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By E-Mail and Certified Mail

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RE: Notice of Intent to Sue For Violations of the Endangered Species Act Related to the Bureau of Land Management and U.S. Fish and Wildlife Service's Consultation for the San Pedro Riparian National Conservation Area Resource Management Plan

Dear Secretary Bernhardt, Director Skipwith, Director Suazo, and Manager Feldhausen:

In accordance with the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), Western Watersheds Project, Center for Biological Diversity, and Sierra Club hereby provide notice of intent to sue the Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service (FWS) for violations of Section 7 of the ESA relating to the June 7, 2019 Biological Opinion for the San Pedro Riparian National Conservation Resource Management Plan, Cochise County, Arizona (2019 BiOp).

BLM has failed to fulfill its ESA duties to ensure that livestock grazing authorized under the Resource Management Plan (RMP) in the San Pedro Riparian National Conservation Area (SPRNCA) does not jeopardize the following listed species or adversely modify their critical habitat: Huachuca water umbel, southwestern willow flycatcher, ocelot, jaguar, desert pupfish, and Gila topminnow, the western yellow-billed cuckoo and northern Mexican garter snake. Although BLM initiated consultation over the impacts of the RMP and FWS issued the 2019 BiOp, the 2019 BiOp ignored the impacts of livestock grazing, finding grazing and its impacts were covered under older biological opinions. But those older consultations did not consider the full scope of grazing authorized under the 2019 RMP nor address changes that have since occurred—including the listing of new species under the ESA. Accordingly, the 2019 BiOp's

failure to consider the impacts of grazing was arbitrary and capricious. By relying on this unlawful BiOp and failing to complete consultation over the impacts of grazing on all listed species and critical habitat in the SPRNCA before issuing the final RMP, BLM has violated and continues to violate its duties under section 7 of the ESA.

Unless BLM and FWS take adequate steps to remedy the unlawful actions described herein, Western Watersheds Project, Center for Biological Diversity, and Sierra Club intend to challenge the agency's unlawful conduct in federal district court in sixty days.

I. FACTUAL BACKGROUND

A. The San Pedro Riparian National Conservation Area

In 1988, Congress created and designated the SPRNCA – the nation's first riparian National Conservation Area (NCA) – and included over 46 miles of the San Pedro and Babocomari rivers, and over 55,000 acres of riparian areas and uplands within the NCA. The SPRNCA contains four of the rarest habitat types in the Southwest (cottonwood/willow forests, marshlands, grasslands, and mesquite bosques), and provides habitat for 400 birds, 50 species of reptiles and amphibians, and over 80 species of mammals, making this area one of the richest assemblages of land mammal species in the entire world. In creating and designating the SPRNCA, Congress required the BLM to manage these lands and waters to “conserve, protect, and enhance” the riparian, aquatic, wildlife, scientific, recreational and other conservation values in the area. 16 U.S.C. §§ 460xx (Arizona-Idaho Conservation Act).

