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12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF ARIZONA**
14 **PRESCOTT DIVISION**

15 Center for Biological Diversity; and) Case No.:
16 Maricopa Audubon Society,)
17 Plaintiffs,) **COMPLAINT FOR**
18 v.) **DECLARATORY AND**
19) **INJUNCTIVE RELIEF**
20 U.S. Bureau of Land Management; and)
21 U.S. Fish and Wildlife Service,)
22 Defendants.)

23
24 **INTRODUCTION**

25 1. Plaintiffs Center for Biological Diversity and Maricopa Audubon Society
26 challenge Defendants' ongoing failure to adequately protect and conserve threatened and
27 endangered species that are being harmed by livestock grazing on the Agua Fria National
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1 Monument in Arizona, in violation of the Endangered Species Act (“ESA”) and
2 Administrative Procedure Act (“APA”), including the Gila chub, Gila topminnow,
3 western yellow-billed cuckoo, and northern Mexican gartersnake. The Gila Chub and
4 yellow-billed cuckoo also have designated critical habitat within the Agua Fria National
5 Monument that is being degraded by livestock grazing.
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8 2. Plaintiffs challenge (1) the failure of the U.S. Bureau of Land Management
9 (“BLM”) and the U.S. Fish and Wildlife Service (“FWS”) to reinitiate and complete ESA
10 Section 7 consultation regarding the ongoing impacts of livestock grazing on the
11 Horseshoe Allotment, within the Agua Fria National Monument, on threatened and
12 endangered species and their critical habitat, pursuant to the ESA; and (2) FWS’
13 November 6, 2018 Letter of Concurrence for the ten-year renewal of livestock grazing on
14 the Horseshoe Allotment, pursuant to the ESA and APA.
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17 3. Plaintiffs seek declaratory relief that Defendants are in ongoing violation of
18 the ESA for failing to adequately protect and conserve the threatened and endangered
19 species that reside within the Agua Fria National Monument. Plaintiffs also seek
20 injunctive relief to ensure adequate interim protection for the threatened and endangered
21 species, and their critical habitat, until Defendants are in full compliance with the ESA.
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24 4. Pursuant to a 2006 Biological Opinion and the 2018 Letter of Concurrence,
25 the BLM has been required to significantly limit and restrict livestock grazing near
26 riparian areas within the Horseshoe Allotment of the Agua Fria National Monument,
27 through mandatory timing restrictions, a rotational system, vegetation use thresholds, and
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1 fencing and exclosures. These restricted riparian areas include along Silver Creek, Indian
2 Creek and the Agua Fria River.

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4 5. Based on BLM and FWS records that Plaintiffs obtained through the
5 Freedom of Information Act and Plaintiffs' site visits and surveys of the riparian habitat
6 within the Horseshoe Allotment, the BLM is significantly failing to comply with the
7 mandatory restrictions that were imposed to ensure adequate protection of this critically
8 important habitat for threatened and endangered species.

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10 **JURISDICTION**

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12 6. Jurisdiction is proper in this Court under 28 U.S.C. § 1331; 28 U.S.C. §
13 1346; 5 U.S.C. §§ 551 *et seq.*; and 16 U.S.C. § 1540(g) because this action involves the
14 United States as a defendant and arises under the laws of the United States, including the
15 ESA, 16 U.S.C. §§ 1531 *et seq.*, and the APA, 5 U.S.C. §§ 551 *et seq.* Plaintiffs
16 provided Defendants with notice of their intent to file suit pursuant to the ESA citizen
17 suit provision. 16 U.S.C. § 1540(g)(2). An actual justiciable controversy exists between
18 Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 and
19 2202; 5 U.S.C. §§ 705 and 706; and 16 U.S.C. § 1540(g). The challenged agency actions
20 are final and subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706.

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23 **VENUE**

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25 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16
26 U.S.C. § 1540(g)(3)(A), because Defendants BLM and FWS have offices in the district, a
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1 substantial part of the events, omissions, and violations giving rise to Plaintiffs' claims
2 occurred in the district, and Plaintiffs reside in the district.
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4 8. Venue is proper in the Prescott Division because the Agua Fria National
5 Monument is located in Yavapai County. LRCiv 77.1(a).
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7 **PARTIES**

8 9. Plaintiff Center for Biological Diversity ("the Center") is a non-profit
9 corporation headquartered in Tucson, Arizona, with offices in a number of states and
10 Mexico. The Center works through science, law, and policy to secure a future for all
11 species, great or small, hovering on the brink of extinction. The Center is actively
12 involved in endangered species and habitat protection issues nationwide. The Center has
13 over 84,000 members and more than 1.7 million supporters throughout the United States
14 and the world, including staff and members within Arizona.
15

16 10. The Center has a long history of working to protect and conserve the many
17 threatened and endangered species that are located on and depend on federal lands within
18 Arizona. This includes submitting petitions under Section 4 of the ESA to compel FWS
19 to designate species as threatened or endangered, and to designate their critical habitat.
20 This also includes working to ensure adequate protection for these species and habitats
21 from federal agency actions, including from livestock grazing on federal lands.
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23 11. The Center brings this action on its own behalf, and on behalf of its
24 members who derive scientific, aesthetic, recreational, and spiritual benefits from the
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1 Agua Fria National Monument, including the areas and habitat where threatened and
2 endangered species may be found.

