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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

CENTER FOR BIOLOGICAL DIVERSITY)
Plaintiff,)
)
vs.)
)
HEATHER PROVENCIO, District Ranger;)
U.S. FOREST SERVICE, an agency of the)
United States; and U.S. FISH AND)
WIDLIFE SERVICE, and agency of the)
United States,)
Defendants.)

Case No. 10-cv-330-TUC-AWT

**FIRST SUPPLEMENTAL
COMPLAINT**

NATURE OF ACTION

1. It has been nearly two years since this Court held Federal Defendants U.S. Fish and Wildlife Service (FWS) and U.S. Forest Service (the Forest Service) violated the Endangered Species Act and the National Environmental Policy Act in permitting livestock grazing on the fragile desert landscape of the Fossil Creek Range allotment in southern Arizona. *See* Dkt No. 38 (Jan. 23, 2012). In the intervening years, FWS and the Forest Service have issued a new Biological Opinion, and Environmental Assessment and Finding of No Significant Impact,

respectively, but these revised documents contain a series of legal and analytical failures, as discussed in detail below.

2. This First Supplemental Complaint now challenges the FWS's Biological Opinion, and the FS's Environmental Assessment and Finding of No Significant Impact as unlawful under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (ESA); the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA); the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.* (NFMA); and the Administrative Procedure Act, 5 U.S.C. § 706 ("APA").

3. Immediate injunctive and/or declaratory relief is required to ensure that FWS and the Forest Service adhere to the requirements of law in administering livestock grazing within the Fossil Creek Range allotment, and to prevent further and irreparable harm to riparian, aquatic and upland habitat and conditions, and other critical resource values resulting from Defendants' unlawful actions.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this action arises under the laws of the United States, including the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 706; and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

5. Venue is properly vested in this Court under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because Plaintiff Center for Biological Diversity resides in this district, Defendants U.S. Forest Service and U.S. Fish and Wildlife Service have offices in this district, and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

6. On July 31, 2013, the Center for Biological Diversity provided the U.S. Forest Service and the U.S. Fish and Wildlife Service with sixty-day notice of its intent to sue, as required under the Endangered Species Act, 16 U.S.C. §1540(g).

7. An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is therefore proper under 28 U.S.C. §§ 2201-02 and 16 U.S.C. § 1540(g), and the government has waived sovereign immunity pursuant to 16 U.S.C. § 1540(g)(1).

SUPPLEMENTAL PARTY INFORMATION

8. CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-profit conservation organization with approximately 245,000 members and online activists dedicated to the preservation, protection, and restoration of biodiversity and ecosystems throughout the world, including in the Coconino National Forest in Arizona. The Center’s main office is located in Tucson, Arizona; the Center also has an office in Flagstaff, Arizona.

9. The Center works to insure the long-term health and viability of animal and plant species across the United States and elsewhere, and to protect the habitat these species need to survive.

10. Plaintiff's members and activists use and enjoy the public lands in the Coconino National Forest – including the Fossil Creek Range allotment – for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiff's members and activists derive recreational, inspirational, religious, scientific, educational, and aesthetic benefit from their activities within these areas. Plaintiff's members and activists intend to continue to use and enjoy the public lands within and around the Fossil Creek Range allotment frequently and on an ongoing basis in the future, including this summer.

11. The aesthetic, recreational, scientific, educational and religious interests of Plaintiff's members have been and will continue to be adversely affected and irreparably injured if Defendants continue to authorize livestock grazing and related activities without conducting adequate environmental analyses or insuring proper protection for wildlife and other resources. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under the ESA, NFMA, NEPA, and the APA. The injuries would be redressed by the relief sought.

12. Defendant HEATHER PROVENCIO is the District Ranger of the Red Rock Ranger District of the Coconino National Forest, based in Flagstaff, Arizona. As the District Ranger, Provencio has management and supervisory authority over livestock grazing authorizations on the Red Rock Ranger District, and is responsible for ensuring that activities within the Red Rock Ranger

District comply with all federal laws and regulations, including the ESA, NEPA and NFMA. Defendant Provencio signed the Decision Notice and Finding of No Significant Impact on the Fossil Creek Range allotment at issue in this case, and Provencio is sued solely in her official capacity.

13. DEFENDANT U.S. FOREST SERVICE is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Coconino National Forest, in accordance and compliance with federal laws and regulations.

14. DEFENDANT U.S. FISH AND WILDLIFE SERVICE is an agency or instrumentality of the United States, and is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial and freshwater aquatic species, including the endangered Yuma clapper rail and Southwestern willow flycatcher, and the threatened Chiricahua leopard frog, Mexican spotted owl, and Sonoran bald eagle, all of which are found in and around the public lands of the Fossil Creek Range allotment.

