

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CENTER FOR BIOLOGICAL DIVERSITY,)
))
Plaintiff,)
))
v.)
))
VICKI CHRISTIANSEN, *Chief, U.S. Forest*)
Service; and AURELIA SKIPWITH,)
Director, U.S. Fish and Wildlife Service,)
))
Defendants.)

)

Case No:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges the United States Forest Service (“Forest Service”) and United States Fish and Wildlife Service’s (“FWS”) failure to adequately protect and conserve the critically endangered New Mexico meadow jumping mouse in the Lincoln National Forest. Despite the devastating impacts that livestock grazing on two allotments within the Lincoln National Forest has had, and will continue to have, on the jumping mouse’s habitat, the Forest Service and FWS have failed to implement the conservation and mitigation measures that are necessary to address the severe ongoing harm directly caused by the agency’s authorization of grazing activities, and thus have violated the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, in myriad ways. Specifically, the Forest Service and FWS’s actions with respect to grazing management within the New Mexico meadow jumping mouse’s habitat, including designated critical habitat, violates the ESA’s affirmative mandates to: (1) avoid jeopardizing the continued existence of a listed species; and (2) develop and carry out programs for the conservation of the New Mexico meadow jumping mouse on the Lincoln National Forest.

2. The Forest Service’s failure to implement the conservation measures proposed in its 2017 Biological Assessment for ongoing grazing activities on the Agua Chiquita Allotment (“2017 Agua Chiquita BA”)—and subsequently relied upon by FWS in its concurrence (“2017 Agua Chiquita Concurrence”) that such activities would not adversely affect the New Mexico meadow jumping mouse or its critical habitat—has modified the action in a manner that causes grave adverse effects to the jumping mouse and its critical habitat that has not been previously considered or authorized by FWS in any prior BA or concurrence in connection with the Agua Chiquita Allotment. Likewise, the Forest Service’s failure to implement the nondiscretionary conservation measures and terms and conditions in the 2018 Biological Opinion for ongoing grazing activities in the Sacramento Allotment (“2018 Sacramento BiOp”), has modified the action in a manner causing grave adverse effects to the jumping mouse and its critical habitat that has not been previously considered or authorized by FWS in any existing incidental take statement for the Sacramento Allotment. Indeed, the Forest Service conceded as much when, in responding to Plaintiff’s Notice of Intent, the agency acknowledged that the obligation to reinstate consultation on grazing management activities had been triggered for both allotments. However, the Forest Service and FWS declined to reinstate consultation prior to the start of the 2020 grazing season, in violation of the ESA and its implementing regulations.

3. The Forest Service’s continued authorization of grazing activities on the Sacramento Allotment despite the fact that the take thresholds for the New Mexico meadow jumping mouse set forth in the Incidental Take Statement appended to the 2018 Sacramento BiOp have been exceeded violates the ESA’s prohibition against take.

4. For these reasons and for those set forth below, the Forest Service and FWS have violated the ESA, its implementing regulations, and the ESA’s citizen suit provision. 16 U.S.C.

§ 1540(g). Additionally, the agencies have acted in a manner that is “arbitrary and capricious, an abuse of discretion,” “otherwise not in accordance with law,” and “without observance of procedure required by law” within the meaning of the judicial review provision of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), (D). Alternatively, the Forest Service and FWS’s failure to take certain legally required actions constitutes agency action that has been “unlawfully withheld or unreasonably delayed.” *Id.* § 706(1). Accordingly, the Forest Service and FWS must be immediately enjoined from authorizing continuing grazing activities on the Lincoln National Forest, and the agencies’ decisions implementing such activities should be vacated and remanded. 16 U.S.C. § 1540(g); 5 U.S.C. § 706.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 16 U.S.C. § 1540(g).

PARTIES

6. Plaintiff Center for Biological Diversity (“the Center”) is a non-profit 501(c)(3) 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 species and habitat protection issues throughout the United States and the world, including protection of plant and animal species from the impacts of global warming. The Center has more than 81,800 members and more than 1.7 million supporters throughout the United States and the world. The Center brings this action on its own institutional behalf and on behalf of its staff and its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific

activities concerning the New Mexico meadow jumping mouse and its habitat, including critical habitat, harmed by the decisions challenged in this case.

7. Plaintiff's members use and enjoy the Lincoln National Forest for a variety of purposes, including hiking, fishing, camping, viewing and photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiff's members derive scientific, aesthetic, recreational, vocational, and spiritual benefits from the Lincoln National Forest, including the areas and habitat where the endangered New Mexico meadow jumping mouse is found.

8. Plaintiff's members derive health, aesthetic, recreational, inspirational, spiritual, scientific, and educational benefits from their activities within the Lincoln National Forest. Plaintiff's members intend to continue to use and enjoy the Lincoln National Forest frequently and on an ongoing basis in the future, including during the summer and fall of 2020. The areas of the Lincoln National Forest that Plaintiff's members intend to continue to use and enjoy include specific areas where the New Mexico meadow jumping mouse is likely to be found.

9. The health, aesthetic, recreational, inspirational, spiritual, scientific, and educational interests of the Plaintiff and its members have been and will continue to be adversely affected and irreparably injured if Defendants' ongoing violations of the ESA and the APA continue. These are actual, concrete injuries caused by Defendants' violations of the ESA and the APA. The relief sought will redress the Plaintiff and its members' injuries.

10. Defendant Vicki Christiansen is the Chief of the Forest Service, an agency within the U.S. Department of Agriculture, and is directly responsible for the supervision, management, and control of the agency. Accordingly, she is responsible for overseeing the Forest Service's actions challenged in this lawsuit. She is sued in her official capacity.

11. Defendant Auerlia Skipwith is the Director of the FWS, an agency within the U.S. Department of the Interior, and is directly responsible for the supervision, management, and control of the agency. Accordingly, she is responsible for overseeing FWS’s actions challenged in this lawsuit. She is sued in her official capacity.

STATUTORY AND REGULATORY FRAMEWORK

A. Endangered Species Act

12. Recognizing that certain species of plants and animals “have been so depleted in numbers that they are in danger of or threatened with extinction,” Congress enacted the ESA to provide both “a means whereby the ecosystems upon which endangered 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. § 1531. The ESA reflects “an explicit congressional decision to afford first priority to the declared national policy of saving endangered species.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978). The ESA “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Id.* at 180.

13. Under the ESA, a species may be listed as endangered or threatened. An endangered species—a status which is reserved for species in the most perilous condition—is one that is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6).

14. Section 9 of the ESA makes it unlawful for any person to “take” an endangered species without express authorization from FWS. 16 U.S.C. § 1538(a)(1). “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The term “harm” is further defined by FWS

regulations to encompass habitat modification or degradation that injures an endangered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering, *see* 50 C.F.R. § 17.3, and “harass” is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.” *Id.*

15. Section 7(a)(1) of the ESA directs all federal agencies, in consultation with the Secretary of Interior, to “utilize their authorities . . . by carrying out programs for the conservation of endangered species.” 16 U.S.C. § 1536(a)(1). “Conservation” means “to use and the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3).

16. Section 7(a)(2) of the ESA further requires all federal agencies 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.” 16 U.S.C. § 1536(a)(2). To carry out this obligation, before undertaking any action that may have direct or indirect effects on listed species, an action agency must engage in consultation with the FWS in order to evaluate the impact of the proposed action. *See id.* § 1536(a). The FWS has defined the term “action” for the purposes of Section 7 broadly to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” 50 C.F.R. § 402.02, “in which there is discretionary federal involvement or control,” *id.* § 402.03.

17. The purpose of consultation is to ensure that the action at issue “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] habitat of such species.” 16 U.S.C.

