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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

Center for Biological Diversity, Maricopa Audubon Society, Plaintiffs, v. Randy Moore, Chief, U.S. Forest Service; Tom Vilsack, Secretary, U.S. Department of Agriculture; Deb Haaland, Secretary, U.S. Department of the Interior; and Martha Williams, Director U.S. Fish and Wildlife Service, Defendants.	Case No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This case challenges the United States Forest Service's ("USFS") and the United States Fish and Wildlife Service's ("FWS") ongoing failure to conserve the threatened Yellow-billed cuckoo (*Coccyzus americanus*) ("cuckoo") and the threatened Sonora chub (*Gila ditaenia*) ("chub"); the agencies' failure to protect the habitat for those species in the Coronado National

Forest ("the Forest"), including designated critical habitat for these species; and the agencies' failure to further the recovery of these species, as required by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. Specifically, Plaintiffs Center for Biological Diversity ("the Center") and Maricopa Audubon Society ("Maricopa Audubon") challenge FWS's September 30, 2021 Biological Opinion ("BiOp") and USFS's reliance on that BiOp in authorizing livestock grazing in various grazing allotments in the Forest. The BiOp and USFS's reliance on it violate Section 7(a)(2) of the ESA, which requires that all federal agencies, in consultation with FWS, "insure" that their actions will not jeopardize the continued existence of endangered or threatened species or adversely modify their critical habitats. *Id*. § 1536(a)(2).

2. Although livestock grazing is adversely affecting these imperiled species and their habitat (including designated critical habitat) in various ways, USFS's grazing authorizations relying upon FWS's BiOp allow the permittees to continue business as usual in the Forest to the severe detriment of the federally protected cuckoo and chub. In doing so, the agencies ignored the obvious effects to the cuckoo and its habitat, arbitrarily concluding that cuckoos would not be harmed, harassed, or otherwise taken by the widespread grazing at issue. With respect to the chub, FWS issued an incidental take statement ("ITS") authorizing the take of all chub outside of exclosures in the action area, and adopting a trigger for reinitiation of consultation under the ESA that is untethered to the unique life cycle needs of the chub. FWS also illogically determined that grazing would not destroy or adversely modify critical habitat for either species. In all three instances, the agencies relied heavily on the permittees' compliance with forage utilization rates set by the agencies, which lack a causal connection to the authorized level of take, are unconnected from the needs of the cuckoo and chub, and defy the best available

scientific evidence on what is necessary to protect these species and their habitat (including designated critical habitat).

3. Defendants also arbitrarily skewed the analysis of reasonably significant threats that face these species, including the devastating effects that climate change and other stressors are causing, and will continue to cause, to the cuckoo and chub (and their habitat). The failure to meaningfully analyze these inevitable threats and their import on survival and recovery for the cuckoo and chub is made all the more arbitrary in light of FWS's past practice of examining these very stressors in other BiOps analyzing proposed actions that affect these same species. In addition, FWS's jeopardy analysis in its BiOp focuses on the persistence of these species in the action area despite livestock grazing (while understating other reasonably foreseeable threats to these species), and thus fails to meaningfully consider the additive impact of this action on these species' recovery prospects (distinct from their odds of survival) as required by the ESA.

4. For these reasons, and as explained in further detail below, USFS and FWS are violating the ESA, its implementing regulations, and the ESA's citizen suit provision, 16 U.S.C. § 1540(g). Additionally, the agencies have acted in a manner that is "arbitrary and capricious, an abuse of discretion," "otherwise not in accordance with law," and "without observance of procedure required by law" within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), (D). Accordingly, livestock grazing should be immediately enjoined, the agencies' grazing authorizations and BiOp should be vacated and remanded, and the agencies should be ordered to immediately re-engage in consultation under Section 7 of the ESA, 16 U.S.C. § 1540(g); 5 U.S.C. § 706, such that no action may be taken in furtherance of these decisions until the agencies issue new, lawfully compliant decisions. *See* 16 U.S.C. § 1536(d) (prohibiting harmful actions to species or habitat pending completion of ESA consultation).

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 16 U.S.C. § 1540(g).

PARTIES

6. Plaintiff Center for Biological Diversity is a 501(c)(3) non-profit corporation headquartered in Tucson, Arizona, with offices in a number of states and Mexico. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including protection of plant and animal species, from the impacts of climate change, wildfires, and human-caused habitat destruction. In addition to more than 625,000 supporters and online activists, the Center has more than 70,000 members and more than 1.7 million supporters throughout the United States and the world. The Center brings this action on its own institutional behalf and on behalf of its staff and its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities concerning the cuckoo and chub, and their habitat (including critical habitat), that are harmed by the decisions challenged in this case.

7. Plaintiff Maricopa Audubon Society is a 501(c)(3) non-profit organization dedicated to the enjoyment of birds and other wildlife with a primary focus on protection through fellowship, education, and community involvement. Maricopa Audubon is a chapter of the National Audubon Society. Maricopa Audubon has over 2,300 members, primarily in central Arizona. Maricopa Audubon Society has played a central role in protecting endangered species in the Southwest—including those at issue in this case—through public education efforts, field surveys, public field trips, and position papers.

8. Plaintiffs' members use and enjoy the Coronado National Forest (including the specific areas at issue in this case) for a variety of purposes, including hiking, fishing, camping, viewing and photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiffs' members derive scientific, aesthetic, recreational, vocational, and spiritual benefits from the Coronado National Forest, including in the specific species at issue here and in the specific habitat (including critical habitat) where the cuckoo and chub are found or are likely to be found within the Coronado National Forest.

9. For instance, Dr. Robin Silver—who is a member of both Plaintiff organizations—began photographing cuckoos (including in the Coronado National Forest) in the late 1980s, and he was a co-author of, and signatory to, the 1998 cuckoo listing petition submitted to FWS that ultimately led to its protections under the ESA. Dr. Silver regularly visits cuckoo habitat in the Coronado National Forest, and he most recently visited areas of the Forest that will be affected by the challenged actions in search of cuckoos on July 14-15, 2023. Plaintiffs' members—including Dr. Silver—intend to, and have concrete plans to, continue using and enjoying occupied cuckoo habitat in the Coronado National Forest regularly and on an ongoing basis in the future, including in 2023 and 2024.

10. Likewise, Plaintiffs' members—including Dr. Silver—have been actively involved for decades in conservation and other scientific endeavors regarding the Sonora chub, including in the Coronado National Forest. For example, Dr. Silver has worked to enhance legal protections for the chub on several occasions, including by authoring and submitting to FWS the 2021 petition to revise critical habitat for the species, which Dr. Silver prepared after conducting multiple site visits to the Coronado National Forest over several decades. In addition, Dr. Silver has supervised, and continues to supervise, various field surveys in the Coronado National Forest

for Sonora chub presence, distribution, and population trends. Dr. Silver last visited occupied chub habitat in the Forest on November 22, 2021. Plaintiffs' members—including Dr. Silver—intend to, and have concrete plans to, continue using and enjoying occupied chub habitat in the Forest regularly and on an ongoing basis in the future, including in 2023 and 2024.