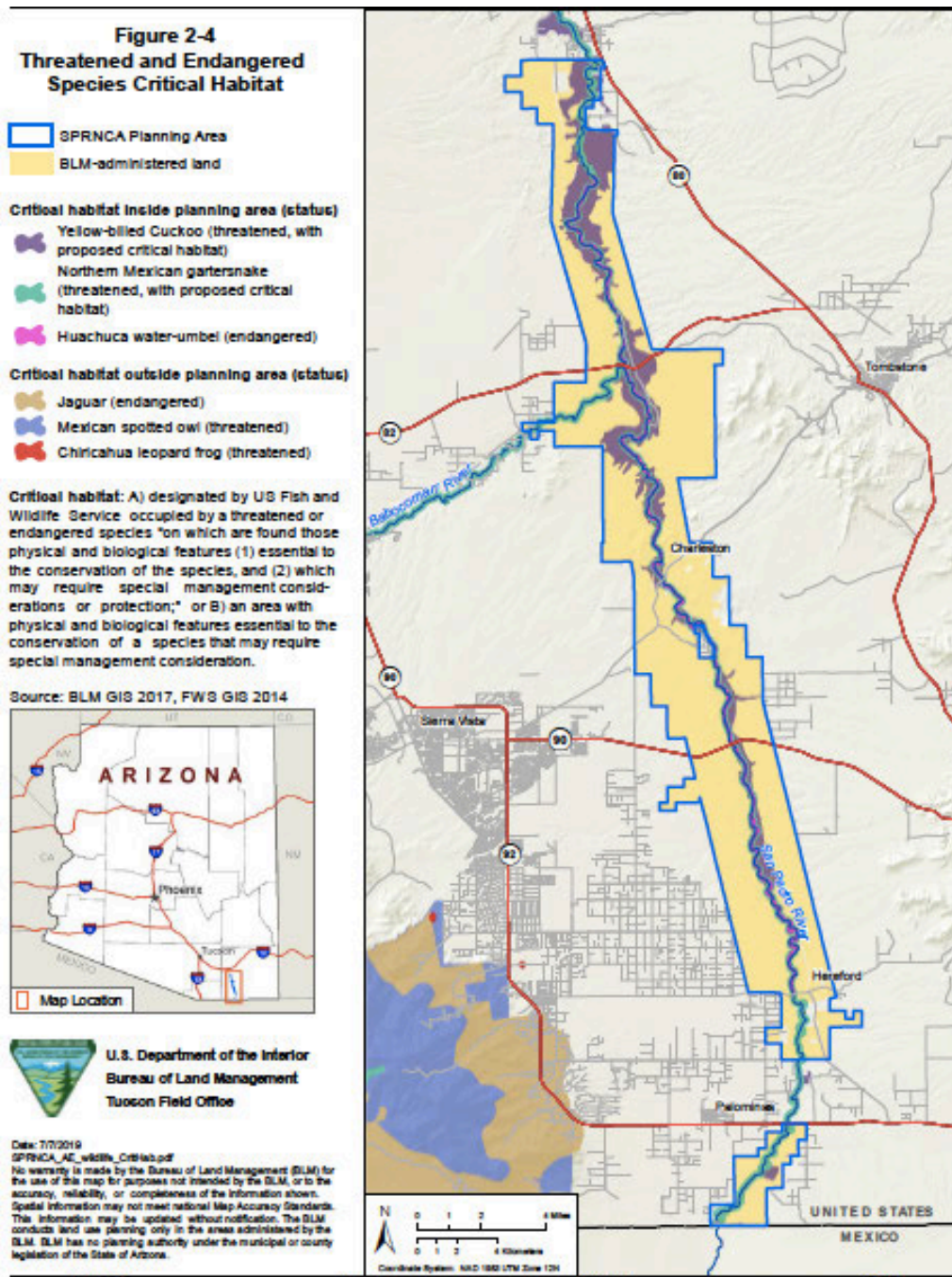
To fulfill this obligation, BLM has prohibited livestock grazing on most of the SPRNCA for the past thirty years, with the exception of several thousand acres the agency acquired through a land exchange in 1987. The agency has permitted livestock grazing on these acquired lands for decades – without an overarching management plan that addresses its effects – despite mounting evidence that cattle degrade ecological conditions and that current management is insufficiently protective of riparian and conservation resources.

The SPRNCA starts at the U.S.-Mexico border and continues north approximately 47 miles along the San Pedro River. Throughout the SPRNCA, BLM has documented more than 10,000 acres of sensitive soils, which are soils with characteristics that make them extremely susceptible to erosion and difficult to conserve, protect, or enhance after disturbance. These soils are found along the lower Babocomari River, on the uplands to the east of the confluence of the Babocomari and San Pedro rivers, and in the uplands in the Brunckow grazing allotment.

SPRNCA also contains significant riparian areas and habitat, including 12,320 acres of riparian habitat and vegetation. Riparian areas and vegetation play a critical role in providing habitat for the diversity of species found throughout SPRNCA.

B. ESA-listed species in the SPRNCA

The SPRNCA provides habitat and critical habitat for 18 species of federally protected (or proposed) threatened and endangered species, including the endangered Huachuca water umbel, southwestern willow flycatcher, desert pupfish, Gila topminnow, jaguar and ocelot; as well as the threatened northern Mexican gartersnake and yellow-billed cuckoo, as illustrated below.



1. Endangered Huachuca water umbel

The Huachuca water umbel (*Lilaeopsis schaffneriana ssp. recurva*) is a semi-aquatic to fully-aquatic herbaceous perennial plant, and is restricted to cienegas, rivers, streams, and springs in the desert Southwest. In 1997, the FWS listed the umbel as an endangered species, and in 1999 the Service designated 51.7 miles of streams and rivers in Arizona as critical habitat.