§ 1536(a)(2). As defined by the ESA’s implementing regulations, an action will cause jeopardy to a listed species if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

Notwithstanding this definition of jeopardy, during consultation the action agency and FWS must consider not only the loss of critical habitat necessary to survival, but also the loss of critical habitat necessary to recovery of a listed species. *See Gifford Pinchot Task Force v. FWS*, 387 F.3d 968, 1071 (9th Cir. 2004). The evaluation of the effects of the proposed action on listed species during consultation must use “the best scientific . . . data available.” 16 U.S.C.

§ 1536(a)(2).

18. Consultation under Section 7(a)(2) may be “formal” or “informal” in nature. Informal consultation is “an optional process” consisting of all correspondence between the action agency and FWS, which is designed to assist the action agency, rather than FWS, in determining whether formal consultation is required. *See* 50 C.F.R. § 402.02. During an informal consultation, the action agency requests information from the FWS as to whether any listed species may be present in the action area. If listed species may be present, the action agency is required by Section 7(c) of the ESA to prepare and submit to FWS a “biological assessment” (“BA”) that evaluates the potential effects of the action on listed species and critical habitat. As part of the BA, the action agency must make a finding as to whether the proposed action may affect listed species and submit the BA to FWS for review and potential concurrence with its finding. 16 U.S.C. § 1536(c). If the action agency finds that the proposed action “may affect, but

is not likely to adversely affect” any species listed species or critical habitat and FWS concurs with this finding, then the consultation process is terminated. 50 C.F.R. § 402.14(b).

19. On the other hand, if the action agency finds that the proposed action “may affect” listed species or critical habitat by having any potentially adverse effect that may occur and is not insignificant or discountable, then formal consultation is required. *See* 50 C.F.R. § 402.11. Following completion of the BA, the action agency must initiate formal consultation through a written request to FWS. *See* 50 C.F.R. § 402.14(c). The result of a formal consultation is the preparation of a biological opinion (“BiOp”) by FWS, which is a compilation and analysis of the best available scientific data on the status of the species and how it would be affected by the proposed action. When preparing a BiOp, FWS must: (1) “review all relevant information;” (2) “evaluate the current status of the listed species;” and (3) “evaluate the effects of the action and cumulative effects on the listed species or critical habitat.” 50 C.F.R. § 402.14(g). Additionally, a BiOp must include a description of the proposed action, a review of the status of the species and critical habitat, a discussion of the environmental baseline, and an analysis of the direct and indirect effects of the proposed action and the cumulative effects of reasonably certain future state, tribal, local, and private actions. *Id.*

20. At the end of the formal consultation process, the FWS issues either a no-jeopardy or a jeopardy BiOp. With a no-jeopardy BiOp, FWS determines that the proposed action is not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. If, as part of a no-jeopardy BiOp, FWS determines that the proposed action will nevertheless result in the incidental taking of listed species, then FWS must provide the action agency with a written Incidental Take Statement (“ITS”) specifying the “impact of such incidental taking on the species” and “any reasonable and prudent measures [“RPMs”] that [FWS] considers

necessary or appropriate to minimize such impact” and setting forth “the terms and conditions . . . that must be complied with by the [action] agency . . . to implement [those measures].” 16 U.S.C. § 1536(b)(4). Take in excess of that authorized by the ITS violates the ESA’s prohibition on take. *Id.* § 1538. With a jeopardy BiOp, FWS may offer the action agency reasonable and prudent alternatives to the proposed action that will not result in jeopardy to a listed species or adverse habitat modification, if they exist. *Id.* § 1536(b)(3)(A).

21. Where a BiOp has been issued and “discretionary Federal involvement or control over the action has been retained or is authorized by law,” the action agency is required to reinitiate consultation with FWS in certain circumstances, including: (1) “[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” or (2) “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16(a)(2), (3). Additionally, consultation must be reinitiated if, over the course of the action, the amount or extent of incidental take is exceeded. *Id.* § 402.16(a)(1).

22. The ESA provides that agencies must hold action in abeyance until any legally required consultation is complete. Section 7(d) of the ESA prohibits an action agency from making “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section] (a)(2).” 16 U.S.C. § 1536(d). “This prohibition . . . continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09. The purpose of this requirement is to ensure that the status quo will be maintained during the consultation process. *See Lane Cty. Audubon Soc’y v. Jamison*, 958 F.2d 290, 294

(9th Cir.1992) (“In order to maintain the status quo, section 7(d) forbids ‘irreversible or irretrievable commitment of resources’ during the consultation period”).

B. Administrative Procedure Act

23. The APA, 5 U.S.C. §§ 701-706, provides for judicial review of agency action. Under the APA, the reviewing court must “hold unlawful and set aside agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). A reviewing court must also set aside agency action, findings, and conclusions found to be without observance of procedure required by law. *Id.* § 706(2)(D). Additionally, reviewing courts may “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

FACTUAL BACKGROUND

A. The New Mexico Meadow Jumping Mouse.

24. The New Mexico meadow jumping mouse is a critically endangered small mammal found exclusively in riparian habitats in the southwestern United States. It is characterized by elongated feet and an extremely long, bicolored tail.

25. The New Mexico meadow jumping mouse’s historical distribution likely included riparian and wetland areas along the Sangre de Cristo Mountains in Colorado and New Mexico, the San Juan Mountains in southern Colorado, the Jemez and Sacramento Mountains in central and southern New Mexico, the Rio Grande Valley from Española to Bosque del Apache National Wildlife Refuge in central New Mexico, and the White Mountains in eastern Arizona. However, habitat loss and fragmentation due to grazing pressure, water management and use, drought, and wildfire severely reduced its population and distribution.

26. On June 20, 2013, FWS proposed listing the New Mexico meadow jumping mouse as an endangered species under the ESA.

27. FWS conducted a comprehensive status review of the New Mexico meadow jumping mouse, and on May 27, 2014, FWS issued a Species Status Assessment Report. In this report, FWS reviewed the jumping mouse's life history, and detailed the threats to the species. As a result of this review, FWS concluded that the jumping mouse had "a high probability of extinction in the near term . . . and a decreasing viability in the long-term" because the remaining populations "are vulnerable to extirpation." FWS, SPECIES STATUS REPORT: NEW MEXICO MEADOW JUMPING MOUSE 2 (May 27, 2014) [hereinafter 2014 SSA].

28. The New Mexico meadow jumping mouse requires very specific habitat characteristics to support its life history needs, and is thus considered a habitat specialist. The species requires dense riparian herbaceous (i.e., non-woody) vegetation composed primarily of sedges and forbs, that averages at least 24 inches tall. To achieve such growth, vegetation must be associated with seasonally available or perennially flowing water. Accordingly, jumping mouse habitat must contain sufficient flowing waters and adjacent upland to support the vegetation characteristics necessary to support the species' foraging, breeding, and hibernating behaviors. Additionally, jumping mice are known to regularly use adjacent upland habitats for dispersal, day nesting, maternal nests, and hibernating. To support movements of individual jumping mice, sufficient habitat—i.e., habitat boasting the tall, dense riparian vegetation essential to the species' life history needs—must extend approximately 330 feet outward from the boundary between the active water channel and the floodplain.



Forest Service photograph included in September, 13, 2019 Notice of Intent depicting healthy critical habitat in the Santa Fe National Forest. This critical habitat unit contains the tall (i.e., at least 24 inch), dense herbaceous riparian vegetation, and adjacent, intact upland habitat that is essential for to the New Mexico meadow jumping mouse species

29. The riparian vegetation serves as an important food source for the New Mexico meadow jumping mouse, whose diet consists mainly of grass and forb seeds. Additionally, the tall, dense plants provide vital cover for nesting, movement, and predation avoidance.

30. The New Mexico meadow jumping mouse has a three-year lifespan. Each year, the jumping mouse hibernates for eight to nine months out of the year—longer than most mammals. It enters hibernation in September or October, and emerges the following May or June. Therefore, it is only active for about three to four months during the summer. Within this short active period, the New Mexico meadow jumping mouse must breed, give birth and raise young, and feed to store sufficient fat reserves to survive the next long hibernation period. Accordingly, if resources are not available in a single season, jumping mice populations are

greatly impacted and have lower reproductive success and over-winter survival rates during hibernation.

