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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

December 28, 2009

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Flagstaff, AZ 86001-2529

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Steven L. Spangle, Field Supervisor
U.S. Fish and Wildlife Service
Arizona Ecological Service Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

Re: **Notice of Intent to Sue For Violations of the Endangered Species Act Regarding the the Chiricauhua Leopard Frog and Mexican Spotted Owl on the Fossil Creek Range Allotment**

Dear Madams and Sir:

Pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540, the Center for Biological Diversity (the Center) hereby provides notice of intent to sue for violations of sections 7(a)(2) and 9 the ESA – as well as the Administrative Procedures Act – relating to your agencies' obligations with respect to the threatened Chiricahua leopard frog and Mexican spotted owl in the Fossil Creek Range Allotment.

The Chiricahua leopard frog and Mexican spotted owl are threatened species under the ESA and they continues to struggle for survival in the Fossil Creek Range allotment. Your agencies have responsibilities to protect and recover this species and its habitat, yet have failed to fulfill those responsibilities due to inadequate management practices and consultation processes that are insufficient to prevent jeopardy and take of these species throughout the Fossil Creek Range allotment.

Legal Background

Section 7(a)(2) requires each federal agency to consult with the United Stated Fish and Wildlife Service and the National Oceanic and Atmospheric Association's National Marine Fisheries Service ("the Services") 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 or threatened species or result in the destruction or adverse modification" of critical habitat. *16 U.S.C. § 1536 (a)(2).* For each proposed action, the federal agency must request from the Services whether any listed or proposed species may be present in the area of the proposed action. *16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.*

If listed or proposed species may be present, the federal agency must prepare a "biological assessment" to determine whether the listed species may be affected by the proposed action. *Id.* If the agency determines that its proposed action may affect any listed species or critical habitat, the agency must engage in "formal consultation" with the Services, depending on the species. *50 C.F.R. § 402.14.*

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

Under ESA § 7(a)(2), the Forest Service also must independently insure that its ongoing management activities do not result in jeopardy or adverse modification of critical habitat throughout the course of any action. *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); *Defenders of Wildlife v. Martin,* 454 F. Supp. 2d 1085, 1096–99 (E.D. Wash. 2006) (holding that Forest Service failed to comply with ongoing obligation under ESA § 7(a)(2) to insure against jeopardy). "Following the issuance of a Biological Opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a). As the Ninth Circuit has held, "[c]onsulting with the Service alone does not satisfy an agency's duty under the Endangered Species Act. An agency cannot 'abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a Service biological opinion must not have been arbitrary or capricious.'" *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994), *quoting Pyramid Lake Paiute Tribe v. United States Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). *See also Aluminum Co. of America v. Bonneville Power Administration*, 175 F.3d 1156, 1161 (9th Cir. 1999) ("an action agency may not escape its responsibility under the Endangered Species Act by simply rubber stamping the consulting agency's analysis").

Further, Section 9 of the ESA and implementing regulations further prohibit the unauthorized "take" of listed endangered species, including through adverse modification of the species' habitat. *16 U.S.C. § 1538(a)(1).* The Services have extended this "take" prohibition to all listed "threatened" species, also. *16 U.S.C. § 1533(d); 50 C.F.R. § 17.31(a).*

Violations of the ESA

The Forest Service has violated Section 7(a)(2) of the ESA by failing to ensure that its authorized livestock grazing will not jeopardize the continued existence of the Chiricahua leopard frog and Mexican spotted owl. The Forest Service has violated this independent duty in at least three ways.

First, the Forest Service cannot fulfill the assumptions and monitoring obligations relied upon by the Fish and Wildlife Service in developing its no-jeopardy biological opinion. In *Marsh*, the Ninth Circuit held that an agency's inability to implement conditions and obligations of the biological opinion violated § 7(a)(2) of the ESA. 816 F.2d at 1386. As in Marsh, the Forest Service here has not and cannot implement grazing standards, monitoring requirements, and other terms and conditions of the Biological Opinion and Incidental Take Statement on the Fossil Creek allotment, as the Forest Service's own staff and others repeatedly admitted.

Second, for the reasons discussed *infra*, the Biological Opinion/Incidental Take Statement (BO/ITS) itself is arbitrary and capricious; accordingly, the Forest Service's reliance on the BO/ITS is arbitrary and capricious. Many courts have held that when the underlying BO/ITS is legally inadequate, the action agency acts arbitrarily and capriciously when it relies on that biological opinion as well. *See, e.g., Center for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139 (D. Ariz. 2002) (holding the Army violated the ESA by relying on an arbitrary biological opinion).

Third, the Ninth Circuit has specifically held that, if an action agency has withheld information from the Fish and Wildlife Service that is relevant to the development of a biological opinion, the action agency's reliance on that biological opinion violates the ESA. *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993). In this case, the Forest Service has failed to identify the specific monitoring, adaptive management and mitigation measures it will employ to ensure against jeopardy of the Chiricahuna leopard frog and Mexican spotted owl. Instead, the Forest Service claimed that it will identify these mitigation and other measures when it issues the annual operating instructions. Forest Service personnel and others objected to the Forest Service's refusal to specifically identify and consult over these measures during the formal consultation process. Because the Forest Service refused to disclose these measures to the Fish and Wildlife Service, the Forest Service's reliance on the BO/ITS is arbitrary and capricious.

