



VIA CERTIFIED MAIL AND E-MAIL

March 21, 2023

Deb Haaland, Secretary of the Interior
U.S. Dept. of the Interior
1849 C Street, N.W.
Washington D.C. 20240
exsec@ios.doi.gov

Tracy Stone-Manning, Director
Exercising Authority of the Director
U.S. Bureau of Land Management
1620 L Street, NW
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Ray Suazo, State Director
U.S. Bureau of Land Management
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Anthony Feldhausen, Gila District Manager
U.S. Bureau of Land Management
3201 E. Universal Way
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**RE: Sixty-Day Supplemental Notice of Endangered Species Act Violations
regarding the Bureau of Land Management's failure to maintain protective
fencing and to remove trespass cows from the San Pedro Riparian National
Conservation Area.**

Dear Mses. Haaland and Stone-Manning, and Messers. Suazo and Feldhausen,

The U.S. Secretary of the Interior ("Secretary"), U.S. Bureau of Land Management ("BLM") Director, State Director and Gila District Manager (who is also, the San Pedro Riparian National Conservation Area ["SPRNCA"] Manager) are hereby notified by the Center for Biological Diversity ("Center") and Maricopa Audubon Society ("Maricopa Audubon") of our intention to file suit 60 days after the submission of this Supplemental Notice for unremedied and ongoing violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and its implementing regulations, 50 C.F.R. §§ 402.01-402.17.

We submit this Supplemental Notice in connection with: (1) your continuing failure to maintain the required boundary fences that are necessary to conserve and recover federally protected species and their critical habitat that are located in the SPRNCA; (2) your failure to promptly remove unauthorized trespass cows in the SPRNCA that are jeopardizing the survival and recovery of an the highly endangered Huachuca Water Umbel, and which are destroying its designated Critical Habitat in the SPRNCA;¹ and (3) you failure to take necessary actions related to fencing and removal of unauthorized trespass cows, which is

¹ Final Rule, Designation of Critical Habitat for Huachuca Water Umbel, Fish and Wildlife Service, Interior, Federal Register, Vol. 64, No. 132, page 37441, July 12, 1999.

adversely modifying the SPRNCA Critical Habitat of other endangered species, including Yellow-billed Cuckoo² and Northern Mexican Gartersnake.³ These species represent the failing health of the San Pedro River and the deteriorating condition of SPRNCA—federal public lands that belong to all Americans—under your watch.

Because of your longstanding disregard for the law and for the health of the SPRNCA, the core population of the endangered Huachuca Water Umbel has now been obliterated by the trespass cows that you refuse to remove and control. The survival of this endangered plant is now jeopardized, as is its recovery prospects. Likewise, trespass cows continue damaging the SPRNCA Critical Habitat of Yellow-billed Cuckoo and Northern Mexican Gartersnake, thereby worsening the condition of these species and their habitat and placing their survival and recovery prospects in greater peril.

This Notice formally supplements our July 9, 2021, Notice⁴ of Endangered Species Act Section 7(a)(1), to “carry[] out programs for the conservation,”⁵ and, Section 9, “caus[ing] to be committed” unlawful take of listed species.⁶

The Center and Maricopa Audubon expressly incorporate by reference the July 9, 2021, Notice as part of this Supplemental Notice. In spite of litigation⁷ resulting from our July 9, 2021, Notice, and in spite of our August 9, 2022, Settlement of that lawsuit,⁸ BLM continues to violate the law in exactly the same ways—on an ongoing basis—that the agency previously agreed to (but did not) remedy.

The documentation of your continuing violations of law and your breach of our August 9, 2022, Settlement includes the following indisputable facts:

- (1) since our August 9, 2022, Settlement, we have filed 57 complaints documenting your continued failure to remove damaging trespass cows from SPRNCA (all of which have been properly submitted to BLM pursuant to the Agreement, and which the Center and Maricopa Audubon expressly incorporate into this Supplemental Notice by reference);

² Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo (*Coccyzus americanus*); Final Rule, Federal Register, Vol. 79, Page 59962, October 3, 2014.

³ Endangered and Threatened Wildlife and Plants, Final Rule, Threatened Status for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, USFWS, Federal Register, Vol. 79, No. 130, Tuesday, July 8, 2014.

⁴ https://www.biologicaldiversity.org/programs/public_land/grazing/pdfs/NOI-20210709-SPRNCA-TRESPASS-GRAZING.pdf

⁵ 16 U.S.C. § 1536(a)(1)

⁶ 16 U.S.C. § 1538(a), (g); see also 50 C.F.R. § 17.3 (clarifying that take includes not only “an intentional or negligent act” but also any “omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering”).

