



VIA CERTIFIED MAIL and E-MAIL

April 29, 2026

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Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act and Administrative Procedure Act: Livestock Grazing on Prescott National Forest’s Upper Verde Allotments

Secretaries Rollins and Burgum, Chief Schultz, and Director Nesvik:

Pursuant to 16 U.S.C. § 1540(g)(2)(A), on behalf of the Center for Biological Diversity (“the Center”) and Maricopa Bird Alliance, we hereby notify you of violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, and its implementing regulations, 50 C.F.R. §§ 402.01-402.17, in connection with livestock grazing authorized by the U.S. Fish and Wildlife Service’s (“FWS”) and the U.S. Forest Service (collectively, the “agencies”) and unlawful damage to designated critical habitat in several allotments along the upper Verde River within the Prescott National Forest (“Prescott”), including: (1) the China Dam Allotment; (2) the Horseshoe Allotment; (3) the Muldoon Allotment; (4) the Perkinsville Allotment; (5) the Sand Flat Allotment; and (6) the West Bear/Del Rio Allotment (collectively, the “Upper Verde Allotments”).

This Notice documents violations of the ESA and Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, with respect to improper livestock management in yet another National Forest in Arizona. As our biological surveys have repeatedly demonstrated, designated critical habitat for imperiled species along the Verde River exists in a highly degraded state due to damage from unauthorized/trespass cattle despite being strictly off-limits to grazing.

In this Notice, we show that grazing restrictions on the allotments in question are not being followed, and that the biological opinions and concurrences currently in effect for these allotments are based on false assumptions regarding cattle exclusion and grazing permit compliance. Importantly, the assumption and requirement that cattle are effectively excluded from upper Verde River riparian critical habitat within the Prescott National Forest is demonstrably false. The ESA consultations relevant to this NOI include:

- (1) the December 30, 2002 Biological Opinion on the effects of livestock grazing on 16 allotments of the Verde River watershed on spikedace, loach minnow, and their critical habitat (AESO/SE 2-21-89-F-071);
- (2) the July 9, 2014 Biological Opinion on the Land and Resource Management Plan (“Forest Plan”) for the Prescott National Forest (AESO/SE 02EAAZ00-2013-F-0019);
- (3) the March 15, 2017 Concurrence for the China Dam Allotment (AESO/SE 02EAAZOO-2017-I-0392) (addressing critical habitat for the western yellow-billed cuckoo and narrow-headed garter snake);
- (4) the March 15, 2017 Concurrence for the Horseshoe Allotment (AESO/SE 02EAAZOO-2017-I-0393) (same);
- (5) the March 15, 2017 Concurrence for the Muldoon Allotment (AESO/SE 02EAAZOO-2017-I-0394) (same);
- (6) the March 21, 2017 Concurrence for the Perkinsville Allotment (AESO/SE 02EAAZOO-2017-I-0395) (same);
- (7) the March 2017 Concurrence for the Sand Flat Allotment;¹ and
- (8) the March 21, 2017 Concurrence for the West Bear (West Bear/Del Rio) Allotment (AESO/SE 02EAAZOO-2017-I-0397) (addressing critical habitat for the western yellow-billed cuckoo and narrow-headed garter snake).

The Prescott National Forest’s grazing authorizations, which rely on FWS’s flawed biological opinions and concurrences, allow grazing permittees to continue business as usual in the Prescott to the detriment of ESA-listed species and their habitats in violation of ESA Section 7(a)(2), which requires that all federal agencies, in consultation with FWS, “insure” that their actions will not jeopardize the continued existence of endangered or threatened species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2).

As detailed below, new information reveals effects of the action that are affecting yellow-billed cuckoo (“cuckoo”), narrow-headed garter snake (“garter snake”), spikedace and loach minnow in a manner or to an extent not previously considered and authorized by the existing Biological Opinions and Concurrences on the Prescott’s grazing program. It also appears that BLM has never consulted with FWS concerning the impacts of livestock grazing on critical habitat of the razorback sucker in or directly adjacent to the Horseshoe Allotment.

Forest Service-authorized grazing on the Prescott’s Upper Verde Allotments has led to unlawful, unauthorized grazing due to lack of appropriate enclosure fencing. This constitutes a modification to the agency action consulted on in a manner that is harming ESA-listed species and critical habitat. The ineffectiveness of the fencing enclosures and the resulting frequent presence of cattle in riparian areas also constitutes new information that reveals effects of the

¹ The Center has not yet located the Sand Flat concurrence, but it is likely available as AESO/SE 02EAAZOO-2017-I-0396.

action that may affect listed species or critical habitat in a manner or to an extent not previously considered. The agencies' failure to reinitiate and complete ESA Section 7 consultation on the ongoing impacts of livestock grazing on threatened and endangered species and their critical habitat within the Prescott National Forest violates the ESA and its implementing regulations. Further, the Forest Service's actions authorizing grazing activities that adversely affect (and likely "take") listed species and their habitat, including designated critical habitat, without first undergoing consultation also violates Sections 7(a)(2) and 9 of the ESA, and is arbitrary and capricious. *See* 16 U.S.C. §§ 1536, 1538; 5 U.S.C. § 706.

The Forest Service's issuance of cattle grazing authorizations, including via permits, allotment management plans ("AMPs") and/or annual operating instructions ("AOIs"), is "arbitrary and capricious, an abuse of discretion," "otherwise not in accordance with law," and "without observance of procedure required by law" within the meaning of the APA, 5 U.S.C. § 706(2)(A), (D).

Prescott National Forest livestock grazing on these riparian allotments should be immediately enjoined, the agencies' grazing authorizations and the Biological Opinions and Concurrences should be vacated and remanded, and the agencies should be ordered to immediately initiate or reinitiate consultation under ESA Section 7, such that no irreversible or irretrievable commitment of resources is made which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. *See* 16 U.S.C. § 1536(d).

LEGAL BACKGROUND: THE ENDANGERED SPECIES ACT

The ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits any "person" from "tak[ing]" any member of an endangered or threatened species without authorization from FWS. 16 U.S.C. § 1538(a)(1)(B), (G); 50 C.F.R. §§ 17.21(c), 17.31. The term "take" is defined broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). FWS has further defined "harass" to include "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. In addition, "harm" is defined to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.*

Under ESA Section 7, before taking any action that may have direct or indirect effects on any listed species, the action agency must consult with FWS to evaluate the impact of the proposed action. *See* 16 U.S.C. § 1536(a). The purpose of consultation is to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical." 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(a). Agency "action" is broadly defined to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. § 402.02. According to ESA regulations, an action jeopardizes a listed species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of

both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” *Id.*

The evaluation of the effects of the proposed action on listed species during consultation must use “the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2). Additionally, once consultation is initiated, the action agency is prohibited from making “any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.” *Id.* § 1536(d).

Consultation under Section 7 may be “formal” or “informal” in nature. Informal consultation is “an optional process” involving all correspondence between the action agency and FWS, which is designed to assist the action agency, rather than FWS, in determining whether formal consultation is required. *See* 50 C.F.R. § 402.02. During informal consultation, the action agency requests information from FWS as to whether any listed species may be present in the action area. If so, the action agency is required to prepare and submit to FWS a “biological assessment” that evaluates the potential effects of the action on listed species and critical habitat. 16 U.S.C. § 1536(c)(1). As part of the biological assessment, the action agency must make a finding as to whether the proposed action may affect listed species. *Id.* If the action agency determines the proposed action “is not likely to adversely affect” listed species or critical habitat, and FWS concurs, the informal consultation process ends. 50 C.F.R. § 402.14(b).

However, if the proposed action “may affect” listed species or critical habitat, then formal consultation is required. *Id.* § 402.14(a); *see also* FWS, Endangered Species Consultation Handbook at 3-13 (1998) [hereinafter “Consultation Handbook”]. The result of formal consultation is a Biological Opinion (“BiOp”) from FWS, which analyzes the best available scientific data on the pre-existing status of the species and evaluates how the proposed action would impact the species’ status compared to its baseline condition.