11. The health, aesthetic, recreational, inspirational, spiritual, scientific, and educational interests of Plaintiffs and their members have been and will continue to be adversely affected and irreparably injured if Defendants' ongoing violations of the ESA and the APA continue. The relief sought will redress Plaintiffs' and their members' injuries by substantially reducing the threats to the survival of the cuckoo and the chub; by ensuring that these species' recovery prospects are not impaired or jeopardized by Defendants' actions; by avoiding any further destruction or adverse modification of their critical habitats; and by ensuring that the distribution of the cuckoo and chub is not diminished, nor are opportunities to observe and enjoy these species in the Forest reduced, to the detriment of Plaintiffs, their members, and their collective interests in these species and their habitat. The relief sought will also provide additional process under federal law that will bring the best available science to bear on Defendants' decisions, which likely will benefit these species and their habitat of particular importance to Plaintiffs and their members.

12. Defendant Randy Moore is the Chief of USFS, an agency within the U.S. Department of Agriculture, and is directly responsible for the supervision, management, and control of the agency. Accordingly, he is responsible for overseeing USFS's actions challenged in this lawsuit, and is sued in his official capacity.

13. Defendant Tom Vilsack is the Secretary of the U.S. Department of Agriculture, and is ultimately responsible for overseeing the work of USFS, an agency within the U.S. Department of Agriculture. He is sued in his official capacity.

14. Defendant Martha Williams is the Director of FWS, an agency within the U.S. Department of Interior, and is directly responsible for the supervision, management, and control of the agency. Accordingly, she is responsible for overseeing FWS's actions challenged in this lawsuit, and is sued in her official capacity.

15. Defendant Deb Haaland is the Secretary of the U.S. Department of the Interior and is ultimately responsible for overseeing the work of FWS, an agency within the Department of the Interior. She is sued in her official capacity.

STATUTORY AND REGULATORY FRAMEWORK

A. Endangered Species Act

16. Recognizing that certain species of plants and animals "have been so depleted in numbers that they are in danger of or threatened with extinction," Congress enacted the ESA to provide both "a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531. The ESA reflects "an explicit congressional decision to afford first priority to the declared national policy of saving endangered species." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. As such, the ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180.

17. Section 9 of the ESA makes it unlawful for any person to "take" an endangered or threatened species without express authorization from FWS. 16 U.S.C. § 1538(a)(1). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The term "harm" is further defined by FWS regulations to encompass "habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. FWS's regulations define "harass[ment]" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." *Id.*

18. Section 7(a)(2) of the ESA requires all 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 species." 16 U.S.C. § 1536(a)(2). To carry out this obligation, before undertaking any action that may have direct or indirect effects on listed species, an action agency must engage in consultation with FWS in order to evaluate the impact of the proposed action. *See id.* FWS has defined the term "action" for the purposes of Section 7 broadly to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02, "in which there is discretionary federal involvement or control," *id.* § 402.03.

19. The purpose of consultation is to ensure that the action at issue "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated] habitat of such species." 16 U.S.C. § 1536(a)(2). As defined by the ESA's implementing regulations, an action will cause jeopardy

to a listed species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Under those same regulations, an action will destroy or adversely modify critical habitat if it will cause a "direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." *Id.* Thus, during consultation the action agency and FWS must consider, in evaluating the effects to the species and its critical habitat, whether "the agency action will [] appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008). The evaluation of the effects of the proposed action on listed species and their habitat (including critical habitat) during consultation must use "the best scientific . . . data available." 16 U.S.C. § 1536(a)(2).

20. Consultation under Section 7(a)(2) may be "formal" or "informal" in nature. Informal consultation is "an optional process" consisting of all correspondence between the action agency and FWS, which is designed to assist the action agency, rather than FWS, in determining whether formal consultation is required. *See* 50 C.F.R. § 402.02. During an informal consultation, the action agency requests information from FWS as to whether any listed species may be present in the action area. If listed species may be present, Section 7(c) of the ESA requires the action agency to prepare and submit to FWS a "biological assessment" ("BA") that evaluates the potential effects of the action on listed species and critical habitat. As part of the BA, the action agency must make a finding as to whether the proposed action may affect listed species and submit the BA to FWS for review and potential concurrence with its finding. 16 U.S.C. § 1536(c). If the action agency finds that the proposed action "may affect, but is not likely

to adversely affect" any listed species or critical habitat, and FWS concurs with this finding, then the consultation process is terminated. 50 C.F.R. § 402.14(b).

21. On the other hand, if the action agency finds that the proposed action "may affect" listed species or critical habitat by having any adverse effect that is not insignificant or discountable, then formal consultation is required. *See* 50 C.F.R. § 402.11. Following completion of the BA, the action agency must initiate formal consultation through a written request to FWS. *See* 50 C.F.R. § 402.14(c). The result of a formal consultation is the preparation of a BiOp by FWS, which is a compilation and analysis of the best available scientific data on the status of the species and how it would be affected by the proposed action. When preparing a BiOp, FWS must: (1) "review all relevant information;" (2) "evaluate the current status of the listed species;" and (3) "evaluate the effects of the action and cumulative effects on the listed species or critical habitat." 50 C.F.R. § 402.14(g). As such, a BiOp must include a description of the proposed action, a review of the status of the species and its designated critical habitat, a discussion of the environmental baseline, and an analysis of the direct and indirect effects of the proposed action and the cumulative effects of reasonably certain future state, tribal, local, and private actions. *Id.*

22. At the end of the formal consultation process, FWS issues either a no-jeopardy or a jeopardy BiOp. With a no-jeopardy BiOp, FWS determines that the proposed action is not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. If, as part of a no-jeopardy BiOp, FWS determines that the proposed action will nevertheless result in the incidental taking of listed species, then FWS must provide the action agency with a written ITS specifying the "impact of such incidental taking on the species" and "any reasonable and prudent measures that [FWS] considers necessary or appropriate to minimize such impact" and setting forth "the terms and conditions . . . that must be complied with by the [action] agency

. . . to implement [those measures]." 16 U.S.C. § 1536(b)(4). Take in excess of that authorized by the ITS violates the prohibition on take contained in Section 9 of the ESA. *Id.* § 1538. With a jeopardy BiOp, FWS determines that the proposed action will jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. In a jeopardy BiOp, FWS may offer the action agency reasonable and prudent alternatives to the proposed action that will avoid jeopardy to a listed species or adverse habitat modification, if they exist. *Id.* § 1536(b)(3)(A).