31. New Mexico meadow jumping mice primarily breed in July or August, and produce only a single litter each year, consisting of no more than seven young. This is a small litter size for a rodent. Females care for the young until they are weaned and independent, which typically occurs at four weeks after birth. This is a long rearing period for a rodent, and it is unlikely that juveniles breed during the same year that they are born. Accordingly, New Mexico meadow jumping mice females likely have only two litters in their three-year lifespans.

32. Because New Mexico meadow jumping mice have so few offspring each year, every litter is important to the survival and recovery of populations. If there are not sufficient resources to support females through the breeding and weaning periods, populations are greatly stressed. The species is thus at a higher risk of extinction because it recovers more slowly from reductions in population size, and is subject to genetic and demographic stochasticity (i.e., random fluctuations in population size that occur because the birth and death of each individual is a discrete event).

33. The New Mexico meadow jumping mouse has limited dispersal capability, and exhibits extreme site fidelity during daily activities. Individual mice typically move less than 330 feet per day, and are unlikely to cross areas of that do not contain suitable riparian habitat. Gaps of more than 656 feet between suitable habitat areas create significant barriers to movement and decrease the ability for jumping mice to colonize new habitats. Accordingly, ensuring connectivity of suitable habitat along riparian corridors is important both to facilitating daily and seasonal movements, and to ensuring sufficient dispersal and gene flow to support viable and resilient populations of jumping mice. Correspondingly, due to the jumping mouse's life history

(e.g., short active period, short life span, low fecundity, low dispersal ability) and specialized habitat requirements, populations have a high potential for extirpation—i.e., local extinction—when habitat is altered, fragmented, or eliminated.

34. The main stressor for the New Mexico meadow jumping mouse is habitat loss. Indeed, all populations “likely have insufficient habitat” and face high risks of extirpation. FWS, SPECIES STATUS ASSESSMENT REPORT FOR THE NEW MEXICO MEADOW JUMPING MOUSE vi (Jan. 30, 2020) [hereinafter 2020 SSA]. The primary sources of current and future habitat loss are pressure from livestock grazing, water management and use, drought, and wildfires. Livestock grazing and poor water management (e.g., water diversion) result in the loss of the riparian vegetation that the mice need to survive. Likewise, drought and wildfires alter the composition of the vegetative community. Climate change will only exacerbate these threats.

35. Livestock grazing poses a significant threat to the New Mexico meadow jumping mouse. Livestock concentrate in riparian areas due to their productivity and proximity to reliable water sources, and preferentially graze native riparian vegetation. Grazing eliminates or reduces the tall herbaceous vegetation and density that the jumping mouse relies upon for its biological functions and life history. Additionally, grazing can alter the composition and structure of the riparian habitats that are essential to the jumping mouse’s survival. By preferentially grazing native riparian vegetation and thus decreasing competition, grazing can allow for the introduction and spread of invasive species, and can convert sites from riparian vegetation-dominated to upland plant species-dominated. Additionally, the concentration of livestock in riparian habitats results in extensive and deleterious trampling, soil compaction, and erosion of the streambed, which degrades the stream channel such that it can no longer support the riparian vegetation and wet soils required to maintain suitable habitat for the jumping mouse.



Photo included in September, 13, 2019 notice letter illustrating the damage from livestock grazing to New Mexico meadow jumping mouse critical habitat in the Upper Wills Canyon/Lower Mauldin Springs area on the Sacramento Allotment. The vegetation appears “mowed,” and is far below the 24-inch minimum required to support New Mexico meadow jumping mice. The photo also illustrates the ineffectiveness of double electric fencing as a method of protecting jumping mouse critical habitat. Specifically, there is no discernable difference between the height or density of the vegetation community inside the enclosure (top of the image) and the vegetation community outside of the enclosure (bottom of the image). Both areas have been subjected to heavy grazing, and appear “mowed.” Neither area contains the tall, dense herbaceous vegetation necessary to support the jumping mouse’s life history needs.



Forest Service photo included in September, 13, 2019 Notice of Intent depicting healthy critical habitat in the Santa Fe National Forest. This critical habitat unit contains the tall (i.e., at least 24 inch), dense herbaceous riparian vegetation, and adjacent, intact upland habitat that is essential for to the New Mexico meadow jumping mouse species.

36. At the individual level, the removal of vegetation reduces the availability of food resources to New Mexico meadow jumping mice. If the New Mexico meadow jumping mouse fails to accumulate sufficient fat reserves during its short active season, it will not survive the long overwinter hibernation. Accordingly, as FWS observed in its 2014 Species Status Assessment Report, the jumping mouse is “extremely sensitive to habitat alterations.” 2014 SSA at 89. Unfortunately, the timing of livestock grazing frequently coincides with the jumping mouse’s short active season, which reduces the availability of food resources precisely at the time when the jumping mouse needs them to build the fat reserves required to breed, raise young, and enter the next hibernation period. By reducing the availability of food resources, which, in turn, affects overwinter survival, livestock grazing in suitable New Mexico meadow jumping mouse habitat results in reduced population sizes and, eventually, the extirpation of populations.

37. The reduction of suitable habitat due to grazing also places individual New Mexico meadow jumping mice at a greater risk of predation due to the loss of vegetative cover. Jumping mice depend on tall, dense riparian herbaceous vegetation, which is easily degraded when grazed to a condition where characteristics needed by jumping mouse are no longer available. Livestock grazing and trampling within jumping mouse habitat reduces the vertical height of riparian vegetation to a level below that which is required to maintain suitable habitat that can be occupied by the jumping mouse.

38. At the population level, grazing results in the extirpation of the New Mexico meadow jumping mouse from the area. Indeed, research has shown that the jumping mouse does not persist in areas that are subject to heavy livestock grazing pressure. The fragmentation and isolation of mouse populations that results from this lack of habitat connectivity makes it unlikely that extirpated populations will recolonize these areas in the future, since there are no nearby, connected populations with robust numbers that can colonize the extirpated population's habitat.

39. On June 10, 2014, FWS formally designated the New Mexico meadow jumping mouse as an endangered species under the ESA. 79 Fed. Reg. 33,119, 33,137 (June 10, 2014). The designation became effective on July 10, 2014. *Id.* The ESA defines "endangered species" as a species that is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

40. FWS determined in its final listing rule that the New Mexico meadow jumping mouse meets the definition of an endangered species primarily because of the present or threatened destruction, modification, or curtailment of its habitat or range; the inadequacy of

existing regulatory mechanisms; and other natural and manmade factors affecting its continued existence. 79 Fed. Reg. at 33,119.

41. As explained by FWS in the final listing rule, the remaining small, isolated New Mexico meadow jumping mouse populations are particularly threatened with extirpation from habitat loss and modifications. 79 Fed. Reg. at 33,134. The main sources of habitat loss and degradation include grazing pressure (which removes the needed vegetation), water management and use, loss of water due to drought (exacerbated by climate change), and wildfires (also exacerbated by climate change). *Id.*

42. On March 16, 2016, FWS issued a final rule designating critical habitat for the New Mexico meadow jumping mouse. *See* 81 Fed. Reg. 14,264 (Mar. 16, 2016). In the rule, FWS identified primary constituent elements—i.e., specific elements of physical or biological features that provide for a species' life history processes, and are essential to the conservation of the species—for the New Mexico meadow jumping mouse. *Id.* at 14,293. These elements that are essential for the conservation of the jumping mouse include: (1) riparian communities along rivers and streams that contain (a) persistent emergent herbaceous wetlands characterized by the presence of forbs and sedges, or (b) scrub-shrub riparian areas; (2) flowing water that provides saturated soils throughout the jumping mouse's active season to support tall (i.e., average height of 24 inches) and dense herbaceous riparian vegetation; (3) sufficient areas of 5.6 to 15 miles along a stream, ditch, or canal that contains suitable or restorable habitat to support habitat connectivity; and (4) adjacent floodplain areas extending approximately 330 feet outward from the water channel. *Id.* FWS identified over 13,000 acres of critical habitat in eight units containing these primary constituent elements. *Id.* at 14,297-99.

