



November 4, 2014

Via Web and Certified U.S. Mail – Return Receipt Requested

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Re: Notice of Intent to Sue for Violations of the Endangered Species Act

The U.S. Forest Service (“USFS”) is hereby notified that the Center for Biological Diversity (“Center”) intends to file civil action, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), challenging ongoing violations of Sections 7 and 9 of the ESA, 16 U.S.C. § 1536 and 1538, resulting from: (1) failure to insure that land management actions are not likely to jeopardize the continued existence of the northern Mexican gartersnake (*Thamnophis eques megalops*) and the narrow headed gartersnake (*T. rufipunctatus*) (collectively, “the species”); (2) failure to consult with the U.S. Fish and Wildlife Service (“FWS”) regarding land management actions that may affect the species; (3) continued implementation of land management actions that may affect the species without required consultation; (4) continued implementation of land management actions that irreversibly or irretrievably commit resources and/or may foreclose the formulation or implementation of reasonable and prudent alternatives prior to completing required consultations regarding the species; and (5) ongoing or foreseeable unauthorized take of the species. These violations arise out of the USFS’s ongoing failure to address impacts to the two listed snake species from its planning and land management, allotment management, and grazing, vegetation, and soil management actions on six National Forests, including but not limited to those set out in detail in Tables 1-2 *infra*. Because to date there has been no legally-required consultation with the FWS regarding the effects of USFS actions on the continued existence of the two listed species, USFS is in continuing violation of 16 U.S.C. § 1536, and must immediately initiate and/or reinstate formal consultation with FWS to insure the survival of the two species.

Noticing party

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ESA requirements

Section 7 of the ESA requires federal agencies, including the USFS, in consultation with the FWS, 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 designated critical habitat of the listed 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 but not limited to actions directly or indirectly causing modifications to land, water or air. 50 C.F.R. § 402.02. Agencies must consult with the FWS on the impacts of any federal action to listed species or their critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.01-402.48.

This consultation process has four basic steps. First, an agency must inquire of the FWS whether any threatened or endangered species “may be present” in the area of an action. 16 U.S.C. § 1536(c)(1). If the answer is yes, the agency “shall” prepare a biological assessment (“BA”) to determine whether any listed species “is likely to be affected by the action.” *Id.*; 50 C.F.R. § 402.12. Third, if the BA determines that the action “may affect” a threatened or endangered species, the agency must initiate a process of “formal consultation” with the FWS. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14; *also see* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“may affect” includes “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character”). Fourth, following this formal consultation, the Service issues a biological opinion (“BO”) summarizing its findings and determining whether the proposed action is likely to jeopardize the continued existence of the species and/or result in adverse modification of designated critical habitat. 50 C.F.R. § 402.14(h). If the FWS finds the action likely to jeopardize the continued existence of the listed species, the BO must suggest “reasonable and prudent alternative” that could be taken by the action agency to avoid such jeopardy. 16 U.S.C. § 1536(b)(3)(A). “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 biological opinion.” 50 C.F.R. § 402.15(a).

Following initiation of consultation with the FWS, federal agencies are prohibited from making irreversible or irretrievable commitments of resources that may preclude reasonable and prudent alternatives for the conservation of threatened or endangered species. 16 U.S.C. § 1536(d). That prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Finally, Section 9 of the ESA prohibits unauthorized take of threatened or endangered species. 16 U.S.C. §§ 1538(a)(1); 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly to include all manner of harm or harassment to protected species, including both direct injury or mortality, and also acts and omissions which disrupt or impair significant behavioral patterns. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3.

Actions affecting the species

The northern Mexican gartersnake and narrow headed gartersnake are vertebrate species that were listed by the FWS as threatened under the ESA, 16 U.S.C. § 1533, on July 8, 2014.¹ The listing decision found that 24 out of 29 known populations of northern Mexican gartersnake and 31 out of 41 known populations of narrow headed gartersnake “are likely not viable and may exist at low population densities that could be threatened with extirpation or may already be extirpated.” 79 Fed. Reg. at 38,678, 38,681-83, 38,685-87. Numerous negative effects on the two species, their prey base, and vegetation cover in their riparian habitat occur as a result of livestock grazing:

Effects from historical or unmanaged grazing include: (1) Declines in the structural richness of the vegetative community; (2) losses or reductions of the prey base; (3) increased aridity of habitat; (4) loss of thermal cover and protection from predators; (5) a rise in water temperatures to levels lethal to larval stages of amphibian and fish development; and (6) desertification (Szaro *et al.* 1985, p. 362; Schulz and Leininger 1990, p. 295; Schlesinger *et al.* 1990, p. 1043; Belsky *et al.* 1999, pp. 8–11; Zwartjes *et al.* 2008, pp. 21–23).