A BiOp must include a description of the proposed action, a review of the species’ status and critical habitat, an evaluation of the environmental baseline, and an analysis of the direct and indirect effects of the proposed action, along with the cumulative effects of reasonably certain future state, tribal, local, and private actions. *See* 50 C.F.R. § 402.14(g); *see also* Consultation Handbook at 4-14 to 4-31. At the conclusion of formal consultation, FWS determines whether the proposed action—in addition to the pre-existing environmental baseline of the species—is likely to jeopardize the continued existence of a listed species or destroy or adversely modify any designated critical habitat.

If FWS concludes that the action is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat but will result in incidental take, it must provide the action agency with a written Incidental Take Statement (“ITS”). The ITS specifies the “impact of such incidental taking on the species” and “those reasonable and prudent measures that the [FWS] considers necessary or appropriate to minimize” those impacts, as well as “terms and conditions” that the action agency must follow. 16 U.S.C. § 1536(b)(4). Should FWS determine that the action will jeopardize a listed species or adversely modify critical habitat, it must suggest reasonable and prudent alternatives to avoid such outcomes. *Id.* § 1536(b)(3)(A).

An ITS must specify the impact of incidental take on the species. 50 C.F.R. § 402.14(i)(1)(i). FWS may use a surrogate to express the amount or extent of anticipated take, provided the BiOp explains the connection between the surrogate and the take of the listed species, justifies why measuring take directly is not practical, and establishes a clear standard for determining when the take limit has been exceeded. *Id.* If an exceedance occurs, FWS and the action agency must reinitiate consultation immediately. *Id.* § 402.14(i)(5); *see also id.* § 402.16(a)(1) (requiring reinitiation of consultation “[i]f the amount or extent of taking specified in the [ITS] is exceeded”).² Immediate reinitiation of consultation is also required “[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” *Id.* § 402.16(a)(2). Similarly, consultation reinitiation is required “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” *Id.* § 402.16(a)(3).

Without a valid BiOp and ITS, any activities resulting in take of listed species are unlawful. 16 U.S.C. § 1538(a)(1)(B), (G); 50 C.F.R. §§ 17.21(c), 17.31. Anyone who undertakes or authorizes such activities may face criminal and civil federal enforcement actions, as well as civil citizen suits seeking declaratory and injunctive relief. *See* 16 U.S.C. §§ 1538(g), 1540. This includes action agencies, which bear independent responsibility for ensuring their activities comply with the ESA; an action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species” merely by relying upon a BiOp, concurrence, or other consultation document issued by FWS. *Pyramid Lake Paiute Tribe v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); *see also Ctr. for Biological Diversity v. U.S. BLM*, No. CV-24-00141, 2026 U.S. Dist. LEXIS 68876, at *30 (D. Ariz. Mar. 30, 2026) (finding BLM violated the ESA by relying on an unlawful Concurrence that assumed—despite contrary evidence—that livestock grazing would not occur in critical habitat).

FACTUAL BACKGROUND

I. Grazing Harms Streams and Riparian-Dependent Wildlife in the Desert Southwest.

Livestock grazing has both direct and indirect effects on streams and is a leading cause of species endangerment in the Southwest, including the ESA-listed species at issue in this Notice which are specifically dependent on aquatic and riparian habitat.³

² Both the action agency and FWS have a duty to reinitiate consultation. *See Ctr. for Biological Diversity v. U.S. DOI*, No. 24-cv-04651, 2026 U.S. Dist. LEXIS 68386 (N.D. Cal. Mar. 30, 2026) (vacating 50 C.F.R. § 402.16(a) (2025), concerning the duty to request reinitiation of consultation, and reinstating prior (2023) version, under which both the action agency and FWS share responsibility for reinitiating consultation).

³ The species at issue in this Notice are: Yellow-billed cuckoo (western DPS): Listed as threatened October 3, 2014 (79 Fed. Reg. 59991), final critical habitat April 21, 2021 (86 Fed. Reg. 20815); loach minnow and spikedace: Uplisted to endangered February 23, 2012 (77 Fed. Reg. 10810), final critical habitat February 23, 2012 (77 Fed. Reg. 10810); narrow-headed garter snake: Listed as threatened July 8, 2014 (79 Fed. Reg. 38677), final critical habitat April 28, 2021 (86 Fed. Reg. 20962); razorback sucker: Listed as endangered October 23, 1991 (56 Fed. Reg. 54950), final critical habitat March 21, 1994 (59 Fed. Reg. 13374).

Scientific study on the impacts of livestock grazing on aquatic and riparian habitats in the Southwest is extensive and universally shows severe and lasting negative impacts. *See Attach. 1* (bibliography of scientific literature demonstrating that livestock grazing is detrimental to Western arid land ecosystems, including aquatic and riparian zones, and the native species that depend on them). For example, livestock directly affects riparian habitat through removal of riparian vegetation. Loss of riparian vegetation in turn raises water temperatures, reduces bank stability, and eliminates an important structural component of the stream environment that contributes to the formation of pools. Grazing physically alters streambanks through trampling and shearing, leading to bank erosion. In combination, loss of riparian vegetation and bank erosion can irreversibly alter riparian ecosystems.

Complete exclusion of cattle is widely accepted as a minimum baseline management strategy in preserving stream health. *See Attach. 1*.

II. Imperiled Wildlife on the Upper Verde River

The upper Verde River is home to numerous ESA-listed species dependent on aquatic and riparian habitat federally designated as critical to the recovery of cuckoo, garter snake, spikedace, and razorback sucker. Critical habitat for cuckoo, garter snake, and spikedace occurs on Muldoon, West Bear/Del Rio, China Dam, Sand Flat, Perkinsville, and Horseshoe allotments. In addition, Perkinsville and Horseshoe allotments also contain critical habitat for razorback sucker (*See Fig. 1* below, also *Attach. 3*). Grazing allotments along the upper Verde River are administered by the Prescott National Forest, which is charged with insuring that its actions will not jeopardize the continued existence of endangered or threatened species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2).

A. Western yellow-billed cuckoo

Western yellow-billed cuckoo (*Coccyzus americanus*) were listed under the ESA in 2014,⁴ and received critical habitat in 2021.⁵ Cuckoo face ongoing population declines owing primarily to loss of native habitat.⁶ Once a fairly common summer resident throughout Arizona, cuckoo populations declined significantly starting in the 1970's and this directly paralleled the decline of its preferred breeding habitat, cottonwood-willow riparian forest.⁷ Despite the extraordinary ecological and biodiversity values of riparian forest ecosystems, these places have been the most disturbed and degraded land type in the western United States in large part due to cattle grazing.⁸

⁴ 79 Fed. Reg. 59992.

⁵ 86 Fed. Reg. 20798.

⁶ Wallace, C.S., Villarreal, M.L. and van Riper III, C., 2013. Influence of monsoon-related riparian phenology on yellow-billed cuckoo habitat selection in Arizona. *Journal of Biogeography*, 40(11), pp.2094-2107.

⁷ 78 Fed. Reg. 61621.

⁸ Bock, C.E., Saab, V.A., Rich, T.D. and Dobkin, D.S., 1993. Effects of livestock grazing on neotropical migratory landbirds in western North America. *Status and management of Neotropical migratory birds. USDA Forest Service, General Technical Report RM-229*, pp.296-309.

Despite the importance of ground cover, understory, and multi-layered vegetation to cuckoo survival and reproduction, cattle grazing is well-known to degrade these important features in riparian and aquatic habitats throughout the arid Southwest (*See Attach. 1*). Loss of riparian habitat regeneration caused by grazing is an acknowledged, prominent, and ongoing threat to cuckoo reproduction.⁹ According to FWS, habitat degradation associated with livestock grazing is a recognized threat in 70 out of 72 (97%) of critical habitat units.¹⁰

FWS defines overgrazing as “grazing activity [that] degrades riparian habitat attributes and prevents long-term health and persistence of these systems.”¹¹ In another example, FWS defines overgrazing as grazing activities that reduce quality and quantity of breeding habitat.¹² Cattle grazing in cuckoo critical habitat, as we document in this Notice, has significantly impacted riparian systems by decreasing herbaceous groundcover, facilitating erosion and preventing regeneration of riparian plants and trees.