43. Today, the New Mexico meadow jumping mouse occurs within eight geographic management units that are defined by critical habitat units and occupied habitat. Despite conservation efforts, habitat loss has continued to occur throughout the New Mexico meadow jumping mouse's historical range. As a result, by 2014, the species had experienced an 82% reduction in population.

44. As of January 2020, the eight geographic management units support 77 small, isolated populations, “[n]early all” of which “are isolated and widely separated, and . . . are likely within patches of suitable habitat too small to support resilient populations of the jumping mouse.” 2020 SSA at iv. In light of this, FWS concluded in its January 30, 2020 “Species Status Assessment” for the New Mexico jumping mouse, that this species “likely does not currently have the number and distribution of resilient populations needed to provide the levels of redundancy and representation (genetic and ecological diversity) for the subspecies to demonstrate high viability.” *Id.*

45. Relevant here, the Sacramento Allotment in the Lincoln National Forest contains parts of two New Mexico meadow jumping mouse critical habitat subunits: Subunit 4B (the “Upper Peñasco” subunit), which consists of 335 acres along 4 miles of the Rio Peñasco on Forest Service and privately-owned lands; and Subunit 4D (the “Wills Canyon” subunit), which consists of 275 acres along 3.4 miles of streams in the Wills Canyon area on Forest Service and privately-owned lands. *See* 81 Fed. Reg. at 14,302. In the final rule designating critical habitat for the jumping mouse, FWS observed that although no jumping mice were detected during surveys in 2005, Subunit 4B along the Rio Peñasco “contains perennial flowing water with saturated soils and has a high potential of being restored to suitable habitat.” *Id.* FWS further observed that the Rio Peñasco subunit “would augment the current size and connectivity of

suitable habitat to increase the distribution of the jumping mouse in the Sacramento Mountains and provide population redundancy and resiliency.” *Id.* FWS thus concluded that “[a]ll of the areas within [Upper Peñasco] Subunit 4B are considered *essential* to the conservation of the jumping mouse.” *Id.* (emphasis added). With respect to the Wills Canyon subunit, FWS reported that some designated critical habitat areas “are considered occupied at the time of listing.” *Id.* Noting that the occupied area “is located on Forest Service lands . . . within the grazing enclosures at Mauldin Spring,” FWS concluded that “[t]he features essential to the conservation of th[e] []species may require special management considerations or protection to reduce . . . threats,” including “grazing.” *Id.* The remaining unoccupied areas of the Wills Canyon subunit, found both upstream and downstream of the occupied areas, “are considered *essential* to the conservation of the jumping mouse.” *Id.* (emphasis added).

46. The Agua Chiquita Allotment in the Lincoln National Forest also contains part of a New Mexico meadow jumping mouse critical habitat subunit: Subunit 4E (the “Agua Chiquita Canyon” subunit), which consists of 398 acres along 4.8 miles of the Agua Chiquita Creek on Forest Service Land. 81 Fed. Reg. at 14,302. At the time of listing, the Agua Chiquita Canyon subunit contained occupied areas that were “located on Forest Service lands . . . within two of four fenced livestock enclosures.” *Id.* FWS concluded that “[t]he features essential to the conservation of th[e] []species may require special management considerations or protection to reduce . . . threats,” including “grazing.” *Id.* The remaining unoccupied areas of the Agua Chiquita Canyon subunit, found both upstream and downstream of the occupied areas, “are considered *essential* to the conservation of the jumping mouse.” *Id.* (emphasis added).

47. FWS has recognized that “[c]urrent grazing practices on the Lincoln National Forest have resulted in the removal or alteration of the [primary constituent element] dense

riparian herbaceous vegetation that historically provided jumping mouse habitat.” FWS, BIOLOGICAL OPINION FOR THE CONTINUATION OF LIVESTOCK GRAZING FOR THE SACRAMENTO ALLOTMENT 49 (Oct. 20, 2016) [hereinafter 2016 SACRAMENTO BIOP].

B. The Forest Service’s Grazing Management In The Lincoln National Forest.

1. The Agua Chiquita Allotment

48. The Agua Chiquita Allotment consists of 28,557 acres of National Forest System lands in the Lincoln National Forest. Riparian vegetation occurs along seeps, springs, and perennial streams within the allotment.

49. The allotment consists of two pastures: the Agua Chiquita Pasture and the Jim Lewis Pasture. Grazing is authorized on the allotment only during the summer grazing season (i.e., May through October). The Forest Service authorizes the permittee to graze up to 275 cow/calf pairs on the allotment each season. Additionally, a Term Private Land Permit—a permit issued to a private landowner who owns unfenced private lands within the grazing allotment, and who has waived grazing management of his private lands to the Forest Service—authorizes grazing for up to up to 60 cow/calf pairs.

50. The Agua Chiquita Pasture contains the Agua Chiquita Creek, a perennial stream that supports the only New Mexico meadow jumping mouse critical habitat on the allotment. Although jumping mice were last detected on the allotment in 2010, as FWS observed in its 2014 Species Status Assessment, the protection and restoration of critical habitat in the Agua Chiquita Creek is important to provide connectivity and expand jumping mouse populations throughout the Sacramento Mountain region. Accordingly, the Agua Chiquita Creek critical habitat is essential to improving species resiliency and redundancy.

51. On April 3, 2017, the Forest Service submitted its 2017 Agua Chiquita BA to FWS requesting FWS's concurrence that the continuation of ongoing grazing activities in the Agua Chiquita Allotment "may affect," but were "not likely to adversely affect" the New Mexico meadow jumping mouse or its critical habitat. *See* Letter from Elizabeth A. Humphrey, Dist. Ranger, U.S. Forest Serv., to Susan Millsap, Field Supervisor, U.S. FWS (Apr. 3, 2017) (transmitting 2017 Agua Chiquita BA and requesting concurrence in "not likely to adversely affect" determination).

52. In the 2017 Agua Chiquita BA, the Forest Service proposed to implement several changes to its grazing management on the allotment to support its determination that grazing activities were not likely to adversely affect the New Mexico meadow jumping mouse. For example, to reduce grazing pressure on the allotment, the Forest Service proposed to divide the permittee's livestock herd between the two pastures for the entirety of the grazing season, as opposed to permitting the entire herd to graze one pasture in the early summer before moving to the second pasture in the late summer. The Forest Service also committed to installing permanent and temporary barbed wire and electric fencing to exclude livestock from jumping mouse habitat along the Agua Chiquita Creek.

53. The Forest Service proposed to limit forage utilization in either pasture to 35 percent. Utilization refers to the amount of plant material that has been removed by livestock during the grazing period. Thus, a forage utilization standard of 35 percent means that livestock should only remove 35 percent of forage; the remaining 65 percent of forage should remain for wildlife and other uses. According to FWS, a 35 percent utilization standard "equates to a minimum stubble height measurement for key species that range from 10.1 centimeters (4 inches) for most grasses, 15.2 centimeters (6 inches) for fescues and 20.3 centimeters (8 inches)

for riparian vegetation.” 2016 Sacramento BiOp at 49. FWS has acknowledged that “[t]hese standards are inadequate to provide suitable [primary constituent elements] within designated jumping mouse critical habitat.” *Id.*

54. The Forest Service further explained that it would implement additional conservation measures that would purportedly ensure that ongoing grazing activities in the Agua Chiquita Allotment would not adversely affect the New Mexico meadow jumping mouse or its habitat. For example, the Forest Service insisted that no livestock grazing would be permitted in riparian areas. The Forest Service committed to performing regular compliance checks throughout the season to document incursions on riparian areas. If livestock were found within riparian areas, the Forest Service stated that it would notify the permittee, and that the livestock would be removed, and any damaged fencing repaired, within 72 hours. The Forest Service also committed to conduct habitat assessments on New Mexico meadow jumping mouse habitat before and after the grazing season using approved methods.