Id. at 38,715. Northern Mexican and narrow headed gartersnakes suffer both direct mortality and loss of essential habitat and prey base due to livestock grazing in riparian areas:

Specifically, results indicated that snake abundance and biomass were significantly higher in ungrazed habitat, with a five-fold difference in number of snakes captured, despite the difficulty of making observations in areas of increased habitat complexity (Szaro *et al.* 1985, p. 360). Szaro *et al.* (1985, p. 362) also noted the importance of riparian vegetation for the maintenance of an adequate prey base and as cover in thermoregulation and predation avoidance behaviors, as well as for foraging success. Direct fatalities of amphibian species, in all life stages, from being trampled by livestock has been documented (Bartelt 1998, p. 96; Ross *et al.* 1999, p. 163). Gartersnakes may, on occasion, be trampled by livestock. A black-necked gartersnake (*Thamnophis cyrtopsis cyrtopsis*) had apparently been killed by livestock trampling along the shore of a stock tank in the Apache–Sitgreaves National Forest, within an actively grazed allotment (Chapman 2005).

Id. The USFS approved and is currently implementing numerous land management actions on the six specified Forests that may affect these species. In particular, livestock grazing on each of

¹ See 79 Fed. Reg. 38,678 (July 8, 2014).

the individual allotments shown in Tables 1 and 2 below is a primary threat to the continued existence of the species because it occurs within, adjacent to, and/or immediately upstream of riparian habitats that are presumed by the FWS to be occupied by the species at the time of listing.²

1. Northern Mexican gartersnake

The northern Mexican gartersnake is a riparian obligate species associated with three primary habitats: source area ponds and ciénegas, lowland river riparian forests and woodlands, and upland stream gallery forests. *See* 79 Fed. Reg. 38,678 (July 8, 2014). Habitat exists in shallow waters, banks and riparian vegetation of large river riparian woodlands and forests. *Id.* at 38,679. Artificial stock tanks also may be vital to the short-term conservation and recovery of the species. *Id.* at 38,715. The snake requires these elements of habitat: permanent water, vegetative cover and prey base. When vegetative cover is eliminated from otherwise suitable habitat, the animal is vulnerable to local extirpation. Loss of vegetative cover from livestock grazing in a single season can permanently eliminate snakes from that locality. Small, isolated populations are especially vulnerable to livestock grazing. *Id.* at 38,714-15. Prey of the northern Mexican gartersnake includes native amphibians and fishes whose populations continue to decline throughout the reptile's range. Declines in prey base have led to subsequent declines in the distribution and density of gartersnake populations. *Id.* at 38,715. Livestock grazing is documented as a suspected contributing factor in gartersnake declines in subbasins including the Verde, Salt, Agua Fria, San Pedro, Gila, and Santa Cruz. *Id.* Livestock grazing threatens the existence of gartersnake populations not only through loss of vegetative cover and prey base, but also through the spread of harmful nonnative species. *Id.* Table 1 below displays approved and ongoing USFS land management actions that may affect the northern Mexican gartersnake.

2. Narrow headed gartersnake

The narrow headed gartersnake is strongly associated with flowing water in perennial streams and associated riparian and upland habitats. 79 Fed. Reg. 38,678 (July 8, 2014). Narrow headed gartersnake requires the following elements of habitat: permanent water, vegetative cover and prey base. *Id.* at 38,683-84. The snake is vulnerable to local extirpation when vegetative cover is eliminated from otherwise suitable habitat. Loss of vegetative cover from livestock grazing in a single season can permanently eliminate snakes from that locality. Small, isolated populations are especially vulnerable to livestock grazing. *Id.* at 38,714-15. Prey of the narrow headed gartersnake primarily includes native fishes whose populations continue to decline throughout the reptile's range. Declines in prey base have led to subsequent declines in the distribution and density of gartersnake populations. *Id.* Livestock grazing is documented as a suspected contributing factor in gartersnake declines in subbasins including the Verde, Salt, Agua Fria, San Pedro, Gila, and Santa Cruz. *Id.* Livestock grazing threatens the existence of gartersnake populations not only through loss of vegetative cover and prey base, but also through the spread of harmful nonnative species. *Id.* The FWS determined that the narrow headed