LEGAL BACKGROUND

Endangered Species Act

15. Congress enacted the Endangered Species Act to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b).

16. The ESA requires the Secretary of Interior or Commerce (“Secretary”) to list species either as threatened or endangered based on the present or threatened destruction, modification, or curtailment of a species’ habitat or range, as well as other factors. 16 U.S.C. § 1533(a)(1). An endangered species is one “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A threatened species is one that is “likely to become an endangered species within the foreseeable future.” *Id.* § 1532(20).

17. Concurrent with listing a species, the Secretary also must designate the species’ “critical habitat.” 16 U.S.C. § 1533(a)(3). Critical habitat is the area that contains the physical or biological features essential to the “conservation” of the species and which may require special protection or management considerations. *Id.* at § 1532(5)(A). Critical habitat is the habitat essential for the recovery of the species.

18. Under § 7 of the ESA, all federal agencies must “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.” 16 U.S.C. § 1536(a)(2).

19. If a species is present in an action area, to fulfill its § 7(a)(2) mandate, an action agency must prepare a biological assessment (“BA”) to identify any listed species likely to be affected by an action. 16 U.S.C. § 1536(c)(1). Through a BA, an action agency evaluates potential effects and determines whether a species

is “likely to be adversely affected” or “not likely to be adversely affected” by the action. 50 C.F.R. § 402.12.

20. If a proposed action “may affect” a listed species or its critical habitat, the action agency must consult with the Fish and Wildlife Service. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). For actions that are likely to adversely affect a species, the action agency must seek “formal” consultation, 50 C.F.R. § 402.14(a), while for actions which the action agency concludes will not likely adversely affect a species, the action agency may seek “informal” consultation. *Id.* at § 402.14(b).

21. Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14.

22. Authorization of grazing is an action “authorized, funded, or carried out” by the Forest Service and therefore requires consultation under the ESA. 16 U.S.C. § 1536(a)(2).

23. During consultation, the U.S. Fish and Wildlife Service must review all relevant information, evaluate the current status of the species or its critical habitat, and evaluate the effects and cumulative effects of the proposed action on the listed species and their critical habitat. 50 C.F.R. § 402.14(g)(1)–(3).

24. During consultation, the action agency may not make any irreversible or irretrievable commitments of resources that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

25. Informal consultation concludes with a Letter of Concurrence, and is only appropriate when the biological assessment or other information indicates that the action has no likelihood of adverse effect. To concur in an action agency's finding that an action is not likely to adversely affect a listed species, FWS must find that the effects of the proposed action must be completely beneficial, insignificant, or discountable.

26. At the completion of formal consultation, FWS issues a biological opinion ("BO"), which determines whether the agency action is likely to jeopardize the species or adversely modify the species' critical habitat. If the action's impact on a species' habitat threatens either the recovery or survival of the species, the BO must conclude that the action adversely modifies critical habitat.

27. The action agency retains the duty to comply with § 7(a)(2) even after FWS issues a biological opinion or Letter of Concurrence. After the completion of consultation, the action agency must determine whether and in what manner to proceed with the action in light of its § 7 obligations and the BO. 50 C.F.R. § 402.15(a). An action agency may not rely solely on a BO or Letter of Concurrence to establish conclusively its compliance with its substantive obligations under § 7(a)(2).

28. If FWS makes a jeopardy determination, the BO may specify reasonable and prudent alternatives that will avoid jeopardy and will allow the agency to proceed with the action. 16 U.S.C. § 1536(b). FWS also may "suggest

modifications” to the action during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy. 50 C.F.R. § 402.13.

29. Section 9 of the ESA prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a)(1). “Take” is defined broadly under the ESA and its regulations to include harassing, harming, wounding, killing, trapping, capturing, or collecting a listed species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19). This so-called “take” prohibition has been extended to threatened species, including the Chiricahua leopard frog. 50 C.F.R. §§ 17.31, 17.43.

30. One exception to § 9’s take prohibition is relevant here. A federal agency may take a listed species in accordance with an Incidental Take Statement (“ITS”), which is an essential element of a BO. 16 U.S.C. § 1536(b)(4). However, the agency is only exempted from § 9’s take provision if the terms and conditions of the ITS are followed. *Id.* § 1536(o)(2).

31. The BO should include an ITS if such take may occur. 50 C.F.R. § 402.14(g)(7). The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking, (2) specifies Reasonable and Prudent Measures to minimize such impact, and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. *Id.* § 402.14(i)(1)(i), (ii), (iv).

32. The incidental take statement must also “specif[y] the impact, i.e., the amount or extent, of such incidental taking on the species,” and must also include a so-called “trigger” for reconsultation.” 50 C.F.R. § 402.14(i).