23. Where a BiOp has been issued and "discretionary Federal involvement or control over the action has been retained or is authorized by law," the action agency is required to reinitiate consultation with FWS in certain circumstances, including: (1) "[i]f the amount or extent of taking specified in the [ITS] is exceeded"; (2) "[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," or (3) "[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion." 50 C.F.R. § 402.16(a)(1)-(3).

24. The ESA provides that agencies must hold action in abeyance until any legally required consultation is complete. Section 7(d) of the ESA prohibits an action agency from making "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 which would not violate [Section 7] (a)(2)." 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. The purpose of this requirement is to ensure that the status quo will be maintained during the consultation process. *See Lane Cty. Audubon Soc'y v. Jamison*, 958 F.2d

290, 294 (9th Cir.1992) ("In order to maintain the status quo, section 7(d) forbids 'irreversible or irretrievable commitment of resources' during the consultation period.").

B. Administrative Procedure Act

25. The APA, 5 U.S.C. §§ 701–706, provides for judicial review of agency action. Under the APA, a reviewing court "shall" hold unlawful and set aside "agency action, findings, and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or when they are adopted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). An agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency," or if the agency's decision "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

26. When reviewing agency action under the APA, a court must ensure that the agency reviewed the relevant data and articulated a satisfactory explanation establishing a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. The agency's failure to do so renders its decision arbitrary and capricious. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

FACTUAL BACKGROUND

A. The Yellow-Billed Cuckoo Background, Listing Status, and Critical Habitat

27. The Yellow-billed cuckoo is a medium-sized bird about 12 inches in length, exhibiting grayish-brown and white plumage, with reddish primary flight feathers and boldly patterned black-and-white tail feathers.

*Image Courtesy of U.S. Fish and Wildlife Service (last visited July 326, 2023), https://ecos.fws.gov/ecp/species/3911

28. In 2014, FWS listed as threatened under the ESA the western distinct population segment of the cuckoo. *See* FWS, *Determination of Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo (Coccyzus americanus)*, 79 Fed. Reg. 59,992 (Oct. 3, 2014). The cuckoo uses nesting habitat from southern British Columbia to southern Sinaloa, Mexico. In 2021, FWS designated 298,845 acres of critical habitat across the western United States. *See* FWS, *Designation of Critical Habitat for the Yellow-billed Cuckoo*, 86 Fed. Reg. 20,798 (Apr. 21, 2021). FWS has not yet developed a recovery plan for the cuckoo.

29. Although there have been various survey attempts to estimate the current population of cuckoos in the Coronado National Forest and specific locations of occupied habitat, the agencies do not currently know with any accuracy the population size of the cuckoo in the Forest or the location of all occupied habitat, which makes analyzing the effects to the species significantly more difficult.

30. Much of the historical riparian habitat where cuckoos have bred has been lost, altered, or degraded. Most riparian habitats in the Southwest have been fundamentally altered by

a century or more of urban and agricultural development, water diversions, dam building, groundwater pumping, livestock grazing, and other human disturbances.

31. Cuckoo home ranges during the breeding season vary, but average over 100 acres. Site-specific variation in home range size is likely a result of characteristics unique to each location (e.g., types and quality of habitat, configuration of patch). Based on the available information, average daily foraging distance occurs within 0.5 miles from the breeding location. A cuckoo's home range is often irregular (e.g., not circular), and may encompass only part of a 0.5-mile radius from the breeding location. In addition to the dense nesting grove or tree, often referred to as the core area, cuckoos need adequate foraging areas near the nest. Foraging areas can be less dense or patchy with lower levels of canopy cover and may be a mix of shrubs, ground cover, and scattered trees. Thus, a portion of the vegetation within the home range may be unsuitable for nesting, but may support large numbers of insects, frogs, or lizards for foraging.

32. In the Southwest (and in the states of Sonora and Sinaloa, Mexico), cuckoo breeding habitat is more variable than in the rest of its range. Southwestern breeding habitat is more water-limited than it is rangewide, contains a greater proportion of xeroriparian and nonriparian plant species, is often narrower, more open, patchier, or sparser than elsewhere, and may persist only as narrow bands or scattered patches along banklines or as small in-channel islands. Cuckoo habitat is largely associated with perennial rivers and streams that support the expanse of vegetation characteristics needed by breeding cuckoos.

33. Humid and cooler conditions created by surface and subsurface moisture and trapped by the multilayered canopy are important habitat parameters for the cuckoo. The cuckoo breeds in drainages where humidity is adequate for successful hatching and rearing of young. The moist and humid conditions that support riparian plant communities typically exist in lower

elevation, broad floodplains, as well as where rivers and streams enter impoundments. In the desert, foothills, and mountain xeroriparian washes and drainages of southeastern Arizona and northwestern Mexico, high humidity and the summer monsoon are important factors in cuckoo occupancy. Drainages may flow only briefly immediately after summer rain in ephemeral drainages where cuckoos breed, with no sustained flow or standing water. Humidity remains high throughout the summer with a corresponding green-up of the herbaceous, shrub, and tree cover. Whereas cuckoo nesting and breeding habitat is generally found below 7,000 feet in elevation, recent surveys during nesting and breeding season in southern Arizona have documented cuckoos in higher-elevation areas as well.

34. The primary threat to the cuckoo is loss and fragmentation of high-quality riparian habitat suitable for nesting. Habitat loss and degradation results from several interrelated factors, including alteration of flows in rivers and streams, mining, encroachment into suitable habitat from agricultural and other development activities on breeding and wintering grounds, stream channelization and stabilization, diversion of surface and ground water for agricultural and municipal purposes, livestock grazing, wildfire, establishment of nonnative vegetation, drought, and prey scarcity due to pesticides. The ongoing threats, which have resulted in small isolated populations, cause the remaining cuckoo populations to be increasingly susceptible to further declines and local extirpations through increased predation rates, barriers to dispersal by juvenile and adult cuckoos, chance weather events, fluctuating availability of prey populations, collisions with tall vertical structures during migration, defoliation of tamarisk by the introduced tamarisk leaf beetle, increased fire risk, and climate change events. The warmer temperatures already occurring in the Southwest may alter the plant species composition of riparian forests over time. An altered climate may also disrupt and change food availability for the cuckoo if the timing of

peak insect emergence changes in relation to when the cuckoos arrive on their breeding grounds to feed on this critical food source.

35. Of the 298,845 acres of designated critical habitat for the cuckoo across the western United States, there are 21 critical habitat management units located in the Coronado National Forest that consist of 21,360 acres. When combined with state-owned and private lands adjacent to the Forest, there are 22 critical habitat management units consisting of 39,933 acres—i.e., 13.4% of the total critical habitat that FWS has identified as essential to this species' survival and recovery.