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4 12. The Center's members use and enjoy the Agua Fria National Monument for
5 a variety of purposes, including hiking, camping, photographing scenery and wildlife,
6 viewing wildlife and signs of wildlife, and engaging in other vocational, scientific, and
7 recreational activities. This includes, but is not limited to, Center members Chris Bugbee
8 and Robin Silver, who most recently visited the Agua Fria National Monument on
9 January 4, 2022.

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11 13. The areas of the Agua Fria National Monument that the Center's members
12 use and enjoy include specific areas where threatened and endangered species may be
13 found, including the Agua Fria River and its tributaries. The Center's members' use and
14 enjoyment of these areas is significantly enhanced knowing that these threatened and
15 endangered species are still likely to be present in these areas.

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17 14. The Center's members derive aesthetic, recreational, inspirational, spiritual,
18 scientific, and educational benefits from their use and activities within the Agua Fria
19 National Monument.

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21 15. The Center's members intend to continue to use and enjoy the Agua Fria
22 National Monument frequently and on an ongoing basis in the future, including during
23 the spring and summer of 2022. The areas of the Agua Fria National Monument that the
24 Center's members intend to continue to use and enjoy include specific areas where
25 threatened and endangered species are likely to be found, including the Agua Fria River
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1 and its tributaries. As just one example, Center members Chris Bugbee and Robin Silver
2 have plans to return to the Agua Fria National Monument on March 1, 2022.
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4 16. The aesthetic, recreational, inspirational, spiritual, scientific, and
5 educational interests of the Center's members have been and will continue to be
6 adversely affected and irreparably injured if Defendants' ongoing violations of the ESA
7 and APA continue. These are actual, ongoing, concrete injuries caused by Defendants'
8 violations of the ESA and the APA. The relief sought will redress the Center and its staff
9 and members' injuries.
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11 17. Plaintiff Maricopa Audubon Society is a nonprofit organization with
12 approximately 2,000 members dedicated to the study and enjoyment of birds and other
13 wildlife, and to the protection and restoration of habitat in the Southwest. Maricopa
14 Audubon Society is run by volunteers and strives to protect and restore wildlife habitat
15 through education and community involvement.
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18 18. Maricopa Audubon members use and enjoy the Agua Fria National
19 Monument for a variety of purposes, including hiking, fishing, camping, viewing and
20 photographing scenery and wildlife, and engaging in other vocational, scientific, and
21 recreational activities. Maricopa Audubon's members derive scientific, aesthetic,
22 recreational, vocational, and spiritual benefits from the Agua Fria National Monument,
23 including the areas and habitat in the Monument where the endangered Yellow-billed
24 cuckoo and Gila chub are found.
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1 19. Maricopa Audubon members derive health, aesthetic, recreational,
2 inspirational, spiritual, scientific, and educational benefits from their activities within the
3 Agua Fria National Monument, Maricopa Audubon members intend to continue to use
4 and enjoy the Agua Fria National Monument frequently and on an ongoing basis in the
5 future, including during the summer of 2022. The areas of the Agua Fria National
6 Monument that Maricopa Audubon members intend to continue to use and enjoy include
7 specific areas where the Yellow-billed cuckoo and Gila chub are most likely to be found.

8 20. The health, aesthetic, recreational, inspirational, spiritual, scientific, and
9 educational interests of Maricopa Audubon and their members have been and will
10 continue to be adversely affected and irreparably injured if Defendants’ ongoing
11 violations of the ESA and the APA continue. These are actual, concrete injuries caused
12 by Respondents’ violations of the ESA. The relief sought will redress the Maricopa
13 Audubon and its members’ injuries.

14 21. Defendant U.S. Bureau of Land Management (“BLM”) is an agency within
15 the U.S. Department of the Interior. It and its officers are responsible for the lawful
16 management of the Agua Fria National Monument, including the Horseshoe Allotment.

17 22. Defendant U.S. Fish and Wildlife Service (“FWS”) is an agency within the
18 U.S. Department of the Interior. It and its officers are responsible for administering the
19 ESA, particularly regarding potential impacts to wildlife and fish species that have been
20 listed as threatened or endangered with extinction pursuant to the ESA.

THE ENDANGERED SPECIES ACT

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23. Congress enacted the ESA in 1973 to provide “a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b).

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Section 2(c) of the ESA establishes that it is the policy of Congress that all federal agencies shall seek to conserve threatened and endangered species, and shall utilize their authorities in furtherance of the purposes of the ESA. 16 U.S.C. § 1531(c)(1).

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24. The ESA defines “conservation” to mean “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 pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).

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25. Section 4 of the ESA directs the Secretary of the Interior to list species that are threatened or endangered with extinction, and to designate “critical habitat” for such species. 16 U.S.C. § 1533(a). “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. 16 U.S.C. § 1532(5)(A).