B. *Narrow-headed garter snake*

The narrow-headed garter snake (*Thamnophis rufipunctatus*) is an imperiled native reptile that has declined dramatically throughout its range because of habitat destruction, modification and fragmentation.¹³ Garter snakes received ESA listing in 2014,¹⁴ and critical habitat in 2021.¹⁵ Primary Biological Features required by garter snakes include: slow-moving water with in-stream pools, off-channel pools, and backwater habitat; lentic wetlands including off-channel springs and cienegas; riparian habitat adjacent to the ordinary high water mark that includes riparian vegetation; organic structural features (e.g., dense aquatic and wetland vegetation, leaf litter) within the stream channel for thermoregulation, shelter, foraging opportunities, and protection from predators; and water quality with low or absent pollutants.¹⁶

Cattle grazing can diminish or eliminate these key features from riparian ecosystems, cienegas and other wetlands. Grazing results in removal of dense vegetation which decreases garter snake shelter, cover, foraging opportunities and protection from predators. Grazing also damages stream channels and backwater pools by trampling banks and shorelines, increasing sedimentation and fouling water quality with urine and feces. These damages extend to adjacent uplands and lead to trampled and vegetatively diminished slopes prone to erosion. According to FWS, activities that may destroy or adversely modify garter snake critical habitat include, but are not limited to, poorly managed livestock grazing, livestock grazing that results in waters heavily

⁹ 79 Fed. Reg. 48555.

¹⁰ 79 Fed. Reg. 48558.

¹¹ 86 Fed. Reg. 20808.

¹² *Id.*, 20853.

¹³ Wood, D.A., Emmons, I.D., Nowak, E.M., Christman, B.L., Holycross, A.T. and Vandergast, A.G., 2018. Conservation genomics of the Mogollon Narrow-headed gartersnake (*Thamnophis rufipunctatus*) and Northern Mexican gartersnake (*Thamnophis eques megalops*) (No. 2018-1141). US Geological Survey.

¹⁴ 79 Fed. Reg. 38677.

¹⁵ 86 Fed. Reg. 20962.

¹⁶ 85 Fed. Reg. 23623-4.

polluted by feces, and actions that would remove, diminish, or significantly alter the structural complexity of key natural habitat features in and adjacent to aquatic habitat.¹⁷

Garter snake recovery depends on riparian restoration, rather than degradation. This notice presents new information demonstrating that cattle grazing on the Prescott National Forest is diminishing riparian ecosystems, and adjacent uplands, upon which garter snakes depend and that have been designated as critical to their recovery. Despite FWS's statement that maintaining fencing and managing trespass cattle lessens impacts to critical habitat,¹⁸ we document in this Notice based on recent habitat surveys that such management is not occurring along the upper Verde.

C. Spikedace

The spikedace (*Meda fulgida*) has declined markedly in distribution and abundance throughout its range due to riparian degradation, water diversion, groundwater pumping, and introduction and spread of non-native predatory and competitive fishes.¹⁹ Despite being listed as threatened in 1986,²⁰ with critical habitat designated in 2007,²¹ spikedace were uplisted to endangered in 2012.²² Over thirty years ago, remnant subpopulations in the upper Verde River, Eagle Creek, and Aravaipa Creek in Arizona, and the Gila River in New Mexico occupied only six percent of the species' former range.²³

Spikedace typically occupy stream habitats less than a meter deep.²⁴ A dynamic diversity of instream zones (eddies, riffles, broad shallow gravel bars adjacent to fast flowing water) and periodic, recurrent flooding are essential to the feeding and reproduction of the spikedace by scouring sands and gravels.²⁵ Spikedace fry and juveniles tend to occupy shallow, peripheral portions of streams that have slow currents and sand or fine gravel substrates but will also occupy backwater habitats. According to FWS, grazing allotments "have contributed to the [spikedace's] current habitat degradation"²⁶ and any activity that affects sedimentation, water quality, and removal of riparian vegetation, such as cattle grazing, can affect spikedace habitat

¹⁷ *Id.*, 23633.

¹⁸ *Id.*, 23641.

¹⁹ Propst, D.L., Bestgen, K.R. and Painter, C.W., 1986. *Distribution, status, biology, and conservation of the spikedace (Meda fulgida) in New Mexico*. US Fish and Wildlife Service.

²⁰ 51 Fed. Reg. 23769.

²¹ 72 Fed. Reg. 13356.

²² 77 Fed. Reg. 10810.

²³ Anderson, Allison A., and A. Hendrickson. "Geographic Variation in Morphology of Spikedace, *Meda Fulgida*, in Arizona and New Mexico." *The Southwestern Naturalist*, vol. 39, no. 2, 1994, pp. 148–155. *JSTOR*, www.jstor.org/stable/3672239. Accessed 9 April. 2026.

²⁴ Propst, D.L., Bestgen, K.R. and Painter, C.W., 1986. *Distribution, status, biology, and conservation of the spikedace (Meda fulgida) in New Mexico*. US Fish and Wildlife Service.

²⁵ *Ibid.*

²⁶ The October 24, 2002, Biological Opinion for Continuation of Livestock Grazing on the Coronado National Forest (2-21-98-F-399-R1) pg. 23.

quality and should be “avoided or corrected.”²⁷ Degraded aquatic habitat is also a major factor in the establishment and domination of aquatic ecosystems by non-native fish.

D. Razorback sucker

A relatively large, endemic fish of the Colorado River basin, the razorback sucker (*Xyrauchen texanus*) was once abundant and widespread but has been extirpated from most of its geographic range due to alteration, fragmentation and degradation of freshwater streams and rivers. Predation of razorback sucker fry by nonnative fishes also played an important role in the species’ demise, and between predation and habitat loss very few razorback suckers are able to reach adulthood. Razorback suckers were listed on October 23, 1991,²⁸ with critical habitat designated on March 21, 1994,²⁹ and received a Recovery Plan in 1998.³⁰

An integral part of preventing additional razorback sucker extirpation and extinction is ensuring that habitat exists for suckers to complete their life history needs, including quiet backwater tributaries that serve as nurseries for fry. Delisting of razorback suckers will not be possible until populations are secure and connected, and when they can persist in the wild reproducing and recruiting into the breeding population without human intervention. Augmenting razorback sucker populations with captive-reared individuals is an imperative conservation strategy, along with protection and restoration of potential habitat so that expansion of existing and reestablished populations can occur. Such restoration obviously includes habitats that have been legally designated as critical to razorback sucker survival and recovery. There is no room for significant cattle grazing impacts to occur in any potential razorback sucker habitat or nursery tributaries.

²⁷ *Ibid.*

²⁸ 56 Fed. Reg. 54957.

²⁹ 59 Fed. Reg. 13374.

³⁰ USFWS, Razorback Sucker (*Xyrauchen texanus*) Recovery Plan (1998)..

A. The 2002 BiOp on 16 allotments (spikedace and loach minnow)

The 2002 BiOp assessing the impacts from proposed and ongoing livestock grazing activities on 16 allotments of the Verde River watershed addresses impacts to two ESA-listed fish: the spikedace and the loach minnow.