33. If during the course of the action the amount or extent of incidental taking specified in the ITS is exceeded, the action agency must immediately reinitiate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

National Forest Management Act

34. In 1976, Congress enacted the National Forest Management Act, 16 U.S.C. §§ 1600–1614, which governs the United States Forest Service’s management of the national forests.

35. NFMA establishes a two-step process for forest planning. NFMA first requires the Forest Service to develop, maintain, and revise “land and resource management plans” (“LRMPs” or “Forest Plans”) for each national forest. *Id.* § 1604(a); *see also* 36 C.F.R. § 219.10(a), (b). Forest Plans guide natural resource management activities forest-wide, setting standards, management area goals and objectives, and monitoring and evaluation requirements.

36. Implementation of a Forest Plan occurs at the site-specific level – that is, once a Forest Plan is in place, site-specific actions, such as issuance of a federal grazing permit, are assessed by the Forest Service in the second step of the forest planning process.

37. Site-specific decisions must be consistent with the broader Forest Plan. 16 U.S.C. § 1604(i).

38. NFMA also requires the Forest Service to provide animal and plant diversity in the national forests. 16 U.S.C. § 1604(g)(3)(B). Forest Service's regulations adopted in 1982 and in place at the time the Forest Service adopted the Coconino Forest Plan (often referred to as the "1982 Planning Regulations") require the Forest Service to manage forests for viable populations of native vertebrate and desired non-native species. 36 C.F.R. § 219.19 (2000).

39. To ensure that viable populations are maintained in the national forest, the Forest Service regulations require that the agency identify management indicator species ("MIS") and that "[p]opulation trends of the management indicator species will be monitored and relationships to habitat change determined." 36 C.F.R. § 219.19(a)(6) (2000).

40. Further, the regulations state "each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction." Id. § 219.12(d) (2000). To ensure biological diversity, the regulations specifically require that "[i]nventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition." Id. § 219.26 (2000).

National Environmental Policy Act

41. The purpose of the National Environmental Policy Act is to "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4331. NEPA's fundamental purposes are to guarantee that: (1) agencies take a "hard look" at the environmental consequences of their actions before these

actions occur by ensuring that the agency carefully considers detailed information concerning significant environmental impacts; and (2) agencies make the relevant information available to the public so that it may also play a role in both the decisionmaking process and the implementation of that decision. 40 C.F.R. § 1500.1.

42. Under NEPA and the implementing regulations, all federal agencies – including the Forest Service – must prepare an environmental impact statement (“EIS”) for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. An agency may first prepare an Environmental Assessment, but if there is any question that a proposed action may be “significant,” then the agency is required by NEPA to perform a full EIS. *Id.*

43. Whether there may be a significant impact on the environment requires consideration of two broad factors: “context” and “intensity.” 40 C.F.R. § 1508.27; 42 U.S.C. § 4332(2)(C). Context means the “significance of an action must be analyzed in several contexts such as society as a whole . . . , the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). Intensity indicates the “severity of impact,” which includes consideration of, *inter alia*, the unique characteristics of the geographic area; the degree to which the effects on the environment are likely to be highly controversial; the degree to which the possible effects on the environment are highly uncertain or involve unique or unknown

risks; and whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Id. at § 1508.27(b).

44. NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §4332(2)(E). The analysis of alternatives is the "heart" of the environmental review process; the EIS must "rigorously explore and objectively evaluate all reasonable alternatives," in order to "provid[e] a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14(a).

45. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8. Cumulative impacts are defined under NEPA as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions [of federal, state, and private actors]." 40 C.F.R. § 1508.7. Cumulative impacts may result "from individually minor but collectively significant actions taking place over a period of time." Id.

46. In addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. § 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental consequences and mitigation measures).

47. When preparing an environmental review, an agency must ensure that high quality information is available to the agency and the public before any

decision is made or any action is taken. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. § 1500.1(b). The agency is required to identify clearly all of its assumptions, to explain any inconsistencies, to disclose all methodologies used, to rebut all contradictory evidence, to eliminate guesswork, to make explicit reference to sources relied upon for conclusions, and to record in an understandable manner the basis for those conclusions. 40 C.F.R. § 1502.24.

SUPPLEMENTAL FACTUAL BACKGROUND

Fossil Creek Range Allotment

48. The Fossil Creek Range Allotment (“Fossil Creek allotment” or “allotment”) lies between Flagstaff and Phoenix, and is located in the Red Rock Ranger District of the Coconino National Forest. Fossil Creek is bounded on the north by Highway 260 and on the east by Fossil Creek, and it totals approximately 42,200 acres of public lands.

49. Elevations in Fossil Creek range from approximately 3,000 feet up to 6,300 feet, and vegetation is mostly pinon-juniper woodlands, with small portions of ponderosa pine at the higher elevations, and pinon-juniper grassland and high desert shrubs/grasslands at the lower elevations.

