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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,

26 and

27 Spur Ranch Cattle Company, *et al.*

28 Defendant-Intervenors

Case No.: 4:20-cv-0020-DCB

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1
2 1. Plaintiff Center for Biological Diversity (“Center”) brings this action
3 against the U.S. Forest Service (“USFS”) and U.S. Fish and Wildlife Service (“FWS”)
4 (collectively, “the Agencies”) for violations of the Endangered Species Act (“ESA”)
5 arising from USFS final agency actions authorizing domestic livestock grazing on 36
6 grazing allotments within the upper Gila River watershed on the Apache-Sitgreaves and
7 Gila National Forests, including the issuance of term grazing permits, allotment
8 management plans (“AMPs”), and allotment annual operating instructions (“AOIs”), as
9 well as the Forest Service’s failure to prevent unlawful livestock grazing on an additional
10 4 allotments that have been purportedly closed to grazing.

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

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

21 4. For two decades, the Agencies have committed to the exclusion of cattle
22 from riparian areas—typically through fencing—as a foundation for meeting their
23 obligations under the Endangered Species Act to ensure that USFS’s grazing
24 authorizations do not jeopardize the continued existence of endangered species, or result
25 in the destruction or adverse modification of their designated critical habitat.
26 Specifically, in carrying out their consultation duties pursuant to section 7 of the ESA for
27 the individual grazing allotment authorizations challenged in this action, the Agencies
28 have determined that the effects of domestic livestock grazing are not likely to adversely

1 impact endangered species dependent on aquatic and riparian habitat based largely on
2 commitments to exclude this streamside habitat from cattle and to have USFS regularly
3 monitor riparian areas to ensure that the fencing exclusions remain intact and effective.

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

11 6. 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 reinstate section
14 7 consultations in four circumstances. 50 C.F.R. § 402.16(a)(1)-(4). Agencies must
15 reinstate 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 7. The Agencies were required to reinstate and complete consultation when
22 presented with evidence documenting extensive cattle use and associated lack of USFS
23 monitoring within the riparian streamside areas of specific allotments within the upper
24 Gila River watershed in the Apache-Sitgreaves and Gila National Forests. The USFS’s
25 failure in fact to exclude domestic livestock from occupied threatened and endangered
26 species habitat, and designated critical habitat, or to take immediate corrective action to
27 remedy these failures, undermines the Agencies’ conclusions regarding the impact of
28 these specific grazing allotment authorizations on listed species and their designated

1 critical habitat, and specifically triggers the reinitiation thresholds at 50 C.F.R.
2 § 402.16(a).

3 8. In addition, the Agencies were required to reinitiate and complete
4 consultation due to the listing and designation of critical habitat for threatened or
5 endangered species subsequent to the most recent section 7 consultations for the upper
6 Gila River watershed allotments.

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

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

16 11. On September 16, 2020, Plaintiff sent a supplemental NOI providing
17 additional details regarding alleged ESA violations, including the addition of three
18 allotments that were not included in the original NOI. The supplemental NOI also
19 provided additional details regarding alleged ESA section 7(a)(1) violations. The
20 Agencies have not responded to this supplemental NOI.

21 **JURISDICTION AND VENUE**

22 12. This Court has jurisdiction over this action pursuant to 16 U.S.C.
23 § 1540(c),(g) (action arising under ESA citizen suit provision); 5 U.S.C. § 702 (APA
24 review); and 28 U.S.C. § 1331 (federal question jurisdiction).

25 13. The Court may grant the relief requested under the ESA, 16 U.S.C.
26 § 1540(g); the APA, 5 U.S.C. §§ 701-706; and 28 U.S.C. §§ 2201-2202 (declaratory and
27 injunctive relief).
28

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