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26. Section 4 of the ESA requires the Secretary to develop and implement Recovery Plans for threatened and endangered species, unless the Secretary finds that such a plan will not promote the conservation of the species. 16 U.S.C. § 1533(f).

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27. Section 7(a)(2) of the ESA requires each federal agency, in consultation with FWS, to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species,

1 or result in the destruction or adverse modification of the critical habitat of such species.
2
3 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs
4 of any kind authorized, funded, or carried out by federal agencies, including actions
5 directly or indirectly causing modifications to the land, water, or air; and actions intended
6 to conserve listed species or their habitat. 50 C.F.R. § 402.02.

7
8 28. During Section 7 consultation, both the action agency and FWS must use
9 the best scientific data available. 16 U.S.C. § 1536(a)(2).

10 29. For each proposed action, the action agency must first request from FWS
11 whether any listed or proposed species may be present in the area of the proposed action.
12 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If listed or proposed species may be
13 present, the action agency must prepare a “biological assessment” to determine whether
14 the listed species may be affected by the proposed action. 16 U.S.C. § 1536(c)(1); 50
15 C.F.R. § 402.12.

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17 30. If the action agency determines that its proposed action may affect any
18 listed species or critical habitat, the agency must engage in “formal consultation” with
19 FWS. 50 C.F.R. § 402.14(a). However, a federal agency is not required to initiate
20 formal consultation if the agency determines, with the written concurrence of FWS, that
21 the proposed action is “not likely to adversely affect” any listed species or critical habitat.
22 50 C.F.R. § 402.14(b)(1).
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1 31. To complete formal consultation, FWS must provide the action agency with
2 a “biological opinion” explaining how the proposed action will affect the listed species or
3 critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h).

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5 32. If FWS concludes in the biological opinion that the proposed action is
6 likely to jeopardize the continued existence of a listed species, or result in the destruction
7 or adverse modification of critical habitat, FWS must outline “reasonable and prudent
8 alternatives” to the proposed action that FWS believes would not jeopardize listed species
9 or result in the destruction or adverse modification of critical habitat. 16 U.S.C. §
10 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2).

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12 33. If FWS concludes in the biological opinion that the proposed action is not
13 likely to jeopardize the continued existence of a listed species, or result in the destruction
14 or adverse modification of critical habitat, FWS must provide an “incidental take
15 statement” along with the biological opinion, specifying the amount or extent of such
16 incidental taking on the species, any “reasonable and prudent measures” that FWS
17 considers necessary or appropriate to minimize such impact, and setting forth the “terms
18 and conditions” that must be complied with by the action agency to implement those
19 measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

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21 34. The reinitiation of formal consultation under the ESA is required and must
22 be requested by FWS or the action agency where discretionary federal involvement or
23 control over the action has been retained or is authorized by law, and if (1) the amount or
24 extent of taking specified in the incidental take statement is exceeded; (2) new
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1 information reveals effects of the action that may affect listed species or critical habitat in
2 a manner or to an extent not previously considered; (3) the action is modified in a manner
3 that causes an effect to the listed species or critical habitat that was not considered in the
4 biological opinion; or (4) a new species is listed or critical habitat designated that may be
5 affected by the identified action. 50 C.F.R. § 402.16(a).
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8 35. After the initiation or reinitiation of consultation, the action agency is
9 prohibited from making any irreversible or irretrievable commitment of resources with
10 respect to the action which may foreclose the formulation or implementation of any
11 reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).
12

13 36. Section 9 of the ESA and its implementing regulations prohibit the
14 unauthorized “take” of any endangered or threatened species of fish or wildlife. 16
15 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly
16 to include harming, harassing, trapping, capturing, wounding or killing a protected
17 species either directly or by degrading its habitat. 16 U.S.C. § 1532(19). Taking that is
18 in compliance with the terms and conditions of an ITS in a biological opinion is exempt
19 from the Section 9 take prohibition. 16 U.S.C. § 1536(o)(2).
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22 **FACTUAL BACKGROUND**

23 **I. The Agua Fria National Monument**

24 37. On January 11, 2000, Presidential Proclamation 7263 created the Agua Fria
25 National Monument, which is located in southeastern Yavapai County in Arizona. The
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1 Monument contains 70,900 acres of BLM-administered federal lands and 1,444 acres of
2 private land.

