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14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE DISTRICT OF ARIZONA**  
16 **TUCSON DIVISION**

17 Center for Biological Diversity; and ) Case No.:  
18 Maricopa Audubon Society, )  
19 Plaintiffs, ) **COMPLAINT FOR**  
20 v. ) **DECLARATORY AND**  
21 U.S. Bureau of Land Management; and ) **INJUNCTIVE RELIEF**  
22 U.S. Fish and Wildlife Service, )  
23 Defendants. )

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**INTRODUCTION**

1. Plaintiffs Center for Biological Diversity and Maricopa Audubon Society (collectively, “the Center”) challenge Defendants’ United States Bureau of Land Management (“BLM”) and United States Fish and Wildlife Service (“FWS”) ongoing failure to adequately protect and conserve numerous threatened and endangered species that are being harmed by livestock grazing within the Gila Box Riparian National Conservation Area (“Gila Box RNCA”) in Arizona, in violation of the Endangered Species Act (“ESA”), including the desert pupfish, Gila chub, Gila topminnow, loach minnow, spikedace, and yellow-billed cuckoo.

2. More specifically, the Center challenges the ongoing failure of the BLM and FWS to reinitiate and complete ESA Section 7 consultation regarding the ongoing impacts of livestock grazing on the Bonita Creek, Johnny Creek, Zorilla, Gila, Morenci, and Bull Gap Allotments, within the Gila Box RNCA, on threatened and endangered species and their critical habitat.

3. The Center seeks declaratory relief that the BLM and FWS are in ongoing violation of the ESA for failing to reinitiate and complete ESA consultation on the Bonita Creek, Johnny Creek, Zorilla, Gila, Morenci, and Bull Gap Allotments. The Center also seeks injunctive relief to ensure adequate interim protection for the threatened and endangered species, and their critical habitat, until the BLM and FWS are in full compliance with the ESA.



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**PARTIES**

8. Plaintiff Center for Biological Diversity is a 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 endangered species and habitat protection issues nationwide. The Center has over 89,000 members throughout the United States and the world, including staff and members within Arizona.

9. The Center for Biological Diversity has a long history of working to protect and conserve the many threatened and endangered species that are located on and depend on federal lands within Arizona. This includes submitting petitions under Section 4 of the ESA to compel FWS to designate species as threatened or endangered, and to designate their critical habitat. This also includes working to ensure adequate protection for these species and habitats from federal agency actions, including from livestock grazing on federal lands.

10. The Center for Biological Diversity brings this action on its own behalf, and on behalf of its members who derive aesthetic, recreational, inspirational, spiritual, scientific, and educational benefits from the Gila Box RNCA, including the areas and habitat where threatened and endangered species may be found. The Center’s members who regularly use and enjoy the Gila Box RNCA include, but are not limited to, Chris Bugbee, Robin Silver, and Todd Schulke.

1           11. The Center for Biological Diversity’s members, including but not limited to  
2 Chris Bugbee, Robin Silver, and Todd Schulke, use and enjoy the Gila Box RNCA for a  
3 variety of purposes, including hiking, camping, photographing scenery and wildlife,  
4 viewing wildlife and signs of wildlife, and engaging in other scientific and recreational  
5 activities. The areas of the Gila Box RNCA that the Center’s members use and enjoy  
6 include specific areas where threatened and endangered species may be found. The  
7 Center’s members’ use and enjoyment of these areas is significantly enhanced knowing  
8 that these threatened and endangered species are still likely to be present in these areas.  
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10           12. The Center for Biological Diversity’s members, including Chris Bugbee,  
11 Robin Silver, and Todd Schulke, intend to continue to use and enjoy the Gila Box RNCA  
12 frequently and on an ongoing basis in the future, including during the fall and winter of  
13 2021-22. The areas of the Gila Box RNCA that the Center’s members intend to continue  
14 to use and enjoy include specific areas where threatened and endangered species are  
15 likely to be found. The aesthetic, recreational, inspirational, spiritual, scientific, and  
16 educational interests of the Center’s members have been and will continue to be  
17 adversely affected and irreparably injured if Defendants’ ongoing violations of the ESA  
18 and FOIA continue. These are actual, ongoing, concrete injuries caused by Defendants’  
19 violations of the ESA and FOIA. The relief sought will redress these injuries.  
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21           13. Plaintiff Maricopa Audubon Society is a non-profit organization dedicated  
22 to the enjoyment of riparian wildlife and plant species with a primary focus on the  
23 protection and restoration of southwestern riparian habitat through fellowship, education,  
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1 and community involvement. Maricopa Audubon is a chapter of the National Audubon  
2 Society. Maricopa Audubon has over 2,300 members, primarily in central Arizona,  
3 including Robin Silver, who also works on its board.  
4