50. The public lands within Fossil Creek provide habitat for a host of wildlife, including the endangered Yuma clapper rail and Southwestern willow flycatcher, the threatened Mexican spotted owl, Chiricahua leopard frog, and the

Sonoran Desert bald eagle. Many other sensitive and MIS species are also found throughout the allotment.

51. The Fossil Creek allotment contains currently occupied, previously occupied, and suitable unoccupied Chiricahua leopard frog (CLF) habitat. CLF currently occupy 13 sites within the Fossil Creek allotment, including Middle, Walt's, Black, Buckskin, Antelope, Charley's, Doren's Defeat, Freckles, Needed, Partnership, Pine, Sycamore Basin, and Upper Boulder tanks. Breeding populations of CLF are located at seven of these tanks, including Middle, Walt's, Black, Buckskin, Sycamore Basin, Doren's Defeat and Pine Tanks.

52. The Fossil Creek allotment also contains designated Critical Habitat for the CLF. The FWS's critical habitat designation includes eight tanks within the north-central portion of the allotment – including Sycamore Basin, Middle, Walt's, Partnership, Black, Buckskin, Needed and Doren's Defeat tanks – as well as drainages and uplands between and among these tanks.

53. According to the FWS, these areas were designated as Critical Habitat because they provide physical or biological features necessary to satisfy the essential requirements of survival and recovery of CLF. According to the FWS, there are two Primary Constituent Elements (PCE) for CLF, including: (1) aquatic habitat and immediately adjacent uplands with certain habitat characteristics necessary for CLF breeding, and (2) other non-aquatic, non-breeding habitat that are essential for dispersal, connectivity and expansion of CLF populations.

54. There are two wilderness areas located within the Fossil Creek Range allotment: the Fossil Springs Wilderness and the Mazatzal Wilderness. The Upper and Lower Wilderness Pastures in the Fossil Creek Range allotment are entirely made up of the Fossil Springs Wilderness, and the Mazatzal Wilderness is located in portions of the Surge and Stehr Lake pastures.

55. The public lands within the Fossil Creek Range allotment also contain streams and wetlands, including seeps, springs, wet meadows and other riparian areas. More specifically, the allotment contains about 21.3 miles of riparian stream courses, including Fossil Creek, Lower Boulder, Sally May Wash, Sycamore Canyon, Lower Mud Tank Draw, Sandrock Canyon, Tin Canyon Draw, Upper Boulder, Stehr Lake Wash, and others.

56. The public lands within the Fossil Creek allotment also contain twenty springs and seeps, including within Chalk Springs, Lower Wilderness, Grass Patch, Sally Mae, Surge, Sycamore, Boulder and Stehr pastures. Several of these springs are in non-functional condition, and are primarily used to water livestock, and others have been negatively affected by livestock grazing, including through trampling and overgrazing of riparian vegetation.

57. The Forest Service has carved the allotment into 28 main grazing pastures, with the lower elevation pastures located in the north-central of the allotment, and the higher elevation pastures to the west and south.

58. The Forest Service has documented degraded range, soil and wetland conditions across the allotment. For example, the Forest Service claims that

12.57% of soils in the allotment are in Satisfactory condition; 23.17% in Satisfactory, but Inherently Unstable condition; and fully 62.64% are in Impaired condition.

59. The allotment contains eight different watersheds, and the Forest Service's own data shows that none (0%) of these watersheds are in proper functioning condition, fully seven of eight are "functioning at risk," and one is in impaired condition. The Forest Service acknowledges that grazing is one of the factors contributing to the poor watersheds conditions across the Fossil Creek allotment.

60. Similarly, the Forest Service has documented impaired riparian conditions in the allotment, with only 55% of the riparian stream courses are in Proper Functioning Condition, with the remaining 45% in At Risk or Unknown condition. These same depaupered conditions are found across the 20 springs in the Fossil Creek allotment, too, with the Forest Service's data showing that only 10 (50%) are in properly functioning condition.

61. The grazing system currently used is an intensive deferred-rest rotation management strategy, modeled after the Savory Method. Under the prior grazing permit, the Forest Service allowed 477 head of livestock to graze year-round for a total of 5,795 AUMs.

62. From 1995 through 2001, actual use averaged about 95% of permitted use, but actual use was reduced from 2002-2006, and the Forest Service completely closed the Fossil Creek allotment in 2002 and 2005-06.

The Coconino National Forest Plan

63. The Forest Service published the Coconino National Forest Land and Resource Management Plan in August 1987. The Service has subsequently amended the plan several times since then, but the Coconino Forest Plan remains the applicable forest plan directing management of the public lands in the Coconino National Forest.

