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**RE: FAILURE TO CONSULT ON ADVERSE MODIFICATION TO
CRITICAL HABITAT FOR LOACH MINNOW AND/OR SPIKEDACE**

Dear Secretaries Kempthorne and Johanns,

Forest Guardians is writing to request that you take immediate action to require the United States Forest Service (USFS) and the United States Fish & Wildlife Service (USFWS) to comply with the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, by directing them to promptly engage in consultation regarding the impacts of ongoing livestock grazing to the critical habitat of the loach minnow and spikedace in Forest Service Region 3.

The loach minnow and spikedace are native southwestern fishes imperiled by anthropocentric habitat modification and predation by non-native species. Among all tangible threats to these two fishes, historic and ongoing public lands livestock grazing is perhaps the defining force currently driving these species towards extinction. Though the harm from grazing is indirect, it is certainly distinct. Livestock grazing damages riparian zones and impairs stream quality, which, in turn, makes otherwise suitable refugia for the fishes uninhabitable.

The loach minnow and spikedace were both listed as threatened species under the ESA in 1986.¹ While ESA § 4(a)(3) requires that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be threatened, the USFWS did not finalize the proposed critical habitat designation for either of these species at the time of their listings. Rather, the agency postponed these designations in order to gather and analyze economic data. The USFWS's initial decision to not designate critical habitat for the loach minnow and spikedace has resulted in a cascade of effects including more than two decades of delay and various legal challenges. Finally, after two failed attempts,² the USFWS has once again designated critical habitat for these species.

Over the last decade, the USFS has completed formal or informal consultation with the USFWS in conjunction with its grazing management decisions on some or all allotments housing these listed fishes. The scope of that consultation, however, encompasses only substantive jeopardy to the species, and not adverse modification to its critical habitat. Because critical habitat for these fishes has recently been designated, the scope of all previous consultations on these grazing allotments is now too narrow. Unless and until the USFS consults with the USFWS regarding whether ongoing grazing activities are adversely modifying loach minnow and spikedace critical habitat, these agencies are in violation of ESA § 7(a)(2).

¹ The loach minnow was listed on October 28, 1986 (51 FR 39468). The spikedace was listed on July 1, 1986 (51 FR 23769).

² The USFWS designated critical habitat for the loach minnow in 1994 and then again in 2000. Upon challenge, both designations were determined to be flawed, and thus judicially stricken. *See Catron County Board of Commissioners v. United States Fish & Wildlife Service*, 75 F.3d 1429 (10th Cir.1996); *New Mexico Cattle Growers Ass'n v. United States Fish & Wildlife Service*, 2004 WL 3426421 (D.N.M. 2004).

This letter is provided as official 60-day notice under the ESA citizen suit provision, 16 U.S.C. § 1540(g), of our intent to sue you to enforce the law if you do not act within the next 60 days to prohibit and/or remedy these legal violations.

BACKGROUND

On March 21, 2007, the USFWS published a final designation of critical habitat for the loach minnow and spikedace. *See* 72 F.R. 13356. According to this final designation, 522.2 miles of rivers and streams in New Mexico and Arizona will take effect as critical habitat for one or both of these species as of April 20, 2007. The critical habitat designation has explicit implications for management of these rivers and streams, the lands directly adjacent to them, and the lands that lie within the watersheds of these rivers and streams.

Grazing management must now accommodate the critical habitat designation in all affected areas. “Activities that, when carried out, funded or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for the spikedace and loach minnow include, but are not limited to, ...destruction and alteration of riparian vegetation, ...excessive sedimentation from mining, livestock grazing, ...and other watershed and floodplain disturbances...” 72 F.R. 13391.

As of April 20, 2007, several grazing allotments within Forest Service Region 3 now contain loach minnow and/or spikedace critical habitat. Each of the following Forests have been impacted by 72 F.R. 13356. In Complex 1, the Coconino and Prescott National Forests contain spikedace critical habitat along the Verde River in Yavapai County, Arizona. In Complex 2, the Apache-Sitgreaves National Forest contains loach minnow critical habitat along the Black River in Apache and Greenlee Counties, Arizona. In Complex 4, the Apache-Sitgreaves and Gila National Forests contain loach minnow critical habitat along the San Francisco and Blue Rivers in Pinal and Graham Counties, Arizona. In Complex 5, the Gila National Forest contains loach minnow and spikedace critical habitat along the Upper Gila Complex in Catron, Grant, and Hidalgo Counties, New Mexico. Attachment 1 provides a list of all known grazing allotments that contain or border such designated critical habitat in each of these areas.

