affect finding for the
9 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
10 livestock use or livestock management activities” where the species is reasonably certain
11 to occur, and for the yellow-billed cuckoo, the grazing cannot “measurably or detectably
12 reduce the suitability or regeneration of” cuckoo streamside habitat.

13 150. The USFS Biological Assessment states that livestock are fully excluded
14 from the San Francisco River and Whitewater Creek on the Harve Gulch/Bighorn
15 allotment.

16 151. The Center’s Gila Grazing Assessment found 2.2 miles of moderate cattle
17 impacts and 1.5 miles of significant cattle impacts on the San Francisco River within the
18 **Harve Gulch/Bighorn allotment**, including cattle trails and wallowing areas, and
19 stunted willow recruitment, contradicting the Agencies’ commitment to exclude cattle
20 from the San Francisco River and other riparian areas within the Harve Gulch/Bighorn
21 allotment.

22 152. The **Dry Creek allotment** includes approximately 2.5 miles of the San
23 Francisco River containing designated critical habitat for the southwestern willow
24 flycatcher, loach minnow, and spikedace and proposed critical habitat for the yellow-
25 billed cuckoo and narrow-headed garter snake.

26 153. Under the Grazing Criteria, a not likely to adversely affect finding for the
27 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
28 livestock use or livestock management activities” where the species is reasonably certain

1 to occur, and for the yellow-billed cuckoo, the grazing cannot “measurably or detectably
2 reduce the suitability or regeneration of” cuckoo streamside habitat.

3 154. The USFS Biological Assessment states that livestock are fully excluded
4 from the San Francisco River on the Dry Creek allotment.

5 155. The Center’s Gila Grazing Assessment found 0.9 miles of significant cattle
6 impacts on the San Francisco River within the **Dry Creek allotment**, including observed
7 cattle in riparian vegetation, large wallowing areas, and cattle tracks, contradicting the
8 Agencies’ commitment to exclude cattle from the San Francisco River within the Dry
9 Creek allotment.

10 156. These findings contradict the Agencies’ commitment in their ESA section 7
11 consultation to exclude cattle from the San Francisco River and other riparian areas on
12 the **Luna, Black Bob, Frisco Plaza, Kelly, Devil’s Park, Alma, Citizen/Roberts Park,**
13 **Harve Gulch/Bighorn, and Dry Creek allotments**, and demonstrate that USFS has not
14 been conducting required monitoring or taken required corrective action.

15 157. The USFS October 17, 2019 NOI response letter acknowledges compliance
16 issues on the **Luna, Black Bob, Kelly, Devil’s Park, and Alma allotments**, stating that
17 unauthorized cattle have been removed, but with the exception of the **Luna allotment**,
18 does not state any intention to reinitiate or complete consultation to address the extensive
19 and severe riparian damage documented by the Center’s assessment. With respect to the
20 **Luna allotment**, the response letter states that USFS will reinitiate consultation in Fiscal
21 Year 2020 to address newly listed species including narrow-headed garter snakes, but this
22 consultation has not yet resulted in a final Biological Assessment or Biological Opinion,
23 and USFS is not ensuring that cattle are removed from riparian areas pending completion
24 of such consultation, despite its acknowledgment that unauthorized cattle have accessed
25 occupied endangered species habitat on Dry Blue Creek, and that grazing is not
26 completely excluded from occupied endangered species habitat on the San Francisco
27 River.
28

1 **Gila National Forest Allotments (Gila River Headwaters)**

2 158. The headwaters of the Gila River flow largely through the nation's first
3 designated wilderness, the Gila Wilderness. Collectively, the West Fork, Middle Fork,
4 and East Fork headwaters of the Gila River contain occupied habitat and/or designated
5 critical habitat for endangered species including loach minnow, spikedace, Chiricahua
6 leopard frog, and narrow-headed garter snake.

7 159. The July 11, 2016 FWS concurrence concluding section 7 consultation
8 included USFS Biological Assessments for the renewal of ten-year grazing permits and
9 associated issuance of AMPs for allotments containing headwater streams of the Gila
10 River within their boundaries including the **Jordan Mesa, Taylor Creek, and XSX**
11 **allotments**. In conformance with the Grazing Criteria, all of these Biological
12 Assessments committed USFS to the exclusion of cattle from the Gila River headwaters
13 and tributaries containing endangered species habitat in order to issue not likely to
14 adversely affect findings for impacted species and critical habitat.