64. The Coconino Forest Plan outlines and adopts specific goals, objectives, and standards and guidelines for a host of actions and activities within the forest, including management of wildlife habitat, livestock grazing and range, off-road driving, geothermal development, roads and transportation system, and others.

65. Regarding management of livestock grazing across the riparian areas in the forest, the Forest Plan requires that “[w]etlands and open water containing emergent vegetation which provide nesting habitat are protected from disturbing uses that will harass nesting birds, such as activities that are noisy or would damage nests or nesting habitat from May 1 to July 15.”

66. The Coconino Forest Plan also adopted a requirement that livestock use not exceed 20 percent on woody vegetation within all riparian areas across the forest.

Prior Decision-Making Process

67. In November 2006, the Forest Service initiated an allotment evaluation for the Fossil Creek Range allotment, a process designed to result in

an environmental assessment looking at grazing in the allotment. On March 21, 2007, the Forest Service initiated public scoping for the Fossil Creek Range allotment environmental assessment, and identified the proposed action as permitting 483 head of livestock to graze the allotment totaling a maximum of 5,800 AUMs. The Forest Service acknowledged that current conditions would not support this grazing level, and claimed that grazing would be authorized at reduced levels until the condition of the public lands improved.

68. In March 2008, the Forest Service issued a draft Environmental Assessment, in which the Forest Service proposed to adopt the grazing scheme outlined in its earlier proposed action and scoping notice. More specifically, in the draft EA, the Forest Service proposed to authorize year-long grazing on the allotment with a maximum of 5,800 AUMs, which equates to 483 head of livestock for a 12-month period.

69. In the draft EA, the Forest Service acknowledged that current conditions cannot support the proposed level of grazing, and the Forest Service claimed that it would authorize 300 head of livestock for 12 months (totaling 3,600 AUMs) until the range conditions improve.

70. On February 9, 2009, the U.S. Fish and Wildlife Service issued its final Biological Opinion examining the impacts of the Forest Service's proposed grazing scheme on the threatened Chiricahua leopard frog, among other species protected under the ESA. The BO also concluded that the Forest Service's livestock grazing scheme would "take" CLF, but was unlikely to jeopardize the

continued existence of Chiricahua leopard frog or destroy or adversely modify designated critical habitat. The BO included an Incidental Take Statement, which did not quantify the level of expected “take” of Chiricahua leopard frog, nor did FWS identify any habitat surrogate for expected take.

71. On April 2, 2009, the Forest Service issued its final EA. In the EA, the Forest Service acknowledged the need to modify grazing to improve vegetation, soil, and habitat conditions on the allotment, as the Forest Service’s existing data – as discussed in the draft EA – showed that the conditions of the public lands and resources were not meeting the requirements of the Coconino Forest plan and other legal requirements.

72. The proposed grazing scheme in the Final EA largely reflects the grazing scheme identified in the draft EA. The proposed action called for authorizing a maximum of 483 head of livestock for 12 months (totaling 5,800 AUMs), with an initial stocking rate of 300 head for 12 months (totaling 3,600 AUMs).

73. On April 28, 2009, the District Ranger Heather Provencio signed a Decision Notice and Finding of No Significant Impact. On June 15, 2009, Plaintiff Center for Biological Diversity appealed the Forest Service’s Fossil Creek Range allotment grazing authorization, environmental assessment, and finding of no significant impact.

74. On July 23, 2009, the Forest Service denied the Center’s administrative appeal.

Prior Round of Litigation

75. On June 15, 2010, the Center filed its original Complaint in this matter, alleging the Forest Service's grazing decision, environmental assessment, and finding of no significant impact violated NEPA, FLPMA, and the APA. The Center also alleged the FWS's BO was unlawful under the ESA and APA. The Center alleged that the BO failed to quantify permissible "take" as required under the ESA, and that the FWS failed to consider the impacts of the Forest Service's grazing scheme on the recovery of CLF populations.

76. Western Watersheds' moved for summary judgment on its claims, and this Court held a hearing on the Center's motion on December 22, 2011. On January 23, 2012, this Court granted in part the Center's motion, holding the Forest Service violated NEPA in failing to fully examine the impacts of its grazing scheme on the fragile soils within the allotment. Dkt. No. 38. The Court also held the FWS's BO was unlawful, in that it failed to quantify expected levels of take, and failed to examine the impacts of the Forest Service's grazing scheme on recovery of CLF. *Id.*

77. The Center moved for remedial relief remanding and vacating the unlawful grazing decision and environmental review, and enjoining grazing until the FS complies with NEPA. which the parties fully briefed. On September 29, 2012, the Court granted the Center's motion in part, and remanded and vacated the grazing decision, Environmental Assessment and Finding of No Significant Impact. Dkt No. 67 (Order on Remedies). The Court denied the Center's request

to enjoin grazing, however, even though the Court held that the approved grazing scheme would irreparably harm soils across the allotment. *Id.* at pp. 5-8.