The BiOp asserts that livestock are excluded from riparian areas on the China Dam, Horseshoe, Muldoon, Perkinsville, Sand Flat, and West Bear/Del Rio allotments. *See* 2002 BiOp at 11 (“A total of 116 riparian acres are present on the [China Dam] allotment but are not accessible to grazing activity and are being monitored for stray cattle to ensure exclusion”); *id.* at 16 (“Approximately 149 riparian acres, adjacent to 3.4 miles of designated critical habitat potentially occupied by spikedace on the Verde River, occur within the [Horseshoe] allotment and are excluded from livestock use and will continue to be monitored”); *id.* at 40 (asserting livestock are “totally excluded” from critical habitat within the Horseshoe Allotment); *id.* at 10 (“The 3.6 perennial miles, existing within the Muldoon allotment, of critical habitat potentially occupied by spikedace on the Verde River are excluded from livestock use and monitored for stray cattle.”); *id.* at 14 (“The 417 riparian acres within the [Perkinsville] allotment, adjacent to 1.6 miles of the Verde River which is critical habitat potentially occupied by spikedace, are partially excluded from livestock use [except during livestock crossings] as well as monitored for strays and vegetative utilization.”); *id.* at 12 (“The 47 riparian acres within the [Sand Flat] allotment are adjacent to 1.7 miles of critical habitat potentially occupied by spikedace on the Verde River and are excluded from livestock use.”); *id.* at 36 (alleging livestock are “excluded” from critical habitat on Sand Flat Allotment); *id.* at 9 (asserting that livestock are “excluded” from riparian areas of the West Bear/Del Rio allotment except “during river crossings”); *id.* at 34 (same).

The 2002 BiOp concludes that authorizing cattle grazing is not likely to jeopardize the continued existence of the spikedace, or result in the destruction or adverse modification of its critical habitat in part because: “The Forest has installed fencing around the majority of the riparian corridor and implemented two monitoring regimes in order to reduce the adverse effects of the action to the spikedace and its critical habitat.” *Id.* at 70-71. The BiOp further finds “no jeopardy” to the spikedace because of “[t]he current integrity of the aquatic habitat [which] is due largely to exclusion from livestock grazing within the riparian corridor. Livestock exclusion is anticipated to continue with exception to the West Bear/Del Rio and Perkinsville allotments where access to the Verde River and riparian community is to occur” for stream crossings. *Id.* at 71.

The 2002 BiOp reaches the same conclusion with respect to the loach minnow for similar reasons: “The Forest has installed fencing around the majority of the riparian corridor in order to reduce the adverse effects of the action to the loach minnow and its critical habitat.” *Id.*

The 2002 BiOp indicates that the “consultation period” for each allotment was 10 years or less, and that this 10-year period for the six allotments at issue here expired in 2012 at the latest. *Id.* at 8, 10, 11, 12, 14, 16.

B. The 2014 Forest Plan BiOp

The 2014 Forest Plan BiOp directly reiterates that there is no grazing allowed along the upper Verde River: “Livestock grazing has not been authorized in the river corridor on the six allotments along the Verde River on the Prescott NF since 1998.” 2014 Forest Plan BiOp at 61. *See also id.* at 68 (“Grazing allotments are not currently open to livestock grazing along the riparian corridor.”); *id.* at 69 (“Livestock grazing has not been authorized in the river corridor on the six allotments along the Verde River on the Prescott NF since 1998. The allotments within the Verde Valley are fenced off from livestock grazing... Site-specific NEPA analysis and ESA section 7 consultation would be required to authorize grazing use along the river corridor.”).

The Forest Plan generally does not authorize site-specific actions, instead providing general guidance and limitations on such future decisions. As the 2014 BiOp recognizes: “Although the LRMP is not a project-specific document, it does provide the direction and guidance for designing and planning specific projects.” *Id.* at 75. The BiOp suggests that a more detailed consultation would be necessary for future, step-down actions because the Forest Plan consultation “does not eliminate the requirement for site-specific project analyses and the need for site-specific informal or formal ESA section 7(a)(2) consultation with the Fish and Wildlife Service (FWS) for individual projects implemented under the LRMP.” *Id.* at 4. Thus, consultation at the Forest Plan level is not a substitute for consultation on site-specific actions such as annual operating instruction, allotment management plans, or the issuance or renewal of livestock grazing permits.

The 2014 Forest Plan BiOp states that “grazing allotment plans, as developed under the revised LRMP, provide guidance for managing and monitoring public lands range use by livestock on the Prescott NF.” *Id.* at 77. Grazing permits have presumably been renewed under the new Forest Plan, or at least since the last spikedace consultation occurred in 2002 and should be subject to site-specific ESA Section 7 consultation. Whether or not grazing permits (or allotment management plans) have not been updated, the site-specific consultations that the Forest Plan BiOp determined are necessary to ensure that grazing is consistent with the substantive mandates of the ESA—including the tipping point analyses that are required for future grazing authorizations—have not occurred. This promised site-specific ESA consultation process—the process that the Forest Plan BiOp relied upon to defer detailed assessment of the deleterious effects of grazing on listed species and critical habitat in the Prescott National Forest—has, to date, failed to materialize for the spikedace, loach minnow, and razorback sucker.³² The Forest Service is in clear violation of its commitment to engage in site-specific consultation prior to authorizing grazing activities that have had—and are having—serious, deleterious effects on listed species and their habitat.

C. The 2017 allotment-specific concurrences

The Forest Service and FWS entered into informal consultation concerning livestock grazing on each of the Upper Verde Allotments that culminated in six FWS concurrences in 2017. The FWS’s concurrences for each of the allotments address, as relevant here, the narrow-headed

³² The 2017 allotment-specific concurrences discussed below address other listed species, albeit inadequately.

garter snake and the western yellow-billed cuckoo. They do not address the spikedace, loach minnow, or the razorback sucker.

FWS’s 2017 concurrence for the China Dam Grazing Allotment concludes that there will be “no direct or indirect effects to” any of the listed species, including garter snake or its then-proposed critical habitat, “since no livestock grazing will be permitted in the along the Verde River Corridor.” FWS, China Dam Livestock Grazing Allotment Concurrence (Mar. 15, 2017) at 2. The concurrence also states: “There would be no direct or indirect effects to the cuckoo or riparian habitat along the Verde River because livestock grazing is not permitted within these riparian corridors.” *Id.* at 3.

FWS’s 2017 concurrences for four other allotments—Horseshoe, Muldoon, Perkinsville, and West Bear—make nearly identical assertions. *See, e.g., id.* (“There would be no direct or indirect effects to cuckoo or riparian habitat along the Verde River because livestock grazing is not permitted within the riparian corridor.”); FWS, Horseshoe Livestock Grazing Allotment Concurrence (Mar. 15, 2017) at 3 (same); FWS, Muldoon Livestock Grazing Allotment Concurrence (Mar. 15, 2017) at 3 (same); FWS, Perkinsville Livestock Grazing Allotment Concurrence (Mar. 21, 2017) at 3 (same); FWS, West Bear Livestock Grazing Allotment Concurrence (Mar. 21, 2017) at 3 (same). The Sand Flat Allotment concurrence is likely based on the same assumptions, and likely reaches the same conclusion.³³

D. Consultation summary

The 2002 BiOp addresses the impacts of livestock grazing on only the spikedace and the loach minnow and their critical habitat, and assumes that riparian habitat on the Upper Verde Allotments is fenced and protected from cattle. By its own terms, the 2002 BiOp expired in 2012. The Forest Service has not reinitiated consultation on the impacts of allotment-specific grazing authorizations on these fish since 2002.

While the 2014 Forest Plan BiOp addressed the species at issue here, it did *not* purport to address the impacts of livestock grazing authorizations on any of the individual allotments, and specifically anticipated that the Forest Service and FWS would engage in subsequent consultation to address project-specific decisions such as AMPs, permit renewals, and AOIs. In addition, that BiOp also assumed that livestock were fenced out of the riparian critical habitat of the Upper Verde Allotments.

The 2017 concurrences also assumed cattle would be excluded from the riparian areas of the six allotments, and also addressed only potential impacts to the narrow-headed garter snake and the cuckoo.

³³ The cut-and-paste nature of these concurrences makes it very likely that the concurrence for the Sand Flat Allotment contains identical statements. Further, while FWS subsequently prepared a biological opinion for the impacts of livestock grazing on the southwestern willow flycatcher within the Perkinsville Allotment in 2021, that BiOp does not address impacts to the upper Verde River, and so is not relevant to this notice letter. *See* FWS, Reinitiation of Consultation for the Ongoing Grazing of the Perkinsville Allotment Project Biological Opinion (Oct. 7, 2021).

We are aware of no site-specific consultation for the razorback sucker, whose critical habitat includes portions of the Horseshoe Allotment.