About 50 percent of the total range of the umbel is located along the San Pedro River and Babocomari rivers in the SPRNCA, and the umbel occurs in perennial portions of the San Pedro River. In the Babocomari River, the umbel is present between two sections of the SPRNCA, but it has not been observed on BLM-administered lands. It has been transplanted to Murray Spring, Horsethief Draw, and Frog Spring, where self-sustaining populations may become established. Designated critical habitat for Huachuca water-umbel exists on the SPRNCA, from approximately 660 feet south of the Hereford Road Bridge, continuing north (downstream) for about 33.7 miles, to about 1 mile north of Summers Well (64 FR 37453).

Livestock grazing is known to adversely affect Huachuca water umbel in many ways, including trampling, increased erosion, sedimentation and downcutting, water degradation and adverse effects to stream hydrology, and consumption. In addition, fire and resulting increased sedimentation, vegetation treatments, and other anthropogenic impacts which can cause increased sedimentation, also threaten umbel populations and habitat.

2. Threatened Northern Mexican gartersnake

The northern Mexican gartersnake (*Thamnophis eques megalops*) reaches up to 44 inches in length, ranges in color from olive to olive-brown or olive-gray with three lighter-colored stripes running the length of its body. Northern Mexican gartersnake is an active predator, and it forages along vegetated streambanks, searching for prey in water and on land. The FWS listed the northern Mexican gartersnake as a threatened species in 2014, and designated critical habitat for the species, including within the SPRNCA.

Northern Mexican gartersnake was historically found within nearly every major watershed in Arizona and southwestern New Mexico. Currently, the only viable populations of gartersnake in the United States occur in Arizona, including nearly 1,560 acres of wetlands and riparian areas, and 7,510 acres of mesquite bosque communities in the SPRNCA.

Northern Mexican gartersnake and its habitat are threatened by any alteration of its riparian and aquatic habitat, including from livestock grazing, fire, increased erosion, and vegetation treatments. The final listing rule for the species specifically discusses the disproportionate effects of “mismanaged or unmanaged grazing” to riparian communities in arid ecosystems “due to the attraction of livestock to water, forage, and shade.” 79 FR 38678 et seq. The listing rule also admits, “The most profound impacts from livestock grazing in the southwestern United States occurred nearly 100 years ago, were significant, and may still be affecting some areas that have yet to fully recover.” *Id.*

3. Threatened western yellow-billed cuckoo

The western yellow-billed cuckoo (*Coccyzus americanus*) is a medium-sized bird, measuring about 12 inches in length, and it has greyish-brown and white plumage with reddish primary flight feathers. Western yellow-billed cuckoos breed in large patches of multilayered riparian habitats, particularly woodlands with cottonwoods (*Populus fremontii*) and willows (*Salix* spp.), which provide relatively cooler and more humid streamside conditions. Dense understory foliage is an important factor in nest site selection, while cottonwood trees are an important foraging habitat. The FWS listed the cuckoo in 2014 and proposed critical habitat on February 27, 2020.

The cuckoo has been extensively documented on the SPRNCA, and proposed critical habitat on the Upper San Pedro River includes the SPRNCA within the 31,060 ac (12,569 ha) and 84-mi (135-km)-long segment of proposed protections from the border with Mexico north to the vicinity of the Town of Saint David in Cochise County, Arizona.

Impacts of livestock grazing on the cuckoo include changes in the structure and composition of riparian vegetation, which in turn affects the breeding and prey population abundance for the species. The habitat preferences of the cuckoo – the relatively cool, damp, and shady areas in riparian corridors – overlap with the sites favored by livestock in the arid West. The removal of livestock from most of the SPRNCA has served as a case study in riparian recovery, and illustrative of the “extent to which livestock grazing destroys and modifies nesting and foraging habitat of the western yellow-billed cuckoo.”

4. Endangered southwestern willow flycatcher

The southwestern willow flycatcher (*Empidonax traillii extimus*) is a small grayish-green passerine bird, which breeds in the southwestern U.S. and migrates to Mexico, Central American, and possibly northern South America. Southwestern willow flycatchers occupy and breed in dense riparian habitats with open areas. In 1995, the FWS listed the southwestern willow flycatcher as endangered, and in 2005 designated critical habitat for the species.