Supplemental Factual Information

78. Since this Court entered its Order on Remedies, the Forest Service has issued a series of Status Reports identifying the actions the Forest Service has taken to come into compliance with this Court's order. *See, e.g.*, Dkt. Nos. 71, 73, 74. BLM has also issued a series of Annual Operating Instructions (AOI) allowing the permittee to graze on the Fossil Creek allotment during the pendency of the Forest Service and FWS's compliance with this Court's earlier orders. For example, on May 28, 2013, the Forest Service issued an AOI to Ward Arizona Ranch Properties, LLC., which provided directions for cattle grazing on the Fossil Creek allotment through October 2013.

79. Also in May, 2013, BLM issued its Final Environmental Assessment for the Fossil Creek allotment. In the EA, the Forest Service considered only two alternatives: a no action alternative, which called for the temporary elimination of livestock grazing from the allotment, and the proposed action alternative.

80. The proposed alternative called for the continuation of status quo livestock grazing – in terms of both grazing intensity and utilization – and further allows the Forest Service and permittee maximum flexibility in planning the annual grazing scheme. For example, the Forest Service proposed a season-of-use from 3/1-2/28 each year – i.e., the entire calendar year – but failed to identify any season-of-use within each pasture. Instead, the Forest Service claimed that

“[p]asture rotation would be planned in the spring and fall, and documented in the AOIs, but they could be modified later in the season.”

81. The grazing scheme proposes no seasonal restrictions on grazing in riparian areas during the critical timeframe (May 1 to July 15) for nesting birds, as required under the Coconino Forest Plan. The Forest Service’s proposed grazing scheme allows uninterrupted access to critical avian nesting habitat during the nesting season.

82. In the EA, the Forest Service admits that it lacks basic information on the current conditions of many of the 20 springs within the Fossil Creek allotment. Indeed, the Forest Service’s fails to even provide the location for 11 of the 20 springs, and the Forest Service only shows current conditions at four of the 20 springs. In the EA, the Forest Service claims that in the future, it will establish baseline conditions at these springs and it will also conduct further monitoring at all riparian locations to establish trend.

83. The Forest Service proposed grazing scheme limited livestock utilization to less than 20% on key woody vegetation, including trees and shrubs, except at the so-called Boulder Water Gap. The Boulder Water Gap is a 40-foot wide area in the Boulder Pasture where livestock have immediate access to Fossil Creek. According to the EA, the Boulder Water Gap “would not be subject to riparian standards [required under the Coconino National Forest Plan] because the purpose of the water gap is to allow cattle access to a 40-foot section along Fossil Creek.”

84. Similarly, the proposed grazing scheme also required the Forest Service to “maintain a minimal stubble height of four inches of herbaceous vegetation” in all riparian areas, except for the Boulder Water gap.

85. On May 17, 2013, the Forest Service issued a Decision Notice (DN) and Finding of No Significant Impact (FONSI) permitting livestock grazing in the Fossil Creek Range allotment. In the Decision Notice, the Forest Service formally approved the grazing scheme discussed in the EA, and by issuing a FONSI, the Forest Service decided to forego preparing an environmental impact statement.

86. On May 28, 2013, the Forest Service issued an Annual Operating Instructions (AOIs) to the permittees on the Fossil Creek allotment. This AOI contained directions for livestock grazing through October 2013. The AOI did not contain any limitations on livestock utilization within riparian areas, including the four-inch minimal stubble height for herbaceous vegetation.

87. On July 8, 2013, the Center appealed the Forest Service’s EA, DN and FONSI, alleging violations of the National Forest Management Act and the Coconino National Forest Plan, NEPA and the ESA. More specifically, the Center claimed the Forest Service’s grazing scheme violated the Coconino National Forest Plan by (1) failing to protect wetlands from disturbing uses during songbird nesting season – i.e., May 1-July 15, and (2) failing to limit livestock use to 20% of woody vegetation within the Boulder Water Gap.

88. The Center asserted the Forest Service violated NEPA by failing to prepare baseline information on the conditions of the seeps, springs and wet

meadows across the Fossil Creek allotment, among other asserted NEPA violations. The Center also alleged violations of the Endangered Species Act, claiming that the Forest Service's grazing scheme fails to ensure against jeopardy of Chiricahua leopard frog and adverse modification of designated critical habitat.

89. On August 14, 2013, the Forest Service Appeal Reviewing Officer issued a recommended Review and Findings on the Center's appeal. The Appeal Reviewing Officer agreed with the Center that the Forest Service violated the Coconino National Forest plan by refusing to apply the 20% utilization standard within the Boulder Water Gap, and the Appeal Officer found the "exception to not apply the 20 percent utilization standard/guideline to the Boulder Water gap is inconsistent" with the Coconino Forest Plan. The Appeal Reviewing Officer (ARO) recommended denied ever other appeal point.