IV. 2020 Litigation Challenges the Prescott National Forest's Failure to Address Unauthorized Livestock Grazing Damage on the Prescott and Other National Forests

In 2019, the Center conducted field surveys to determine whether cattle were present within riparian areas specifically excluded from grazing along the Verde River and to document the extent and intensity of impacts from cattle grazing across the Verde River ecosystem. This effort included allotments in the Prescott National Forest. Contrary to the commitments made by the Forest Service and FWS through the ESA Section 7 process, these 2019 biological surveys documented widespread cattle grazing occupancy and damage, and nonfunctional exclusion fencing, in dozens of locations inspected across the study area. The Center compiled the findings of these surveys into a comprehensive report and provided that report to the Prescott National Forest and FWS in March 2020. *See Attach. 2 ([Ravaged River: Cattle Damage to Endangered Species Habitat in Arizona's Verde River Watershed](#))*.

On March 5, 2020, the Center provided agencies with a Notice of Intent to file suit pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540(g), with respect to 22 Verde River watershed grazing allotments on the Prescott, Coconino, and Tonto National Forests. A subsequent complaint was filed on September 17, 2021 (Case 3:20-cv-08243-DGC, D. Ariz.) that identified numerous ESA violations and resulted in a 3-year stipulated settlement agreement filed on October 5, 2021. The 2020 Notice and 2021 complaint and settlement included the Prescott National Forest grazing allotments at issue in this Notice.

Per the 2021 stipulated settlement agreement, the Prescott National Forest agreed to monitor riparian areas excluded from permitted livestock grazing on National Forest System lands within or adjoining the active grazing allotments along the Verde for the presence of livestock. If livestock were found, the Prescott National Forest agreed to initiate appropriate administrative processes to remove those livestock from the area. If the Prescott National Forest detected damage to fencing during their agreed upon monitoring efforts, they agreed to repair the fence or instruct the associated grazing permittee to repair the fence.

To summarize, the Prescott National Forest agreed to follow their own mandates and obligations for a period of three years.

The October 2021 settlement agreement also required the Prescott National Forest to provide quarterly livestock monitoring reports to the Center. The Forest Service's own reports demonstrate that unauthorized livestock grazing was persistent and ongoing during the three-year life of the settlement, from 2021-2024. Most of the allotments at issue in this Notice had unauthorized/trespass cattle issues early in the settlement period. For example, in November 2021, unauthorized/trespass cows were recorded on Muldoon, West Bear/Del Rio, Perkinsville, and Horseshoe allotments. Sporadic fence issues and subsequent cattle intrusions continued but appeared to wane over time, although allotments were only required to be monitored twice a year per the settlement agreement and only "fresh" cattle sign was reported.

By 2023, trespass grazing proved to be a consistent problem on the Perkinsville allotment, with unauthorized livestock documented in February, March, and August of that year. In January 2024, 19 unauthorized/trespass cows were removed from the off-limits riparian corridor of Perkinsville Allotment. Further instances of unauthorized/trespass cows on Perkinsville Allotment occurred in May and June 2024, as well as on the neighboring China Dam Allotment in May.

After the settlement agreement expired in the fall of 2024, Center surveys (in February 2025) revealed numerous instances of unauthorized/trespass livestock and extensive associated damage to protected critical habitat in five of the six Upper Verde Allotments at issue in this Notice. These problems only intensified in 2026 to include all six grazing allotments and higher rates of moderate to significant damage from cattle to off-limits critical habitat (*See Attach. 3*).

In the interim, since our March 16, 2020, Notice of Intent to Sue, the Center's March 2020 report, [Ravaged River, Cattle Damage to Endangered Species Habitat in Arizona's Verde River Watershed](#), the September 17, 2020 lawsuit, and the October 5, 2021 settlement, the Prescott National Forest has continued to authorize significant, destructive grazing by issuing AOIs and other approvals, despite the fact that listed species' critical habitat and occupied habitat on the allotments habitat have continued to be degraded by cattle grazing.

V. New Information Shows Continued Unauthorized Grazing and Cattle Damage in Riparian Critical Habitat within the Upper Verde Allotments.

Since the stipulated settlement agreement expired on October 5, 2024, the Center surveyed grazing allotments along the upper Verde River on the Prescott National Forest for trespass cattle and damage in 2025 and 2026. Although the Prescott National Forest purportedly prohibits cattle grazing in the riparian corridor of the upper Verde River, all surveyed allotments in the Chino Valley Ranger District included in this Notice showed escalation of cattle damage to this important riparian zone designated as critical for yellow-billed cuckoo, narrow-headed garter snake, spikedace and loach minnow recovery in 2025 and continuing in 2026. *See Attach. 3*.

This Notice provides additional documentation to the 2020 Notice and hard evidence from surveys conducted in 2025 and 2026 that livestock continue to cause significant and widespread damage to riparian and designated critical habitat across the Prescott National Forest, including in areas that ostensibly are strictly off-limits to grazing. Specifically, the additional surveys presented in this Notice document the presence of livestock and their sign (e.g., feces, fresh hoofprints, freshly trampled streambanks, grazed habitat, etc.) within fenced riparian and critical habitat and significant adverse impacts and habitat degradation in designated critical habitat within the allotments at issue, including habitat within purported livestock enclosures.

The Prescott National Forest's continued failure to exclude domestic livestock from threatened and endangered species habitat, including designated critical habitat, or to take immediate corrective action to remedy these failures, demonstrates that the Prescott National Forest's and FWS's conclusions regarding the impact of those specific grazing allotment authorizations on listed species and their designated critical habitat are based on false assumptions, and the data provided herein triggers the specific reinitiation thresholds at 50 C.F.R. § 402.16(a).

We note that the U.S. District Court for the District of Arizona issued a [decision](#) last month ordering BLM to reinitiate consultation on a grazing allotment in the Agua Fria National Monument. There, BLM and FWS based a concurrence and “not likely to adversely affect” determination on the assumption that exclosures would prevent harm to listed species by preventing cattle access to riparian habitat. The court found that assumption erroneous and ordered reinitiation of consultation based largely on survey data that the Center provided to BLM showing cattle presence and damage in supposedly closed riparian areas, similar to the data provided here in **Attachment 3**. See *Ctr. for Biological Diversity v. U.S. BLM*, 2026 U.S. Dist. LEXIS 68876, No. CV-24-00141-TUC-RM (D. Ariz. Mar. 30, 2026) (**Attachment 4**).

Most importantly, the court in that case recognized that, similar to the situation addressed in this Notice, land management agencies cannot assume that fencing will protect the riparian areas and the listed species and their critical habitat found there when evidence in the agency’s possession shows otherwise.

Specifically, the court ruled:

[T]he Concurrence [for the Horseshoe Allotment on the Agua Fria National Monument] did not account for much of the evidence showing that fences excluding livestock on a seasonal basis had not been working.

....

Furthermore, in omitting any discussion regarding the fact that preexisting fences on the Horseshoe Allotment had not been fully effective in keeping cattle out of restricted areas, the agencies entirely failed to consider an important aspect of the problem at hand. During the years that Silver Creek was technically completely closed to livestock, “moderate to heavy” livestock use was still observed at least once, and cattle had to be repeatedly removed from the area. Therefore, the agencies’ implicit reliance on the effectiveness of future fences ran counter to the evidence before them, rendering that reliance arbitrary and capricious.

...

Cattle grazing on Silver Creek would not occur at all but for Defendants’ reissuance of the permit allowing grazing on the Horseshoe Allotment, and, given the history—known to Defendants at the time of the 2018 Concurrence—of illicit cattle making their way past fences, is reasonably certain to occur. Defendants attempt to frame unauthorized grazing as a third-party action completely outside their control, but this ignores the central fact that *all* grazing on the Horseshoe Allotment is directly subject to their regulation. Therefore, the cases that Defendants cite in support of their position are inapplicable.

...

Defendants’ argument that federal agencies need not consult on unauthorized activities is unavailing where, as here, the “unauthorized” activities are a direct result of authorized activities, and are directly subject to Defendants’ regulation.