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4 38. The Agua Fria National Monument includes one of the most significant
5 systems of prehistoric sites in the Southwest, as well as outstanding biological resources.
6 The Monument is primarily composed of semi-desert grassland, and includes important
7 riparian habitat along the Agua Fria River, Silver Creek, and other tributaries. A number
8 of threatened and endangered species depend on this riparian habitat.
9

10 **II. The 2006 Biological Opinion**

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12 39. On November 2, 2006, FWS issued a Biological Opinion concerning the
13 effects of livestock grazing within the Agua Fria National Monument on Gila chub and
14 its critical habitat. The Gila chub had been designated by FWS as an endangered species
15 in 2005. The Biological Opinion included consideration of livestock grazing on the
16 Horseshoe, Box Bar, and Cross Y Allotments.
17

18 40. As stated in the 2006 Biological Opinion, Gila chub and its critical habitat
19 are present in Silver Creek, within the Boone Pasture of the Horseshoe Allotment.
20 According to the 2006 Biological Opinion, cattle grazing in the winter of 2005 and the
21 spring of 2006 led to overuse in Silver Creek in the Boone Pasture. A two-mile reach of
22 Silver Creek was rated as “Functioning-at-Risk,” with a downward trend as result of
23 excessive livestock use. This overuse negatively impacted riparian and aquatic habitat.
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26 41. Due to this excessive livestock use, all livestock grazing was to be
27 removed from the Horseshoe Allotment for at least two years, from November 2006 to
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1 November 2008. And if resumed, grazing in the Horseshoe Allotment was required to be
2 restricted to the winter season, from November 1 to March 1, with livestock rotated
3 through three different winter riparian pastures during this time.
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5 42. The BLM was required by the 2006 Biological Opinion to annually monitor
6 Gila chub habitat in Silver Creek, within one month after livestock are moved into and
7 within one month after they are moved out of Boone Pasture of the Horseshoe Allotment.
8

9 43. Pursuant to the 2006 Biological Opinion, ESA consultation was required to
10 be reinitiated if established thresholds (40% upland utilization, 50% riparian herbaceous
11 utilization, 25% bank alteration, 30% woody riparian seedling utilization) were exceeded
12 at any time in the life of the grazing permit. Additionally, the BLM was required to fence
13 Silver Creek and exclude livestock grazing if the utilization levels were exceeded.
14

15 44. FWS concluded in the 2006 Biological Opinion that the livestock grazing
16 would not jeopardize the continued existence of Gila chub, and would not adversely
17 modify or destroy its critical habitat. This was based on the Horseshoe Allotment being
18 in non-use from 2006 to 2008, and then managed as fall-winter use only, with livestock
19 rotated through three different riparian pastures to prevent extended periods of use in
20 Silver Creek.
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23 45. In order to monitor the amount of incidental take of the Gila chub, the 2006
24 Biological Opinion required the BLM to provide an annual monitoring report to FWS
25 regarding the population status of the Gila chub and the condition of its critical habitat at
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1 Silver Creek and Indian Creek, including riparian vegetation use levels and streambank
2 alteration.

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4 46. The annual report was required to include any incidences of fish deaths,
5 harm, or harassment related to livestock, and measures used to reduce the amount of
6 incidental take. The annual report was also required to include the results of any soil,
7 watershed, or ecological condition assessments completed, including monitoring of the
8 established utilization thresholds.
9

10 **III. Arizona Game and Fish Department's Purchase of Horseshoe Ranch**

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12 47. In 2007, the Arizona Game and Fish Department proposed to purchase the
13 Horseshoe Ranch and associated allotments, which included the Horseshoe Allotment on
14 BLM-administered lands and the Copper Creek Allotment on the Tonto National Forest.

15
16 48. The Horseshoe Ranch (198.6 acres), along with the Horseshoe Allotment
17 (32,388 acres), are located within the Agua Fria National Monument. The Agua Fria
18 River runs through the Horseshoe Ranch.

19
20 49. The Arizona Game and Fish Department viewed the acquisition as an
21 opportunity to more effectively manage habitat for threatened and endangered species.

22 50. The Department purchased the Ranch in 2009.

23 **IV. The 2018 ESA Informal Consultation on the Horseshoe Allotment Renewal**

24
25 51. On October 1, 2018, the BLM issued a Biological Assessment, pursuant to
26 Section 7 of the ESA, concerning the Horseshoe Allotment Grazing Authorization
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1 Renewal. The Assessment considered the effects of renewing a ten-year grazing permit
2 on the Horseshoe Allotment on threatened and endangered species, and critical habitat.

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4 52. According to the 2018 Biological Assessment, the Horseshoe Allotment
5 was sublet in 2012 by the Arizona Game and Fish Department to JH Grassfed Inc, and
6 livestock grazing resumed on the allotment. Since the resumption of grazing in 2012, the
7 amount of authorized livestock on the Horseshoe Allotment has been 4572 Animal Unit
8 Months (which is equivalent to 381 cow-calf pairs grazing year around).

9
10 53. The BLM stated in the 2018 Biological Assessment that livestock are
11 authorized to use riparian pastures within the Horseshoe Allotment during the non-
12 growing season (November 1 to March 1).

13
14 54. BLM acknowledged in the 2018 Biological Assessment that multiple
15 threatened and endangered species can be found at various locations within the
16 Horseshoe Allotment. The endangered Gila chub occupies portions of Silver Creek and
17 Larry Creek tributary. The endangered Gila topminnow occupies Larry Creek tributary.
18 The threatened western yellow-billed cuckoo is known to breed in riparian areas
19 surrounding the Agua Fria River, Indian Creek, and Silver Creek. And the threatened
20 northern Mexican garter snake occupies the Agua Fria drainage. Critical habitat has also
21 been designated and proposed for threatened and endangered species in the Allotment.