90. On August 20, 2013, the Forest Supervisor agreed with the ARO, and ordered that the "Responsible Officer is required to manage livestock to remain within the 20 percent utilization on the woody vegetation standard/guideline within the Boulder Water Gap or amend the Forest Plan to provide for an exception to the standard/guideline." The Forest Supervisor adopted the ARO's recommended finding in all other aspects, too.

91. On September 10, 2013, the Forest Supervisor clarified his 8/20/2013 decision, noting that the "Responsible Officer is required to manage livestock to remain within the 20 percent utilization on woody vegetation standard/guideline

with MA 12 or amend the Forest Plan to provide for an exception to the standard/guideline.”

92. On November 14, 2013, the Forest Service reversed course, and found that the 20% utilization standard was being obtained in the Boulder Water Gap, and the “language in the 2013 Fossil Creek Allotment Environmental Assessment that the ‘Boulder Water Gap would not be subject to riparian standards . . . ’ is incorrect.” According to the Forest Service’s current interpretation, the Coconino Forest Plan’s requirements to limit grazing to 20% in riparian areas applies on an allotment-wide scale, and not on a riparian area scale. Under the analysis, the Forest Service can permit 100% utilization within the Boulder Water gap, and still meet the forest plan limitation if – in the aggregate – all utilization on all riparian areas falls below the 20% level.

93. On November 20, 2013, the Forest Service issued its second AOI for grazing year 2013, which covers grazing from November 2013 to February 2014. Like the earlier AOI, this one included no provision limiting grazing in riparian areas to allow a residual herbaceous grass height of four inches.

94. Meanwhile, on May 7, 2013, the U.S. Fish and Wildlife Service issued its final Biological Opinion for the Chiricahua leopard frog on the Fossil Creek Range allotment (2013 BO). In its 2013 BO, the FWS concluded that the Forest Service’s grazing scheme may affect the threatened CLF and its designated critical habitat.

95. In the BO, the FWS noted that CLF now occupy 13 sites within the Fossil Creek allotment, including eight tanks that are designated Critical Habitat for CLF (Middle, Black, Walt's, Buckskin, Sycamore Basin, Partnership, Doren's Defeat, and Needed tanks). The FWS concluded that five of these livestock tanks must be protected to ensure survival of CLF (i.e., Middle Tank, Black Tank, Walt's Tank, Buckskin Tank, and Sycamore Basin Tank), and the remaining suitable and occupied habitats are critical in terms of providing for recovery of CLF – especially by providing connectivity and dispersal habitat of existing populations.

96. In examining the impacts of the Forest Service's grazing scheme on recovery of CLF – as this Court required in its summary judgment order – the FWS looked only to the impacts of grazing on the five tanks necessary for survival. In fact, the FWS failed to examine the impacts of the Forest Service's grazing scheme on areas providing dispersal and connectivity habitat – i.e., precisely the areas the FWS previously acknowledged were “important” to CLF recovery.

97. The FWS similarly failed to adequately examine the impacts of the Forest Service's grazing scheme on designated critical habitat, especially critical habitat outside the previously mentioned stock tanks that are necessary for survival. Indeed, the BO provides no analysis on the impacts of grazing on the dispersal and non-breeding habitat. Instead, the FWS simply concluded that the

grazing scheme “should not significantly reduce or modify [dispersal and non-breeding habitat.]”

FIRST CLAIM FOR RELIEF:
**Violation of the National Forest Management Act and APA
Consistency Requirement**

1. Plaintiff realleges and incorporates by reference all preceding paragraphs.
2. The National Forest Management Act requires that all site-specific decisions “shall be consistent with the [Forest Plan].” 16. U.S.C. § 1604(i). The Forest Service’s regulations implementing the NFMA indicate that land and resource management plans “guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management.” 36 C.F.R. § 219.1(b).
3. The Forest Service has violated the NFMA because the agency has failed to comply with the Coconino Forest Plan standards for season-of-use and utilization restrictions within riparian areas, as well as other standards for riparian vegetation, fish and wildlife populations and habitat, and water quality, within the Fossil Creek Range allotment.
4. Therefore, the Forest Service’s authorization of livestock grazing practices via its 2013 Fossil Creek Range Allotment grazing authorization and associated NEPA documents violates the Coconino Forest Plan, the National

Forest Management Act, 16 U.S.C. § 1604(i), and its implementing regulations, and is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and therefore must be reversed and set aside under 5 U.S.C. § 706(2)(A).