15 160. The **Taylor Creek allotment** includes approximately three miles of the
16 East Fork Gila River (2.5 miles on private land) containing designated critical habitat for
17 the loach minnow and spikedace and proposed critical habitat for the narrow-headed
18 garter snake; 3.4 miles of Beaver Creek containing designated critical habitat for
19 Chiricahua leopard frog; and nine miles of Taylor Creek, which is occupied by headwater
20 chub. The Taylor allotment is contained entirely within the Gila Wilderness.

21 161. Under the Grazing Criteria, a not likely to adversely affect finding for the
22 narrow-headed garter snake, loach minnow, and spikedace requires that there "will be no
23 livestock use or livestock management activities" where the species is reasonably certain
24 to occur.

25 162. The USFS Biological Assessment states that livestock are excluded from
26 East Fork Gila River, Beaver Creek, and Taylor Creek on the Taylor Creek allotment.

27 163. The Center's Gila Grazing Assessment found 0.9 miles of moderate cattle
28 impacts and 3.5 miles of significant cattle impacts on Beaver Creek and Taylor Creek on

1 the **Taylor Creek allotment**, including cows inside enclosure areas, lack of fencing,
2 severe impacts on herbaceous growth and woody regeneration, wallows and bare ground,
3 downed fences, bank shearing, and long-term suppression of woody regeneration,
4 contradicting the Agencies' commitment to exclude cattle from Beaver Creek and Taylor
5 Creek within the Taylor Creek allotment.

6 164. The **Jordan Mesa allotment** includes approximately 5.7 miles of the East
7 Fork Gila River containing designated critical habitat for the loach minnow and
8 spikedace and proposed critical habitat for the narrow-headed garter snake. The Jordan
9 Mesa allotment is contained entirely within the Gila Wilderness.

10 165. Under the Grazing Criteria, a not likely to adversely affect finding for the
11 narrow-headed garter snake, loach minnow, and spikedace requires that there "will be no
12 livestock use or livestock management activities" where the species is reasonably certain
13 to occur.

14 166. The USFS Biological Assessment states that the entire East Fork Gila River
15 will be closed to grazing on the Jordan Mesa allotment, but that the allotment currently
16 remains in non-use.

17 167. The Center's Gila Grazing Assessment found 3.7 miles of moderate cattle
18 impacts and 2.6 miles of significant cattle impacts on East Fork Gila River on the **Jordan**
19 **Mesa allotment**, including signs of cattle use or movement throughout the entire survey
20 area, severe browse pressure on all woody regeneration, and fencing in disrepair,
21 contradicting the Agencies' commitment to exclude cattle from the East Fork Gila River
22 within the Jordan Mesa allotment.

23 168. The **XSX allotment** includes portions of the East Fork Gila River
24 containing designated critical habitat for the loach minnow and spikedace and proposed
25 critical habitat for the narrow-headed garter snake; 4.6 miles of the Gila River containing
26 designated critical habitat for the loach minnow and spikedace and proposed critical
27 habitat for the northern Mexican garter snake and narrow-headed garter snake; and
28

1 portions of West Fork Gila River. The XSX allotment is contained entirely within the
2 Gila Wilderness.

3 169. Under the Grazing Criteria, a not likely to adversely affect finding for the
4 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
5 livestock use or livestock management activities” where the species is reasonably certain
6 to occur.

7 170. The Biological Assessment states that the Middle Fork, East Fork, and Gila
8 River are excluded from grazing on the XSX allotment.

9 171. The Center’s Gila Grazing Assessment found one mile of moderate cattle
10 impacts on the East Fork Gila River on the **XSX allotment**, contradicting the Agencies’
11 commitment to exclude cattle from within the XSX allotment.

12 172. These findings contradict the Agencies’ commitment in their ESA section 7
13 consultation to exclude cattle from the Gila River headwaters and tributaries on the
14 **Taylor Creek, Jordan Mesa, and XSX allotments**, and demonstrate that USFS has not
15 been conducting required monitoring or taken required corrective action.

16 173. The USFS October 17, 2019 NOI response letter acknowledges compliance
17 issues on the **Taylor Creek and Jordan Mesa allotments**, and states that USFS will
18 reinitiate consultation on the **Taylor Creek allotment** in Fiscal Year 2020 to address
19 newly listed species including narrow-headed garter snakes, but this consultation has not
20 yet resulted in a final Biological Assessment or Biological Opinion, and USFS is not
21 ensuring that cattle are removed from riparian areas pending completion of such
22 consultation.