5 14. Maricopa Audubon Society has undertaken ongoing efforts to protect  
6 habitats for imperiled species throughout the arid southwest. Maricopa Audubon has  
7 played a strong role in protecting endangered and threatened species in the southwest  
8 through public education efforts, field surveys, public field trips, and position papers.  
9 Maricopa Audubon has been intimately involved in riparian protection efforts throughout  
10 the southwest since the mid-1970s. For example, on February 2, 1998, Maricopa  
11 Audubon was a petitioner with the Center for Biological Diversity for federal endangered  
12 species listing protection for the southwestern yellow-billed cuckoo. This action resulted  
13 in designation of the cuckoo as threatened by the U.S. Fish and Wildlife Service on  
14 October 3, 2014. In addition, Maricopa Audubon conducts field trips with members of  
15 the organization and non-members from the general public to critical habitat areas of  
16 species listed under the ESA, including the cuckoo.  
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21 15. Maricopa Audubon Society brings this action on behalf of itself and its  
22 adversely affected members, including but not limited to Robin Silver. The educational,  
23 scientific, aesthetic, conservation, and recreational interests of Maricopa Audubon's  
24 members within the Gila Box RNCA, including Robin Silver, have been and continue to  
25 be harmed. Maricopa Audubon's members intend to continue using and enjoying the  
26 Gila Box RNCA, including this fall and winter. Unless the Court grants the requested  
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1 relief, Maricopa Audubon’s members will continue to be adversely affected and  
2 irreparably injured by Defendants’ failures to comply with the law. The requested relief  
3 would redress these injuries.  
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5 16. Defendant U.S. Bureau of Land Management (“BLM”) is an agency within  
6 the U.S. Department of the Interior. It and its officers are responsible for the lawful  
7 management of the Gila Box RNCA.  
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9 17. Defendant U.S. Fish and Wildlife Service (“FWS”) is an agency within the  
10 U.S. Department of the Interior. It and its officers are responsible for administering the  
11 ESA, particularly regarding potential impacts to wildlife and fish species that have been  
12 listed as threatened or endangered with extinction pursuant to the ESA.  
13

## 14 **LEGAL BACKGROUND**

### 15 **I. The Endangered Species Act**

16 18. Congress enacted the ESA in 1973 to provide “a program for the  
17 conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b).  
18 Section 2(c) of the ESA establishes that it is the policy of Congress that all federal  
19 agencies shall seek to conserve threatened and endangered species, and shall utilize their  
20 authorities in furtherance of the purposes of the ESA. 16 U.S.C. § 1531(c)(1).  
21

22 19. The ESA defines “conservation” to mean “the use of all methods and  
23 procedures which are necessary to bring any endangered species or threatened species to  
24 the point at which the measures provided pursuant to this Act are no longer necessary.”  
25 16 U.S.C. § 1532(3).  
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1           20.     Section 4 of the ESA directs the Secretary of the Interior to list species that  
2 are threatened or endangered with extinction, and to designate “critical habitat” for such  
3 species. 16 U.S.C. § 1533(a). “Critical habitat” is the area that contains the physical or  
4 biological features essential to the “conservation” of the species and which may require  
5 special protection or management considerations. 16 U.S.C. § 1532(5)(A).  
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8           21.     Section 7(a)(2) of the ESA requires each federal agency, in consultation  
9 with FWS, to ensure that any action authorized, funded, or carried out by the agency is  
10 not likely to jeopardize the continued existence of any threatened or endangered species,  
11 or result in the destruction or adverse modification of the critical habitat of such species.  
12 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include all activities or programs  
13 of any kind authorized, funded, or carried out by federal agencies, including actions  
14 directly or indirectly causing modifications to the land, water, or air; and actions intended  
15 to conserve listed species or their habitat. 50 C.F.R. § 402.02.  
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18           22.     During Section 7 consultation, both the action agency and FWS must use  
19 the best scientific data available. 16 U.S.C. § 1536(a)(2).  
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21           23.     For each proposed action, the action agency must request from FWS  
22 whether any listed or proposed species may be present in the area of the proposed action.  
23 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If listed or proposed species may be  
24 present, the action agency must prepare a “biological assessment” to determine whether  
25 the listed species may be affected by the proposed action. 16 U.S.C. § 1536(c)(1); 50  
26 C.F.R. § 402.12.  
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1           24. If the action agency determines that its proposed action may affect any  
2 listed species or critical habitat, the agency must engage in “formal consultation” with  
3 FWS. 50 C.F.R. § 402.14(a). To complete formal consultation, FWS must provide the  
4 action agency with a “biological opinion” explaining how the proposed action will affect  
5 the listed species or critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h).  
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8           25. If FWS concludes in the biological opinion that the proposed action is  
9 likely to jeopardize the continued existence of a listed species, or result in the destruction  
10 or adverse modification of critical habitat, FWS must outline “reasonable and prudent  
11 alternatives” to the proposed action that FWS believes would not jeopardize listed species  
12 or result in the destruction or adverse modification of critical habitat. 16 U.S.C. §  
13 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2).  
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15           26. If FWS concludes in the biological opinion that the proposed action is not  
16 likely to jeopardize the continued existence of a listed species, or result in the destruction  
17 or adverse modification of critical habitat, FWS must provide an “incidental take  
18 statement” along with the biological opinion, specifying the amount or extent of such  
19 incidental taking on the species, any “reasonable and prudent measures” that FWS  
20 considers necessary or appropriate to minimize such impact, and setting forth the “terms  
21 and conditions” that must be complied with by the action agency to implement those  
22 measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).  
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26           27. The reinitiation of formal consultation under the ESA is required and must  
27 be requested by FWS or the action agency where discretionary federal involvement or  
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1 control over the action has been retained or is authorized by law, and if (1) the amount or  
2 extent of taking specified in the incidental take statement is exceeded; (2) new  
3 information reveals effects of the action that may affect listed species or critical habitat in  
4 a manner or to an extent not previously considered; (3) the action is modified in a manner  
5 that causes an effect to the listed species or critical habitat that was not considered in the  
6 biological opinion; or (4) a new species is listed or critical habitat designated that may be  
7 affected by the identified action. 50 C.F.R. § 402.16(a).