Southwestern willow flycatchers have been documented nesting and as migrants on the SPRNCA and the San Pedro River has the largest population of southwestern willow flycatchers in Arizona, and one of the largest in the nation. Critical habitat for the species occurs to the north of the SPRNCA.

The final listing rule for southwest willow flycatcher identifies livestock grazing as an ongoing and persistent threat to the flycatcher, including by noting that the “[e]xcessive use of riparian areas and uplands for livestock grazing may affect the volume and composition of riparian vegetation, may physically disturb nests, may alter floodplain dynamics such that regeneration of riparian habitat is impaired or precluded, and may facilitate brood parasitism by brown-headed cowbirds.” 62 FR 39135. It also identifies livestock grazing as a biological activity that can remove, thin, or destroy riparian vegetation, reducing constituent elements for southwestern willow flycatcher sheltering, feeding, breeding, and migrating.

5. Endangered ocelot

Ocelot (*Leopardus pardalis*) are medium-sized spotted cats with pale gray to cinnamon upper body, spotted head and striped cheeks and neck, and rounded ears with a conspicuous white spot. Ocelot use a wide range of habitats including thornscrub, semi-arid and semi-desert grasslands, and mixed habitat types of Sonoran desert, chaparral, and Madrean evergreen woodlands. Ocelot spatial patterns are strongly linked to dense cover or vegetation and are often found in dense thornscrub, utilizing open areas less often. Ocelot have been listed as an endangered species throughout the western hemisphere since 1982.

Little is known about ocelots in Arizona, but they have been documented in the Huachuca Mountains. Recent detections in Arizona included locations in semidesert grassland, Great Basin grassland, and Madrean evergreen woodland, within 2.5 km of perennial water. In a recent camera trap study in Sonoran, Mexico, ocelot were documented in mature gallery forests and floodplain woodlands. Ocelots have not been located within the SPRNCA, but in the 2019 BiOp the FWS noted that ocelot may use the area as connectivity/movement habitat.

Livestock grazing is known to negatively impact ocelot. The final listing rule noted that habitat alteration – including alteration due to grazing and agricultural use – has reduced and fragmented ocelot habitat rangewide, and that this destruction, modification, or curtailment of its habitat or range posed the greatest threat to the survival of the ocelot in the U.S. A recent study Rorabaugh *et al.* 2020: 17) found that ocelot detections went down as cattle presence increased, noting that “negative effects of cattle on ocelots may be due to effects on water availability or quality, but we cannot rule out other habitat effects or simply the presence of cattle as causative mechanisms.”¹

According to the FWS, protecting occupied and potential habitat, preserving habitat adjacent to occupied habitat, increasing habitat, and minimizing human disturbances are key recovery actions for ocelots in Arizona.

6. Endangered desert pupfish

The desert pupfish (*Cyprinodon macularius*) is a small, silvery colored fish, with narrow dark vertical bars on its side measuring less than three inches long. During the breeding season, male pupfish become bright blue with orange-tipped fins and exhibit aggressive, territorial behavior. Pupfish habitat includes clear, shallow waters with soft substrates associated with wetlands, springs, streams, margins of larger lakes and river, and shoreline pools. Naturally occurring populations of pupfish have been extirpated in Arizona, and now all remaining populations are resulting from a series of translocations. The FWS listed the desert pupfish as endangered in 1986.

¹ Rorabaugh JC, Schipper J, Avila-Villegas S, Lamberton-Moreno JA, Flood T. 2020. Ecology of an ocelot population at the northern edge of the species' distribution in northern Sonora, Mexico. PeerJ 8:e8414 <http://doi.org/10.7717/peerj.8414>.

Desert pupfish were once common in desert springs, marshes, and tributary streams of the lower Gila River drainage, including the San Pedro River. Habitat loss via dewatering (groundwater pumping), habitat modification (including stream channelization), and domestic livestock grazing (including increased erosion, removal of vegetative cover, trampling where livestock feed or gather at water, and increased sedimentation) are ongoing threats to this species. They have been reintroduced into the SPRNCA, into Little Hoe Wetland and Murray Springs. Livestock grazing in and around pupfish habitat is known to degrade pupfish habitat, and cattle can quickly impact localized pupfish populations and habitat.

