



VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 26, 2010

Tom Tidwell, Chief
USDA Forest Service
1400 Independence Ave., SW
Washington D.C. 20250-0003

Ken Salazar, Secretary of the Interior
U.S. Dept. of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Sixty-Day Notice of Intent to Sue the U.S. Forest Service and the U.S. Fish and Wildlife Service Pursuant to the Endangered Species Act Re: Continued Implementation of Forest Plans in the Southwest Region

Dear Chief Tidwell and Secretary Salazar,

The U.S. Forest Service is hereby notified that the Center for Biological Diversity intends to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), to challenge the Forest Service’s: (1) failure to comply with the mandatory terms and conditions of the 2005 Biological Opinion concerning implementation of the Forest Plans in the Southwest Region, including monitoring and reporting requirements; (2) failure to insure that the Forest Plans in the Southwest Region, including projects and activities that are authorized pursuant to and allowed by these Plans, are not likely to jeopardize the continued existence of listed species, including the Mexican spotted owl, southwestern willow flycatcher, New Mexico ridge-nosed rattlesnake, Chiricahua leopard frog, Apache trout, Chihuahua chub, loach minnow, spikedace, and ocelot, and/or result in the destruction or adverse modification of the critical habitat of listed species; (3) failure to timely reinitiate and complete consultation with the U.S. Fish and Wildlife Service (“FWS”) regarding the impacts of these Forest Plans on listed species, including the Mexican spotted owl, southwestern willow flycatcher, New Mexico ridge-nosed rattlesnake, Chiricahua leopard frog, Apache trout, Chihuahua chub, loach minnow, spikedace, and ocelot; (4) continued authorization and approval of activities in the Southwest Region that may affect listed species prior to the reinitiation and completion of consultation on these Forest Plans; (5) continued authorization and approval of activities in the Southwest Region that may irreversibly and irretrievably commit resources which may foreclose the formulation or implementation of reasonable and prudent alternatives prior to completing the reinitiation of consultation regarding the impacts of the Forest Plans on listed species; and (6) unauthorized take of listed species on national forests in the Southwest Region.

The Center for Biological Diversity also intends to file suit, pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), to challenge FWS’ failure to timely reinitiate and complete consultation concerning the Forest Service’s ongoing implementation of the Forest Plans in the Southwest Region.

I. Identity of the Organization Giving Notice: The name, address, and phone number of the organization giving notice of intent to sue under the ESA is:

Center for Biological Diversity
P.O. Box 710
Tucson, Arizona 85702-0710
Tel: 520-623-5252

II. Counsel for the party giving notice:

Marc D. Fink, Attorney
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209 East 7th St.
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III. Requirements of the ESA

Section 7 of the ESA requires the Forest Service, in consultation with FWS, to insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air; and actions intended to conserve listed species or their habitat. 50 C.F.R. § 402.02. Forest plans are ongoing agency actions pursuant to Section 7 of the ESA. *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 623 F.Supp. 2d 1044, 1054 (N.D. Cal. 2009), citing *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053-54 (9th Cir. 1994).

For each federal action, the Forest Service must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the Forest Service must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

If the Forest Service determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation, FWS must provide the Forest Service 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. The biological opinion “is required to address both the ‘no jeopardy’ and ‘no adverse modification’ prongs of Section 7.” *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006), citing 50 C.F.R. § 402.14(g)(4). Consultation must generally be completed within 90 days from the date on which consultation is initiated. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, 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 Forest Service to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

In order to monitor the impacts of incidental take, the Forest Service must monitor and report the impact of its action on the listed species to FWS as specified in the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the Forest Service must reinitiate consultation with FWS immediately. 50 C.F.R. § 401.14(i)(4).