55. On April 28, 2017, FWS issued its 2017 Agua Chiquita Concurrence, in which it concurred with the Forest Service’s determination that the proposed action “may affect, is not likely to adversely affect” the jumping mouse or its critical habitat, stating that “[t]he effects associated with allotment management for the Agua Chiquita Allotment were . . . insignificant or discountable to the species and [its] critical habitat, as well as beneficial to the recovery of habitat for the jumping mouse.” *See* Letter from Susan S. Millsap, Field Supervisor, U.S. FWS, to Elizabeth A. Humphrey, Dist. Ranger, U.S. Forest Serv. 3-4 (Apr. 28, 2017). FWS explained that its concurrence in the “not likely to adversely affect” determination relied upon the Forest Service’s commitment to implement both the changes to grazing management, and the conservation measures that were outlined in the 2017 Agua Chiquita BA. *Id.*

56. FWS reminded the Forest Service that the ESA's implementing regulations required the reinitiation of consultation if: (1) new information revealed that the action may affect listed species or critical habitat in a manner or to an extent not previously considered; (2) the action was modified in a manner causing effects to listed species or critical habitat not previously considered; or (3) a new species is listed or critical habitat designated that may be affected by the action.

57. On information and belief, the Forest Service has failed to implement the conservation measures outlined in the 2017 Agua Chiquita Concurrence. As illustrated in photos submitted to the Forest Service in the Center's 2019 Notice of Intent, forage utilization in the pastures appears to exceed 35 percent. Moreover, widespread, chronically heavy grazing by livestock is evident within exclosures. The impacts from grazing on critical habitat in the Agua Chiquita Allotment are significant. Between 2016 and 2019, the Forest Service's own records show that on at least 136 separate occasions, the grazing permittee's cattle entered New Mexico meadow jumping mouse critical habitat that had been fenced off to exclude grazing by private livestock. The end result of these repeated incursions into jumping mouse critical habitat on the Agua Chiquita Allotment can clearly be seen in the photographs included in the Center's 2019 Notice of Intent: short, sparse riparian vegetation that reaches far less than the "at least" 24 inches of "dense riparian herbaceous vegetation" required to sustain this "habitat specialist" species. Accordingly, livestock grazing has adversely affected, and continues to adversely affect, New Mexico meadow jumping mouse habitat, including critical habitat, on the Agua Chiquita Allotment.

2. *The Sacramento Allotment*

58. The Sacramento Allotment consists of 111,213 acres of National Forest System lands in the Lincoln National Forest. Riparian vegetation occurs along seeps, springs, and perennial streams within the allotment.

59. The allotment consists of a summer and winter range, and thus is grazed year-round. Both the summer and winter range consist of four pastures each. The summer range includes four livestock traps (i.e., fenced enclosures that allow for the concentration and sorting of cattle), while the winter range includes one livestock trap. The Forest Service authorizes 200 to 412 cow/calf pairs and 5 horses to graze the summer range between April and October, and 200 to 335 cow/calf pairs and 5 horses to graze the winter range between November and May.

60. Between 1981 and 1989, the allotment was lightly stocked, or left vacant. As a result, range conditions improved.

61. In November 1989, the Forest Service issued a 10-year term grazing permit for the Sacramento Allotment to the Sacramento Grazing Association authorizing the grazing of up to 553 cattle. In light of the improved range conditions, beginning in 1991, the allotment was stocked with the full permitted number of cattle.

62. Two studies completed in 1996 and 1998 determined that stocking levels exceeded the allotment's grazing capacity. In particular, the studies noted that grazing levels had been set without considering the forage production or the number of elk on the allotment. The studies documented deteriorating range conditions and excessive forage use in riparian zones, resulting in a decline in the quality of vegetation and soil conditions.

63. However, despite these expert conclusions, between 1991 and 2004, the allotment was stocked with 553 cattle, a level that far exceeded the allotment's grazing capacity. Indeed, in

2004, the Forest Service reported that 90 percent of the riparian areas associated with perennial streams in the allotment were in “poor” condition. The historic impacts from livestock “continue to cause significant soil loss and modification of habitat.” 2016 SACRAMENTO BIOP at 20.

64. By 2004, the allotment’s stocking levels were slightly reduced to current levels of up to 412 cow/calf pairs and 5 horses on the summer range, and up to 335 cow/calf pairs and 5 horses on the winter range. However, despite the reduction in authorized stocking levels, overutilization of the forage by domestic livestock continued. For example, in 2010, the forage utilization levels in key areas was estimated to be 53 percent. In 2011, forage utilization in key areas exceeded 76 percent. Both of these figures far exceeded the then-permitted standard of 45 percent utilization.

65. Monitoring data collected since 2011 confirms that grazing levels consistently exceed permitted standards. Between 2011 and 2015, data indicated that forage utilization in key areas within the allotment exceeded 50%, and continues to trend downward. Indeed, during the 2016-2017 season, “many key areas within the summer pastures also exceeded forage/range” standards. FWS, BIOLOGICAL OPINION FOR THE REINITIATION OF CONSULTATION FOR ONGOING LIVESTOCK MANAGEMENT ON THE SACRAMENTO AND DRY CANYON ALLOTMENTS 40 (Oct. 2018) [hereinafter 2018 SACRAMENTO BIOP].

a. The 2016 Sacramento BiOp

66. In response to the listing of the New Mexico meadow jumping mouse as endangered, on April 4, 2016, the Forest Service submitted a BA (“2016 Sacramento BA”) to FWS requesting the initiation of formal consultation on ongoing livestock grazing activities in the Sacramento Allotment for the New Mexico meadow jumping mouse.

67. In the 2016 Sacramento BA, the Forest Service concluded that continued livestock grazing on the Sacramento Allotment “may affect, is likely to adversely affect” the New Mexico meadow jumping mouse and its critical habitat. Forest Serv., SACRAMENTO ALLOTMENT ONGOING GRAZING AND PROPOSED INFRASTRUCTURE ACTIVITIES ASSOCIATED WITH THE NEW MEXICO MEADOW JUMPING MOUSE: BIOLOGICAL ASSESSMENT 20 (Apr. 2016). The Forest Service explained that its analysis of the effects of ongoing grazing activities in the Sacramento Allotment on the New Mexico meadow jumping mouse took into account additional conservation measures designed to protect the New Mexico meadow jumping mouse and its critical habitat. These measures included: installing temporary electric fence exclosures around critical habitat in Wills Canyon and Rio Peñasco Canyon; implementing a 35 percent forage utilization standard in New Mexico meadow jumping mouse habitat outside of exclosures (although two livestock traps that occurred outside of jumping mouse habitat would be authorized for utilization of greater than 70 percent); conducting frequent monitoring of jumping mouse habitat to determine if additional agency action is necessary; implementing jumping mouse inventory surveys to locate additional populations; conducting frequent compliance checks throughout the summer grazing season; and restricting the use of the Wills Canyon and Rio Peñasco Traps, including by limiting the number of livestock allowed to remain within the trap, shortening the permitted period of use, and implementing a 35 percent utilization standard, to alleviate pressure on jumping mouse habitat.

68. On October 10, 2016, FWS issued its BiOp on the effects of ongoing grazing on the Sacramento Allotment on the New Mexico meadow jumping mouse and its critical habitat.

69. The 2016 Sacramento BiOp reported the presence of New Mexico meadow jumping mice had been detected at four locations within the Sacramento Allotment.