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

15 29. Section 9 of the ESA and its implementing regulations prohibit the  
16 unauthorized “take” of any endangered or threatened species of fish or wildlife. 16  
17 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly  
18 to include harming, harassing, trapping, capturing, wounding or killing a protected  
19 species either directly or by degrading its habitat. 16 U.S.C. § 1532(19). Taking that is  
20 in compliance with the terms and conditions of an ITS in a biological opinion is exempt  
21 from the Section 9 take prohibition. 16 U.S.C. § 1536(o)(2).

1 **II. The Freedom of Information Act**

2 30. The purpose of the Freedom of Information Act (“FOIA”) is government  
3 transparency. FOIA establishes the public’s right to access all federal agency records  
4 unless such records may be withheld pursuant to one of nine, narrowly construed  
5 exemptions. 5 U.S.C. § 552(b)(1)-(9).  
6

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8 31. FOIA imposes strict deadlines on federal agencies. Within 20 working  
9 days of receiving a FOIA request, an agency must determine whether to disclose  
10 responsive records and notify the requester of its determination, and it must then make  
11 records “promptly” available unless it can establish that certain unusual circumstances  
12 are present and/or that it may lawfully withhold records, or portions thereof, from  
13 disclosure. 5 U.S.C. § 552(a)(3)(A), (a)(6). Also within 20 working days, the agency  
14 must inform the requester that it has a right to appeal the agency’s determination. *Id.* §  
15 552(a)(6)(A)(i).  
16

17  
18 32. FOIA places the burden on the agency to prove that it may withhold  
19 responsive records from a requester. 5 U.S.C. § 552(a)(4)(B).  
20

21 33. Congress has specified limited circumstances in which federal agencies  
22 may obtain more time to make the determination that is required by 5 U.S.C. §  
23 552(a)(6)(A)(i).  
24

25 34. First, an agency may toll the 20-working-day deadline to seek additional  
26 information or clarification from a requester, but that tolling period ends when the agency  
27 receives such information or clarification. 5 U.S.C. § 552(a)(6)(A).  
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1           35.     Second, an agency may extend the 20-working-day deadline for an  
2 additional 10 working days by providing written notice to the requester that sets forth  
3 “unusual circumstances” to justify a deadline extension, and also providing the date by  
4 which the agency expects to make the determination. 5 U.S.C. § 552(a)(6)(B)(i). To  
5 invoke such “unusual circumstances,” the agency must provide the requester with “an  
6 opportunity to limit the scope of the request so that it may be processed within [20  
7 working days] or an opportunity to arrange with the agency an alternative time frame for  
8 processing the request or a modified request.” *Id.* § 552(a)(6)(B)(ii).

9           36.     FOIA requires each agency to make reasonable efforts to search for records  
10 in a manner that is reasonably calculated to locate all records that are responsive to the  
11 FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D).

12           37.     FOIA requires federal agencies to expeditiously disclose requested records,  
13 *see* 5 U.S.C. § 552, and mandates a policy of broad disclosure of government records.  
14 Any inquiry under FOIA brings with it a strong presumption in favor of disclosure.

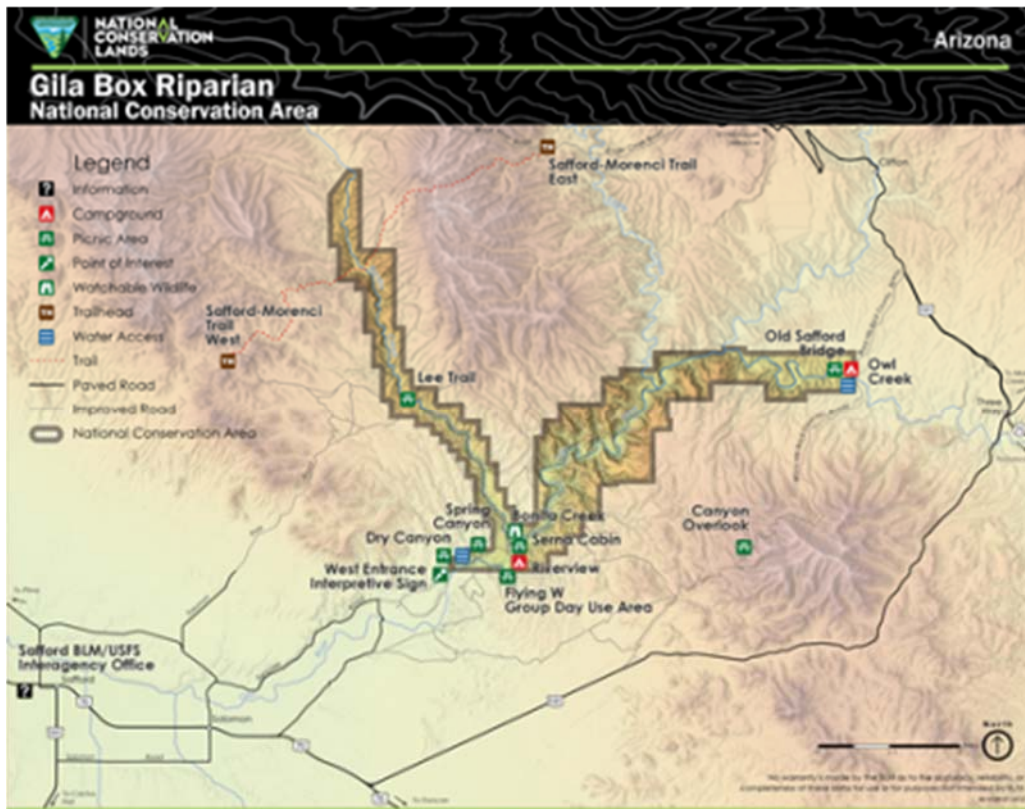
15           38.     Congress recognized that in certain, limited instances, records may be  
16 withheld as exempt from FOIA’s broad disclosure mandate, and thus it created nine  
17 categories of exemptions. 5 U.S.C. § 552(b). These exemptions, however, must be  
18 narrowly construed in light of FOIA’s objective of disclosure, not secrecy.