7. Endangered jaguar

Jaguars (*Panthera onca*) are the largest species of cat native to the Western hemisphere. They are muscular cats with relative short, massive limbs, a cinnamon-buff color with many black spots and melanistic forms are known to occur. Jaguars occupy thornscrub, lowland deserts, mesquite grasslands, Madrean oak woodlands, and pine-oak woodland communities. The FWS listed the jaguar as a foreign endangered species in 1972, and in 1997 the Service listed the species as endangered throughout its range in the United States.

In 2014, the Service designated approximately 764,207 acres of critical habitat for the jaguar, including within Pima, Santa Cruz, and Cochise Counties in Arizona, and in Hidalgo County, New Mexico. Critical habitat for the jaguar is designated in the Huachuca Mountains just 15 miles west of the SPRNCA. Jaguar are known to be far ranging and movements of up to 500 miles have been documented, making it likely that jaguar move through the SPRNCA to other mountain ranges. Livestock grazing can negatively impact the habitat of this species, including displacement of prey species, increasing the distance to water, removing tree cover, or appreciably increasing human presence on the landscape.

8. Endangered Gila topminnow

The Gila topminnow (*Poeciliopsis occidentalis occidentalis*, a subspecies of the Sonoran topminnow) is a small species of fish, rarely exceeding one inch in length, with guppy-like body and males are jet black with yellow fins. Historically, Gila topminnow was abundant in the Gila River drainage – including the San Pedro River system – but has been reduced over the past 50 years to only nine extant populations. The FWS has attributed the declining populations of Gila topminnow to a series of existing and growing threats, including, among other threats, aquatic habitat degradation, fire and resulting sedimentation and scouring; and poorly managed livestock grazing. In 1967, the Service listed the Gila topminnow as an endangered species.

All naturally occurring populations of Gila topminnow in the SPRNCA have been extirpated, but they have been reintroduced into Murray Springs, Horsethief Draw, and Ben Springs in the SPRNCA. The SPRNCA has the potential to provide more habitat for Gila topminnow to the extent that it is protected from invasive predatory species.

Overgrazing and wood cutting combined with drought in the late 1800's caused extensive loss of habitat for the topminnow. Ground water pumping and incising of the San Pedro River

further damaged habitat for this species. Land use practices such as livestock grazing continue to threaten the Gila topminnow.

C. BLM's Approved Resource Management Plan for the San Pedro Riparian National Conservation Area.

On July 30, 2019, BLM issued a Final Environmental Impact Statement, Final Resource Management Plan and Record of Decision for the San Pedro Riparian NCA. The RMP approved a series of grazing authorizations and allocations within the SPRNCA, including (1) permitted livestock grazing within four allotments; (2) BLM's so-called "adaptive management strategy," in which BLM allows "increased levels of livestock grazing" within these same allotments with no further public notice and comment; and (3) targeted livestock grazing, in which BLM may approve unlimited livestock grazing anywhere within or outside existing grazing allotments unattached to the underlying grazing permit and livestock forage allocation. As a result, the RMP effectively revoked the moratorium on grazing on SPRNCA lands outside of the four allotments.

1. Grazing on four allotments within the SPRNCA

The SPRNCA RMP authorizes permitted livestock grazing on four allotments within the SPRNCA, including the Babocomari, Bruckow Hill, Lucky Hills, and Three Brothers allotments. In total, the 2019 RMP authorizes an initial stocking rate of 592 Animal Unit Months (AUMs) for grazing on 7,030 acres of lands on the allotments within the SPRNCA. The RMP states that, at some indefinite future time, BLM will complete land health evaluations to reauthorize the grazing leases with terms and conditions designed to achieve allotment specific objectives or, in effect, punting a site-specific look at livestock grazing authorizations to sometime later.

2. The BLM's adaptive management strategy for livestock grazing

The RMP also adopted an "adaptive management strategy" for livestock grazing management on the four allotments. This strategy encompasses "outcome-based grazing," a program that the BLM is "piloting" on the SPRNCA. The RMP provides that, "BLM will use an adaptive management strategy, as appropriate, in implementing RMP decisions, including the authorized livestock grazing decisions." The SPRNCA RMP also provides for adaptive management of livestock grazing on the existing allotments, "which would be done through implementation-level decisions in accordance with 43 Code of Federal Regulations (CFR) 4160 to ensure that compliance with the enabling legislation continues."