Additionally, the allotment contains two subunits of designated critical habitat: the Upper Peñasco and Wills Canyon streams. According to the BiOp, these two subunits are “extremely important” to the New Mexico meadow jumping mouse, and “are a crucial part in the survival and recovery” of the species. The fragmentation and isolation of jumping mouse habitat has made maintaining habitat connectivity increasingly vital to the survival and recovery of the species. Hence, restoring the entire river system to the point where floodplains rebuild with the soil and banks necessary to support tall, dense riparian vegetation is vitally important to supporting the survival and recovery of the jumping mouse, particularly in the Lincoln National Forest. Despite the importance of maintaining the primary constituent elements for the jumping mouse in these two subunits, the 2016 Sacramento BiOp reported that only 295 acres of the total 733 acres of critical habitat identified in the allotment was “suitable” to meet the jumping mouse’s needs. 2016 SACRAMENTO BIOP at 49. The remaining 476 acres—over 64 percent—of critical habitat in the allotment had been rendered “unsuitable for the jumping mouse for any portion of its life stages,” largely due to the impacts of continued livestock grazing. *Id.*¹

70. FWS acknowledged that the New Mexico meadow jumping mouse “has been and continues to be affected” by domestic livestock grazing due to grazing’s adverse effects on jumping mouse habitat, including the elimination or reduction in vegetative cover, and the depletion of food resources. 2016 SACRAMENTO BIOP at 44. Although wild ungulates (e.g., elk and deer) may also graze in or near riparian habitats where the New Mexico meadow jumping

¹ Both the 2016 and 2018 BiOps for the Sacramento Allotments note that the amount of critical habitat identified by the Forest Service on National Forest System lands is more than what is designated in the final Federal Register notice. The discrepancy is the result of the Lincoln National Forest’s use of a corporate GIS mapping tool. Because management decisions in the Lincoln National Forest are based off of the corporate GIS mapping tool, FWS’s analyses in both BiOps reference the tool’s calculated numbers. For consistency, this Complaint also references the Forest Service’s calculated acreages, as reported in the BiOps.

mouse occurs, domestic livestock are far more concentrated in riparian areas, and thus have greater adverse impacts on forage and streambanks than wild ungulates. In a study comparing the impacts from wild ungulate grazing to those from livestock grazing on New Mexico meadow jumping mouse habitat in the Sacramento Allotment, the Forest Service found that there “was *no discernable difference* between areas not grazed and those available to [wild ungulate] grazing only.” In contrast, “[s]ignificant utilization was apparent between areas grazed by wild ungulates and those areas open to grazing by all wild and domestic grazers” (i.e., livestock). Accordingly, domestic livestock grazing is a primary driver of the degradation of New Mexico meadow jumping mouse habitat in the Sacramento Allotment.

71. FWS explained that the extirpation of New Mexico meadow jumping mouse populations from the Sacramento Mountains could largely be attributed to historic grazing practices. Indeed, according to FWS, “[c]urrent grazing practices on the Lincoln National Forest have resulted in the removal or alteration of the [] dense riparian herbaceous vegetation” that the jumping mouse requires for its life history needs. 2016 SACRAMENTO BIOP at 49. FWS further noted that the adverse effects of grazing in the Sacramento Allotment on the New Mexico meadow jumping mouse have been exacerbated by years of drought, which contributed to the loss of suitable habitat because the drier soils that are exposed as surface waters retreat cannot support the tall, dense herbaceous vegetation that the jumping mouse requires for its habitat. Despite these adverse impacts, FWS noted that the Forest Service has *never* enacted or proposed livestock management changes to protect and manage jumping mouse habitat through years of drought.

72. FWS determined that the Forest Service’s proposed utilization standard of 35 percent for livestock grazing were inadequate to provide suitable jumping mouse habitat,

particularly in areas where riparian habitat has already been subjected to disproportionate use by livestock, resulting in trampled and collapsing streambanks that cannot support the dense riparian vegetation that the jumping mouse requires. FWS also determined that the 35 percent utilization standards were insufficient to provide suitable primary constituent elements within designated critical habitat. However, FWS noted that the Forest Service had committed to protecting 53 percent of identified critical habitat. FWS argued that the construction of fences to exclude livestock from jumping mouse habitat, coupled with frequent monitoring to ensure compliance, would protect habitat from damage and degradation, allow for natural restoration of riparian areas, and improve habitat connectivity. According to FWS, these management changes would facilitate the expansion of jumping mouse habitat and limit the extirpation of current populations that would otherwise have occurred.

73. FWS acknowledged that unauthorized grazing within exclosures was expected to occur “infrequently” when fences were down or gates were inadvertently left open. 2016 SACRAMENTO BIOP at 49. FWS admitted that these unauthorized incursions would adversely affect “some” jumping mice through trampling, the loss of protective cover, or a reduction in food availability. *Id.* FWS nevertheless insisted that fencing and other long-term conservation measures that the Forest Service had committed in its 2016 Sacramento BA to implement as part of its proposal to continue its ongoing grazing management activities would “assist in the survival and recovery of the jumping mouse” by maintaining and restoring jumping mouse habitat. *Id.* at 47. Indeed, despite acknowledging that continued livestock grazing on the Sacramento Allotment was the principal cause of jumping mouse habitat loss, FWS nevertheless claimed that “[w]ithout these [conservation] measures, the survival and recovery of the jumping mouse would be in peril.” *Id.* at 48.

74. FWS concluded that the Forest Service's proposal to continue grazing on the Sacramento Allotment would not jeopardize the continued existence of the endangered New Mexico meadow jumping mouse, and would not destroy or adversely modify designated critical habitat because: (1) only a small amount of low to moderate quality jumping mouse habitat and primary constituent elements would be impacted by the proposed action through water gaps, i.e., gaps in riparian fencing that allow cattle access to water at specific points on the stream, and trailing, i.e., the act of herding cattle from one area to another; (2) any effects to areas occupied by the jumping mouse through occasional unauthorized use would be minor and temporary, and would be minimized by frequent inspections and monitoring; (3) most of the impacts to suitable habitat within exclosures would be due to rare, random events and are anticipated to be short-term in light of frequent inspections and monitoring protocols; (4) the implementation of protective measures for the jumping mouse would result in a significant gain in habitat and connectivity over existing conditions; and (5) the Forest Service adjusted its proposed action and committed to initiating a series of protective and recovery actions designed to reduce direct and indirect threats and improve the status of the jumping mouse. FWS explained that this conclusion was based on the full implementation of the Forest Service's proposal as described in the 2016 Sacramento BA, including all proposed conservation measures.

75. FWS included an ITS in the 2016 Sacramento BiOp. In light of the close causal link between jumping mice and suitable habitat conditions, FWS used suitable habitat within exclosures, as well as riparian and upland habitat outside of exclosures, as surrogates for determining when the authorized take of jumping mice was exceeded. Accordingly, the ITS imposed take limitations of 20 percent forage utilization within any given exclosure after unauthorized use, and 35 percent of forage utilization within critical habitat where grazing is

authorized (i.e., outside of exclosures). Water gaps, corrals, and horse pasture were excluded from the take limitations. The ITS provided that if the amount of forage utilization under either scenario was exceeded, the Forest Service was required to reinitiate formal consultation.

76. The ITS also included two RPMs, along with specific non-discretionary implementing terms, to minimize the effects of incidental take. These RPMs were in addition to the Forest Service's conservation measures that were considered as part of the proposed action.