19           39.     United States district courts have jurisdiction “to enjoin the agency from  
20 withholding agency records and to order the production of any agency records improperly  
21 withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

**FACTUAL BACKGROUND**

**I. The Gila Box Riparian National Conservation Area**

40. The Arizona Desert Wilderness Act of 1990 established the Gila Box Riparian National Conservation Area (“RNCA”). The Gila Box RNCA includes four perennial waterways, the Gila and San Francisco rivers and Bonita and Eagle creeks. The Gila Box RNCA was established in order to conserve, protect, and enhance its riparian and associated areas, and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, recreational, educational, scenic, and other resources and values of such areas. 16 U.S.C. § 460ddd(a).



1           41.    The Gila Box RNCA consists of scenic, steep-walled desert canyons  
2 surrounding perennial rivers and creeks, and is one of the most significant riparian zones  
3 in the southwest.  
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5           42.    The BLM was required to develop a comprehensive management plan for  
6 the Gila Box RNCA. 16 U.S.C. § 460ddd(g). The BLM completed the Gila Box RNCA  
7 Management Plan in 1998.  
8

9           43.    The Gila Box RNCA Management Plan directs that livestock will be  
10 deferred from the riparian areas within the RNCA for the life of the Plan. According to  
11 the Plan, this deferment of grazing best meets the statutory mandate to conserve, protect,  
12 and enhance the riparian areas, and provides the best protection for natural and cultural  
13 resources.  
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15           44.    Pursuant to the Gila Box RNCA Management Plan, riparian corridors may  
16 only be used on a very limited basis to trail livestock as part of pasture rotations that are  
17 implemented to achieve RNCA management goals and objectives.  
18

19           45.    Pursuant to the Gila Box RNCA Management Plan, the BLM must work  
20 closely with livestock operators to remove livestock and repair fencing as quickly as  
21 possible when incidental trespasses occur.  
22

23           46.    The Gila Box RNCA Management Plan requires the BLM to monitor  
24 populations and habitats of threatened and endangered species. This includes population  
25 estimate surveys for Gila chub within lower Bonita Creek, in order to determine the  
26 population stability and viability in the upper and lower reaches of the creek.  
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1           47. For the Johnny Creek allotment, the Gila Box RNCA Management Plan  
2 prohibits livestock use in the riparian area along Bonita Creek.  
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4           48. For the Bonita Creek allotment, the Gila Box RNCA Management Plan  
5 prohibits livestock use within the riparian areas along Bonita Creek and the Gila River.  
6 Grazing was required to be discontinued on approximately 1,900 acres of upland habitat  
7 until fencing was constructed that would exclude livestock from Bonita Creek.  
8

9           49. For the Bull Gap allotment, the Gila Box RNCA Management Plan  
10 prohibits livestock use within the riparian areas along Bonita Creek and the Gila River.  
11

12           50. For the Gila and Morenci allotments, the Gila Box RNCA Management  
13 Plan prohibits livestock use on public land in the riparian areas along the Gila River.  
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15           51. For the Zorilla allotment, the Gila Box RNCA Management Plan requires a  
16 quarter mile of fence to exclude livestock from accessing the Gila River.

17 **II. The 2012 Biological Opinion on the Gila District Livestock Grazing Program**

18           52. On May 21, 2012, FWS issued the “Biological Opinion on the Gila District  
19 Livestock Grazing Program” (“2012 Biological Opinion”). The 2012 Biological Opinion  
20 covered three previous livestock grazing consultations: (1) the programmatic biological  
21 opinion for the Safford/Tucson Field Offices’ livestock grazing program; (2) the  
22 biological opinions for the Phoenix District Portion of the Eastern Arizona Grazing EIS  
23 and the Upper Gila-San Simon Grazing EIS; and (3) the biological opinion for livestock  
24 grazing on 18 allotments along the Middle Gila River Ecosystem.  
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1           53.     The BLM’s management of the Gila Box RNCA, including the Bonita  
2 Creek, Johnny Creek, Zorilla, Gila, Morenci, and Bull Gap Allotments, is included within  
3 the 2012 Biological Opinion.  
4

5           54.     FWS acknowledges within the 2012 Biological Opinion that livestock  
6 grazing can adversely affect watersheds that support the aquatic and riparian habitats in  
7 which threatened and endangered fish occur. For instance, trampling by livestock can  
8 alter vegetation composition, increase erosion and sedimentation into streams, and  
9 increase flood events. Grazing can promote invasion by non-native plant species.  
10 Livestock trample and destroy cryptobiotic crusts, which help stabilize soils and provide  
11 soil nutrients. In extreme situations, these actions can decrease or extirpate populations  
12 from specific areas.  
13

14           55.     The 2012 Biological Opinion includes a number of “conservation  
15 measures,” which the BLM must implement in order to reduce the adverse effects to  
16 threatened and endangered species, and critical habitat, from livestock grazing. The  
17 general conservation measures, which were required to be implemented for all livestock  
18 grazing actions, include (1) submitting an annual monitoring report to FWS, summarizing  
19 for the previous year the implementation and effectiveness of the measures and  
20 documenting incidental take; (2) working to remove unauthorized livestock from  
21 excluded areas, including contacting the owner of the livestock as soon as possible after  
22 the unauthorized use of livestock is reported and request removal; (3) working as quickly  
23 as practical to repair enclosure fences or notify permittees to repair fences; and (4)  
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1 inspecting fences that are used for excluding livestock from BLM managed riparian areas  
2 before livestock are turned out.