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CLAIM FOR RELIEF:
Violation of the Endangered Species Act and APA
Jeopardy and Adverse Modification

5. Plaintiff realleges and incorporates by reference all preceding paragraphs.

6. The Forest Service is violating Section 7 of the ESA, and its implementing regulations as set forth at 50 C.F.R. § 402.16, by failing to ensure through consultation that the Forest Service's approval and implementation of livestock grazing and other management actions on the Fossil Creek Range allotment do not jeopardize Chiricahua leopard frog or destroy or adversely modify its critical habitat. The Forest Service reliance on the FWS's unlawful Biological Opinion similarly violates Section 7 of the ESA.

7. FWS's May 7, 2013 Biological Opinion is arbitrary, capricious, an abuse of discretion, and not in accordance with the ESA in that it fails to adequately consider the impacts of the Forest Service's grazing scheme on survival and recovery of CLF, on designated CLF critical habitat, and for other reasons.

8. These violations are subject to judicial review under 16 U.S.C. § 1540(g) and 5 U.S.C. § 706.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CLAIM FOR RELIEF:
Violation of the National Environmental Policy Act and APA

9. Plaintiff realleges and incorporates by reference all preceding paragraphs.

10. This Third Claim for Relief challenges the Forest Service's violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and NEPA's implementing regulations, in failing to prepare an Environmental Impact Statement prior to issuing grazing decisions on the Fossil Creek Range Allotment and in failing to undertake a thorough and objective assessment of the environmental implications of the new final grazing decision. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706(1).

11. The Forest Service violated NEPA and federal regulations in multiple respects through issuance of the final grazing decision on the Fossil Creek Range allotment, including, but not limited to:

a. Adopting the final grazing decision on the Fossil Creek Range allotment without first preparing an Environmental Impact Statement examining the ecological impacts of the grazing scheme on the wildlife populations, habitat, wilderness and public lands within the allotment, and, instead, electing to prepare an Environmental Assessment and Finding of No Significant Impact;

b. Adopting the final grazing decision without first taking the requisite “hard look” at the direct and indirect impacts of the grazing scheme, including the impacts to wildlife populations, habitat, wilderness, and public lands within the Fossil Creek Range allotment;

c. Adopting the final grazing decision without first examining the cumulative impacts of the grazing scheme together with the past, present, and reasonably foreseeable future actions in and around the Fossil Creek Range allotment; and, further, in failing to examine the cumulative impacts of the grazing scheme together with the impacts of recurrent drought and climate change on the fragile desert landscape in and around the allotment; and

d. Adopting the final grazing decision without first examining a reasonable range of alternative courses of actions that meet the stated purpose and need to improve the condition of the public lands and wildlife habitat within the Fossil Creek Range allotment; and

12. Accordingly, Defendants’ final decisions are arbitrary, capricious, an abuse of discretion, and not in accordance with the National Environmental Policy Act, and therefore must be reversed and set aside under 5 U.S.C. § 706(2)(A).

WHEREFORE, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court grant the following relief:

A. Order, declare, and adjudge that the Forest Service violated the Coconino National Forest Plan, the National Forest Management Act, and its implementing regulations in adopting the Grazing Authorization on the Fossil Creek Range Allotment;

B. Order, declare, and adjudge that the Forest Service violated Section 7(a)(2) of the Endangered Species Act in adopting the Grazing Authorization on the Fossil Creek Range Allotment;

C. Order, declare, and adjudge that the Forest Service violated the National Environmental Policy Act and its implementing regulations in issuing its Decision Notice and Finding of No Significant Impact for the Grazing Authorization on the Fossil Creek Range Allotment;

D. Reverse and set aside the Grazing Authorization on the Fossil Creek Range allotment;

E. Order, declare, and adjudge that the U.S. Fish and Wildlife Service's May 7, 2013 Biological Opinion is invalid under the APA, 5 U.S.C. § 706(2)(A), because it misses key impacts on Chiricahua leopard frog; it runs counter to evidence available to the agency; it authorizes the Forest Service to proceed with a grazing scheme that is likely to jeopardize the Chiricahua leopard frog and adversely modify designated critical habitat within the meaning of ESA section 7(a)(2) and is thus arbitrary and capricious, and contrary to the ESA and its implementing regulations, in violation of the ESA § 7 and the APA, 5 U.S.C. § 706;

F. Reverse and set aside the Biological Opinion and the incidental take statement;

G. Enter such other temporary, preliminary, and/or permanent injunctive relief as may be prayed for hereafter by Plaintiff;

H. Award Plaintiff its reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or all other applicable authorities; and

I. Grant such further relief as the Court deems just and proper in order to remedy Defendants' violations of the NFMA, ESA, NEPA and APA.

Dated this 5th day of December, 2013

Respectfully submitted,

/s/ Todd C. Tucci

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