The reinitiation of formal consultation is required and must be requested by the Forest Service or FWS if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) 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; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

After the initiation or reinitiation of consultation, the Forest Service is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19); *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d at 1127 n. 7. Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

IV. The 2005 Biological Opinion

On June 10, 2005, FWS completed a “programmatic” biological opinion for the “continued implementation of the Land and Resource Management Plans for the Eleven National Forest and National Grasslands of the Southwestern Region.” FWS and the Forest Service agreed that the Forest Plans in the Southwest Region would adversely affect 36 listed species, including 3 species of mammals, 5 species of birds, 3 species of reptiles and amphibians, and 12 species of fish. FWS found that implementation of the Forest Plans was expected to result in the “incidental” take of a number of threatened and endangered species, including the Mexican

spotted owl, southwestern willow flycatcher, New Mexico ridge-nosed rattlesnake, Chiricahua leopard frog, Apache trout, Chihuahu chub, loach minnow and spikedace.

A. Mexican Spotted Owl

For the Mexican spotted owl, FWS determined that “incidental take” was reasonably certain to occur as a result of the implementation of the Forest Plans in the Region. FWS determined that the anticipated level of take was most appropriately quantified in terms of the number or percent of “Protected Activity Centers” (“PACs”) with disturbance and/or habitat alteration. FWS anticipated that take is reasonably certain to occur within 5 percent of the total PACs in the form of harm and 5 percent of the total number of PACs in the form of harassment for a total of a 10 percent as a result of the proposed action. The anticipated take is set forth per recovery unit. FWS and the Forest Service agreed to annually review and evaluate the actual incidental take for project-specific actions.

As set forth in the biological opinion, to be exempt from the Section 9 prohibition on take, the Forest Service must comply with the non-discretionary terms and conditions of the incidental take statement. The terms and conditions for the Mexican spotted owl include specific monitoring requirements. The Forest Service must monitor Mexican spotted owl PAC occupancy pursuant to the most recent version of the Recovery Plan. This monitoring must assess changes in owl site occupancy rates so that management actions can be adjusted if changes in owl populations occur. Additionally, in order to monitor the impacts of incidental take, the Forest Service must track and report the effects of the Forest Plans on Mexican spotted owls.

B. Southwestern Willow Flycatcher

According to the biological opinion, national forests that have occurrences of the southwestern willow flycatcher include the Apache-Sitgreaves, Carson, Gila, and Tonto National Forests. FWS determined that take is reasonably certain to occur on these four national forests as a result of the continued implementation of the Forest Plans, in the form of harm and harassment. FWS was unable to determine, however, the number of southwestern willow flycatcher territories that would be taken.

Pursuant to the mandatory terms and conditions of the 2005 biological opinion, the Forest Service must monitor southwestern willow flycatcher sites and associated territories on national forest system lands; and in order to monitor the impacts of incidental take, the Forest Service must track and report the effects of the proposed action on southwestern willow flycatchers.

C. Chiricahua Leopard Frog

According to the biological opinion, the Chiricahua leopard frog is known to occur on the Apache-Sitgreaves, Coconino, Coronado, Gila and Tonto National Forests. FWS anticipates that incidental take of the Chiricahua leopard frog is reasonably certain to occur as a result of the continued implementation of the Apache-Sitgreaves, Coconino, Coronado, Gila and Tonto Forest Plans. This take is expected to be in the forms of harm and harassment due to road use and management, prescribed fire, mechanical fuels treatments, chemical use, rangeland management,

recreation, and the impacts of surface disturbing projects. FWS concluded that the incidental take of the Chiricahua leopard frog will be considered exceeded if, after a period of two consecutive years, there is a decrease in the number of occupied population sites on National Forest System lands as result of the proposed action.

The Forest Service must monitor populations of Chiricahua leopard frogs on national forest system lands; and in order to monitor the impacts of incidental take, the Forest Service must track and report the effects of the proposed action on Chiricahua leopard frogs.

D. New Mexico Ridge-Nosed Rattlesnake

The Peloncillo population of the New Mexico ridge-nosed rattlesnake is one of three known populations, and is the only known population in the action area. Within the Peloncillo Mountains, a total of 27 New Mexico ridge-nosed rattlesnakes have been found in 13 general areas. FWS anticipated that the incidental take of New Mexico ridge-nosed rattlesnakes is reasonably certain to occur as a result of the continued implementation of the Coronado Forest Plan, in the form of direct mortality, harm and harassment.