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4 56. For threatened and endangered fish, the 2012 Biological Opinion includes  
5 additional conservation measures, including requiring the BLM to monitor, at least  
6 annually, (1) aquatic habitat variables, riparian vegetation, and streambanks as they relate  
7 to livestock management and unauthorized livestock use; and (2) the populations of Gila  
8 topminnow, desert pupfish, loach minnow, spikedace, Little Colorado spinedace, and  
9 Gila chub.

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11 57. For the desert pupfish and Gila topminnow, the 2012 Biological Opinion  
12 includes additional conservation measures, including requiring the BLM to ensure the  
13 timely repair and maintenance of structures required to maintain aquatic ecosystem  
14 function.

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16 58. The Bonita Creek, Johnny Creek, and Bull Gap Allotments border or  
17 include portions of Bonita Creek.

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19 59. According to the 2012 Biological Opinion, the desert pupfish, Gila chub,  
20 Gila topminnow, loach minnow, and spikedace are found within Bonita Creek.

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22 60. The Gila River is likely occupied by the razorback sucker, and Bonita  
23 Creek is possibly occupied by the sucker.

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25 61. FWS states in the 2012 Biological Opinion that grazing has been excluded  
26 from all riparian areas administered by the BLM within the Bonita Creek, Johnny Creek,  
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1 and Bull Gap Allotments, with the exception that the BLM authorizes annual livestock  
2 drives down the riparian corridor on the Bonita Creek Allotment.  
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4 62. FWS concluded in the 2012 Biological Opinion that the BLM's grazing  
5 program is not likely to jeopardize the continued existence of any listed species, and is  
6 not likely to destroy or adversely modify any critical habitat.  
7

8 63. For the desert pupfish, FWS based it's no jeopardy and no adverse  
9 modification determination in part on the fact that (1) few or no direct effects to the  
10 pupfish were expected in the Johnny Creek or Bull Gap Allotments because pupfish  
11 populations are within livestock exclosures or livestock is not currently proposed on the  
12 allotment; (2) few direct effects were anticipated in the Bonita Creek Allotment because  
13 only trailing once or twice per year would occur through Bonita Creek; (3) pupfish  
14 populations are protected from grazing; and (4) conservation measures will be  
15 implemented, including maintaining exclosures and having livestock removed from  
16 exclosures as soon as possible.  
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19 64. For the Gila chub, FWS based it's no jeopardy and no adverse modification  
20 determination in part on the fact that (1) few or no direct effects to the chub were  
21 expected in the Bonita Creek Allotment because current populations are inaccessible to  
22 livestock because of topography or exclosures; and (2) few direct effects were anticipated  
23 in the Bonita Creek Allotment because the only grazing activities in the stream were from  
24 trailing through Bonita Creek once or twice per year.  
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1           65. For the Gila topminnow, FWS based it's no jeopardy and no adverse  
2 modification determination in part on the fact that (1) few direct effects to the topminnow  
3 were expected in the Johnny Creek or Bull Gap Allotments because current populations  
4 are inaccessible to livestock; (2) few direct effects were anticipated in the Bonita Creek  
5 Allotment because only trailing once or twice per year would occur through Bonita  
6 Creek; (3) topminnow populations are protected from grazing; and (4) conservation  
7 measures will be implemented, including having livestock removed from exclosures as  
8 soon as possible.  
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11           66. For the loach minnow, FWS based it's no jeopardy and no adverse  
12 modification determination in part on the fact that (1) few or no direct effects to the loach  
13 minnow were expected because the populations are excluded from livestock, the  
14 allotment does not have livestock, or only trailing once or twice a year would occur; and  
15 (2) conservation measures will be implemented, including having livestock removed  
16 from exclosures as soon as possible.  
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19           67. For the spokedace, FWS based it's no jeopardy and no adverse modification  
20 determination in part on the fact that (1) few or no direct effects to the spokedace were  
21 expected because the populations are excluded from livestock, the allotment does not  
22 have livestock, or only trailing once or twice a year would occur; and (2) conservation  
23 measures will be implemented, including having livestock removed from exclosures as  
24 soon as possible.  
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1           68. For the razorback sucker, FWS based it's no jeopardy and no adverse  
2 modification determination in part on the fact that the BLM will implement actions that  
3 eliminate or reduce the adverse effects to the sucker and its critical habitat, such as  
4 exclusions, seasonal restrictions, and other actions that minimize livestock use along and  
5 near the water.  
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8           69. FWS determined in the 2012 Biological Opinion that the incidental take of  
9 Gila chub is not reasonably certain to occur in the Bonita Creek Area because the areas  
10 that have chub now or in the future are excluded from livestock grazing and trailing of  
11 livestock would take place only once or twice a year across the creek and in a very small  
12 portion of the creek.  
13

14           70. FWS determined in the 2012 Biological Opinion that the incidental take of  
15 loach minnow and spikedace is not reasonably certain to occur in Bonita Creek from  
16 livestock use or trailing because grazing is not permitted in the creek, and trailing will  
17 take place infrequently and in a very small portion of the creek.  
18

19           71. The Gila River, within the Gila Box RNCA and within the Zorilla, Gila,  
20 Morenci, Bull Gap, and Bonita Creek Allotments, has been formally designated by FWS  
21 as critical habitat for the yellow-billed cuckoo.  
22