23 **Gila National Forest Allotments (Gila River)**

24 174. After the headwaters converge, the upper Gila River flows through a large
25 portion of the Gila Wilderness, and then further downstream enters into a mixture of
26 Forest Service, private, and other federal and state lands in New Mexico before crossing
27 the Arizona state line.
28

1 175. FWS has made specific decisions constituting final agency concurring with
2 USFS Biological Assessments concluding section 7 consultations for the renewal of ten-
3 year grazing permits and associated issuance of AMPs for allotments within the Gila
4 River including the **Brock Canyon, Redstone, and Gila River allotments**. In
5 conformance with the Grazing Criteria, all of these Biological Assessments committed
6 USFS to the exclusion of cattle from the Gila River in order to issue not likely to
7 adversely affect findings for impacted species and critical habitat.

8 176. The **Brock Canyon allotment** includes approximately fourteen miles of
9 the Gila River containing designated critical habitat for the southwestern willow
10 flycatcher, Gila chub, loach minnow, and spikedace and proposed critical habitat for the
11 narrow-headed garter snake.

12 177. Under the Grazing Criteria, a not likely to adversely affect finding for the
13 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
14 livestock use or livestock management activities” where the species is reasonably certain
15 to occur.

16 178. The USFS Biological Assessment states that the entire Brock Canyon
17 allotment is in non-use.

18 179. The Center’s Gila Grazing Assessment found significant cattle impacts
19 throughout the Brock Canyon allotment on the Gila River. The Brock Canyon allotment
20 is contained largely within the Gila Wilderness.

21 180. These findings contradict the Agencies’ commitment in their ESA section 7
22 consultation to exclude cattle from the Gila River and other riparian areas on the **Brock**
23 **Canyon allotment**, and the larger commitment to keep the allotment in non-use, and
24 demonstrate that USFS has not been conducting required monitoring or taken required
25 corrective action.

26 181. The **Redstone allotment** includes approximately fourteen miles of the Gila
27 River containing designated critical habitat for the southwestern willow flycatcher, Gila
28

1 chub, loach minnow, and spikedace and proposed critical habitat for the narrow-headed
2 garter snake. The Redstone allotment is contained largely within the Gila Wilderness.

3 182. Under the Grazing Criteria, a not likely to adversely affect finding for the
4 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
5 livestock use or livestock management activities” where the species is reasonably certain
6 to occur.

7 183. The USFS Biological Assessment did not address the Redstone allotment,
8 which was considered vacant and was officially ungrazed since 1999. In 2012, USFS
9 reopened the Wildhorse Mesa Pasture on the Redstone allotment.

10 184. The Center’s Gila Grazing Assessment found significant cattle impacts
11 throughout the **Redstone allotment** on the Gila River.

12 185. These findings contradict the Agencies’ commitment in their ESA section 7
13 consultation to exclude cattle from the Gila River and other riparian areas occupied by
14 endangered species, and the larger commitment to keep the allotment in non-use, and
15 demonstrate that USFS has not been conducting required monitoring or taken required
16 corrective action.

17 186. The **Gila River allotment** includes approximately eleven miles of the Gila
18 River containing designated critical habitat for the southwestern willow flycatcher, loach
19 minnow, and spikedace and proposed critical habitat for the yellow-billed cuckoo,
20 northern Mexican garter snake, and narrow-headed garter snake.

21 187. Under the Grazing Criteria, a not likely to adversely affect finding for the
22 narrow-headed garter snake, loach minnow, and spikedace requires that there “will be no
23 livestock use or livestock management activities” where the species is reasonably certain
24 to occur.

25 188. The USFS Biological Assessment states that the Gila River is excluded
26 from grazing.

27 189. The Center’s Gila Grazing Assessment found 0.8 miles of moderate cattle
28 impacts, and 4.3 miles of significant cattle impacts on the Gila River within the **Gila**

1 **River allotment** including downed fences, severe trampling, long-term heavily grazed
2 patches, heavy browsing on woody regeneration, bank degradation, and breaches in
3 fencing.

4 190. These findings contradict the Agencies' commitment in their ESA section 7
5 consultation to exclude cattle from the Gila River and other riparian areas on the **Gila**
6 **River allotment**, and the larger commitment to keep the allotment in non-use, and
7 demonstrate that USFS has not been conducting required monitoring or taken required
8 corrective action.

9 CLAIMS FOR RELIEF

10 Claim I

11 **Failure to Reinitiate and Complete ESA Section 7 Consultation to Ensure Ongoing** 12 **Livestock Grazing Does Not Jeopardize Listed Species** 13 **or Destroy or Adversely Modify Critical Habitat** **(ESA Violation of 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.16)**

14 191. Plaintiff incorporates all preceding paragraphs by reference.

15 192. USFS has authorized livestock grazing on the grazing allotments identified
16 in the paragraphs above and listed in **Table 1** through final agency actions including the
17 issuance of term grazing permits, allotment management plans ("AMPs"), and allotment
18 annual operating instructions ("AOIs").