B. <u>The Sonora Chub Background, Listing Status, and Critical Habitat</u>

36. The Sonora chub is a stream-dwelling member of the minnow family (Cyprinidae). The chub is a desert-adapted species that exploits small habitats. This species can achieve total lengths of 7.8 inches; however, individuals typically do not exceed 5 inches. The body is moderately chubby and dark-colored, with two prominent, black, lateral bands above the lateral line. Breeding individuals are brilliantly colored.

**Image Courtesy of U.S. Fish and Wildlife Service (last visited July 26, 2023), https://ecos.fws.gov/ecp/species/1394*

37. FWS listed the chub as threatened under the ESA in April 1986, and FWS also designated critical habitat for the species at that time. *See* FWS, *Final Rule to Determine the*

Sonora Chub to Be a Threatened Species and to Determine its Critical Habitat, 51 Fed. Reg. 16,042 (Apr. 30, 1986). In that decision, FWS noted that "[i]ndirect effects of grazing, such as erosion and siltation, are minor at present, but could have significant effects on Sonora chub habitat if grazing were increased." *Id.* at 16,044.

38. This species only exists today in southeastern Arizona and northern Sonora, Mexico. The vast majority of the chub's remaining, occupied habitat in the United States is located in the Coronado National Forest within the Tumacacori Ecosystem Management Area ("EMA"), including in the deepest, most permanent pools in the intermittent drainages of Sycamore Creek and California Gulch. FWS has explained that the chub is particularly sensitive to habitat threats, including because of its extremely limited range.

39. Habitat characteristics important to the chub include clean permanent water with pools and intermediate riffle areas, and/or intermittent pools maintained by bedrock or by subsurface flow in areas shaded by canyon walls. Thus, at the time of listing, FWS designated critical habitat for the species to include areas of land and water in the Forest, in four areas: (1) Sycamore Creek, and a riparian zone 25 feet wide along each side of the creek, from Yank's Spring downstream approximately 5 stream miles to the International Border with Mexico; (2) Yank's Spring; (3) Penasco Creek, including a riparian zone 25 feet wide along each side of the creek, from its confluence with Sycamore Creek; and (4) an unnamed tributary to Sycamore Creek, from its confluence with Sycamore Creek. All of the designated critical habitat for the Sonora chub occurs on land and waters within the Coronado National Forest.

40. Official surveys for presence of Sonora chub are often only conducted in a single pool in the northern, upper end of the canyon, and extrapolations are then made from this limited data. The absence of rigorous and repeatable species abundance surveys throughout the chub's

range renders it difficult to determine overall population trends either through direct measures of abundance or through the surrogate of habitat availability.

41. FWS completed its most recent recovery plan for the chub in 1992—i.e., more than three decades ago. In that recovery plan, FWS did not adopt delisting criteria for this species, finding it was impracticable to do so because of limitations in the best available information and because the lack of understanding of the species' threats made it difficult to identify priorities and appropriate actions to remove or offset the threats.

42. In 2019, several months prior to USFS's transmittal of its BA to FWS for its grazing program in the Forest, FWS issued a "Supplemental Finding" to the 1992 recovery plan. In this recovery plan supplement, FWS acknowledged that "[c]limate change represents the most serious, and to date unmitigated threat (and mechanism of habitat degradation) to Sonora chub." Specifically, FWS found that:

> Changes in temperature (Weiss and Overpeck 2005) and stream flow (Seager et al. 2007) are anticipated to reduce the amount of habitat available to the Sonora chub within the United States, worsen habitat conditions throughout the species' range, strengthen effects of other threats, and have both direct and indirect ecological impacts on the species. The effects of climate change, particularly those associated with drought and rising temperatures, have the potential to be a severe threat to the Sonora chub. Moreover, climate change, despite increasing drought conditions, is also anticipated to increase the incidence and/or magnitude of extreme weather events and subsequent flooding (Karl et al. 2009, Gershunov et al. 2013).

FWS noted that, as a result of climate change, "drought is now persistent and is no longer a random event," and "[f]looding remains random but is anticipated to increase in magnitude and/or frequency." As a result, "Sonora chub persisting at lower abundance in habitat reduced by drought will experience larger and/or more frequent floods that may further deplete the species' abundance and/or ability to recolonize upstream habitats after having been displaced to downstream reaches."

43. In its recovery plan supplement, FWS pointed out that increasing aridity, drought, and flooding due to climate change has already led to noticeable effects, including surveys documenting an absence of chub in locations of the Forest where they have historically been observed. In addition, FWS found that:

> Climate change, a threat not identified during listing and recovery planning, along with water development which was previously known, threaten to alter the hydrologic conditions which sustain the streams in which Sonora chub occurs, potentially reducing the species' resilience and ability to persist through stochastic events such as drought and floods.

44. In its most recent 5-year review for the species (conducted in 2022 as required by the ESA), FWS found that "[t]he threat posed by climate change" to the chub's survival and recovery "remains potentially severe."

C. USFS's September 2019 BA

45. USFS permits livestock grazing on approximately 90% of the Forest—i.e., 1,466,424 acres, which consists of 177 active grazing allotments across twelve EMAs. The Forest's grazing program is generally governed by guidelines and standards contained in the Forest Plan for the Coronado National Forest, which USFS most recently revised in 2018. As part of its grazing program in the Forest, USFS uses a multi-layered approach where livestock grazing is governed not only by the 2018 Revised Forest Plan, but also a permit, an allotment management plan, and annual operating instructions for each grazing allotment.

46. As relevant here, the 2018 Revised Forest Plan sets forth a guideline for its grazing program, which states that although "[f]orage utilization should be based on site-specific resource conditions and management objectives," forage utilization "in general should be managed at a level corresponding to light to moderate intensity (15 to 45 percent of current year's growth)." Nothing in the 2018 Revised Forest Plan or the Environmental Impact

Statement accompanying the Forest Plan suggests that the level of grazing intensity correlates with the unique life cycle needs of ESA-listed species in the Forest, let alone has any causal connection to the level of take that occurs at incremental increases in forage utilization rates.

47. Rather than engage in Section 7 consultation on individual grazing authorizations before allowing any new grazing after the adoption of the 2018 Revised Forest Plan, USFS did not disturb any existing grazing permits. Instead, USFS allowed all ongoing grazing activities to continue in the Forest. In February 2019, as widespread livestock grazing continued across the Forest, USFS submitted a BA to FWS for programmatic consultation on its Forest-wide grazing program, which it amended and submitted in final form (after input from FWS and grazing permittees) in September 2019.

48. In its final BA, USFS explained its view that "[t]he purpose of this programmatic [BA] is to evaluate the effects of the on-going livestock grazing program for the Coronado National Forest . . . on federally proposed and listed threated and endangered species and their critical habitats." USFS stated that it was initiating Section 7 consultation on its livestock grazing program "as defined by the Standards and Guidelines" adopted in the 2018 Revised Forest Plan.