23 **III. New information reveals effects of livestock grazing on the Gila Box RNCA in**  
24 **a manner and to an extent not considered in the 2012 Biological Opinion.**

25           72. Between April 21 and June 1, 2021, staff of the Center for Biological  
26 Diversity conducted field surveys of approximately 20 miles of habitat along the Gila  
27 River and its tributaries within the Gila Box RNCA.  
28

1           73.     The Center’s surveys documented cattle throughout the Gila Box RNCA,  
2 including in major tributaries such as Bonita Creek. The Center’s surveys documented  
3 numerous cows and cattle grazing damage along riparian corridors that were supposed to  
4 be protected from grazing.  
5

6           74.     The Center’s surveys found that FWS’ assumption in the 2012 Biological  
7 Opinion that livestock impacts would be limited in Bonita Creek to only biannual  
8 crossings is not accurate.  
9

10          75.     Within the Bonita Creek Allotment, the Center’s surveys found that cattle  
11 impacts increased in severity and frequency along Bonita Creek as the surveyors moved  
12 upstream towards the San Carlos Apache Reservation. Cattle trails were found through  
13 the survey area, including onto the Johnny Creek Allotment. In numerous areas within  
14 the Bonita Creek Allotment, riparian habitat was heavily browsed, cattle feces polluted  
15 the water, shorelines were trampled, and soils were barren and compacted.  
16  
17

18          76.     Within the Zorilla Allotment, the Center’s surveys found that streambanks  
19 and uplands along the Gila River were nearly completely severely degraded and  
20 damaged. There was little grass remaining along the Gila River. And there was no  
21 functional boundary fencing between the Zorilla and Gila Allotments, as cattle trails  
22 passed throughout the area.  
23

24          77.     Within the Gila Allotment, the Center’s surveys found that large swaths of  
25 riparian habitat were denuded and devoid of grass and understory vegetation. Chronic  
26  
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1 and acute cattle grazing impacts indicated a sustained cattle presence. Streambanks were  
2 chiseled and shorelines were heavily trampled and degraded.

3  
4 78. Within the Morenci Allotment, the Center's surveys found many more  
5 miles of barren understory and degraded riverbanks.

6  
7 79. Within the Bull Gap Allotment, the Center's surveys found widespread  
8 areas of severely damaged streamside and upland habitat. The surveyors found huge  
9 swaths of bare soil with dust bowl-like conditions.

10  
11 80. Along Bonita Creek, the Center's surveys found that there was a seamless  
12 movement of cattle between private and BLM lands, without the required protective  
13 boundary fencing to protect the BLM lands.

14  
15 81. Along the Gila River, in proximity to the intersection between the Twin C,  
16 Bull Gap, Tollgate and Bonita Creek allotments, the Center documented severe cattle  
17 impacts similar to other heavily damaged Gila Box RNCA areas. This area is not within a  
18 designated allotment but is also being heavily damaged by grazing.

19  
20 82. The following are a sampling of images taken by Center staff during the  
21 surveys between April 21 to June 1, 2021 at the Gila Box RNCA. Numerous additional  
22 images were included and provided to the agencies within the Center's notice letter.  
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Severe grazing, ground compaction and bank degradation by along Bonita Creek within GBRNCA, 33.042306, -109.561711, June 1, 2021.



A cow along Bonita Creek, 33.044788, -109.560799, June 1, 2021.

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Cows along Bonita Creek on the Johnny Creek Allotment, 33.010108, -109.553535, May 31, 2021.



Cattle feces and denuded streamside habitat along the Gila River on the Zorilla Allotment, 32.964801, -109.322019, April 21, 2021.



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Streambank trampling and degradation caused by cattle grazing on the Zorilla Allotment, 32.966205, -109.312663, April 21, 2021.



Trampling and streambank degradation impacting willow seedlings along the Gila River on the Gila Allotment, 32.972803, -109.35173, April 22, 2021.

1 **IV. A new species has been listed, and critical habitat designated, that may be adversely**  
2 **affected by livestock grazing on the Gila Box RNCA.**

3 83. Subsequent to the 2012 Biological Opinion, on October 3, 2014, FWS  
4 designated the western yellow-billed cuckoo as a threatened species under the ESA. 79  
5 Fed. Reg. 59,992 (Oct. 3, 2014).  
6

7 84. On April 21, 2021, FWS designated critical habitat for the western yellow-  
8 billed cuckoo. 86 Fed. Reg. 20,798 (April 21, 2021).  
9

10 85. The western yellow-billed cuckoo is found within the Gila Box RNCA.  
11 Designated critical habitat for the western yellow-billed cuckoo is found within the Gila  
12 Box RNCA.  
13

14 86. Ongoing livestock grazing on the Bonita Creek, Johnny Creek, Zorilla,  
15 Gila, Morenci, and Bull Gap Allotments, within the Gila Box RNCA, may adversely  
16 affect the western yellow-billed cuckoo and its designated critical habitat.  
17

18 87. FWS did not consider or address within the 2012 Biological Opinion the  
19 potential adverse impacts of livestock grazing within the Gila Box RNCA on the western  
20 yellow-billed cuckoo or its critical habitat.  
21

22 **V. The Center's ESA Notice Letter**

23 88. On July 21, 2021, the Center sent a detailed sixty-day notice letter to the  
24 Secretary of Interior, FWS, and the BLM, identifying the ESA violations included in this  
25 Complaint, pursuant to the citizen suit provision of the ESA. 16 U.S.C. § 1540(g).  
26

27 89. More than sixty days has passed since Defendants' receipt of the notice  
28 letter. Defendants have not responded to the notice letter.