22
23 55. At the time of the 2018 Biological Assessment, critical habitat for the Gila
24 chub within Silver Creek did not support Gila chub due to the influx of sediment from the
25 2005 Cave Creek Complex Fire. The BLM stated that the vast majority of the critical
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1 habitat was covered in sediment, which resulted in a near total loss of surface flows
2 except for a small number of isolated pools, where were devoid of fish species.
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4 56. According to the 2018 Biological Assessment, the Gila chub critical habitat
5 within Silver Creek would be excluded from livestock grazing, except for a hardened
6 crossing site at the 9023A road.
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8 57. The 2018 Biological Assessment included vegetative use thresholds for
9 grazing in the Horseshoe Allotment, including that riparian herbaceous use is limited to
10 50% of plant species biomass and maintenance of 6-8 inches of stubble height for
11 emergent species, measured during grazing season. According to the Biological
12 Assessment, it is the responsibility of the permittee to ensure that livestock grazing does
13 not exceed vegetative use thresholds.
14

15 58. The 2018 Biological Assessment included conservation measures for the
16 threatened and endangered species, including that livestock grazing would be limited to
17 the winter season of use (November 1 to March 1) in riparian pastures, and the use of
18 riparian vegetation would be limited to no more than 4-6 inches of stubble height and 50
19 percent use of aquatic emergent vegetation. Livestock was required to be removed prior
20 to the exceedance of the stubble height, aquatic emergent, and riparian utilization
21 thresholds.
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23 59. Pursuant to the Biological Assessment, the BLM is required to complete at
24 least two compliance checks annually between March 1 and November 1 to ensure that
25 the livestock pasture fences are effective at excluding livestock from riparian pastures
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1 and exclosures. The grazing permittee is responsible for maintaining and repairing the
2 fences on the Allotment.
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4 60. The BLM determined in the 2018 Biological Assessment that the
5 Horseshoe Allotment Grazing Authorization Renewal “may affect, but is not likely to
6 adversely affect” the yellow-billed cuckoo, Gila chub, Gila topminnow, northern
7 Mexican gartersnake, and critical habitat.
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9 61. The BLM concluded in the Biological Assessment that the adverse impacts
10 to the threatened and endangered species would be insignificant due to the
11 implementation of the conservation measures.
12

13 62. On November 6, 2018, FWS issued a Letter of Concurrence for the ten-year
14 renewal of livestock grazing on the Horseshoe Allotment. The Concurrence confirmed
15 that the renewal would allow grazing to continue on the Horseshoe Allotment for ten
16 years, and for up to 4,572 animal unit months.
17

18 63. According to FWS’ Letter of Concurrence, “because of the drought and
19 Cave Creek Complex Fire, some riparian sites, especially Silver Creek, which
20 experienced heavy sediment loads, are not properly functioning.”
21

22 64. FWS’ Letter of Concurrence states that the “conservative utilization
23 thresholds” would apply to grazing on the Horseshoe Allotment, including a limit of 50%
24 of plant species biomass and maintenance of 6-8 inches of stubble height for emerging
25 species for riparian herbaceous species.
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1 65. Pursuant to FWS' Letter of Concurrence, the BLM is required to measure
2 livestock utilization of important riparian areas within the Allotment seasonally, while
3 livestock are in the pasture, and ensure that vegetation does not exceed thresholds.
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5 66. The BLM is also required by FWS' Concurrence to inspect riparian pasture
6 fences, including a permanent enclosure fence around a segment of Silver Creek, before
7 allowing livestock into that pasture. The BLM must also inspect fences after moving
8 livestock out of the pasture. And the BLM must check riparian fences following high
9 flow events, and carry out bi-annual checks in addition to the permittee's monitoring.
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11 67. FWS' Concurrence further requires the BLM to follow its drought policy
12 using the annual seasonal cycle of grazing to determine drought-caused circumstances or
13 resource conditions.
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15 68. Pursuant to FWS' Concurrence, if the BLM finds that the enclosure fence is
16 not keeping livestock out of Silver Creek or riparian pastures during the growing season,
17 BLM is required to adjust the fence monitoring or management strategy and consider
18 reinitiating consultation.
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20 69. Pursuant to the conservation measures included in FWS' Letter of
21 Concurrence, the BLM is required to construct a permanent enclosure fence in order to
22 prevent year-round grazing at Silver Creek and associated springs.
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24 70. The BLM must also suspend surface water diversions at Indian and Silver
25 creeks and the Agua Fria River to increase surface water flow.
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1 71. Additionally, livestock grazing in riparian areas will occur only in the
2 winter non-growing season (November 1-March 1).
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4 72. Based on the mitigation and conservation measures, FWS concurred with
5 BLM's determination that the Horseshoe Allotment Renewal "may affect, but is not
6 likely to adversely affect" the western yellow-billed cuckoo, Gila club, Gila topminnow,
7 or the northern Mexican gartersnake, or associated critical habitat.
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9 73. FWS did not consider within the 2018 Letter of Concurrence whether or not
10 the BLM had complied with the monitoring requirements, use restrictions, and thresholds
11 that were included within and required by the 2006 Biological Opinion.
12

13 **V. The BLM's 2020 Environmental Assessment and Decision on the Horseshoe**
14 **Allotment Grazing Authorization Renewal**

15 74. In September, 2020, the BLM issued a Final Environmental Assessment,
16 Finding of No Significant Impact, and Notice of Proposed Decision for the "Horseshoe
17 Allotment Grazing Authorization Renewal," which would renew the Allotment grazing
18 authorization for ten years.
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20 75. The Center submitted a Letter of Protest on September 26, 2020.