19 193. The Agencies have relied upon the USFS's commitments to exclude cattle
20 from riparian areas—typically through fencing—as a foundation for meeting their
21 obligations under the Endangered Species Act to ensure that USFS's grazing
22 authorizations do not jeopardize the continued existence of endangered species or result
23 in the destruction or adverse modification of their designated critical habitat.
24 Specifically, in carrying out their consultation duties pursuant to section 7 of the ESA for
25 the specific grazing authorizations challenged in this action, the Agencies have
26 determined that the impacts of domestic livestock grazing on endangered riparian species
27 are insignificant based largely on commitments that designated streamside habitat is
28 excluded from cattle and that USFS will regularly monitor riparian areas in order to

1 ensure that the fencing exclusions remain intact and effective. These commitments
2 include requirements specific to each listed threatened or endangered species, as detailed
3 in the “Master Framework for Streamlining Consultation on Livestock Grazing
4 Activities” (December 2015), also called the Grazing Guidance Criteria.

5 194. Plaintiff Center for Biological Diversity conducted on-the-ground
6 assessments to determine if cattle are present within riparian areas excluded from cattle
7 on grazing allotments in the Apache-Sitgreaves and Gila National Forests in 2017, 2018,
8 and 2019. These assessments documented that purported fencing exclusions were
9 frequently in disrepair or absent, resulting in widespread cattle presence and associated
10 extensive damage to riparian areas.

11 195. The ESA places ongoing obligations on federal agencies to ensure that their
12 actions do not jeopardize the continued existence of endangered species or adversely
13 modify or destroy their designated critical habitat, including the duty to reinitiate section
14 7 consultation in four circumstances. 50 C.F.R. § 402.16(a)(1)-(4). Agencies must
15 reinitiate consultation, for example, “[i]f the amount or extent of taking specified in the
16 incidental take statement is exceeded,” when “[n]ew information reveals effects of the
17 action that may affect listed species or critical habitat in a manner or to an extent not
18 previously considered,” or when “[t]he identified action is subsequently modified in a
19 manner that causes an effect to the listed species or critical habitat that was not
20 considered in the biological opinion.” *Id.* § 402.16(a)(1)-(3).

21 196. The grazing assessment reports provided the Agencies with documentation
22 of extensively damaged, ineffective, or absent fencing and associated riparian use and
23 damage by cattle. These findings contradict the requirements and commitments made
24 pursuant to application of the Grazing Guidance Criteria, and thus undermine the legality
25 of section 7 consultation decisions authorizing grazing on the identified allotments, as all
26 of these decisions relied upon the purported exclusion of cattle from southwestern rivers
27 and streams as a foundation for those decisions.
28

1 197. The Agencies were required to reinitiate and complete consultation when
2 presented with evidence documenting extensive cattle use and associated lack of USFS
3 monitoring of the riparian streamside areas of specific allotments within the upper Gila
4 River watershed on the Apache-Sitgreaves and Gila National Forests. In addition, USFS
5 is required to address or remediate the extensive natural resource damage to occupied
6 endangered species streamside and riparian habitat and designated critical habitat that has
7 been demonstrated in the Center's assessments. The USFS's failure in fact to exclude
8 domestic livestock from occupied threatened and endangered species habitat specifically
9 triggers the reinitiation thresholds at 50 C.F.R. § 402.16(a). By failing to reinitiate and
10 complete consultation despite the fact that the reinitiation criteria are satisfied, the
11 Agencies are in violation of 50 C.F.R. § 402.16.

12 198. The Agencies are in ongoing violation of the ESA for livestock grazing on
13 the grazing allotments identified in the paragraphs above and listed in **Table 1**. 16 U.S.C.
14 § 1536(a)(2); 50 C.F.R. § 402.16. By failing to take effective actions to exclude livestock
15 from these allotments, or to remediate the extensive natural resource damage to occupied
16 endangered species streamside and riparian habitat and designated critical habitat that has
17 been demonstrated in the Center's assessments, USFS is in ongoing violation of the
18 substantive ESA section 7(a)(2) requirement that federal agencies ensure their actions are
19 not likely to jeopardize the continued existence of any listed species or result in the
20 destruction or adverse modification of designated critical habitat.

21 199. Plaintiff and its members are injured by the Agencies' violations of ESA
22 section 7(a)(2) and failure to reinitiate and complete consultation.

23 200. An Order of the Court directing compliance with 50 C.F.R. § 402.16 and
24 ESA section 7 would redress Plaintiff's injuries.