49. In describing the proposed action in its BA, USFS reiterated the key guideline it adopted in its 2018 Revised Forest Plan: "[f]orage utilization should be based on site-specific resource conditions and management objectives, but in general should be managed at a level corresponding to light to moderate intensity (15-45% of current year's growth)." USFS also explained its view that "[g]razing intensity, when combined with other forms of implementation and effectiveness monitoring . . . , can help guide management decisions to meet desired conditions," and noted that "[m]ost of the allotments on the forest are managed at a forage utilization guideline that corresponds to a moderate intensity or 30-45% utilization in order to

provide for grazed plant recovery, increased plant vigor and retention of herbaceous litter to protect soils and provide forage and herbaceous cover for wildlife." USFS acknowledged that "utilization monitoring often occurs annually" and that "consistent patterns of annual utilization in excess of 45% of key species in key areas would be used as a basis to modify management practices or take administrative actions necessary to reduce utilization in subsequent grazing seasons."

50. In its BA, USFS concluded that its grazing program in the Forest was likely to adversely affect both the cuckoo and the chub (and their respective critical habitats). However, USFS downplayed the extent of those effects by relying on measures, including forage utilization rates, annual monitoring of grazing intensity, and adaptive management, that the agency claimed will limit the extent and severity of impacts to these species and their habitat.

D. FWS's September 2021 BiOp

51. Both before and after FWS received the final BA from USFS, FWS experts raised concerns with USFS's proposed use of grazing intensity metrics (i.e., forage utilization rates) as the means of evaluating the effects to various listed species in the Forest. For instance, on July 5, 2019, FWS's lead cuckoo biologist explained that she and other FWS species leads "discussed that the range grazing measures are inadequate to measure need for sensitive/listed [] wildlife."

52. In 2019, FWS's lead cuckoo biologist also published a report (along with other biologists) documenting significant, new information of a "previously unknown breeding population" of cuckoos in southeastern Arizona, which "may provide increasingly important habitat for recovery as climate change or increasing water use reduces the suitability of riparian habitat along perennial and intermittent rivers and streams." The report explained that this

"information is needed by land management agencies for developing conservation measures for cuckoos, especially where grazing, mining, or vegetation management projects are planned."

53. In September 2021, FWS finalized its BiOp for continued grazing in the Forest pursuant to the guidelines and standards set forth in the 2018 Revised Forest Plan.

1. The BiOp's Analysis of Effects to the Yellow-billed cuckoo

54. In examining the effects of the proposed action on the cuckoo, FWS stated that its "analysis differs, to some extent, from the" analysis contained in the USFS's BA. In particular, FWS highlighted that "[a]lthough the Forest's forage utilization standards help to protect riparian vegetation, and rest-rotation grazing activities minimize negative effects to the riparian vegetation, some damage to cuckoo habitat is expected in parts of some drainages on the Forest," and that "[c]auses of negative impacts to cuckoo habitat include grazing in some drainages outside of the period defined by leaf drop to bud break, effects from noncompliance with [allotment management plans], and effects from infrastructure failure." Moreover, FWS found that as part of the proposed action, "[l]ivestock use of remaining wetland and riparian sites to which access is permitted (and where cattle are not excluded from the entirety of the site) has the potential to degrade habitat used by cuckoo for nesting and/or foraging." In addition, FWS explained that "[g]razing during the growing season (bud break to leaf drop) in cuckoo-occupied drainages can reduce the quantity of suitable habitat and, in some cases, could cause disturbance to breeding birds." FWS also concluded that "there are likely to be occasional and difficult to quantify effects to the deciduous tree component of yellow-billed cuckoo habitat."

55. Despite FWS's findings that the proposed action would likely affect cuckoos and their habitat (including occupied critical habitat) in myriad ways, FWS asserted that these impacts "do not appear to be appreciably affecting yellow-billed cuckoo occupancy of the action

area." In turn, and because of its view that "the cuckoo is currently widespread throughout its range and in the action area, where ongoing livestock grazing has occurred for many decades," FWS concluded that the proposed action "is not likely to jeopardize the continued existence of the cuckoo destroy or adversely modify the species' designated critical habitat."

56. Despite reaching a no-jeopardy conclusion, FWS determined that "the proposed action is unlikely to contribute to the recovery of the yellow-billed cuckoo" because "it is likely that grazing has and will continue to result in intermittent and small-scale adverse effects" to "the riparian portions of yellow-billed cuckoo habitat." FWS also acknowledged that "[t]he tipping point at which the ability to recover the yellow-billed cuckoo (i.e. downlist from its threatened status) is difficult to definitively determine in the absence of a recovery plan." Thus, in the absence of a recovery plan for the cuckoo, FWS did not even attempt to identify and apply a tipping point—i.e., a point at which ongoing and new adverse effects render recovery difficult if not impossible to achieve—as part of its analysis, and instead assumed that "[t]he proposed action is . . . unlikely to reduce the species' potential for recovery" merely due to the fact that the cuckoo is purportedly widespread at the rangewide and action area scales, and grazing "appears to not be measurably influencing the species' distribution or abundance within the action area."

57. In analyzing recovery and reaching it no-jeopardy conclusion, FWS ignored the significant threat that climate change poses to the cuckoo's survival and recovery prospects—a threat that is exacerbated by livestock grazing. Indeed, although the effects of climate change during the planning horizon of the 2018 Revised Forest Plan and beyond are reasonably certain to result in hotter, drier conditions with consequent effects on the cuckoo, its habitat, and its prey (as well more frequent and more intense droughts and wildfires), FWS did not meaningfully

analyze these additive effects that will occur irrespective of the proposed action, in determining whether the proposed action will impair the cuckoo's recovery or otherwise result in jeopardy.

58. FWS's failure to adequately consider the effects of climate change in evaluating the impacts to the cuckoo is especially troubling because such effects are well-established in the available scientific literature; FWS's own cuckoo expert raised specific concerns about the substantial threat posed by climate change; and FWS has addressed climate change in prior BiOps involving the cuckoo, finding that "climate change will degrade habitat to the point of being incapable of supporting the occurrence of yellow-billed cuckoos." Here, however, FWS did not endeavor even to identify which portions of occupied cuckoo habitat in the action area are reasonably certain to lose the capability to support cuckoos due to climate change (and when that might occur), let alone analyze how this foreseeable, permanent loss of suitable habitat will affect the species' survival and recovery prospects when added to the impacts of livestock grazing under the proposed action. As such, FWS's assertion that "current management is unlikely to result in appreciable reductions in [] cuckoo abundance over time," fails to adequately account for the actual threats facing the species.