The Center further puts you on notice that the new grazing authorization on the Fossil Creek Range allotment will cause unauthorized "take" of the Chiricahua leopard frog in violation

of ESA §§ 9 & 4(d), 16 U.S.C. § 1538(a)(1) & 1533(d), and implementing regulations. "Incidental" take is allowed only if it complies with the legally-adequate "conditions set forth in the incidental take statement." *Ramsey v. Kantor*, 96 F.3d 434, 441 (9th Cir. 1996). But, take that exceeds the scope of an incidental take statement, or take that is authorized under an unlawful Incidental Take Statement, is prohibited. *Id.* at 442; *see also Ore. Natural Resources Council v. Allen*, 476 F.3d 1031, 1040 (9th Cir. 2007) ("Incidental take" must be truly incidental and may not be the purpose of the action. . . . The take must be in compliance with the terms and conditions of the Incidental Take Statement.").

Violations of the Administrative Procedures Act

In the spirit of seeking an amicable resolution of this case short of litigation, the Center also puts you on notice that it intends to seek declaratory and injunctive relief vacating the Fish and Wildlife Service's Biological Opinion/Incidental Take Statement issued on the Fossil Creek Range allotment, too.

The BO/ITS is arbitrary and capricious in its analysis and evaluation of the impacts of the grazing decision on the Chiricahua leopard frog. More specifically, the BO/ITS failed to quantify take, and failed to articulate a reasoned explanation why take was unquantifiable, as required under *ORNC v. Allen*, 476 F.3d 1031 (9th Cir. 2007). In the BO/ITS, the Service also failed to provide an adequate trigger for re-initiation of consultation, which is also a violation under *Allen*. For these and additional reasons, the Center believes the BO/ITS is arbitrary and capricious, and contrary to the requirements of the Endangered Species Act.

1. Obligation to Quantify Take.

First, Incidental Take Permits must set forth a permissible level of take, and the Ninth Circuit has acknowledged that "Congress has clearly declared a preference for expressing take in numerical form." *Allen*, 476 F.3d at 1037. If the consulting agency decides to forego quantifying take, it may utilize a surrogate if it explains why a numerical standard was impracticable. *Id.*

In *Allen*, plaintiffs challenged the adequacy of a BO and ITS allowing take of northern spotted owl, claiming that the Service had failed to establish a numerical standard for take without explanation. The Service claimed that it could not quantify take because its owl surveys were out-of-date, and the Service argued that its use of a habitat surrogate met its obligations to quantify take. The Ninth Circuit rejected the Service's argument, and held that the Service refusal to identify a quantifiable level of take was arbitrary and capricious.

The BO/ITS here does not satisfy the standard identified in *Allen*. Indeed, the BO here does not quantify the permissible take, does not address levels of expected take, and does not even identify any habitat surrogate for expected take. Instead, the Service discusses different "forms of [expected] take," including direct mortality resulting from livestock trampling and range development activities, and harm and harassment resulting from increases sedimentation,

loss of riparian habitat, erosion and other factors due to livestock grazing. At best, the BO/ITS notes these impacts will affect "a proportion of C[hiricahua] L[eopard] F[rog] adults, metamorphs, tadpoles, or egg masses," with a "proportion" meaning "a small enough quantity of population . . . to allow recovery of the population to pre-disturbance levels over time." But the Service never quantifies expected take, or provides any objective meaning of a "proportion."

Under *Allen*, this unquantified level of expected take is arbitrary and capricious.

2. Trigger For Re-consultation.

In addition to quantifying take, an ITS must identify a "trigger that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision [of the ESA], and requiring the parties to re-initiate consultation." *Ariz. Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1249 (9th Cir. 2001). The purpose of this trigger is to afford the action agency a means for monitoring the effects of its actions during implementation. In particular, the action agency must ensure that its actions are not exceeding the level of incidental take or harm to the species that the Service has allowed in the ITS. If done correctly, an Incidental Take Statement serves to monitor ESA compliance and guard against unacceptable harm to threatened and endangered species.

The Ninth Circuit has routinely invalidated Incidental Take Statements that do not adequately trigger re-initiation of consultation. *Allen*, 476 F.3d at 1038; *Arizona Cattle Growers*, 273 F.3d at 1249-51 (no measurable guidelines to re-initiate consultation); *Natural Resources Defense Council v. Evans*, 279 F.Supp.2d 1129, 1185-87 (N.D. Cal. 2003) (identifying trigger when "any individual" is taken, without any evidence that exceedance could be detected).

In this case, the Service set two triggers for re-initiation of consultation: (1) take continues to the degree that recovery of the population in precluded; and (2) "if, after a period of two consecutive years, the species is considered extirpated from the [Ranger District] as a result of livestock management." BO at 32. Neither of these triggers are sufficient.

Like in *Arizona Cattle Growers*, the first trigger does not "contain measurable guidelines to determine when incidental take would be exceeded." 476 F.3d at 1038. Indeed, this trigger has no standards at all.

The second trigger is equally faulty in this it allows the taking of all frogs in the allotment, and would not allow for re-initiation of consultation prior to the extirpation of the population. In *Allen*, the Ninth Circuit rejected a similar ITS, which included a trigger that allowed the taking of "all spotted owls" within the project area.

Conclusion

As provided under the ESA citizen suit provision, 16 U.S.C. §1540(g), the Center for Biological Diversity may institute legal action after 60 days following the date of this notice for

the foregoing violations of law, and seek declaratory and injunctive relief as appropriate, as well as recovery of their costs and expert and attorney fees.

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

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

Sincerely,

Todd C. Tucci
Attorney for the Center for Biological Diversity

cc: Secretary Ken Salazar
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