The Forest Service must monitor New Mexico ridge-nosed rattlesnakes habitat on the Coronado National Forest; and in order to monitor the impacts of incidental take, the Forest Service must track and report the effects of the proposed action on New Mexico ridge-nosed rattlesnakes.

E. Apache Trout

According to the biological opinion, Apache trout occur on the Apache-Sitgreaves, Coronado, and Kaibab National Forests. FWS concluded that incidental take of Apache trout is reasonably certain to occur as result of the continued implementation of the Apache-Sitgreaves, Coronado, and Kaibab Forest Plans. FWS concluded that the incidental take of Apache trout will be considered exceeded if, after a period of two consecutive years, there is a loss of any one population on National Forest System lands as a result of the proposed action. The Forest Service must monitor Apache trout populations on national forest system lands; and in order to monitor the impacts of incidental take, the Forest Service must track and report the effects of the proposed action on Apache trout.

F. Chihuahua Chub

According to the biological opinion, the Chihuahua chub is found only in McKnight and the Mimbres River. On National Forest System lands, the Chihuahua chub is found only on the Gila National Forest, in a segment of McKnight Creek. FWS determined that incidental take of the Chihuahua chub is reasonably certain to occur as a result of the continued implementation of the Gila Forest Plan. FWS further determined that incidental take would be considered exceeded if one self-sustaining population is no longer maintained on the Gila National Forest. The Forest Service is required to monitor Chihuahua chub populations on the Gila National Forest.

G. Loach Minnow

FWS anticipates adverse affects to the loach minnow from implementation of the Apache-Sitgreaves, Coronado, and Gila Forest Plans. FWS concluded that incidental take of loach minnows will be considered exceeded if, after a period of two calendar years, there is a loss in the current number of loach minnow sites on National Forest System lands as a result of the proposed action, without being offset by newly established sites. The Forest Service must monitor loach minnow sites on national forest system lands; and in order to monitor the impacts of incidental take, the Forest Service must track and report the effects of the proposed action on loach minnow.

H. Spikedace

FWS determined that incidental take of spikedace is reasonably certain to occur on the Apache-Sitgreaves, Coconino, Gila, and Prescott National Forests as a result of the continued implementation of the Forest Plans. Incidental take of spikedace will be considered to be exceeded if, over a period of two consecutive years, the total number of spikedace sampled on the Gila National Forest drops below 500 spikedace as a result of the proposed action. In addition, two of three sites on the Gila National Forest (East Fork, West Fork, and Middle Fork of the Gila River) must remain occupied with spikedace, or take will be considered exceeded.

The Forest Service must monitor spikedace populations on national forest system lands; and in order to monitor the impacts of incidental take, the Forest Service must track and report the effects of the proposed action on spikedace.

V. The Forest Service's "Annual Reports" to FWS

Biological opinions with incidental take statements must include monitoring and reporting requirements, which must be complied with by the Forest Service in order to track the impacts of incidental take on listed species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). The 2005 Biological Opinion repeats the same provision for numerous listed species, requiring the Forest Service to track and report the effects of the action on the listed species, as required by 50 C.F.R. § 402.14(i)(3), in order to assess when the amount or extent of take is being approached or exceeded, and in order to make adaptive management changes for reducing adverse effects to the species.

In October, 2008, the Forest Service completed its "Annual Report" for the period June 10, 2005 through June 10, 2007, regarding the Programmatic Biological Opinion on the Land and Resource Management Plans for the 11 National Forests in the Forest Service Southwest Region. The Forest Service acknowledges in the report that it is not complying with the monitoring requirements set forth in the biological opinion's terms and conditions, and/or has likely exceeded the allowable incidental take, for a number of listed species, including the Mexican spotted owl, southwestern willow flycatcher, New Mexico ridge-nosed rattlesnake, Chiricahua leopard frog, Apache trout, Chihuahua Chub, loach minnow and spikedace.