Furthermore, Defendants' failure to adequately account for the well-documented shortcomings of the existing enclosure fencing is even more glaring in the 2024 Concurrence than in the 2018 Concurrence, because even more evidence of the trespass livestock problem existed in 2024.

Id. at *13, *21-23, *28 (citations omitted).

Despite the commitments and assumptions made in the 2002 and 2014 BiOps and the 2017 concurrences, the Center has documented cattle, including with identifiable brands, in designated critical habitat for four species and within multiple areas of the Verde River corridor explicitly closed to livestock. Just as in Agua Fria National Monument, field surveys of the Upper Verde Allotments demonstrate that fencing that is supposed to exclude livestock from critical habitat and prevent cattle damage to it fails to do so. A subset of 2025-2026 survey photos, showing unauthorized/trespass cattle and subsequent damage to designated riparian critical habitat for cuckoo, narrow-headed garter snake, spikedace and loach minnow, are presented in **Attachment 3**.

The “new information” contained in our previous Notices and herein reinforces the fact that the grazing management regime implemented via grazing authorizations has failed to adequately protect riparian habitat from grazing impacts. As a result, the allotments and complexes at issue have suffered and are continuing to suffer habitat degradation that is directly attributable to livestock, and that goes beyond the effects contemplated by the BiOps and concurrences. *See* 50 C.F.R. § 402.16. Accordingly, the reinitiation of consultation is required, *see id.*, and the Prescott National Forest's issuance of AOIs and other decisions that authorize grazing that *is adversely affecting* listed species and critical habitat without a valid BiOp or concurrence in place, violates the ESA and its implementing regulations, is unlawful and unreasonable, and is arbitrary and capricious and not in accordance with law. *See* 16 U.S.C. §§ 1536, 1538; 5 U.S.C. § 706.

Moreover, even if the Prescott National Forest's selected grazing management measures could be effective at protecting and recovering riparian habitat—which is not the case—the Prescott National Forest has failed to effectively implement, monitor, or enforce its grazing management regime. Because of these management failures—e.g., the failure to monitor riparian habitat and the failure to actually exclude livestock from riparian and sensitive areas—the grazing activities authorized by the AOIs and other actions have been “modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion[s] or written concurrence[s].” 50 C.F.R. § 402.16(a)(3). For example, as documented here and in our previous Notice, livestock impacts are pervasive throughout riparian areas that the agencies assume are closed to cattle.

Assumptions that the Prescott National Forest would effectively exclude cattle from streamside habitat—and that regular monitoring of effective exclusion fencing would occur in the absence of a court settlement—have not been met. New information reveals that agency actions may affect listed species or critical habitat in a manner or to an extent not considered in 2002 BiOp, the 2014 Forest Plan BiOp, and the 2017 Concurrences, and that the agency action has been modified in a manner that causes an effect to the listed species or critical habitat not considered in those BiOps or concurrences.

Thus, the assumptions upon which the conclusions of the 2002 BiOp, the 2014 Forest Plan BiOp, and the 2017 Concurrences are based are fatally flawed, rendering the consultation documents wholly ineffective at serving their purpose of protecting imperiled native species from the continuous onslaught from herds of domestic cattle.

To summarize our concerns: Livestock activities managed by Prescott National Forest within the Upper Verde Allotments have jeopardized threatened and endangered species and adversely affected, adversely modified, and destroyed their critical habitat; are currently jeopardizing, adversely modifying and destroying their critical habitat; and will continue to jeopardize, and adversely modify and destroy their critical habitat, in violation of ESA Section 7(a)(2). The Prescott National Forest must halt these violations immediately.

LEGAL VIOLATIONS

I. The Forest Service and FWS Are in Ongoing Violation of ESA Section 7(a)(2) by Failing to Reinitiate Consultation.

Reinitiation of consultation is required and must be requested by the Forest Service and FWS where discretionary federal involvement or control over the action has been retained or is authorized by law, and if the amount or extent of taking specified in the incidental take statement is exceeded, new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or concurrence, or a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16(a).³⁴

The Forest Service and FWS have violated and remain in ongoing violation of the ESA by failing to reinitiate and complete consultation on the actual impacts of livestock grazing on threatened and endangered species and designated critical habitat within the Upper Verde Allotments. This results in at least two ESA violations.

First, new information reveals that the Prescott National Forest's authorization of livestock grazing within the Upper Verde Allotments has adversely affected, and will continue to adversely affect, the cuckoo, garter snake, spikedace and loach minnow, and their designated critical habitat, in a manner and to an extent not considered in the 2002 or 2014 BiOps or the 2017 Concurrences. *See id.* § 402.16(a)(2); 16 U.S.C. § 1536(a)(2). This includes information from **Attachment 3** which demonstrates the presence of livestock within specific areas that the 2002 BiOp, 2014 BiOp, and 2017 Concurrences all assume are excluded from livestock.

Second, the action (authorization of livestock grazing) has been modified in a way that impacts listed species. *See* 50 C.F.R. § 402.16(a)(2); 16 U.S.C. § 1536(a)(2). Specifically, although the 2002 BiOp, 2014 BiOp, and the 2017 Concurrences all assume that critical habitat and riparian areas would be closed to livestock grazing, the Center's surveys have repeatedly shown that this assumption is false. To the contrary, livestock grazing is routinely degrading critical habitat and riparian areas throughout supposedly protected riparian areas within the Upper Verde Allotments.

³⁴ Both the action agency and FWS have a duty to reinitiate consultation. *See supra*, note 2.

The chronic nature of cattle grazing in off-limits riparian areas represents a modification of the authorized action.

In the absence of the required reinitiated consultation, the Forest Service and FWS are in ongoing violation of their obligation under ESA Section 7 to ensure that the Forest Service's actions are not likely to jeopardize the continued existence of the numerous ESA-listed species within the upper Verde, including the cuckoo, garter snake, spikedace and loach minnow, or result in the destruction or adverse modification of their designated critical habitat. 16 U.S.C. § 1536(a)(2).

The Center provides the Forest Service and FWS notice that the agencies' failure to reinitiate and complete consultation on final agency actions, including the issuance of term grazing permits, allotment management plans and annual operating instructions or plans, authorizing grazing on the six Upper Verde Allotments identified is in violation of Section 7(a)(2) of the Endangered Species Act.

II. The Forest Service Is in Ongoing Violation of ESA Section 7(a)(2) by Failing to Consult on Livestock Grazing's Effects on the Razorback Sucker.

The agencies' failure to consult at all on the effects of livestock grazing authorizations on the razorback sucker, for which critical habitat occurs within and adjacent to the Horseshoe Allotment, also violates ESA Section 7(a)(2). 16 U.S.C. § 1536(a)(2).

The agencies' failure to conduct *any* site-specific consultations concerning the razorback prior to authorizing grazing on a yearly basis is far from harmless. For instance, it is well established that, to satisfy its duty to ensure against jeopardy, FWS must demonstrate that the effects of the proposed action will not impair the species' chances of recovery or survival. Legally and logically, whether an action pushes a species across the jeopardy threshold depends on both the species' pre-existing status (i.e., its baseline condition) and the proposed action's additional impacts. *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 936 (9th Cir. 2008) (holding that FWS must consider whether harm from the proposed action, when added to baseline conditions, threatens to "tip[]" listed species "too far into danger"). Thus, during consultation, FWS must identify, based on the best available scientific evidence, an objective metric for determining the points at which recovery or survival is compromised—i.e., the "tipping points." *Id.* Unless FWS "knows roughly at what point survival and recovery will be placed at risk," it is impossible for FWS to "conclude that no harm will result from 'significant' impairments to habitat that is already severely degraded." *Id.* Otherwise, the duty to insure against jeopardy becomes a meaningless exercise, as even projects with seemingly minor impacts may jeopardize a species whose baseline status is severely degraded.

Although the programmatic 2014 Forest Plan BiOp mentions the razorback, it does not attempt to address the site-specific impacts of livestock grazing there.³⁵ Instead, the agencies deferred such analysis, insisting that the required analyses would occur with site-specific future analysis.