21 76. On November 19, 2020, the BLM issued a Notice of Final Decision for the
22 Horseshoe Allotment. The BLM's final decision was to implement the Proposed Action,
23 and to authorize livestock grazing use on the Horseshoe Allotment with a term of 10-
24 years beginning March 1, 2021.
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1 77. According to the BLM’s permits schedule database, the permit status for
2 the Horseshoe Allotment is fully processed, with a permit lease effective date of March 1,
3 2021, and a permit lease expiration date of February 28, 2031.
4

5 **VI. New Information reveals effects of livestock grazing on the Horseshoe**
6 **Allotment in a manner and to an extent not considered in the 2006 Biological**
7 **Opinion, 2018 Biological Assessment, or 2018 Letter of Concurrence.**

8 78. Staff of the Center for Biological Diversity conducted field surveys in the
9 Horseshoe Allotment of the Agua Fria National Monument in February and March, 2021.

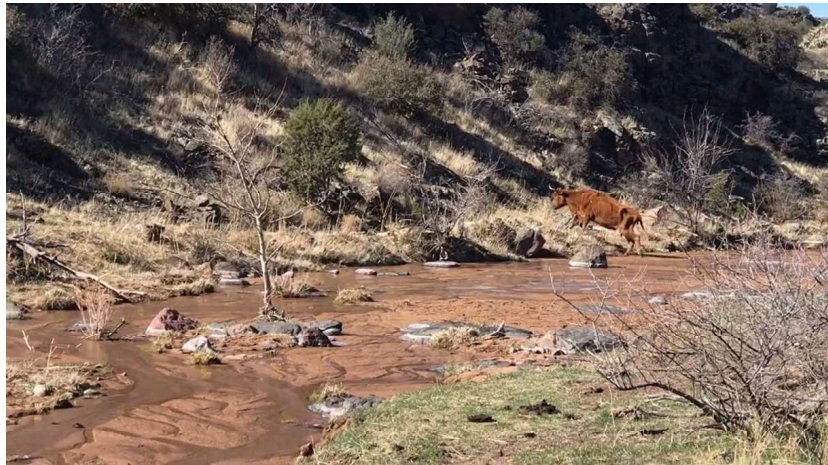
10 79. As explained in a May 6, 2021 letter from the Center to the BLM, these
11 surveys documented destructive cattle grazing within the Silver Creek, Long Gulch, and
12 Aqua Fria Rivers. These surveys showed that cattle grazing on the Horseshoe Allotment
13 has grossly exceeded utilization of herbaceous riparian areas and is chronically occurring
14 outside of the permitted grazing season in riparian areas on the Allotment.
15

16 80. The Center’s surveys demonstrated that the use thresholds are not being
17 adhered to on the Horseshoe Allotment, and that the result is chronic degradation of
18 ecological conditions within designated critical habitat on the Agua Fria National
19 Monument.
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21 81. The following are a sampling of photos taken by Center staff on February
22 28 and March 1, 2021, within Gila Chub critical habitat on Silver Creek, within the Agua
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Fria National Monument.



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82. Cows were again observed by Center staff in the Agua Fria River and riparian habitat on April 4, 2021.

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83. On August 10, 2021, a paid contractor of the Center returned to the Horseshoe Allotment to survey conditions at Silver Creek and a section of the Agua Fria River, and found that cattle have still been accessing, using, and degrading the riparian habitat, including designated critical habitat, even though they are required to be excluded from these areas during this time of the year.

84. The following are representative photos from the August 10, 2021 site visit, showing recent signs of cows in the riparian area of Silver Creek:

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85. On December 19, 2021 and January 4, 2022, Center staff returned to the Agua Fria National Monument. Cattle Impact Surveys were conducted on the Agua Fria River and Indian Creek on the northern end of the Monument. Center staff observed that cattle impacts in both stream segments were severe, continuous and pervasive. The entirety of the riparian areas surveyed showed signs of heavy grazing and stream-bank erosion.