A. Mexican Spotted Owl

For the Mexican spotted owl, the Forest Service typically monitored only 20-25% of PACs during 2005-07. Moreover, PACs have been monitored for owl occupancy but not owl reproduction. The Forest Service states in the annual report that personnel and funding levels are not adequate to meet the monitoring requirements set out in Term and Condition 3.1. As a result, in many cases, monitoring has not been accomplished. In addition, the Forest Service claims in the report that the incidental take authorized by the biological opinion is difficult to understand at the Forest level.

B. Southwestern Willow Flycatcher

For the southwestern willow flycatcher, the Forest Service states in the report that the Tonto National Forest has indicated that monitoring efforts will be reduced in 2007, and that the Apache-Sitgreaves National Forest did not monitor sites in 2007. According to the report, the Forest Service will likely not be able to continue to monitor the Roosevelt Lake site at past levels, and thus it will be “difficult to comply” with Term and Condition 3.1 in the future. The Forest Service also claims that issuing take for the southwestern willow flycatcher at the site level is “problematic.”

C. Chiricahua Leopard Frog

For the Chiricahua leopard frog, monitoring has not been conducted according to protocol on all possible sites due to insufficient funds and personnel. Moreover, according to the report, “it would appear that take has been exceeded for the Chiricahua leopard frog.” The Forest Service further acknowledges that monitoring as required by the terms and conditions of the biological opinion is not occurring for all populations. The Forest Service also expresses its concern that it is unable to fund the monitoring that is “suggested” in term and condition 3.2. The Forest Service further states that “[o]bviously, several populations have been lost, particularly on the Coronado National Forest,” but claims it does not appear these losses are the result of the implementation of the Coronado Forest Plan. The Forest Service also acknowledges “there is an issue of exceeding take on the Gila NF.” And, the Forest Service states that the majority of the potentially suitable habitat on the Clifton Ranger District of the Apache-Sitgreaves National Forest “remains without surveys for presence,” which will likely continue to be a concern into FY 2008.

D. New Mexico Ridge-Nosed Rattlesnake

For the New Mexico ridge-nosed rattlesnake, the Forest Service states in the report that budget limitations have precluded monitoring efforts. As further stated by the Forest Service, “[d]ue to the fact that it is extremely difficult to survey and find the species, as a result of its secretive behavior and cryptic coloration, the Forest Service is unable to expend the time and dollars that is required to conduct surveys on any regular basis.”

E. Apache Trout

For the Apache trout, the Forest Service states in the report that only five miles of surveys were completed on the Apache-Sitgreaves National Forest. The Forest Service acknowledges that it has not, and will likely not in the future, monitor all populations of Apache trout on National Forest Systems lands annually.

F. Chihuahua Chub

According to the report, efforts to monitor McKnight Creek on the Gila National Forest for the Chihuahua Chub were not successful in 2006 due to fire danger and high stream flows. Monitoring of McKnight Creek was completed during April, 2007, and no Chihuahua chub were detected. According to the report, this species no longer occurs on the Forest.

G. Loach Minnow

For the loach minnow, the Forest Service admits in its report that the Apache-Sitgreaves National Forest has occupied habitat but that the amount is unknown. Surveys have not been conducted in presumed habitat, and it is unknown whether any losses of populations have occurred since 2005. The report further states that the Apache-Sitgreaves National Forest has not cooperatively monitored loach minnow sites on the forest. As further stated, funding and personnel are not available to do adequate surveys and monitoring on all Forests with loach minnow. The Forest Service also states that it is “very difficult” to reduce the impacts of WUI projects to insignificant or discountable for this species. And critical habitat was designated in 2007, meaning the Forest Service must reinitiate consultation for this species.

H. Spikedace

For the spikedace, the Forest Service report states that no cooperative monitoring occurred on the Apache-Sitgreaves or the Coconino National Forests within the reporting period. According to the Forest Service, funding and personnel are not available to do adequate surveys and monitoring in all cases. In addition, incidental take is not adequately tied to the implementation of the Forest Plans. Furthermore, consultation must be reinitiated because critical habitat was designated for this species in 2007.