25
26
27
28

Claim II
Unlawful Irreversible or Irretrievable Commitment of Resources
Pending Completion of Consultation
(ESA Violation of 16 U.S.C. 1536(d))

1
2
3
4 201. Plaintiff incorporates all preceding paragraphs by reference.

5 202. USFS’s October 17, 2019 NOI response letter does not provide any specific
6 timeline or other clear commitment for completing the vast majority of the required
7 reinitiated consultations and does not acknowledge that such reinitiation is required for
8 many allotments. Cattle continue to access purportedly excluded riparian areas, even
9 though the Agencies have determined that such exclusion is necessary to avoid
10 jeopardizing listed species or the destruction or adverse modification of their designated
11 critical habitat.

12 203. ESA section 7(d) provides that once an agency initiates or reinitiates
13 section 7 consultation, the agency “shall not make any irreversible or irretrievable
14 commitment of resources with respect to the agency action which has the effect of
15 foreclosing the formulation or implementation of any reasonable and prudent alternative
16 measures which would not violate subsection (a)(2).” 16 U.S.C. § 1536(d). The purpose
17 of section 7(d) is to prevent harm to endangered species and designated critical habitat
18 pending the completion of section 7 consultation. In this case, USFS must take immediate
19 action to prevent permittees from foreclosing conservation options that might otherwise
20 be available upon the completion of consultation.

21 204. USFS has failed to exclude cattle from riparian areas occupied by listed
22 threatened or endangered species, and/or containing designated critical habitat for such
23 species, within the grazing allotments identified in the paragraphs above and listed in
24 **Table 1** in violation of ESA section 7(d), 16 U.S.C. § 1536(d).

25 205. Plaintiff and its members are injured by the Agencies’ violations of ESA
26 section 7(d).

27 206. An Order of the Court directing compliance with ESA section 7(d) would
28 redress Plaintiff’s injuries.

REQUEST FOR RELIEF

Wherefore, Plaintiff respectfully requests that the Court:

1. Declare that Defendants are violating section 7(a)(2) of the Endangered Species Act and 50 C.F.R. § 402.16 by failing to reinitiate and complete consultation on the grazing allotments identified in the paragraphs above and listed in **Table 1** in order to ensure that grazing activities on those allotments do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of their designated critical habitat;
2. Declare that Defendants are violating Section 7(d) of the Endangered Species Act by failing to remove all cattle within purportedly excluded riparian areas;
3. Order USFS to remove all cattle within purportedly excluded riparian areas within ten days of this Court’s Order;
4. Order USFS to remediate the extensive natural resource damage to occupied endangered species streamside and riparian habitat and designated critical habitat that has been documented in the Center’s assessments;
5. Order USFS to commit to monthly monitoring of all riparian and streamside areas required to be excluded from domestic livestock grazing pursuant to the Grazing Criteria and section 7 of the Endangered Species Act;
6. Order the Agencies to reinitiate and complete consultation on the grazing allotments identified in the paragraphs above and listed in **Table 1**;
7. Grant Plaintiff its reasonable attorneys’ fees and costs associated with this action, as provided by the ESA, § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. § 2412; and
8. Provide such additional relief as the Court may deem just and proper.

Respectfully Submitted this 13th day of January, 2020.

/s/ Brian Segee
Brian Segee (Cal. Bar No. 200795)
Center for Biological Diversity
660 S. Figueroa Street, Suite 1000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Los Angeles, CA 90017
(805) 750-8852
bsegee@biologicaldiversity.org
Pro Hac Vice Application Pending

Marc Fink (Minn. Bar No. 343407)
Center for Biological Diversity
209 East 7th Street
Duluth, MN 55805
Tel: (218) 464-0539
mfink@biologicaldiversity.org
Pro Hac Vice Application Pending

Attorney for Plaintiffs

TABLE 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Apache National Forest Allotments

Blue River: Red Hill, Cow Flat, Fishhook/Steeple Mesa, Raspberry, Sandrock, Pigeon

Eagle Creek: East Eagle, Mud Springs, Double Circle, Tule, Dark Canyon

San Francisco River: Wildbunch (also on Blue River), Pleasant Valley

Gila National Forest Allotments

Gila River Headwaters: Jordan Mesa, Taylor Creek, and XSX

Gila River: Redstone, Brock Canyon, Gila River

Tularosa River: Corner Mountain, Negrito/Yeguas, Govina, Alexander, Deep Canyon, Lower Plaza

San Francisco River: Luna, Black Bob, Frisco Plaza, Kelly, Devil's Park, Alma, Citizen/Roberts Park, Harve Gulch/Bighorn, Dry Creek