³⁵ Even if the agencies could somehow rely on the 2014 Forest Plan BiOp to address the impacts of livestock grazing authorization on the Horseshoe Allotment, the agencies would still be required to reinitiate consultation for the same reasons provided in the previous section.

Without this site-specific consultation, the Forest Service is therefore allowing destructive grazing activities to continue without answering the necessary threshold question: at what point will the survival or recovery of listed species be “appreciably” diminished in light of the degraded condition of those species and their habitat, both in the Prescott National Forest and range-wide? As a result, ongoing grazing in the Horseshoe Allotment is occurring without any assurance that such grazing will not impede the survival or recovery of listed species, in violation of Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

For these reasons, by issuing grazing authorizations (including AMPs, permit renewals, and AOIs) without undertaking a comprehensive and scientifically rigorous analysis that accurately defines the baseline condition of the razorback sucker and its critical habitat within the Horseshoe Allotment in the Prescott National Forest and assessing the impacts of ongoing grazing in the appropriate context, the agencies cannot fulfill their statutory obligations to ensure that the grazing activities there comply with the ESA. 16 U.S.C. § 1536(a)(2); *see Defs. of Wildlife v. U.S. Dep’t of Interior*, 931 F.3d 339, 353 (4th Cir. 2019) (quoting *Nat’l Wildlife Fed’n*, 524 F.3d at 930)).

III. The Forest Service Is in Ongoing Violation of ESA Section 7(a)(1) by Failing to Carry Out a Program for the Conservation of Threatened and Endangered Riparian Fish and Wildlife.

By allowing continued livestock grazing in the allotments here at issue that has for years harmed local populations of ESA-listed species and destroyed and adversely modified significant acreage of designated critical habitat in the Prescott National Forest, the Forest Service has violated—and continues to violate—its fundamental duty to affirmatively conserve these imperiled species.

In addition to the obligation to avoid jeopardizing species or destroying or adversely modifying their critical habitat under ESA Section 7(a)(2), Section 7(a)(1) imposes an obligation on all federal agencies, in consultation with FWS, to “carry[] out programs for the conservation” of listed species. 16 U.S.C. § 1536(a)(1). This provision imposes an “affirmative duty on each federal agency to conserve each of the species listed.” *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998); *accord Pyramid Lake Paiute Tribe*, 898 F.2d at 1416-17 (noting that federal agencies have “affirmative obligations to conserve under [S]ection 7(a)(1)”). “Conserve” is defined by the ESA to mean *recovery*, *i.e.*, the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [in the ESA] are no longer necessary.” 16 U.S.C. § 1536(a)(1).

The Forest Service’s actions—and in particular the continued authorization of livestock grazing in the allotments at issue without any serious efforts by the Prescott National Forest to modify the grazing regime in response to evidence of severe habitat degradation and/or the failure of mitigation measures to protect and restore vital habitat areas, including critical habitat areas—constitute the direct *opposite* of a program designed to avoid extirpation of ESA-listed species from Prescott National Forest land, let alone a program that is specifically aimed at *recovering* listed species. Especially because the Prescott National Forest’s discretionary authorization of livestock grazing in these allotments appears to be a significant

contributing factor to the lack of recovery of the listed species in the Prescott National Forest, Section 7(a)(1) imposes on the Forest Service an affirmative duty to immediately develop, in consultation with FWS, a comprehensive program that will timely implement all measures necessary to conserve—i.e., *recover*—ESA-listed species before local populations are wiped out entirely by the Prescott National Forest’s repeatedly unlawful actions.

IV. Section 7(d) Violations

Section 7(d) imposes an obligation on the Forest Service to avoid “mak[ing] any irreversible or irretrievable commitment of resources” until such consultation is lawfully completed. *See* 16 U.S.C. § 1536(d). Accordingly, the Prescott National Forest’s issuance of AOIs and other actions authorizing grazing on the Upper Verde Allotments—that are either (1) based on fatally flawed BiOps and/or unlawfully deficient concurrences, or (2) issued without compliance with the ESA’s procedural and/or substantive mandates—violate Section 7(d) of the ESA and must be immediately suspended until lawful consultations are completed. *See id.*

Once the Prescott National Forest initiates and/or reinitiates consultation with respect to the allotments at issue, the agency is prohibited from making any irreversible or irretrievable commitment of resources with respect to the action that may foreclose the formulation or implementation of any reasonable and prudent alternative measures. *Id.* Under those circumstances, the ESA’s policy of institutionalized caution mandates that grazing in riparian or other habitat areas that support listed species and/or provide critical habitat *must* be precluded until consultation with FWS can be completed. *See id.* (“Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation of any reasonable and prudent alternative measures....”). To allow the Prescott National Forest to continue to authorize grazing that is indisputably causing serious harm to ESA-listed species and their critical habitat would be exactly the kind of commitment of resources which would foreclose the implementation of other alternatives, in express violation of the ESA. *See id.*

Accordingly, pursuant to ESA Section 7(d), the Forest Service must ensure that all grazing authorizations and activities in areas likely to support listed species or that contain critical habitat are halted until the consultation deficiencies can be remedied. *See* 16 U.S.C. § 1536(d). Thus, the Prescott National Forest cannot allow livestock on the six Prescott grazing allotments in question. *See Pac. Rivers Council v. Thomas*, 936 F. Supp. 738 (D. Idaho 1996). The Forest Service and FWS must then proceed to evaluate and mitigate the direct, indirect, and cumulative impacts of grazing on the listed species that depend on the riparian habitats of the Prescott National Forest for breeding, feeding, migratory, stopover, and general habitat. Only then can the Forest Service comply with its obligation to prevent irreversible or irretrievable commitment of resources foreclosing implementation of alternatives during the consultation process. *Id.*

ESA Section “7(d) does not serve as a basis for any governmental action unless and until consultation has been initiated,” which begins with the submission of a biological assessment to FWS. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994). Because the Forest Service has not yet submitted a biological assessment examining the effects of grazing on listed species and designated critical habitat (despite a clear obligation to do so), the agency has not

yet begun the process of formal consultation. Accordingly, section “7(d) [cannot] serve as the basis for permitting *any* agency action” on the allotments. *Id.*

V. The Forest Service Has Violated, and Is in Ongoing Violation of ESA Section 9.

By relying on the legally deficient BiOps and concurrences to authorize activities that not only are reasonably certain to take listed species, but are in fact taking listed species in myriad ways and adversely destroying and modifying designated critical habitat, the Forest Service is in ongoing violation of ESA Section 9. Because the Prescott National Forest lacks legally adequate authorization from FWS to take such listed species or harm critical habitat in light of the deficient nature of the concurrence and BiOp, the Forest Service’s actions are in ongoing violation of ESA Section 9. *See* 16 U.S.C. § 1538(a)(1)(B).

The Center’s repeated documentation and the Prescott National Forest’s own records demonstrate that trespass cattle grazing and unauthorized permitted cattle grazing are adversely affecting listed species and their critical habitat along the upper Verde in a manner that constitutes “take,” in violation of ESA Section 9 (killing, injuring, harming, harassing, and otherwise taking members of these species).

Because the Forest Service could eliminate or at least reduce the risk of take by constructing and maintaining functional fencing, removing the trespass cattle, modifying or revoking grazing permits, and/or closing pastures that overlap with off-limits areas, the Forest Service is “caus[ing] to be committed” unlawful take of ESA-listed species. *Id.* § 1538(a), (g); *see also* 50 C.F.R. § 17.3 (clarifying that the harass prong of the take prohibition includes not only “an intentional or negligent act” but also any “omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering”). Federal courts have held that when consulting on the impacts of livestock grazing, federal agencies have a duty to address the impacts of *unauthorized* grazing that results from agency decisions. *Ctr. for Biological Diversity*, 2026 U.S. Dist. LEXIS 68876 at *22-23.