² The Center developed Tables 1 and 2 by overlaying spatial data obtained from the FWS Critical Habitat Portal (<http://ecos.fws.gov/crithab/>) with data obtained from the USFS showing allotment locations. The map is available upon written request.

gartersnake may persist at up to 36 localities. *Id.* at 38,686-87. Table 2 below displays approved and ongoing USFS land management actions that may affect the narrow headed gartersnake.

Violations of ESA

The USFS has approved and is currently implementing actions in the livestock grazing allotments shown in Tables 1 and 2, respectively, any or all of which may affect the species without insuring that the actions will not jeopardize continued existence of the species in occupied habitats.³ To date, according to the best information available to the Center, the USFS has not consulted with the FWS regarding effects to the species that may result from actions listed in Tables 1 or 2, in violation of the ESA. 16 U.S.C. § 1536(a)(2); *also see Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp. 2d. 1115, 1142 (N.D. Cal. 2006) (“Section 7 of the ESA imposes an affirmative duty on a federal agency to ensure that any action it carries out will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat”).

The USFS has the responsibility under the ESA to certify that its actions will not jeopardize threatened or endangered species through consultation with the FWS. “An agency cannot ‘abrogate its responsibility to ensure that its actions will not jeopardize a listed species...’” *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). When a new species, such as the two gartersnakes, is listed, ESA § 7 and FWS regulations require reinitiation of formal consultation where, as in the case of national forest land and allotment management, federal agency involvement or control over the action is retained and/or authorized. 50 C.F.R. § 402.16.

Continued implementation of the actions listed in Tables 1 and 2, respectively, may affect the species without required consultation, in violation of the ESA. *Id.* By its ongoing failure to comply with the procedures required by Section 7 of the ESA for the actions listed in Tables 1 and 2, the Forest Service is failing to insure that these authorized actions and activities will not jeopardize the continued existence of the species. *Id.* Continued implementation of the actions listed in Tables 1 and 2, even after consultation is initiated, may violate Section 7(d) of the ESA by making irreversible and irretrievable commitments of resources that may foreclose consideration of reasonable and prudent alternatives. 16 U.S.C. § 1536(b), (d). Implementation of the actions listed in Tables 1 and 2 also may cause unauthorized take of the species, in violation of the ESA. 16 U.S.C. § 1538.

³ On July 10, 2013, the FWS published a proposed rule to designate critical habitat for each of the species at locations considered to be occupied based on the best available scientific information. 78 Fed. Reg. 41,550, 41,556 (“Critical habitat for both gartersnake species is being proposed in areas considered currently occupied”).

Table 1. Actions that may affect northern Mexican gartersnake.

Forest	Allotment	Forest	Allotment
<i>Apache-Sitgreaves NF</i>	Beaver Creek	<i>Gila NF</i>	Little Rough
	Fish Creek		Mangas/Silverdale
	Grandfather		Mule Creek
	Harden Cienega		Pleasanton
	PS		Potholes
	Sprucedale-Reno		Redstone
<i>Coconino NF</i>	West Fork	Tennessee	Watson Mountain
	Apache Maid	XSX	<i>Prescott NF</i>
	Fossil Creek	Antelope Hills	
	Hackberry-Pivot Rock	Brown Springs	
	Thirteen Mile Rock	China Dam	
	Walker Basin	Copper Canyon	
Windmill	Dugas		
<i>Coronado NF</i>	Windmill West	Horseshoe	Jerome
	Carrizo	Muldoon	Perkinsville
	Dark Canyon	Sand Flat	Squaw Peak
	Duquesne	Todd	V Bar
	Fresnal	Verde	West Bear/Del Rio
	Hayfield	Young	<i>Tonto NF</i>
	HQ	7/K	
	Jarillas	Cedar Bench	
	Lake	Christopher Mountain	
	Lone Mountain	Del Shay	
	Lyle Canyon	Diamond Butte	
	A-Draw	Ellinwood	
	Bender	Gisela	
	Blacktail	Green Valley	
	Campini	H-4	
	Canelo	Hardt Creek	
	Chuney	Indian Gardens	
	Collins Canyon	Red Creek	
	Crittenden	Sears Club/Chalk Mtn	
	Kunde	Seventy Six	
	Lochiel	Skeleton Ridge	
O'Donnell	Soldier Camp		
Papago	Star Valley		
Post Canyon	Tonto Basin		
San Rafael	Walnut		
Santa Cruz			
Sawtelle			
U-D			

Table 2. Actions that may affect narrow headed gartersnake.