1 **VI. The Center’s March 3, 2021 and May 24, 2021 Freedom of Information Act**  
2 **(“FOIA”) Requests**

3 90. On March 3, 2021, the Center submitted a request for records to the BLM  
4 pursuant to FOIA. The Center requested records regarding the Gila Box RNCA, including but  
5 not limited to annual monitoring reports, allotment management plans, wildlife reports and  
6 analysis, consultations, and records concerning trespass and unauthorized livestock.  
7

8 91. On May 24, 2021, the Center submitted another request for records to the BLM  
9 pursuant to FOIA. The Center requested records related to the Bonita Creek Allotment, within  
10 the Gila Box RNCA, including the allotment management plan, operating instructions, and  
11 drought instructions.  
12

13 92. The Center sent emails to the BLM to inquire about the status of the March 3,  
14 2021 FOIA request and the May 24, 2021 FOIA request. The Center sent letters to the BLM,  
15 notifying the agency that it is in violation of FOIA concerning the Center’s March 3, 2021 FOIA  
16 request and the May 24, 2021 FOIA request.  
17

18 93. At this time, the BLM has not provided any records to the Center in response to  
19 the March 3, 2021 FOIA request, or the May 24, 2021 FOIA request.  
20

21 **CLAIMS FOR RELIEF**

22 **FIRST CLAIM FOR RELIEF**

23 **The BLM and FWS are in Ongoing Violation of the ESA for Failing to Reinitiate and**  
24 **Complete Consultation on the Ongoing Impacts of the Bonita Creek, Johnny Creek,**  
**Zorilla, Gila, Morenci, and Bull Gap Allotments within the Gila Box RNCA**

25 94. The Center incorporates by reference all preceding paragraphs.  
26

27 95. Section 7 of the ESA requires the BLM to consult with FWS to ensure that  
28 any action authorized, funded, or carried out by the agency is not likely to jeopardize the

1 continued existence of any threatened or endangered species, or result in the destruction  
2 or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2).  
3

4 96. The reinitiation of consultation is required and must be requested by FWS  
5 or the BLM where discretionary federal involvement or control over the action has been  
6 retained or is authorized by law, and if new information reveals effects of the action that  
7 may affect listed species or critical habitat in a manner or to an extent not previously  
8 considered, the action is modified in a manner that causes an effect to the listed species or  
9 critical habitat that was not considered in the biological opinion, or a new species is listed  
10 or critical habitat designated that may be affected by the identified action. 50 C.F.R. §  
11 402.16(a).  
12  
13

14 97. The BLM and FWS have violated and remain in ongoing violation of the  
15 ESA by failing to reinitiate and complete consultation on the impacts of livestock grazing  
16 on the Bonita Creek, Johnny Creek, Zorilla, Gila, Morenci, and Bull Gap Allotments  
17 within the Gila Box RNCA despite significant new information and newly listed species  
18 and critical habitat revealing that livestock grazing on the Allotments has adversely  
19 affected, and will continue to adversely affect, threatened and endangered species and  
20 their critical habitat in a manner and to an extent not considered within the 2012  
21 Biological Opinion. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a).  
22  
23

24 98. The ongoing failure of the BLM and FWS to reinitiate and complete  
25 consultation on the ongoing impacts of the Bonita Creek, Johnny Creek, Zorilla, Gila,  
26  
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1 Morenci, and Bull Gap Allotments on threatened and endangered species, and critical  
2 habitat, violates the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a).

3  
4 99. In the absence of the required reinitiated consultation, the BLM is in  
5 ongoing violation of its obligation under Section 7 of the ESA to ensure that its actions  
6 are not likely to jeopardize the continued existence of the numerous threatened and  
7 endangered species assessed in the 2012 Biological opinion, including the desert pupfish,  
8 Gila chub, Gila topminnow, loach minnow, spikedace, and yellow-billed cuckoo or result  
9 in the destruction or adverse modification of any designated critical habitat. 16 U.S.C. §  
10 1536(a)(2).  
11  
12

### 13 **SECOND CLAIM FOR RELIEF**

14 The BLM Violated FOIA by Failing to Provide a Timely or Adequate Determination  
15 regarding the Center's March 3, 2021 FOIA Request.

16 100. The Center incorporates by reference all preceding paragraphs.

17  
18 101. The Center has a statutory right to have BLM process its FOIA requests in  
19 a manner that complies with FOIA. 5 U.S.C. § 552(a)(3).

20 102. The Center's rights in this regard were violated when BLM unlawfully  
21 delayed the response to the Center's March 3, 2021 FOIA request beyond the  
22 determination deadlines imposed by FOIA. 5 U.S.C. § 552(a)(6)(A)(i), (ii).

23  
24 103. BLM has failed to make an adequate and timely determination because the  
25 statutory deadline of 20 days has passed and BLM has failed to inform the Center  
26 whether it plans to comply with the FOIA requests; when the Center may anticipate  
27 receiving a full response (an estimated completion date) to the requests, and if not, the  
28

1 reasons for which it is denying the requests; the volume of records denied; and how the  
2 Center may appeal. 5 U.S.C. § 552(a)(6)(A)(i).

3  
4 104. BLM has failed to notify the Center of any “unusual circumstances” in a  
5 notice that also set forth a date on which the determination was expected to be dispatched  
6 within ten working days of the statutory 20-day deadline, as required by FOIA. 5 U.S.C.  
7 § 552(a)(6)(B)(i).