59. In reaching its no-adverse modification conclusion, FWS likewise relied on the purported persistence of the species over time despite ongoing livestock grazing in the action area, while acknowledging that, based on the proposed action, FWS "anticipate[s] some level of occasional suppression of the deciduous riparian component of cuckoo habitat on portions of the Forest over time." But FWS made no effort to quantify how many acres—let alone the quality, condition, or location of such acres—of cuckoo critical habitat the agency anticipates the proposed action would alter. Nor, in reaching its no-adverse modification conclusion, did FWS examine the foreseeable effects of climate change to cuckoo critical habitat rangewide or in the

action area, thereby significantly underestimating the importance of critical habitat in the Forest and substantially downplaying the additive effects of the proposed action to the species' survival and recovery.

60. After concluding that the proposed action would not jeopardize the cuckoo or destroy or adversely modify its critical habitat, FWS issued an ITS for the species. However, in so doing, FWS improperly assumed that the mere fact that some cuckoos may continue to use the habitat meant that there would be no incidental take from the grazing activities: "[w]e do not anticipate the incidental take of yellow-billed cuckoos from livestock grazing on the Forest based on the analysis of consistent yellow-billed cuckoo occupancy across survey sites in areas subject to various current grazing practices, including non-use by livestock over varying spatial and temporal scales." FWS did not attempt to reconcile its finding that the cuckoo would not be taken at all by USFS's grazing program with FWS's identification elsewhere in the BiOp of myriad, concrete effects that are reasonably certain to adversely affect the cuckoo and its habitat (including critical habitat).

61. In reaching all of these determinations—i.e., the no-jeopardy conclusion, the no-adverse modification finding, and the finding of zero incidental take—FWS relied heavily on USFS's purported conservation measures, and, in particular, on USFS's commitment to monitor and ensure permittee compliance with forage utilization rates adopted in the 2018 Revised Forest Plan. Nowhere in the BiOp did FWS explain why "no incidental take of yellow-billed cuckoos is reasonably certain to occur" due to permittee compliance with forage utilization rates that are merely a one-point-in-time measure of grazing intensity, nor did FWS identify any causal link between the USFS-adopted forage utilization rates in cuckoo habitat and the take (or lack thereof) of cuckoos based on the unique life cycle needs of this species.

62. In addition to failing to connect the forage utilization rates adopted by USFS in cuckoo habitat to the species-specific life cycle needs of the cuckoo (e.g., breeding, feeding, sheltering), FWS also disregarded the fact that reinitiation of consultation over USFS's grazing program in the Forest is not immediately triggered even if forage utilization exceeds the rates specified in the 2018 Revised Forest Plan. This is because "utilization monitoring often occurs annually" and therefore is insufficient to detect in real time any forage utilization exceedances (let alone cuckoo take). Moreover, USFS has stated that it will not "modify management practices or take administrative actions necessary to reduce utilization" until it deems there to be "consistent patterns of annual utilization in excess of 45% of key species." Thus, even if cuckoos are repeatedly taken (and even if forage utilization in cuckoo habitat exceeds the rates adopted in the 2018 Revised Forest Plan at various points in time), it could take significant time, if ever, before the agencies determine that such events trigger reinitiated consultation.

2. The BiOp's Analysis of Effects to the Sonora chub

63. With respect to the Sonora chub, FWS incorporated by reference in the BiOp the analysis of effects conducted by USFS in its BA. There, USFS determined that "[d]irect effects to Sonora chub and [key elements] of critical habitat may occur because livestock are not completely excluded from occupied and designated critical habitat in some allotments within the action area and, therefore, may trample and ingest Sonora chub and their eggs, impair water quality, and deteriorate habitat." Based on the guidelines adopted in the 2018 Revised Forest Plan—including permittee adherence to forage utilization rates of specified grazing intensities—USFS asserted that "[t]hese impacts, however are not expected to be widespread or excessive."

64. The BiOp explained that "[c]hanges in the watershed resulting from grazing can cause indirect effects such as increased sedimentation, higher peak flows and channel

incisement, and lower base flows within the drainages with occupied Sonora chub habitat, and changes in riparian vegetation and channel morphology may cause injury and mortality of Sonora chub and adversely alter its habitat." Further, FWS found that "[f]lows from higher elevations traverse drainages in the allotments, which if altered by grazing, may contribute elevated levels of sediment and exhibit other characteristics of degraded watershed described above"; "[t]his can affect riparian function with occupied Sonora chub habitat in the proposed action area."

65. With respect to the 1.2 miles of occupied critical habitat where grazing is allowed (i.e., there are no exclosures to protect the chub)—which comprises 15% of the designated critical habitat in Sycamore Canyon—FWS found that grazing will cause direct adverse effects, including "increased water temperatures as a result of stream channels becoming wider and shallower," "loss of nutrients within in the stream channel due to reduction of pools in number, size, and depth," "reduction in cover as a result of livestock grazing on riparian vegetation which helps to increase water temperatures," and "reduction of cover by banks sloughing off due to livestock trampling."

66. Despite the potential for extensive, severe direct and indirect effects to the chub and its occupied critical habitat, FWS concluded that the proposed action "will not preclude the implementation of Sonora chub recovery tasks, nor will the action appreciably reduce the ability of the species' critical habitat to support recovery of the species." This finding was contingent on the implementation of conservation measures by USFS and permittees, including a measure requiring that exclosure "fences are regularly checked and repaired such that no fences are non-functional for more than two weeks while permitted livestock are in any adjacent pasture next to the exclosure." Although FWS acknowledged the serious effects that grazing would cause to the

1.2-mile segment of occupied critical habitat where grazing is allowed and the chub is left unprotected from livestock, FWS brushed aside those effects merely because other portions of critical habitat do contain livestock exclosures.

67. Ultimately, FWS concluded that "the action, as proposed, is not likely to jeopardize the continued existence of the Sonora chub, and is not likely to destroy or adversely modify designated critical habitat." FWS based these conclusions on "the fact that Sonora chub have persisted in the presence of livestock grazing activities and these activities are not considered a leading threat to the continued survival and persistence of this species," and the fact that "[m]ost occupied Sonora chub habitat is excluded from grazing except for 1.2 stream miles in Penasco Canyon which is grazed during winters only and in conjunction with a neighboring pasture to address access to water." Elsewhere in the BiOp, however, FWS acknowledged that other portions of occupied chub habitat are also not excluded from grazing—i.e., "all un-excluded portions of California Gulch."

68. In reaching its no-jeopardy conclusion, FWS failed to reconcile its assertion that livestock grazing is not considered a leading threat to the chub with FWS's own prior, contradictory finding that "the major stressors affecting the status [and recovery] of the species . . . . are mining, *grazing*, roads and infrastructure, fire, border activities, nonnative fishes and amphibians, border activities, and climate change." And in reaching its no-adverse modification conclusion, FWS failed to analyze the importance of the affected 1.2-mile stretch of critical habitat to the population either within the action area or rangewide, let alone explain why FWS's finding that the proposed action would "adversely alter" the species' critical habitat did not rise to the level of adverse modification prohibited by the ESA.