⁷ https://www.biologicaldiversity.org/programs/public_land/grazing/pdfs/lawsuit-20211027-AMENDED-COMPLAINT-WITH-ATTACHMENTS.pdf

⁸ https://www.biologicaldiversity.org/species/plants/Huachuca_water_umbel/pdfs/lawsuit-20220809-SETTLEMENT-AGREEMENT-SPRNCA-ESA-7a1-case--settlement-agreement-signed.pdf

- (2) since receiving your February 9, 2023, Report, for the period from August 9, 2022 through January 31, 2023,⁹ pursuant with our August 9, 2022, Settlement, we have filed 40 new complaints documenting that many unauthorized trespass cows remain in areas AFTER you relied upon local ranchers to have removed them;
- (3) you have failed to provide follow-up as agreed to in the Settlement, but more importantly, as is required by law, you have failed to protect the SPRNCA, to monitor and assure that cows have been actually removed by local ranchers when requested; and,
- (4) you have failed to monitor SPRNCA riparian areas excluded from cow grazing as required twice per year to protect SPRNCA by the August 9, 2022, Settlement, and as required to provide for basic conservation protection for SPRNCA, the federally protected species that reside there, and their designated critical habitat in the SPRNCA.

This Supplemental Notice includes all of our 95 documented complaints¹⁰ since the filing of our July 9, 2021, Notice. It also includes our November 11, 2021, notification¹¹ to you of the fact that your historic malfeasance has resulted in the loss of the core population of endangered Huachuca Water Umbel. In addition, it includes our January 10, 2023, mapping of the last 59 complaints of trespass cows 2022-2023 provided to you with an appeal for help to overcome “local BLM leadership incompetence.”¹²

This Supplemental Notice guarantees that all of this documentation will be part of the official evidentiary record if another lawsuit is necessary, should you continue refusing to obey the law by allowing trespass cows to destroy SPRNCA (including critical habitat) on a daily basis.

⁹ https://www.biologicaldiversity.org/programs/public_land/lands/rivers/san_pedro_river/pdfs/lawsuit-20230209-SETTLEMENT-SIX-MONTH-REPORT-COVER-LETTER-and-REPORT.pdf

¹⁰ https://www.biologicaldiversity.org/programs/public_land/lands/grazing/pdfs/COMPLAINTS-20210709--20230319-95-SPRNCA-TRESPASS-COW-GRAZING-COMPLAINTS.pdf

¹¹ Email, to: Secretary Deb Haaland, BLM Deputy Director Nada Culver, U.S. Fish and Wildlife Service (“USFWS”) officials, Regional Director Amy Lueders, Arizona State Director Jeff Humphrey, Southern Arizona Manager Julie McIntyre, and Huachuca Water Umbel Lead Julie Crawford; from: Robin Silver; RE: TODAY’S SURVEY FINDS THAT THE CORE POPULATION OF AN ENDANGERED SPECIES HAS BEEN LOST IN BLM’S SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA; November 11, 2021, https://www.biologicaldiversity.org/programs/public_land/lands/rivers/san_pedro_river/pdfs/20211111-email-TODAYS-SURVEY-FINDS-CORE-POPULATION-OF-ENDANGERED-SPECIES-LOST-Center-to-BLM.pdf.

¹² Email, to: Secretary Deb Haaland, Deputy Secretary Tommy Beaudreau, Interior Inspector General Mark Lee Greenblatt, Assistant Secretary Shannon Estenoz, BLM Director Tracy Stone-Manning, BLM Deputy Director Nada Culver, DOJ Attorney (representing BLM) John Martin, USFWS Director Martha Williams, USFWS Regional Director Amy Lueders, USFWS Arizona Director Heather Whitlaw, and USFWS Southern Arizona Manager Julie McIntyre; from: Robin Silver; RE: MAPPING OF THE LAST 59 COMPLAINTS OF TRESPASS COWS 2020-2022 IN THE SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA PROVE LOCAL BLM LEADERSHIP INCOMPETENCE. WE NEED HELP!!; January 10, 2023, https://www.biologicaldiversity.org/programs/public_land/lands/rivers/san_pedro_river/pdfs/20230110-EMAIL-TO-HAALAND-et-al-MAPPING-OF-THE-LAST-59-COMPLAINTS_BLM-INCOMPETENCE_WE-NEED-HELP.pdf.