Because grazing management has demonstrably strayed from the 2002 BiOp, the 2014 Forest Plan BiOp, and the 2017 Concurrences—and because the agencies have so far failed to candidly assess or lawfully authorize the readily foreseeable effects of the proposed action to the cuckoo, garter snake, and native fishes—the Forest Service is in ongoing violation of ESA Section 9 by authorizing activities that are taking ESA-listed species in myriad ways and destroying and adversely affecting critical habitat along the upper Verde. Because the Prescott National Forest lacks legally adequate authorization from FWS to take any listed species or harm their critical habitat, the Forest Service’s actions are in ongoing violation of ESA Section 9. *See* 16 U.S.C. § 1538(a)(1)(B), (G).

As demonstrated above, the Forest Service and FWS are in ongoing violation of the ESA. *Accord Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127-28 (9th Cir. 2012) (“In particular, [the] agency cannot meet its section 7 obligations by relying on a [BiOp] that is legally flawed or by failing to discuss information that would undercut the [BiOp’s] conclusions.”). These violations cannot be cured absent *completion* of a formal consultation process that comes to grips with the full spectrum of foreseeable effects resulting

from grazing activities across the Prescott National Forest, which culminates with a BiOp that imposes serious and meaningful terms, conditions, and measures that will actually avoid jeopardy, as well as the destruction or adverse modification of critical habitat, for all ESA-listed species that may be present in the Prescott National Forest. Moreover, until such consultation can be completed, the agencies are in ongoing violation of the ESA absent: (1) immediate suspension of the Prescott National Forest’s grazing authorizations that occurred in the absence of any lawful consultation and/or that rely on the fatally flawed BiOps and concurrences identified herein; and (2) and removal from the allotments and/or complexes at issue of the livestock that are continuing to take listed species and harm habitat, including critical habitat.

Where consultations regarding the effects of grazing on listed species and/or critical habitat within the Prescott National Forest have *never* been completed—here, for the razorback sucker on the Horseshoe Allotment—the Forest Service is in clear violation of ESA Section 9’s prohibition on the take of listed species. As extensively discussed above, grazing activities within the Prescott National Forest are reasonably certain to take listed species. Thus, by proceeding to authorize such activities without obtaining lawful authorization from FWS to take listed species, the Forest Service is in ongoing violation of ESA Section 9. 16 U.S.C. § 1538(a)(1)(B).

THE BROAD VIEW

Significant and unauthorized cattle damage to sensitive desert riparian zones is not a problem limited only to the Verde River. Instead, this is part of a widespread pattern that is having cumulative and potentially irreversible impacts on imperiled riparian-obligate species across the region. Recently, the Center finalized a comprehensive, three-year field survey effort and compiled a report to document the condition of cuckoo critical habitat on federal public lands in Arizona and New Mexico. *See Attach. 5 ([Grazed to Death: Livestock Production Adversely Modifying Majority of Drought-Stricken Western Yellow-billed Cuckoo Critical Habitat on Public Lands in Arizona and New Mexico, June 2024](#)).* The report concluded on the basis of the best available science (compiled through standardized survey methods applied immediately prior to or during the cuckoo nesting and breeding season) that livestock grazing has adversely modified at least 57% of the cuckoo’s critical habitat on federal public lands grazing allotments in Arizona and New Mexico. The surveys demonstrated moderate to significant impacts and adverse modification of habitat on 31,509 acres (i.e., 80% of 39,170 acres of critical habitat surveyed by field biologists).

In light of the worsening, combined threats of climate change³⁶ and livestock grazing on public lands in the Southwest, the report concludes that agencies must exclude livestock from cuckoo breeding and nesting habitat, and emphasizes that eliminating livestock access to ephemeral, intermittent, and perennial drainages is essential to allow tree and shrub seedlings to grow and survive to support cuckoo breeding and nesting.

³⁶ The report explained that FWS itself has raised questions about the long-term survival and recovery prospects of the cuckoo, especially given the rapidly worsening threat of climate change.

This Notice provides specific examples of the extensive cuckoo critical habitat degradation caused by livestock in off-limits areas, especially in the Verde River corridor.

This damage includes: heavily browsed woody streamside recruitment; cattle trails meandering through riparian zones; streamside impacts resulting in shearing of banks into vertical surfaces; heavily diminished grass and herbaceous growth; myriad instances of cattle wallows and bare soils; significant removal of riparian vegetation and adjacent understory; and extensive areas of exposed, trampled, and/or compacted soils. *See* **Attach. 3**.

Also attached to this Notice is the Center’s 2024 Annual Report, completed in 2025, summarizing region-wide surveys of livestock grazing impacts to critical habitat including within the Prescott National Forest from 2017-2024. *See* **Attach. 6**. ([Livestock Damage to Aquatic and Riparian Critical Habitat in the U.S. Southwest: Field Assessment Results 2017-2024](#)).

Our findings on the Prescott National Forest, as well as across the region, are consistent with U.S. Department of Justice Senior Trial Attorney Andrew A. Smith’s observations:

“It’s well settled that cattle and riparian areas do not mix.”³⁷

The Prescott National Forest must finally live up to its long-ago commitments to exclude livestock from the upper Verde River.

And further, the Prescott National Forest must recognize that it cannot assume that fences will prevent impacts to listed wildlife and the riparian habitat they rely upon when evidence demonstrates those assumptions are false.

CONCLUSION

The Prescott National Forest has a well-documented history of accepting chronic livestock trespass, grazing permit violations and compliance issues that have persisted without consequence. For years, Center members, the general public, and federal employees and contractors have reported trespass and unauthorized cattle grazing within the Verde River watershed on the Prescott National Forest, and within occupied and designated critical habitat for threatened and endangered species. As shown by our March 16, 2020, Notice of Intent to Sue, our report, [Ravaged River, Cattle Damage to Endangered Species Habitat in Arizona’s Verde River Watershed](#), and the [Center’s 2025-2026 survey data and photographs](#), damage to these habitats, and to primary constituent elements thereof, is widespread, chronic, severe, and ongoing.

Despite extensive evidence of trespass cattle and chronic unauthorized grazing, the Prescott National Forest has yet to repair or install effective fences or otherwise meaningfully address the

³⁷ Argument Transcript, *New Mexico Cattle Growers’ Association, et al. v. United States Forest Service, et al.*, Case 1:23-cv-00150-JB-GBW, Albuquerque, NM (February 1, 2024), page 126 (quoting , Environment and Natural Resources Division Senior Trial Attorney Andrew A. Smith), available at [NM CATTLE v USFS OMNI 020124](#).

chronic, unauthorized presence of livestock grazing in the most ecologically important sections of the Verde River, including habitat for threatened and endangered species.

Now that a federal judge has recognized the reality that “the agencies’ implicit reliance on the effectiveness of future fences [runs] counter to the evidence before them, rendering that reliance arbitrary and capricious,” the status quo must finally be abandoned.

For the reasons explained above, and as demonstrated in the attached materials (*see Attachs. 1-6*), if: (1) the Forest Service or FWS fails to request reinitiation of consultation prior to the expiration of the 60-day window set forth in the ESA’s citizen suit provision; (2) the Forest Service fails to develop and implement a program to conserve listed species consistent with ESA Section 7(a)(1); or (3) the agencies fail to provide for increased protections for the listed species and critical habitat during the reinitiated consultation as required by ESA Section 7(d), we will proceed with legal action.

We urge the agencies to address these historically serious, chronic violations of federal law, and to prioritize the survival and recovery of the cuckoo, garter snake, spokedace and loach minnow over continued cattle grazing in these sensitive areas of our public lands.

Please contact Chris Bugbee or Robin Silver (contact information below) if you have any questions or if you would like to discuss this matter. Please include livestock@biologicaldiversity.org on any email correspondence.

Sincerely,



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List of Attachments:

- Attach. 1. Grazing bibliography
- Attach. 2. 2019 Verde River report
- Attach. 3. 2025-2026 Field surveys and survey methodology
- Attach. 4. 2026 U.S. District Court decision
- Attach. 5. 2024 yellow-billed cuckoo adverse modification report
- Attach. 6. 2025 cattle grazing summary report 2017-2024