69. Nor, in reaching its no-jeopardy and no-adverse modification conclusions, did FWS examine the foreseeable effects of climate change to the chub and its critical habitat (whether rangewide or in the action area). As a result, FWS significantly underestimated the threats facing this species and its critical habitat and substantially downplayed the additive effects of the proposed action to the species' survival and recovery.

70. The failure to address climate change as part of the jeopardy and critical habitat evaluations is especially arbitrary in light of FWS's own findings—roughly two years prior to the issuance of the BiOp at issue—that "[c]limate change represents the most serious, and to date unmitigated threat (and mechanism of habitat degradation) to Sonora chub" because "[c]hanges in temperature (Weiss and Overpeck 2005) and stream flow (Seager et al. 2007) are anticipated to reduce the amount of habitat available to the Sonora chub within the United States, worsen habitat conditions throughout the species' range, strengthen effects of other threats, and have both direct and indirect ecological impacts on the species." Yet, FWS did not address its prior findings regarding climate change, nor did it apply these findings or the best available science on climate change, in evaluating whether the proposed action will jeopardize the chub or adversely modify its critical habitat.

71. In issuing an ITS for the chub, FWS found that:

> Incidental take from the proposed livestock grazing in the Tumacacori EMA is expected to occur both as mortality of individual Sonora chub and as harm resulting from habitat modification and destruction within or adjacent to this EMA. We anticipate that all Sonora chub that occur within the 1.2 miles of Penasco Canyon that are open to livestock grazing and all un-excluded portions of California Gulch are vulnerable to take as a result of the proposed action.

FWS determined that the "effects that result in dead or impaired individuals are unlikely to be detected because this species is small, well camouflaged, and occurs in water of varying clarity," and thus FWS decided to "use measurable effects to habitat . . . as a surrogate for evaluating take

of this species." FWS stated its view that "[w]e consider these measurable parameters to have a linear relationship to the degree of potential effects to Sonora chub from livestock grazing and by extension, the degree or amount of take"; FWS thus generically stated that "[t]he more significant the effects to habitat, the more likely there is take occurring, and vice versa."

72. With respect to ongoing grazing, the ITS makes clear that "direct take of Sonora chub will occur when livestock are in occupied habitat," and "all Sonora chub outside of exclosures may be taken through harm from livestock grazing." The ITS provided two separate triggers for reinitiation of consultation: (1) "if exclosure fencing inspections and repairs are not conducted and implemented within two weeks of observation"; or (2) if "[l]ivestock grazing occurs within a pasture containing occupied habitat resulting in use measured at a level higher than authorized for that specific pasture in any two of three subsequent monitoring events" because, according to the ITS, "[e]xceeding these levels of forage utilization will result in unacceptable impacts to occupied habitat and individual Sonora chub." Neither of these triggers addresses the fact that the ITS allows every single chub in areas outside of exclosures to be killed (which would not itself trigger reinitiated consultation). In fact, FWS did not analyze or explain whether the species' survival or recovery prospects would be appreciably diminished if the chub were permanently extirpated from these areas. Nor, aside from pointing to a generic relationship between grazing intensity and take of chub, did FWS identify any causal link between the USFS-adopted forage utilization rates in occupied chub habitat and the take (or lack thereof) of chub based on the unique life cycle needs of this species.

E. Plaintiffs' February 2022 Notice of Intent

73. On February 28, 2022, in accordance with 16 U.S.C. § 1540(g)(2), Plaintiffs notified USFS and FWS of their intent to prosecute unremedied violations of the ESA arising

from FWS's BiOp and USFS's reliance on that BiOp in implementing its ongoing grazing program. In that Notice of Intent ("2022 NOI"), Plaintiffs identified numerous legal violations of the ESA and its implementing regulations, including those raised in this Complaint. The 2022 NOI contained a substantial volume of information, photographs, and other evidence raising questions as to the validity of the BiOp and triggering the duty for USFS and FWS to reinitiate consultation due to significant effects to the cuckoo and chub, and critical habitat for both species, in excess of those authorized in FWS's BiOp and ITS.

74. On April 27, 2022, USFS and FWS sent Plaintiffs separate responses to the 2022 NOI. Underscoring that the forage utilization rates are metrics for estimating grazing intensity on certain plant species used by cattle as forage rather than metrics tethered to the life cycle needs of the cuckoo, chub, or any other listed species, FWS's response stated that the "proposed utilization rates are consistent with current principles of livestock management in our region and were not deemed to be excessive." This response ignores the fact that whether the USFS-adopted forage utilization rates in occupied habitat are "consistent with current principles of livestock management" or are "deemed to be excessive" compared to grazing intensity throughout the region (which often occurs where there are no ESA-listed species), has nothing to do with the unique needs of listed species or the measures necessary to ensure their survival and recovery.

75. FWS also asserted that even though its BiOp had barely mentioned climate change, it had in fact considered drought conditions (and USFS's adaptive management approach of reducing livestock numbers during drought conditions) as part of its analysis. Yet, FWS did not explain its failure to address its own prior findings that "climate change will degrade habitat to the point of being incapable of supporting the occurrence of yellow-billed cuckoos," and that "[c]limate change represents the most serious, and to date unmitigated threat

(and mechanism of habitat degradation) to Sonora chub" because "[c]hanges in temperature (Weiss and Overpeck 2005) and stream flow (Seager et al. 2007) are anticipated to reduce the amount of habitat available to the Sonora chub within the United States, worsen habitat conditions throughout the species' range, strengthen effects of other threats, and have both direct and indirect ecological impacts on the species."

76. With respect to the ITS of zero for the cuckoo, FWS acknowledged that "we anticipated livestock would forage on riparian vegetation (including trees) which could adversely affect riparian and aquatic species, including the cuckoo." However, it asserted that "[c]urrently available analysis of cuckoo monitoring data generated over time and space, including within active grazing allotments on the Forest, does not suggest with reasonable certainty that effects from grazing affect life history traits such as breeding, feeding, or sheltering in a manner or extent that could meet the definition of incidental take under the [ESA]." In other words, as a basis for projecting no take of cuckoos, FWS doubled down on the fact that cuckoo numbers appear to have remained relatively static in the action area despite the fact that "grazing on the Forest has been occurring for decades, using similar management prescriptions as proposed by the Forest." FWS did not provide any further explanation as to why the proposed action was unlikely to affect cuckoo breeding, feeding, or sheltering, nor did FWS identify the currently available analysis of cuckoo monitoring to which it referred. Nor did FWS acknowledge that the reports cited in the BiOp inaccurately characterize as "ungrazed" portions of occupied cuckoo habitat that are in fact grazed through the cuckoo's anticipated arrival time in the area.