As a reminder, the laws that you continue to violate (including since the August 9, 2022, Settlement), include:

- (1) **ESA Section 7(a)(1).** By chronically failing to take action in response to repeated complaints of trespass cows in habitat—including occupied critical habitat—for the federally protected species identified herein, and especially BLM's failure to construct and/or maintain fencing to keep trespass cows out of SPRNCA, BLM is in ongoing violation of Section 7(a)(1) of the ESA. The Center has submitted dozens of complaints notifying BLM that significant ongoing take—which has *not* been authorized through any lawful mechanism under Section 7(a)(2) of the ESA—is occurring as a result of BLM's failure to meaningfully address trespass cows. But BLM has not taken any action—let alone developed any coherent “program” to further the conservation of these species—while watching the habitat for these species (including designated critical habitat) deteriorate to the point where survival and recovery of these populations are in serious jeopardy. Section 7(a)(1) imposes an affirmative obligation on all federal agencies, in consultation with the FWS, to “carry[] out programs for the conservation”—i.e., recovery—of listed species. 16 U.S.C. § 1536(a)(1).

BLM's actions and omissions in SPRNCA—and in particular the refusal to take any action to meaningfully eliminate trespass cows from habitat critical for listed species—constitute the direct *opposite* of a program designed to avoid extirpation of these species from SPRNCA, let alone a program that is specifically aimed at *recovering* the species. Because trespass cows are the primary contributing factor to the demise of these species and their habitat in SPRNCA, Section 7(a)(1) imposes on the BLM an affirmative duty to immediately develop, in consultation with the FWS, a comprehensive program that will timely implement all measures necessary to conserve—i.e., *recover*—these species before these populations are wiped out entirely.

Until and unless the BLM develops such a program, the agency is in flagrant violation of Section 7(a)(1). See, e.g., *Ctr. for Biological Diversity*, 276 F. Supp. 3d at 1030-32 (holding that an agency violated Section 7(a)(1) where its actions “did nothing to reverse or end the damage to the [species'] habitat inflicted by (and continuing to be inflicted by) [an invasive beetle species]” especially where the agency “was clearly aware of the accelerating deterioration of the [species'] habitat and the increasing urgency of its obligation under Section 7(a)(1) to engage in conservation efforts”).

Moreover, BLM cannot rely on the existence of any current program—including, for example, the Huachuca water umbel recovery plan, any multi-species conservation plan or habitat conservation plan—to meet its Section 7(a)(1) obligations because these plans do not address the issue of trespass grazing in and around the SPRNCA, and otherwise contain insignificant conservation measures that are not reasonably likely to conserve the species from the primary and direct threat of trespass livestock grazing in and around

SPRNCA. See *Pyramid Lake*, 898 F.2d at 1415; *Paulison*, 522 F.3d at 1146-47."

- (2) **ESA Section 9.** It is indisputable that trespass cows adversely affect the listed species identified herein and their habitat (including critical habitat) in SPRNCA in a manner that constitutes unauthorized "take" in violation of Section 9 of the ESA by killing, injuring, harming, harassing, and otherwise taking members of these species. Because BLM could eliminate (or at least significantly reduce) the risk of take by constructing and maintaining appropriate fencing—yet BLM refuses to do so despite countless complaints submitted by the Center documenting that a substantial level of take is occurring on lands administered by BLM—BLM is "caus[ing] to be committed" unlawful take of listed species. 16 U.S.C. § 1538(a), (g); see *also* 50 C.F.R. § 17.3 (clarifying that take includes not only "an intentional or negligent act" but also any "omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering"). Thus, BLM must timely construct and/or maintain appropriate fencing in order to halt its ongoing violation of that provision.

Because BLM has neither obtained lawful authorization for this substantial, ongoing take in the SPRNCA under the Section 7(a)(2) incidental take statement process, nor received a Section 10 incidental take permit authorizing any take of these species, BLM is repeatedly violating Section 9 in an ongoing manner through its actions and omissions in the SPRNCA.

The Center and Maricopa Audubon look forward to hearing from you in response to this Supplemental Notice. However, the Center will not delay the filing of a lawsuit if you continue failing to take appropriate corrective actions within sixty days of receiving this letter.

Eubanks & Associates, PLLC will represent the Center and Maricopa Audubon should litigation be necessary. Please note that if another lawsuit is necessary, we intend to begin discovery proceedings upon filing the Complaint.

If you have further questions, please contact Robin Silver, M.D., Center for Biological Diversity, P.O. Box 1178, Flagstaff, AZ 86002, by mail; by phone: (602) 799-3275, or by Email: rsilver@biologicaldiversity.org.

Sincerely,



Robin Silver, M.D.
Co-Founder and Board Member
Center for Biological Diversity