As summarized in the June 10, 2005 – June 10, 2007 Annual Report, several national forests in the Southwest Region have indicated their inability to comply with the monitoring required in Term and Condition 3.1 in the 2005 biological opinion for many species, and most, if not all, national forests in the Region are faced with personnel and funding levels that are not adequate to accomplish the monitoring required by Term and Condition 3.1.

The October, 2008 “Annual Report” covers the period from June 10, 2005 through June 10, 2007. At this time, no other Annual Reports have been completed or provided to FWS.

VI. April 17, 2009, Letter from the Forest Service to FWS

On April 17, 2009, the Southwest Region of the Forest Service wrote a letter to FWS to request the re-initiation of formal consultation on the 2005 programmatic biological opinion. According to the April 17th letter, “[i]t has now become apparent that the Forest Service will likely soon exceed the amount of take issued for at least one species, the Mexican spotted owl.” Additionally, “it has become apparent that the Forest Service is unable to fully implement and comply with the monitoring requirements associated with the Reasonable and Prudent Measures for several species (including MSO) in the [biological opinion].”

FWS has not responded to the Forest Service’s April 17, 2009, letter or reinitiated formal consultation on the Forest Plans in the Southwest Region. In the meantime, the Forest Service continues to authorize, approve, and allow projects and activities in areas that provide habitat for one or more listed species, which may adversely affect these species and/or their critical habitat.

VII. Significant New Information, Listings, and Critical Habitat Designations Since the 2005 Programmatic Biological Opinion

Subsequent to the 2005 programmatic biological opinion, there has been significant new information revealing potential affects of the continued implementation of Forest Plans in the Southwest Region on listed species and their critical habitat that has not been considered through consultation between the Forest Service and FWS. This new information includes, but is not limited to, the ongoing drought in the southwest, the impacts and implications of climate change, the increased threat of invasive species, severe wildfires and the increased threat of additional severe wildfires, and the recent sighting of a critically endangered ocelot in southern Arizona.

Since FWS prepared the 2005 biological opinion, there have also been new listings and critical habitat designations, including the November, 2005 listing and designation of critical habitat for the Gila chub; the October, 2005, designation of critical habitat for the southwestern willow flycatcher; and the March, 2007, designation of critical habitat for the loach minnow and spikedace. In addition, FWS prepared a recovery plan for the Chiricahua leopard frog in 2007, and revised the recovery plan for the Apache trout in September, 2009. Furthermore, new candidate species have been designated in the region, including but not limited to the roundtail and headwater chub, Mexican garter snake, and Rio Grande cutthroat trout.

VIII. On-going and Approved Projects Affecting Listing Species in Southwest Region

Despite the on-going monitoring and reporting deficiencies and violations of the terms and conditions of the 2005 biological opinion for numerous listed species, and the potential exceedance of the authorized incidental take for one or more listed species, the Forest Service continues to approve and allow projects and activities on national forests in the Southwest Region that will further adversely affect these listed species and/or their critical habitat. The following is only a sampling of these projects.

A. The Upper Beaver project on the Coconino National Forest

The Forest Service recently signed the decision notice for the Upper Beaver project, which includes 11,740 acres of logging within Mexican spotted owl habitat, including 159 acres of logging in PACs. The Forest Service determined that the project may affect the Mexican spotted owl and its critical habitat and thus entered into formal consultation. FWS concluded that take of owls is anticipated as result of high levels of noise from logging operations immediately adjacent to occupied habitat over the next 10 years. This chronic and continued disturbance may result in disrupted Mexican spotted owl reproduction and the ability of these PACs to contribute to the recovery of the species. Overall, FWS anticipates the take of one pair of Mexican spotted owls associated with the Lake Mountain PAC, Jones Mountain PAC, and Jacks Canyon PAC due to long-term logging operations planned during multiple breeding seasons immediately adjacent to these PACs.

B. The Phase II Utility Maintenance in Utility Corridors on Arizona Forests

In 2008, the Forest Service proposed the Phase II Utility Maintenance in Utility Corridors project, located on the Apache-Sitgreaves, Coconino, Kaibab, Prescott, and Tonto National Forest. The project covers all utility line maintenance related activities along utility corridors on national forest system lands in Arizona for 10 years. The Forest Service determined that the project may adversely affect the Mexican spotted owl, southwestern willow flycatcher, loach minnow, and their critical habitat.