Outcome-based grazing is a new range management initiative announced by BLM to the public in the fall 2017. According to BLM, this policy was designed to offer livestock operators greater flexibility to manage livestock grazing in response to changing on-the-ground conditions, such as weather. Permittees would apparently be allowed to adjust livestock numbers upward, under a permitted maximum, and switch season of use, with reduced oversight. Thus, it is unclear what the adaptive management/outcome-based grazing regimes will be on the SPRNCA allotments.

3. Targeted livestock grazing

The San Pedro RMP also provides for a pilot program called, “targeted grazing,” in which the BLM may permit livestock grazing by goats, sheep, or cattle. Targeted grazing could occur throughout the SPRNCA and would not be limited to areas that are available to leased livestock grazing. Livestock used for targeted grazing would be controlled through the use of electric fences, water sources for livestock would be determined at a later date and may include temporary water haul sites. The BLM identifies targeted grazing as a vegetation management tool and not part of – but in addition to – the livestock forage allocation. It also provides for utilization at levels exceeding 40 percent on upland perennial grass species. Further, it is unknown how the BLM will engage the public, or whether or not BLM will disclose the full extent of the planned targeted grazing to the FWS, or whether BLM will proceed on a piecemeal basis, artificially minimizing the impacts of the targeted grazing program.

D. Consultation history

Due to the prevalence of federally protected species occurring within the SPRNCA, BLM consulted with the FWS over the impacts of its proposed management plan. On May 22, 2019, BLM sent FWS a Final Revised Biological Assessment (2019 BA), providing BLM’s analysis of the impacts of BLM’s PRMP and seeking consultation under Section 7 of the ESA.

In the 2019 BA, BLM described the proposed RMP and its likely impacts on the eight listed species and critical habitat described above. BLM determined that the proposed RMP was likely to adversely affect the following threatened and endangered species: 1) Huachuca water umbel and its designated critical habitat; 2) desert pupfish; 3) Gila topminnow; 4) southwestern willow flycatcher; ocelot; 5) northern Mexican gartersnake; and 6) yellow-billed cuckoo. The agency determined that the proposed RMP was not likely to adversely affect jaguar.

FWS responded to BLM’s BA by issuing a BiOp on June 7, 2019. The BiOp agreed with BLM’s likely to adversely affect and not likely to adversely affect determinations and found that the proposed RMP was unlikely to jeopardize these species nor adversely modify their critical habitat. However, FWS excluded “previous BLM actions in the action area for which consultation has already occurred” and concluded that livestock grazing under the RMP was partially covered by a 2012 Biological Opinion for grazing throughout BLM’s Gila District, which addressed impacts to the southwestern willow flycatcher, the desert pupfish, the Huachuca water umbel, jaguar, and ocelot. For the Huachuca water umbel and the Gila topminnow, BLM also concluded that a BiOp from 2008 for an Aquatic Species Conservation action also covered impacts to those species. Thus, for each of those species, FWS concluded that “the effects of livestock grazing will not be addressed in this RMP consultation.”

However, both of the prior BiOps contain inaccurate and outdated information about grazing authorized within and the species and environmental baseline of the SPRNCA. For example, the 2008 BiOp incorrectly noted that “[t]he SPRNCA does not have permitted livestock grazing.” Similarly, the 2012 BiOp mischaracterized the extent of livestock grazing on the SPRNCA, incorrectly claiming “[g]razing is currently excluded on the SPRNCA, except for a

portion of the river on private land in the Brunchow Hill allotment. The exclusion is maintained by approximately 200 miles of SPRNCA boundary fence.” The 2012 BiOp also analyzed impacts to species based on an assumption that BLM would manage trespass livestock, thereby reducing impacts to those species impacted by livestock grazing. However, BLM has never been able to manage trespass livestock and indeed, the National Riparian Stream Team (NRST) acknowledged that trespass livestock is a grave concern in the SPRNCA.

Further, the 2012 BiOp relied on conditions for grazing that are not required by the 2019 RMP/ROD. The 2012 Grazing BiOp requires BLM to implement the following guidelines: “[I]ivestock grazing will be excluded within the occupied and un-surveyed, suitable habitat during the breeding season (April 1-September 1).” It also includes utilization monitoring limits of 30 percent on apical meristems of wood vegetation 0-6 feet tall. But BLM did not include these mitigation conditions in the 2019 ROD/RMP.