86. The following are representative photos from the Center's December 19, 2021, site visit to Silver Creek:

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87. The following are representative photos from the January 4, 2022 site visit to Indian Creek:

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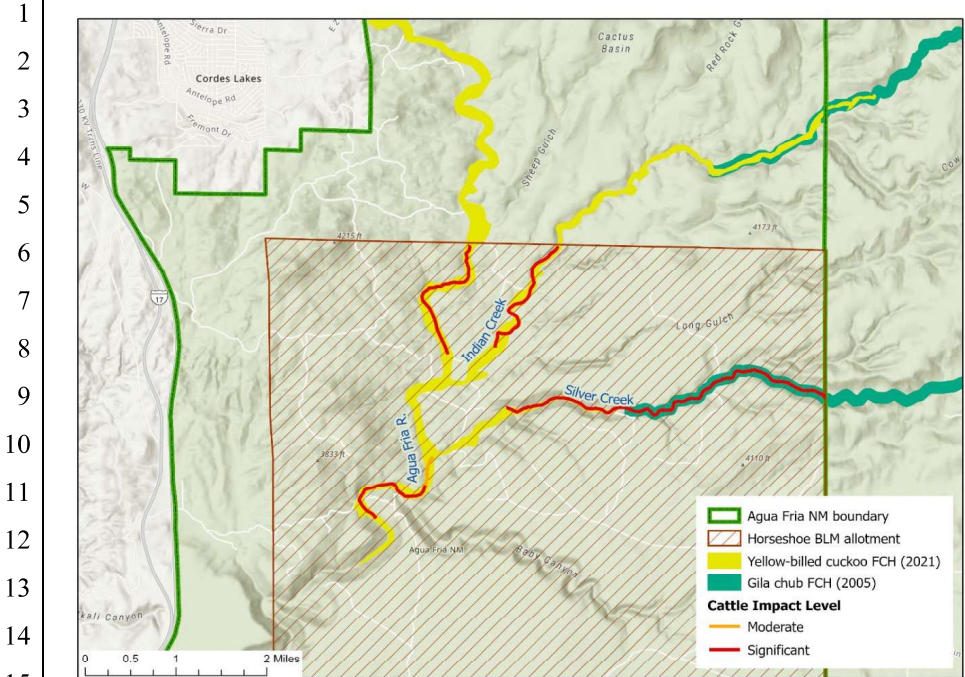


88. The following are representative photos from the January 4, 2022 site visit to the Agua Fria River:

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89. The following map was prepared by Center staff using BLM and FWS data, along with a “cattle impact level” that is based on the Center’s site visits and surveys.



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90. On April 21, 2021, FWS issued a new final rule designating critical habitat for the western yellow-billed cuckoo, including within the Agua Fria National Monument. 86 Fed. Reg. 20798 (April 21, 2021). On April 28, 2021, FWS issued a new final rule designating critical habitat for the northern Mexican gartersnake. 86 Fed. Reg. 22518 (April 28, 2021).

91. Additionally, Arizona is currently experiencing its most severe drought on record. As stated in recent testimony by the U.S. Department of Interior, “[w]e have never seen drought at the scale and intensity that we see right now, and it is possible that

1 this may be the baseline for the future.”¹ The spatial extent of perennial water on the
2 Agua Fria decreased 26% from 2008 to 2016,² and this trend has likely continued.
3

4 **VII. Plaintiffs ESA Notice Letters**

5 92. On June 14, 2021, Plaintiffs sent a sixty-day notice letter to the Secretary of
6 Interior, FWS, and the BLM, identifying the ESA violations included in this Complaint,
7 pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).
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9 93. On August 13, 2021, the FWS and BLM responded to Plaintiffs notice
10 letter. The agencies claimed in response that they had not received any significant new
11 information, and that they were unable to confirm that photos of cattle provided by the
12 Plaintiffs were on BLM managed lands. The agencies also stated that that they were
13 working to ensure compliance with the requirements set forth in in the Letter of
14 Concurrence, and that “the Silver Creek fence will soon be ready for installation.”
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17 94. On August 26, 2021, Plaintiffs provided FWS and the BLM with a
18 supplemental notice letter that provided extensive and detailed documentation of
19 destructive cattle grazing within the riparian areas of Silver Creek, Long Gulch, and the
20 Agua Fria River, within the Agua Fria National Monument. The agencies have not
21 responded to Plaintiffs’ supplemental notice letter.
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26 ¹ [https://naturalresources.house.gov/imo/media/doc/Klein%20Testimony%20-](https://naturalresources.house.gov/imo/media/doc/Klein%20Testimony%20-%20WOW%20Ov%20Hrg%2005.25.21.pdf)
27 [%20WOW%20Ov%20Hrg%2005.25.21.pdf](https://naturalresources.house.gov/imo/media/doc/Klein%20Testimony%20-%20WOW%20Ov%20Hrg%2005.25.21.pdf)

28 ²https://www.researchgate.net/publication/331908613_Citizen_scientists_document_long-term_streamflow_declines_in_intermittent_rivers_of_the_desert_southwest_USA

1 95. As of the Center’s January 4, 2022 site visit, the Silver Creek fencing has
2 still not been installed.

3
4 **CLAIMS FOR RELIEF**

5 **FIRST CLAIM FOR RELIEF**

6 The BLM and FWS are in Ongoing Violation of the ESA for Failing to Reinitiate and
7 Complete Consultation on the Horseshoe Allotment

8 96. Plaintiffs hereby incorporate by reference all preceding paragraphs.