77. In its separate response, USFS primarily summarized and relied upon its review of 27 allotments that it conducted in response to the 2022 NOI. Although USFS went to great lengths to refute the poor condition of vegetation in occupied habitat for the cuckoo and the

chub—including because many of Plaintiffs' photographs were taken before monsoon season—USFS's own review highlighted the significant problems that are unavoidable when using qualitative metrics such as grazing intensity (measured through forage utilization). USFS emphasized "the stark differences" in the photographs taken by Plaintiffs during one part of the year and USFS later that year, which in USFS's view "demonstrate[s] how one-point-in-time qualitative assessments can vary" are thus are difficult for "determin[ing] livestock impacts." Yet FWS and USFS relied heavily on similar metrics—which are often only monitored once annually—in formulating the ITSs for the cuckoo and the chub. Thus, USFS's response merely highlights the ineffectiveness of forage utilization to accurately (let alone in real time) document forage utilization exceedances that could trigger adaptive management actions by USFS or reinitiated consultation between the agencies.

78. USFS also acknowledged what Plaintiffs alleged in their 2022 NOI—forage "[u]tilization is a metric to assess the degree of forage biomass removal by livestock that is used in combination with other long-term vegetation inventories to establish cause-and-effect relationships between herbivory and overall vegetation health and composition." It is not, and never was intended to be, any direct measure of the life cycle needs (or impacts to such needs) of the cuckoo, chub, or any other listed species. It is merely a qualitative metric to ensure that cattle eat only a specified percentage of forage biomass within a particular pasture. Indeed, quite ironically, USFS criticized Plaintiffs' similar metric for precisely this reason, stating that "[t]he qualitative method does not provide any correlation to habitat needs for listed species."

79. USFS's response also failed to explain, let alone address, the fact (raised directly in the 2022 NOI) that ongoing cattle grazing is causing extensive suppression of woody streamside vegetation, which is occasionally masked by intermittent monsoonal activity.

F. Plaintiffs' February 2023 Notice of Intent

80. On February 24, 2023, Plaintiffs sent a second NOI ("2023 NOI"). In this NOI, Plaintiffs reiterated many of the legal violations identified in the 2022 NOI and also included new information, photographs, and evidence raising additional questions as to the validity of the BiOp and triggering the duty for USFS and FWS to reinitiate consultation due to significant effects to the cuckoo and chub, and critical habitat for both species, in excess of those authorized in FWS's BiOp and ITS.

81. In April 2023, FWS and USFS sent Plaintiffs separate responses to the 2023 NOI. Those responses largely mirrored (and incorporated by reference) those previously provided in response to the 2022 NOI. USFS asserted that it not only relies upon forage utilization, but also on quantitative measures that provide information on vegetation structure and recruitment which purportedly "has a direct bearing on habitat quality for listed species." Despite this generic statement, USFS did not provide any analysis or explanation for how these measures or the data derived from them are directly related to the life cycle needs or specific behaviors of the cuckoo or chub (let alone any other listed species in the Forest).

82. USFS also stated that it "disclosed that grazing impacts would occur in yellow-billed cuckoo critical habitat in the [BA] that was the basis for the 2021 Biological Opinion," but USFS never reconciled that fact with the BiOp's issuance of an ITS of zero for the cuckoo.

PLAINTIFFS' CLAIMS FOR RELIEF

Claim I – FWS's Violations of the ESA and the APA

83. Plaintiffs hereby incorporate paragraphs 1-82 by reference.

84. By determining in the BiOp that the USFS's ongoing grazing program for the Forest (as identified in the 2018 Revised Forest Plan) will not jeopardize the cuckoo's or chub's survival or recovery prospects despite the myriad serious adverse effects of grazing on these

species' survival and/or recovery, FWS violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), its regulations implementing the ESA, and acted arbitrarily and capriciously in violation of the APA, 5 U.S.C. § 706(2).

85. By determining in the BiOp that the USFS's ongoing grazing program for the Forest (as identified in the 2018 Revised Forest Plan) will not destroy or adversely modify critical habitat for the cuckoo or chub despite the myriad serious adverse effects of grazing on these species' respective critical habitats, FWS violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) and its regulations implementing the ESA, and acted arbitrarily and capriciously in violation of the APA, 5 U.S.C. § 706(2).

86. By issuing ITSs for the cuckoo and chub that fail to accurately account for the proposed action's effects on these species, that are not tethered to the specific life cycle needs of these listed species, and that do not provide meaningful or effective triggers for reinitiated consultation, FWS violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), its implementing regulations, and acted in an arbitrary and capricious manner in violation of the APA, 5 U.S.C. § 706(2).

87. By failing to rely upon the best available scientific evidence, including, but not limited to, information regarding the likely effects of the proposed action on the cuckoo and the chub and evidence demonstrating the severity of climate change as a baseline threat to the survival and recovery of these species, FWS violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, and acted in an arbitrary and capricious manner in violation of the APA, 5 U.S.C. § 706(2).

88. By failing to accurately account for the environmental baseline or the direct, indirect, and cumulative effects of USFS's ongoing grazing program for the Forest (as identified

in the 2018 Revised Forest Plan), FWS violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) and its implementing regulations, and acted in an arbitrary and capricious manner in violation of the APA, 5 U.S.C. § 706(2).

Claim II – USFS's Violations of the ESA

89. Plaintiffs hereby incorporate paragraphs 1-82 by reference.

90. By relying on the unlawful BiOp to authorize ongoing livestock grazing in occupied habitat for the cuckoo and chub, and by failing to satisfy its substantive obligations under the ESA to safeguard against jeopardy to the cuckoo and chub and against adverse modification of their critical habitat, USFS has independently violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter an Order:

(1) Declaring that Defendants have violated the ESA and the APA;

(2) Enjoining USFS from authorizing livestock grazing in occupied habitat for the cuckoo and the chub in the Forest, including making "any irreversible or irretrievable commitment of resources with respect to" that action in violation of 16 U.S.C. § 1536(d), until consultation has been reinitiated and completed;

(3) Setting aside all active USFS grazing authorizations in the Forest that allow livestock grazing in occupied cuckoo and chub habitat, and the BiOp upon which those authorizations rely;

(4) Remanding the affected USFS grazing authorizations and BiOp to Defendants with instructions to immediately reinitiate consultation to address the impacts of proposed grazing on the cuckoo and the chub;

(5) Awarding Plaintiffs their attorneys' fees and costs in this action; and

(6) Granting Plaintiffs any further relief as the Court may deem just and proper.

Respectfully submitted this 28th day of July 2023.

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