Finally, FWS admitted in the 2019 BiOp that the northern Mexican gartersnake and the yellow-billed cuckoo had not been listed under the ESA when the 2012 and 2008 BiOps were written. But instead of considering impacts of grazing to those species in the 2019 BiOp, however, FWS claimed consultation over the older BiOps would be reinitiated in the future.

In sum, the 2019 BiOp did not evaluate the effects of grazing authorized under the 2019 RMP, but rather relied on prior and future consultations to comply with the ESA. However, as the examples above illustrate, the prior consultations did not actually consider the impacts of grazing authorized under the 2019 RMP nor newly listed species and other new developments.

II. LEGAL FRAMEWORK

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). It was enacted “to provide a program for the conservation of . . . endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

Section 7 of the ESA imposes a substantive obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for such species. *See* 16 U.S.C. § 1536(a)(2); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). Jeopardy results where an action reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02. Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.*

To fulfill the substantive mandates of section 7 of the ESA, federal agencies must consult

with the United States Fish and Wildlife Service (“the Service”) for terrestrial wildlife. 16 U.S.C. § 1536 (a)(2). The ESA’s implementing regulations allow an agency to enter into informal consultation with the Service to determine whether its actions “may affect” threatened or endangered species or their critical habitats. *See* 50 C.F.R. § 402.13. Usually this is done by completing a biological assessment and submitting it for the Service’s concurrence. *Id.* § 402.12(j), (k). If the agency determines that the action is “not likely to adversely affect” listed species and their habitats, and the Service concurs, no further action is necessary. *Id.* §§ 402.13, 402.14(b). If, through the informal consultation process or otherwise, the agency determines that its action is “may affect” listed species or their critical habitats, formal consultation is required that results in a biological opinion. *Id.* § 402.14(a).

When a federal agency is engaged in formal consultation under section 7(a)(2) of the ESA, section 7(d) of the ESA prohibits the agency from “mak[ing] any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d). This prohibition “continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09. “Section 7(d) was enacted to ensure that the status quo would be maintained during the consultation process. . . .” *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034–35 (9th Cir. 2005), *abrogated on other grounds as recognized by Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1092 (9th Cir. 2015). Compliance with section 7(d) guards “against the risk of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress.” *NRDC v. Houston*, 146 F.3d 1118, 1128–29 (9th Cir. 1998) (emphasis in original).

During formal consultation, the Service must “review all relevant information” regarding the action area, whether provided by the action agency or not. 50 C.F.R. § 402.14(g)(1). The Service must evaluate both the current status of listed species and critical habitat in the action area, as well as the effects of the proposed action and cumulative effects on listed species and critical habitat. *Id.* § 402.14(g)(2)-(3). Then, based on this information, the Service must reach a “biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” *Id.* § 402.14(g)(4). In carrying out the consultation process, “each agency shall use the best scientific . . . data available.” 16 U.S.C. § 1536(a)(2).

After formal consultation is completed, the Service must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If the biological opinion concludes that the action will not result in jeopardy, the Service must provide an “incidental take statement” specifying the impact of such incidental taking on the species, any “reasonable and prudent measures” that the Service consider necessary to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4).

Under section 7(a)(2) of the ESA, BLM also must independently ensure that its actions do not result in jeopardy or adverse modification of critical habitat. *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1096–99 (E.D.

Wash. 2006) (holding that Forest Service failed to comply with ongoing obligation under ESA § 7(a)(2) to insure against jeopardy). As the Ninth Circuit has held, “[c]onsulting with the Service alone does not satisfy an agency’s duty under the Endangered Species Act. An agency cannot ‘abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a Service biological opinion must not have been arbitrary or capricious.’” *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994) (quotation omitted).

III. VIOLATIONS OF THE ENDANGERED SPECIES ACT

BLM’s issuance of an RMP is an action “authorized, funded, or carried out by the agency” subject to the substantive and procedural mandates of section 7 of the ESA. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (holding that BLM’s revision of a management plan was an “agency action” that required consultation); *Lane County Audubon Soc’y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (finding management plan implemented without consultation violates the ESA). Thus, prior to issuing a new RMP for the SPRNCA, BLM was required to consult with FWS regarding impacts to *all* listed species and designated critical habitat that may be affected by grazing allowed under the RMP.