Forest	Allotment	Forest	Allotment	Forest	Allotment
<i>Apache-Sitgreaves NF</i>	Alpine	<i>Apache-Sitgreaves NF, cont.</i>	Wildbunch	<i>Gila NF, cont.</i>	Govina
	Baseline-Horsesprings		Williams Valley		Harden Cienega
	Beaver Creek	<i>Coconino NF</i>	Apache Maid		Harve Gulch
	Bobcat-Johnson		Beaver Creek		Hermosa
	Bush Creek		Buck Springs		Holt Gulch
	Copperas		Fossil Creek		Indian Creek
	Cow Flat		Hackberry-Pivot Rock		Jordan Mesa
	Coyote-Whitmer		Ike's Backbone		Keller Canyon
	Double Circle		Thirteen Mile Rock		Kelly
	East Eagle		Walker Basin		Laney
	Fish Creek		Windmill		Leggett
	Fishhook-Steeple Mesa		Windmill West		Little Rough
	Grandfather	<i>Gila NF</i>	Alexander		Lower Plaza
	Harden Cienega		Alma		Luna
	Heber		Apache Canyon		Mangas/Silverdale
	Hickey		Big Horn		McCarty
	Long Tom		Black Bob		Negrito-Yeguas
	Lower Campbell Blue		Brock Canyon		Pleasanton
	Mud Springs		Canyon Creek		Potholes
	PS		Cedar Breaks		Pueblo Creek
Pigeon	Citizen		Reading Mountain		
Pleasant Valley	Copper Creek		Redstone		
Raspberry	Corner Mountain	Roberts Park			
Red Hill	Cross V	Sapillo			
San Francisco	Deep Canyon	South Fork			
Sandrock	Diamond Bar	Spar Canyon			
Sardine	Devils Park	T Bar			
Sprucedale-Reno	Dry Creek	Taylor Creek			
Tule	Eagle Peak	XSX			
Turkey Creek	East Apache Creek	Watson Mountain			
Upper Cambell Blue	Frisco Plaza	West Sand Flat			
West Fork	Gila River	Whiterocks			

Table 2, cont. Actions that may affect narrow headed gartersnake.

Forest	Allotment	Forest	Allotment
<i>Prescott NF</i>	Anetelope Hills	<i>Tonto NF, cont.</i>	Ellinwood
	Brown Springs		Gisela
	China Dam		Green Valley
	Copper Canyon		H-4
	Horseshoe		Haigler Creek
	Jerome		Hardt Creek
	Muldoon		Haystack Butte
	Perkinsville		Heber-Reno Driveway
	Sand Flat		Hicks-Pike Peak
	Squaw Peak		Indian Gardens
	Verde		Marsh Creek
	West Bear/Del Rio		O.W.
	Young		Payson
<i>Tonto NF</i>	American Gulch	Pine	
	Bar X	Poison Springs	
	Bull Springs	Pole Hollow	
	Cedar Bench	Red Creek	
	Christopher Mountain	Sedow	
	Chrysotile	Seventy Six	
	Colcord Canyon	Skeleton Ridge	
	Cross V	Soldier Camp	
	Dagger	Star Valley	
	Del Shay	Tonto Basin	
	Diamond Butte	Walnut	

Conclusion

The Center may take legal action 60 days following the date of this notice for the violations of the ESA described above, and may seek declaratory and injunctive relief as appropriate, as well as recovery of costs and expert and attorney fees. The Center has prepared this notice based on reasonably diligent investigation of relevant facts. If any of the foregoing is factually inaccurate, please notify me promptly to avoid unnecessary litigation.

The U.S. Supreme Court stated that the purpose of the 60-day notice requirement of the ESA is to encourage settlement among parties and avoid litigation. In that spirit, I encourage you to contact me at the address or phone number shown below to resolve this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jay Lininger". The signature is stylized and cursive.

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