77. The first RPM required that the Forest Service monitor all aspects of ongoing grazing within the Sacramento Allotment. FWS established thirteen terms and conditions to implement the RPM, requiring the Forest Service to: (1) perform twice-weekly compliance checks and report the results to FWS; (2) conduct estimates of range conditions in protected areas using approved methods four times per season; (3) monitor key species utilization at established points throughout the season; (4) contact both FWS and the permittee within 24 hours of discovering any livestock trespass into exclosures; (5) analyze the impacts of livestock trespass into exclosures using approved methods and report the extent of habitat affected to FWS within 72 hours to ensure that the ITS's take threshold is not exceeded; (6) discuss with all permittees the conservation measures, management actions, and terms and conditions that limit grazing impacts to jumping mouse habitat; (7) ensure that exclosures are functional and are maintained throughout the season; (8) report unauthorized activities immediately to FWS; (9) provide an annual post-grazing season report documenting the Forest Service's compliance with the RPMs, terms and conditions, and conservation measures; (10) work with permittees to reduce livestock incursions into jumping mouse exclosures; (11) minimize the effects of herding, trailing, and trampling on riparian habitat, and report the measures taken to do so to FWS in the annual post-grazing season report; (12) trail (i.e., herd) livestock on the existing road system

when moving herds between pastures to limit impacts to riparian areas; and (13) minimize utilization in the uplands and riparian zone within unfenced critical habitat to less than 20 percent, reducing the likelihood or amount of take occurring outside of exclosures in occupied habitat.

78. The second RPM required that the Forest Service consider all information collected for each summer grazing season and implement adaptive management to minimize impacts to New Mexico meadow jumping mouse habitat. FWS established two implementing conditions for this RPM, requiring the Forest Service to: (1) monitor the effects of temporarily removing fencing around the Peñasco trap exclosure to determine the impacts to habitat that had been fenced; and (2) decline to remove additional fencing from the trap area if utilization exceeds moderate use.

b. The 2018 Sacramento BiOp

79. The Sacramento Allotment Annual Monitoring Report for 2017 “indicated [that] several terms and conditions were not met for the New Mexico meadow jumping mouse.” Letter from Susan S. Millsap, Field Supervisor, U.S. FWS, to Elizabeth A. Humphrey, Dist. Ranger, U.S. Forest Serv. 1 (Jan. 9, 2018).

80. On January 9, 2018, FWS sent a letter to the Forest Service recommending that, due to the Forest Service’s failure to comply with several of the 2016 Sacramento BiOp’s terms and conditions for the New Mexico meadow jumping mouse during the 2017 grazing season, the Forest Service reinstate formal consultation on the Sacramento Allotment.

81. On May 1, 2018, the Forest Service issued a “determination” under Section 7(d) of the ESA to assess “whether ongoing grazing actions in the [Sacramento] [A]llotment would constitute a[n] irreversible or irretrievable commitment of resources that foreclose the

development or implementation of any reasonable and prudent alternatives” for the New Mexico meadow jumping mouse. U.S. Forest Serv., SECTION 7(D) DETERMINATION FOR ALL ONGOING ACTIONS FOR THE NEW MEXICO MEADOW JUMPING MOUSE ON THE SACRAMENTO ALLOTMENT ON THE LINCOLN NATIONAL FOREST 3 (May 2018) [hereinafter 7(D) DETERMINATION]. The Forest Service acknowledged that “[o]ngoing livestock grazing will adversely affect critical habitat,” yet insisted that the *effects* of ongoing gazing would not be irreversible, as vegetation could always regrow. *Id.* at 17. Additionally, the Forest Service determined that the terms and conditions in the 2016 Sacramento BiOp were sufficiently protective to ensure that ongoing grazing would not adversely affect the jumping mouse or its critical habitat.

82. In making its Section 7(d) determination, the Forest Service did not acknowledge—much less discuss—its failure to comply with the very terms and conditions that it determined were necessary to protect the New Mexico meadow jumping mouse and its habitat, nor did the Forest Service assess the damage to jumping mice and their habitat that had occurred as a result of that failure. Instead, the Forest Service identified the environmental baseline—i.e., the “status quo,” or the condition of the listed species or its designated critical habitat in the action area absent the effects of the proposed action—as maintaining ongoing grazing activities, without regard for whether those activities would exacerbate the damage to jumping mouse habitat that had already occurred, or would preclude the development of reasonable and prudent alternatives to protect and recover the jumping mouse and its habitat during the reinitiation of consultation with FWS.

83. On August 20, 2018, the Forest Service issued its final BA (“2018 Sacramento BA”) with an official request for the reinitiation of consultation for ongoing grazing activities in the Sacramento Allotment. In the 2018 Sacramento BA and subsequent meetings with FWS, the

Forest Service committed to several conservation measures that purported to mitigate the impacts of the grazing on the New Mexico meadow jumping mouse. Those measures included: replacing existing barbed wire fencing with pipe fencing in the Upper Rio Peñasco enclosure, and the Wills Canyon enclosures at Mauldin Spring; reconstructing the Mauldin Trough to provide a reliable water source for livestock outside of the stream; installing temporary electric fence enclosures in the Peñasco Trap to exclude livestock from the majority of riparian habitat within the trap area; installing temporary electric fencing in Wills Canyon to protect the majority of riparian habitat; developing a long-term strategy for the restoration of riparian areas within critical habitat and other historically occupied areas; conducting frequent compliance checks, defined as 1 to 2 times per week; reporting unauthorized livestock intrusions into enclosures to permittees within 24 hours, and reporting the incursion of livestock and its effects on jumping mouse habitat to FWS within 72 hours; conducting periodic vegetation monitoring using approved methods; and implementing jumping mouse inventory surveys. Additionally, the Forest Service committed to reconstruct and expand the existing riparian enclosure in critical habitat located along Silver Springs Creek in the James Canyon Allotment—which is part of the same critical habitat unit as that located in the Sacramento and Aqua Chiquita Allotments—to protect the habitat from feral horse overgrazing that was occurring.

84. The 2018 Sacramento BiOp reaffirmed FWS’s conclusion in the 2016 Sacramento BiOp that current grazing practices in the Sacramento Allotment—indeed, throughout the Lincoln National Forest—had resulted in the removal of the tall, dense riparian herbaceous vegetation that historically provided jumping mouse habitat, and contributed substantially to the loss of historical populations. FWS also confirmed the “crucial part” that the streams in the

Upper Rio Peñasco Canyon and Wills Canyon play in the survival and recovery of the jumping mouse in the Sacramento Mountains. 2018 SACRAMENTO BIOP at 64.

85. In the 2018 Sacramento BiOp, FWS acknowledged that livestock grazing was a “primary source[] of past and future habitat losses” for the New Mexico meadow jumping mouse in the Sacramento Allotment. 2018 SACRAMENTO BIOP at 21-22. FWS further conceded that overgrazing by livestock of riparian and upland areas outside of permanent enclosures continued to degrade and fragment jumping mouse habitat, further isolating populations and threatening the survival and recovery of the species in the Sacramento Mountains.

86. FWS also again determined that the Allotment’s forage maximum utilization standard of 35 percent was insufficient to protect New Mexico meadow jumping mouse habitat. Limiting forage utilization to just 35 percent was *still* inadequate to provide suitable primary constituent elements—including dense riparian vegetation of at least 24 inches tall—within designated jumping mouse critical habitat. However, FWS again dismissed concerns over continued grazing activities by citing to the Forest Service’s commitment to protect 44 percent of identified critical habitat within the Sacramento and James Canyon Allotments by excluding livestock grazing. FWS did not acknowledge that the Forest Service had made—and failed to effectuate—a similar commitment to protect jumping mouse habitat in the 2016 Sacramento BiOp.

87. Despite acknowledging the serious adverse impacts of current grazing practices on New Mexico meadow jumping mouse habitat in the Sacramento Allotment, FWS determined that the Forest Service’s proposed management changes, if implemented, were sufficient to protect the jumping mouse and its habitat. For example, FWS explained that the design and installation of “*effective* fencing barriers” would limit livestock grazing in protected areas, and

allow for the natural restoration of primary constituent elements. 2018 SACRAMENTO BIOP at 64 (emphasis added). According to FWS, the exclusion of livestock from protected areas would thus help restore additional habitat and facilitate the expansion of jumping mouse populations. FWS insisted that fencing and other long-term conservation measures that the Forest Service committed to implement as part of its proposal to continue its ongoing grazing management activities would “assist in the survival and recovery of the jumping mouse” by maintaining and restoring jumping mouse habitat. *Id.* at 66. Indeed, FWS claimed that “[w]ithout these measures, the survival and recovery of the jumping mouse would be in greater peril.” *Id.* FWS did not meaningfully address the fact that the Forest Service had failed to effectively implement and enforce similar conservation measures required by the 2016 Sacramento BiOp, which in turn, had resulted in additional habitat degradation and loss.