Although BLM recognized this obligation and consulted with FWS over the impacts of the RMP, BLM needed to determine whether and in what manner to proceed with the action in light of its ESA obligations and the completed consultation. 50 C.F.R. § 402.15(a). Where a consultation is legally flawed, reliance on that consultation violates the agency’s substantive duty to ensure against jeopardy and adverse modification of critical habitat. *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) (finding that an agency that relies on a legally flawed biological opinion has failed to satisfy this substantive duty). Here, the 2019 BiOp contains numerous errors of a legal nature and of such gravity that BLM should have known not to rely upon it to fulfill its section 7 obligations.

First, the 2019 BiOp failed to consider the impacts of grazing on the Northern Mexican garter snake and the yellow-billed cuckoo. As detailed above, the 2019 BiOp admitted that the prior consultations did not address impacts to these species, but still declined to consider the impacts of grazing on those species. This was arbitrary because BLM considered and adopted the RMP as a single agency action, so the agencies needed to consider the effects of the action as whole and within the same consultation. Accordingly, the 2019 BiOp arbitrarily segmented the impacts of grazing on those species from its analysis of the effects of the RMP on all species. As a result, BLM approved the RMP without completing *any* consultation on the impacts of grazing to these species, in violation of section 7 of the ESA.

Second, the 2019 BiOp also declined to consider the effects of grazing on other species and critical habitat, deferring instead to prior consultations. But neither of those older BiOps actually analyzed the impacts of livestock grazing in the SPRNCA. Indeed, those older BiOps largely relied upon the fact that livestock grazing was *not* occurring in the SPRNCA to reach their conclusions. But even if those BiOps had considered the grazing in the SPRNCA, changes to the species, environmental baseline, and grazing over the last several years would render those

consultations obsolete. Thus, by relying on inapplicable and outdated consultations, the 2019 BiOp arbitrarily failed to consider the effects of grazing on all listed species and critical habitat.

Third, BLM and FWS failed to consult over *all* impacts of grazing authorized by the RMP. BLM's BA included an inaccurate description of the grazing scheme and FWS relied on this information, which caused the 2019 BiOp to minimize the amount of livestock grazing that would take place. In particular, BLM failed to disclose, and FWS failed to consider, that the RMP includes an adaptive management plan as part of that permitted livestock grazing authorization that could increase the number of AUMs from those enumerated in the RMP. Thus, the 2019 BiOp failed to consider the full scope of grazing and its effects on listed species.

For these reasons, BLM and FWS, in their consultation and the resulting 2019 BiOp, ignored the impacts of past, present, and future livestock grazing that is authorized under the RMP. These significant legal flaws render the 2019 BiOp arbitrary and capricious. By relying on a legally flawed BiOp, BLM failed to complete consultation and insure that the grazing authorized by the RMP is not likely to jeopardize the continued existence of the listed species and designated critical habitat, in violation of section 7(a)(2) of the ESA. *Wild Fish Conservancy*, 628 F.3d at 532.

Finally, by issuing a final RMP that allows grazing within the SPRNCA prior to completing *any* consultation over impacts of grazing on the Mexican gartersnake and yellow-billed cuckoo, BLM made an irreversible and irretrievable commitment of resources. Thus, BLM is also in violation section 7(d) of the ESA. 16 U.S.C. § 1536(d).

To remedy these legal violations, BLM must withdraw the Record of Decision for the RMP and cease authorizing grazing until FWS issues a legally valid Biological Opinion for livestock grazing within the SPRNCA.

IV. CONCLUSION

Western Watersheds Project, Center for Biological Diversity, and Sierra Club may institute legal action after 60 days following the date of this notice for the foregoing violations of law, and seek declaratory and injunctive relief as appropriate, as well as recovery of their costs and expert and attorney fees.

The undersigned has prepared this notice based on good faith information and belief after reasonably diligent investigation. However, if any of the foregoing is factually erroneous or inaccurate, please notify me promptly to avoid unnecessary litigation. Moreover, the U.S. Supreme Court and other courts have often noted that the purpose behind the 60-day notice requirement of the ESA and other statutes is to encourage settlement discussions among parties and avoid potential litigation. In that spirit, I encourage you to contact Western Watersheds Project, Center for Biological Diversity, and/or Sierra Club in order to seek an amicable resolution of this matter. Appropriate contact information is listed below.

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Likewise, please feel free to contact me (or have your attorneys, if any, contact me), at the address and number on the letterhead above.

Sincerely,



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