FWS anticipated that the project will result in the taking of one pair of Mexican spotted owls within 16 PACs due to the modification of key habitat components, disturbance from low altitude helicopter flights, ground patrols during the breeding season, and hazard removal during the breeding season. Take is expected to occur at least once in each PAC, which may be short-term disturbance or permanent habitat modification. FWS also found it possible that additional take could occur in an additional 62 PACs within the project area.

FWS also determined that the project will result in the take of southwestern willow flycatchers at specific known breeding sites, and adverse affects to designated critical habitat. More specifically, FWS determined that a maximum of two events per site over the 10-year project is anticipated to take all breeding southwestern willow flycatchers at the PN-145 and line 131 sites. The harassment of all pairs of breeding of breeding southwestern willow flycatchers at each of these sites is anticipated to prevent nesting and/or cause failure of nesting attempts.

For the loach minnow, the project is also reasonably certain to cause take in the forms of harm and/or harassment resulting in habitat modification and injury or death. More specifically, take is anticipated to occur at each of 8 road crossings on the Blue River and Campbell Blue Creek.

C. Fossil Creek Grazing Allotment

In 2009, FWS completed a biological opinion for the Fossil Creek Range Allotment on the Coconino National Forest. The Forest Service determined that the project may affect the

Chiricahua leopard frog along with other listed species. FWS determined that the action is reasonably certain to result in the take of Chiricahua leopard frogs, due to direct mortality and injury at an occupied livestock tank, direct mortality or injury through trampling, harm and harassment due to the loss of bankline and vegetative cover and sedimentation of pools, and due to the benefits to other competing species.

D. Wildbunch Allotment Management Plan

In 2008, FWS completed a biological opinion for the Wildbunch allotment management plan on the Apache-Sitgreaves National Forest. For impacts to the Mexican spotted owl, FWS acknowledged that no surveys have been completed, and thus the number of owls inhabiting the area is unknown. FWS further acknowledged that the project does not meet the guidance of the owl's recovery plan. FWS then concludes that is unable to conclude with reasonable certainty where owls are present and how they might be incidentally taken, and thus includes no terms and conditions or limits on take.

For the loach minnow, FWS concludes that the proposed grazing will result in take due to adverse affects to the riverine habitat in which loach minnow live. FWS anticipated that take will occur throughout the portions of the Blue and San Francisco rivers and their tributaries included within the action area.

FWS also concluded that take of Chiricahua leopard frog will occur on the allotment.

E. Grazing Allotments on Douglas Ranger District of Coronado National Forest

In 2008, FWS prepared a biological opinion regarding the impacts of the Deer Creek, Graves, Juniper Basin, Outlaw Mountain, Skull Canyon, Skelton Canyon, and Fairchild grazing allotments in the Peloncillo Mountains of the Coronado National Forest. Regarding impacts to the New Mexico ridge-nosed rattlesnake, FWS concluded that impacts would be the same as set forth in its 2002 biological opinion regarding grazing activities on the Coronado National Forest. In the 2002 biological opinion, FWS stated that grazing would occur over the entire range of the New Mexico ridge-nosed rattlesnake in the Peloncillo Mountains, and that take is reasonable certain to occur. FWS concluded that take is likely due to direct mortality or injury by trampling and by harm resulting from reduced vegetative cover.

IX. Forest Service and FWS Violations of the ESA

A. Violations of Section 7 of the ESA

The Forest Service is violating the mandatory terms and conditions set forth in the 2005 biological opinion concerning the implementation of the Forest Plans in the Southwest Region, including mandatory monitoring and reporting requirements for a number of listed species, including the Mexican spotted owl, southwestern willow flycatcher, New Mexico ridge-nosed rattlesnake, Chiricahua leopard frog, Apache trout, Chihuahua Chub, loach minnow and spikedace, in violation of the ESA. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv),

402.14(i)(3). Due to these monitoring and reporting failures, the Forest Service is also failing to insure that it has not exceeded the incidental take allowances for these listed species.