Additionally, several grazing allotments within Forest Service Region 3 now lie within the watersheds of those rivers recently designated as critical habitat. Attachment 2 provides a list of all allotments within the watersheds of designated critical habitat for the loach minnow and/or spikedace. This list includes allotments in the Gila, Apache-Sitgreaves, Coconino, Prescott, Coronado, and Kaibab National Forests. This list represents all allotments falling within the Verde, Blue, Eagle Creek, San Pedro, and/or Gila River watersheds.

STATUTORY FRAMEWORK

The ESA is designed to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1538(a)(1)(B). The heart of the ESA’s proactive protection for species and their habitat is Section 7(a)(2), which requires that every federal agency insure that its actions are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. *See* 16 U.S.C. § 1536(a)(2).

The prohibitions against jeopardy and adverse modification are implemented first and foremost through the consultation process. When the USFS determines that a proposed federal action “may affect listed species or critical habitat,” it is required to formally consult with the USFWS. The consultation process is critical to insuring that the substantive protections of the ESA are carried out. Failure to consult in accordance with ESA § 7(a)(2) is arbitrary and capricious under the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A), and violative of the ESA itself.

DISCUSSION

The USFS and the USFWS are in violation of ESA § 7(a)(2) with respect to the loach minnow and spikedace on all Forest Service grazing allotments containing critical habitat or falling within any of the designated streams’ and/or rivers’ respective watersheds. This is true because the USFS and USFWS have failed to consult on whether ongoing livestock grazing on these allotments is adversely modifying loach minnow and/or spikedace critical habitat.

Critical habitat for the loach minnow and spikedace is being, and will continue to be, negatively impacted by livestock grazing unless and until such consultation is appropriately completed. Livestock grazing results in the loss of vegetative ground cover, soil compaction, and erosion. Such watershed degradation leads to excessive sedimentation of rivers and streams- a condition that has numerous and well documented adverse effects on fish and fish habitat. These adverse effects include the smothering of invertebrate fish prey species and fish eggs, as well as the elimination of sub-cobble pockets used as habitat by fish.

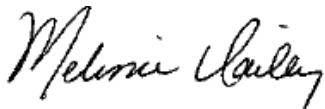
It is inconsequential that the USFS has already consulted with the USFWS on substantive jeopardy to these fishes with respect to the impacted grazing allotments. The duties to protect against substantive jeopardy and adverse modification to critical habitat are distinct, and therefore may not be conflated. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir.2004) (reading the adverse modification consultation requirement as promoting species recovery, and thus being more protective than the substantive jeopardy consultation requirement, which merely guards against species extinction).

Previous consultations are both legally and factually deficient. This is because many of the USFWS's past "no effect" findings for loach minnow and spikedace in USFS Region 3 have been premised on the idea that particular habitat – the San Francisco River is one prominent example – is not occupied by these species. Since unoccupied habitat has now been designated as necessary for recovery of the species, there can be no question that consultation must be initiated.

In other previous consultations, the USFWS has specifically found that while ongoing grazing will not cause jeopardy, it will impact recovery efforts. *See e.g.*, Biological Opinion for Grazing Permit Reauthorization on 7 Allotments on the Apache-Sitgreaves, Gila, Coronado, and Tonto National Forests (July 20, 1999); Biological Opinion for Grazing Permit Reauthorization on 17 Allotments on the Apache-Sitgreaves National Forest (June, 2001). Because the purpose of critical habitat is to effectuate recovery of the species, consultation must clearly be initiated on all similarly situated allotments to specifically address adverse modification to critical habitat. This is true regardless of any previous consultation.

Forest Guardians is dedicated to preserving the loach minnow, spikedace, and all wildlands and wildlife of the American southwest. We understand the ecological importance of these species' newly designated critical habitat, and appreciate the significant ways in which continued public lands livestock grazing may impact and impair that habitat. We are hopeful that the USFS and USFWS will immediately consult regarding the potential for adverse modification to these species' critical habitat on all affected grazing allotments. Please contact us if you believe that any of the above analysis of fact or law is incorrect or if you wish to discuss this letter further.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Melissa Hailey".

Melissa Hailey, Esq.
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Dated this 23rd day of April, 2007.