8  
9 105. BLM has further violated FOIA by unlawfully failing to undertake a search  
10 reasonably calculated to locate all records that are responsive to the Center’s March 3,  
11 2021 FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D).

12  
13 106. BLM has further violated FOIA by refusing to promptly disclose records  
14 responsive to the Center’s March 3, 2021 FOIA request. 5 U.S.C. § 552.

15  
16 107. The Center has a statutory right to the records it seeks and there is no legal  
17 basis for BLM to assert that any of FOIA’s nine exemptions to mandatory disclosure  
18 apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9). To the  
19 extent BLM is claiming any of these exemptions, BLM is unlawfully withholding from  
20 disclosure records that are responsive to the Center’s March 3, 2021 FOIA request.

21  
22 108. The Center has a statutory right to any reasonably segregable portion of a  
23 record that may contain information lawfully subject to any of FOIA’s exemptions. 5  
24 U.S.C. § 552(b). BLM is violating the Center’s rights in this regard to the extent it is  
25 unlawfully withholding reasonably segregable portions of any lawfully exempt records  
26 that are responsive to the Center’s March 3, 2021 FOIA request.  
27  
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1           114. BLM has failed to notify the Center of any “unusual circumstances” in a  
2 notice that also set forth a date on which the determination was expected to be dispatched  
3 within ten working days of the statutory 20-day deadline, as required by FOIA. 5 U.S.C.  
4 § 552(a)(6)(B)(i).

5  
6           115. BLM has further violated FOIA by unlawfully failing to undertake a search  
7 reasonably calculated to locate all records that are responsive to the Center’s May 24,  
8 2021 FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D).

9  
10           116. BLM has further violated FOIA by refusing to promptly disclose records  
11 responsive to the Center’s May 24, 2021 FOIA request. 5 U.S.C. § 552.

12  
13           117. The Center has a statutory right to the records it seeks and there is no legal  
14 basis for BLM to assert that any of FOIA’s nine exemptions to mandatory disclosure  
15 apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9). To the  
16 extent BLM is claiming any of these exemptions, BLM is unlawfully withholding from  
17 disclosure records that are responsive to the Center’s May 24, 2021 FOIA request.

18  
19           118. The Center has a statutory right to any reasonably segregable portion of a  
20 record that may contain information lawfully subject to any of FOIA’s exemptions. 5  
21 U.S.C. § 552(b). BLM is violating the Center’s rights in this regard to the extent it is  
22 unlawfully withholding reasonably segregable portions of any lawfully exempt records  
23 that are responsive to the Center’s May 24, 2021 FOIA request.

24  
25  
26           119. Based on the nature of the Center’s organizational activities, it will  
27 undoubtedly continue to employ FOIA’s provisions in record requests BLM in the  
28



1 foreseeable future. The Center's organizational activities will be adversely affected if  
2 BLM can continue violating FOIA's disclosure provisions as it has in this case. Unless  
3 enjoined and made subject to a declaration of the Center's legal rights by this Court,  
4 BLM will continue to violate the Center's right to receive public records under FOIA.  
5

6 **RELIEF REQUESTED**

7  
8 WHEREFORE, the Center respectfully requests that this Court:

9 A. Declare that the BLM and FWS are in ongoing violation of the ESA for  
10 failing to reinitiate and complete consultation on the ongoing impacts of livestock grazing  
11 on the Bonita Creek, Johnny Creek, Zorilla, Gila, Morenci, and Bull Gap Allotments  
12 within the Gila Box RNCA;

13  
14 B. Order the BLM and FWS to promptly reinitiate and complete ESA  
15 consultation on the ongoing impacts of livestock grazing on the Bonita Creek, Johnny  
16 Creek, Zorilla, Gila, Morenci, and Bull Gap Allotments on threatened and endangered  
17 species and critical habitat;

18  
19 C. Order the BLM to take the actions necessary to prevent any further adverse  
20 impacts to threatened and endangered species, and critical habitat, within the Gila Box  
21 RNCA, until the BLM and FWS can demonstrate full compliance with the ESA;

22  
23 D. Declare that the BLM's failure to provide the Center with timely and full  
24 responses to the Center's March 3, 2021 and May 24, 2021 FOIA requests, including its  
25 failure to make timely determinations and produce all records requested, is in violation of  
26 FOIA, 5 U.S.C. § 552(a)(6);  
27  
28

1 E. Declare that the BLM's failure to timely undertake a search for and disclose  
2 to the Center all records responsive to the Center's March 3, 2021 and May 24, 2021  
3 FOIA requests, as alleged above, are unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i);

4 F. Order the BLM to conduct searches reasonably calculated to locate all  
5 records responsive to the Center's March 3, 2021 and May 24, 2021 FOIA requests,  
6 utilizing a cut-off date for such searches that is the date the searches are conducted;  
7

8 G. Order the BLM to provide the Center, by a date certain, with all responsive  
9 records and reasonably segregable portions of lawfully exempt records sought in this  
10 action;  
11

12 H. Award to the Center its costs, expenses, expert witness fees, and reasonable  
13 attorney fees pursuant to applicable law including the ESA, 16 U.S.C. § 1540(g) and  
14 FOIA, 5 U.S.C. § 552(a)(4)(E); and  
15

16 I. Grant the Center such further relief as may be just, proper, and equitable.  
17

18 Dated October 7, 2021.

Respectfully submitted,

19 */s/ Marc D. Fink*

20 Marc D. Fink (MN Bar No. 343407)

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