Through its failure to comply with the monitoring and reporting requirements that are included within the terms and conditions of the 2005 biological opinion, and through its failure to insure that it has not exceeded the incidental take limits for these listed species, the Forest Service is thereby failing to insure that the Forest Plans in the Southwest Region are not likely to jeopardize the continued existence of listed species, including the Mexican spotted owl, southwestern willow flycatcher, New Mexico ridge-nosed rattlesnake, Chiricahua leopard frog, Apache trout, Chihuahua chub, loach minnow and spikedace, and/or result in the destruction or adverse modification of their critical habitat. 16 U.S.C. § 1536(a)(2).

The Forest Service has failed to timely reinitiate and complete the reinitiated consultation with FWS regarding the continued implementation and impacts of the Forest Plans in the Southwest Region on listed species and their critical habitat, in violation of the ESA. 16 U.S.C. §§ 1536(a)(2), 1536(b)(1)(A), 1536(c)(1); 50 C.F.R. §§ 402.12, 402.14(e), 402.14(i)(4), 402.16. Moreover, FWS has failed to timely reinitiate and complete consultation with the Forest Service regarding the continued implementation and impacts of the Forest Plans in the Southwest Region on listed species and their critical habitat, in violation of the ESA. 16 U.S.C. §§ 1536(a)(2), 1536(b)(1)(A); 50 C.F.R. §§ 402.14(e), 402.16

By allowing, authoring, and approving projects and activities to proceed on national forest system lands in the Southwest Region that may affect listed species or their critical habitat, prior to the reinitiation and completion of consultation with FWS, the Forest Service is violating the ESA. 16 U.S.C. § 1536(a)(2); *see Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994) (holding that Section 7(d) of the ESA “does not serve as a basis for any governmental action unless and until consultation has been initiated”).

By allowing, authoring, and approving projects and activities to proceed on national forest system lands in the Southwest Region that may affect listed species or their critical habitat, prior to the completion of reinitiated consultation with FWS, the Forest Service is violating the ESA. 16 U.S.C. § 1536(d); *see Pacific Rivers Council*, 30 F.3d at 1057 (recognizing that “timber sales constitute per se irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period”); *Silver v. Babbitt*, 924 F.Supp. 976, 982 (D. Az. 1995) (“An agency must hold action in abeyance until the required consultation is complete”); *id.* at 984 (holding that “timber sales are ‘actions that may affect’ the [Mexican] spotted owl”); *id.* at 985 (recognizing that the logging of Mexican spotted owl habitat constitutes a “per se irretrievable and irreversible commitment of resources”); *id.* at 989 (enjoining “all activity” until consultation is complete, and ordering the Forest Service to “defer or suspend all timber harvest activities” until the re-consultation the Forest Plans is complete).

B. Violations of Section 9 of the ESA

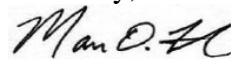
Because the Forest Service is in ongoing violation of the terms and conditions for listed species, including the Mexican spotted owl, southwestern willow flycatcher, New Mexico ridge-nosed rattlesnake, Chiricahua leopard frog, Apache trout, Chihuahua chub, loach minnow and

spikedace, any “take” of these species – incidental or otherwise – is no longer covered by the programmatic biological opinion and is in violation of Section 9 of the ESA. 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538. The Forest Service continues to authorize, approve, and allow projects and activities on the National Forests in the Southwest Region that are likely to cause or result in an unauthorized take of one or more listed species. The Forest Service is thus in ongoing violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1536(d); 50 C.F.R. § 17.31(a).

X. Conclusion

For the above stated reasons, the Forest Service has violated and remains in ongoing violation of Sections 7 and 9 of the ESA, and FWS has violated and remains in ongoing violation of Section 7 of the ESA. If these violations of law are not cured within sixty days, the Center for Biological Diversity intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. 16 U.S.C. § 1540(g). This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



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cc: Corbin Newman, U.S. Forest Service Regional Forester
Eric H. Holder, Jr., U.S. Attorney General