9
10 97. Section 7 of the ESA requires the BLM to consult with FWS to ensure that
11 any action authorized, funded, or carried out by the agency is not likely to jeopardize the
12 continued existence of any threatened or endangered species, or result in the destruction
13 or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2).

14
15 The reinitiation of consultation is required and must be requested by FWS or the BLM
16 where discretionary federal involvement or control over the action has been retained or is
17 authorized by law, and if new information reveals effects of the action that may affect
18 listed species or critical habitat in a manner or to an extent not previously considered, the
19 action is modified in a manner that causes an effect to the listed species or critical habitat
20 that was not considered in the biological opinion, or a new species is listed or critical
21 habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16(a).

22
23 98. The BLM and FWS have violated and remain in ongoing violation of the
24 ESA by failing to reinitiate and complete consultation on the impacts of livestock grazing
25 on the Horseshoe Allotment despite significant new information that reveals that grazing
26 on the Allotment has adversely affected, and will continue to adversely affect, threatened
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1 and endangered species and their critical habitat in a manner and to an extent not
2 considered within the 2018 Letter of Concurrence, and despite new critical habitat being
3 designated. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a).

4
5 99. The ongoing failure of the BLM and FWS to reinitiate and complete
6 consultation on the ongoing impacts of the Horseshoe Allotment on threatened and
7 endangered species, and critical habitat, violates the ESA. 16 U.S.C. § 1536(a)(2); 50
8 C.F.R. § 402.16(a).

9
10 100. In the absence of the required reinitiated consultation, the BLM is in
11 ongoing violation of its obligation under Section 7 of the ESA to ensure that its actions
12 are not likely to jeopardize the continued existence of the Gila chub, Gila topminnow,
13 yellow-billed cuckoo, and northern Mexican garter snake, or result in the destruction or
14 adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2).

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17 **SECOND CLAIM FOR RELIEF**

18 FWS' 2018 Letter of Concurrence is Arbitrary, Capricious, and Contrary to the
19 ESA

20 101. Plaintiffs hereby incorporate by reference all preceding paragraphs.

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22 102. In preparing the 2018 Letter of Concurrence, FWS failed to properly
23 consider all relevant factors, failed to provide a rational connection between the facts
24 found and the agency's conclusion, and reached a conclusion that runs counter to the
25 facts and evidence that was before the agency.

26
27 103. FWS' determination in the 2018 Letter of Concurrence that the Horseshoe
28 Allotment Renewal is not likely to adversely affect any threatened or endangered species,

1 or critical habitat, is unsupported, arbitrary and capricious, and inconsistent with the best
2 available scientific evidence and information. FWS violated the ESA in preparing the
3 November 6, 2018 Letter of Concurrence, 16 U.S.C. § 1536, and the Letter of
4 Concurrence is arbitrary, capricious, an abuse of discretion, and contrary to the ESA. 5
6 U.S.C. § 706(2)(A).
7

8 104. Additionally, the BLM's reliance on this Letter of Concurrence violates the
9 agency's independent and continuing duty to ensure that it's authorization and
10 implementation of the Horseshoe Allotment Renewal is not likely to jeopardize the
11 continued existence of any threatened or endangered species, or result in the destruction
12 or adverse modification of designated critical habitat, in violation of Section 7 of the
13 ESA. 16 U.S.C. § 1536(a)(2).
14

15 **RELIEF REQUESTED**

16 WHEREFORE, the Plaintiffs respectfully request that this Court:
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18 A. Declare that the BLM and FWS are in ongoing violation of the ESA for
19 failing to reinitiate and complete consultation on the ongoing impacts of the Horseshoe
20 Allotment on the Agua Fria National Monument;
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22 B. Order the BLM and FWS to promptly reinitiate and complete ESA
23 consultation on the ongoing impacts of the Horseshoe Allotment on the Agua Fria
24 National Monument on threatened and endangered species and critical habitat;
25

26 C. Declare that FWS violated the ESA in preparing the November 6, 2018
27 Letter of Concurrence for the reissuance of the Horseshoe Allotment grazing lease, and
28

1 that the Letter of Concurrence is arbitrary, capricious, and contrary to law;

2
3 D. Order the BLM to take the actions necessary to prevent any further adverse
4 impacts to the Gila chub, Gila topminnow, yellow-billed cuckoo, and northern Mexican
5 garter snake, and critical habitat, within the Horseshoe Allotment of the Agua Fria
6 National Monument, until the BLM and FWS can demonstrate full compliance with the
7
8 ESA;

9 E. Award to Plaintiffs their costs, expenses, expert witness fees, and
10 reasonable attorney fees pursuant to applicable law including the ESA, 16 U.S.C. §
11
12 1540(g) and Equal Access to Justice Act, 28 U.S.C. § 2412;

13 F. Grant the Plaintiffs such further relief as may be just, proper, and equitable.

14 Dated January 12, 2022.

Respectfully submitted,

15
16 /s/ Marc D. Fink

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