88. FWS acknowledged that unauthorized grazing within exclosures was expected to occur “infrequently” when fences were down or gates were inadvertently left open. 2018 SACRAMENTO BIOP at 65. However, FWS determined that frequent monitoring would allow the Forest Service to quickly discover and respond to any unauthorized use. FWS explained that if the exclosures were not maintained, the requirement to reinitiate consultation would be triggered.

89. FWS concluded that the Forest Service’s proposal to continue grazing in the Sacramento Allotment, as modified by the management changes agreed to in the 2018 Sacramento BA and subsequent meetings, would not jeopardize the continued existence of the New Mexico meadow jumping mouse, or destroy or adversely modify designated critical habitat. FWS provided the exact same rationale for its conclusion as it did in the 2016 Sacramento BiOp, i.e., that: (1) the use of water gaps and trailing meant that only a small amount of low to moderate quality jumping mouse habitat and primary constituent elements would be impacted by

livestock grazing; (2) any effects to fenced occupied habitat caused by occasional unauthorized use would be minor and temporary, and would be minimized by frequent inspections and monitoring; (3) frequent inspections and monitoring protocols would ensure that most of the impacts from livestock grazing to suitable habitat within exclosures are rare and short-term; (4) the implementation of protective measures for the jumping mouse would result in a “significant” increase in habitat and improved habitat connectivity; and (5) adjustments to the proposed action, including additional protective and recovery actions, would reduce direct and indirect threats to, and improve the status of the jumping mouse. FWS again explained that its conclusions were based on the full implementation of the Forest Service’s proposal as described in the 2018 Sacramento BA, including the Forest Service’s commitment to implement specific conservation measures.

90. FWS included an ITS in the 2018 Sacramento BiOp (“2018 Sacramento BiOp ITS”) and again used suitable habitat as a surrogate for determining when the authorized take had been exceeded. The 2018 Sacramento BiOp ITS imposed the same take limitations as those imposed by the 2016 Sacramento BiOp ITS, i.e., 20 percent forage utilization within any given exclosure after unauthorized use, and 35 percent of forage utilization within critical habitat where grazing is authorized (i.e., outside of exclosures). The ITS provided that if the amount of forage utilization under either scenario was exceeded, the Forest Service was required to reinstate formal consultation.

91. The 2018 Sacramento BiOp ITS included the same RPMs as the 2016 Sacramento BiOp ITS, with only slight variations in the implementing terms and conditions. The first 2018 RPM—i.e., that the Forest Service monitor all aspects of ongoing grazing—included the same thirteen implementing measures as the first RPM in the 2016 Sacramento BiOp ITS, plus an

additional measure requiring the Forest Service to annually evaluate the presence or absence of primary constituent elements within the riparian components of designated critical habitat using approved methods. The second RPM—i.e., that the Forest Service consider annual monitoring data to implement an adaptive management strategy to minimize impacts to New Mexico meadow jumping mouse habitat—included a single term and condition requiring the Forest Service to assess the condition of jumping mouse habitat throughout the grazing season, and work with FWS to design and implement adaptive management measures.

92. On information and belief, the Forest Service has failed to implement the terms and conditions and conservation measures outlined in the 2018 Sacramento BiOp. As illustrated in photos submitted to the Forest Service in the Center’s 2019 Notice of Intent, forage utilization appears to exceed both take thresholds in the 2018 Sacramento BiOp ITS, and widespread, chronically heavy grazing by livestock is evident both within and outside of exclosures. Between 2016 and 2019, the Forest Service’s own records show on at least 123 separate occasions, the permittee’s cattle entered New Mexico meadow jumping mouse critical habitat that had been fenced off to exclude grazing by private livestock. As a result of these incursions into jumping mouse critical habitat, the riparian vegetation is sparse, and reaches far less than the “at least” 24 inches of “dense riparian herbaceous vegetation” required to sustain this “habitat specialist” species. Accordingly, livestock grazing has adversely affected, and continues to adversely affect New Mexico meadow jumping mouse habitat, including critical habitat, on the Sacramento Allotment in ways not analyzed or authorized by the 2018 Sacramento BiOp or the 2018 Sacramento BiOp ITS.

93. On information and belief, the Forest Service has exceeded the incidental take thresholds specified in the 2018 Sacramento BiOp ITS by allowing forage utilization in excess of

20 percent within exclosures as a result of livestock incursions, and forage utilization in excess of 35 percent in areas of designated critical habitat where grazing is authorized.

C. The Center's September 13, 2019 Notice of Intent And The Forest Service's Response.

94. On September 13, 2019, the Center transmitted an ESA notice of intent to the Secretary of the Interior, FWS, and the Forest Service, identifying the ESA violations set forth in this Complaint, including 1) Forest Service's failure to ensure against jeopardy by permitting grazing on New Mexico meadow jumping mouse habitat without adequate protection, 2) the Forest Service and FWS's failure to reinitiate consultation on the Forest Service's continued implementation of ongoing grazing activities on the Agua Chiquita and Sacramento Allotments in the Lincoln National Forest, 3) the Forest Service's failure to administer a program to conserve the jumping mouse in the Lincoln National Forest, and 4) the Forest Service's unlawful take of jumping mice in excess of the 2018 Sacramento BiOp ITS.

95. The Center attached to its Notice of Intent photos taken between August 1 and August 4, 2019 of New Mexico meadow jumping mouse critical habitat located along the Agua Chiquita Creek in the Agua Chiquita Allotment, as well as critical habitat located along the Rio Peñasco Canyon and Wills Canyon in the Sacramento Allotment. The photos documented chronic, acute, and significant degradation of jumping mouse critical habitat, and significant adverse impacts to areas within exclosures from unauthorized livestock trespass. In many

exclosures, trampling and overutilization of forage by livestock was evident, particularly when compared to photos of healthy jumping mouse habitat.



Photo included in September 13, 2019 notice letter depicting a New Mexico meadow jumping mouse critical habitat exclosure in the Agua Chiquita Allotment. Widespread, chronic grazing is evident within the metal pipe fence exclosure. Herbaceous vegetation appears “mowed,” and is far shorter than the 24 inches required to support jumping mouse populations.



Photo included in September, 13, 2019 notice letter depicting two types of New Mexico meadow jumping mouse critical habitat exclosures in the Sacramento Allotment: on the right, an elk fence type critical habitat exclosure; and on the left, an electric fence critical habitat exclosure. Herbaceous vegetation in the electric-fenced exclosure appears “mowed,” and is far shorter than the 24 inches required to support jumping mouse populations.



Forest Service photo included in September, 13, 2019 Notice of Intent depicting healthy critical habitat in the Santa Fe National Forest. This critical habitat unit contains the tall (i.e., at least 24 inch), dense herbaceous riparian vegetation, and adjacent, intact upland habitat that is essential for to the New Mexico meadow jumping mouse species.

96. As illustrated by the photos provided by the Center in its 2019 Notice of Intent, many exclosures in the Sacramento Allotment appeared to greatly exceed the 20 percent utilization standard for determining when incidental take has been exceeded. Critical habitat areas not within exclosures also appeared to greatly exceed the 35 percent utilization standard for when incidental take has been exceeded. Likewise, as illustrated by the photos provided by the Center, forage utilization in the Agua Chiquita Allotment appeared to exceed the 35 percent utilization standard, and heavy use by livestock was evident within exclosures.

97. In both the Agua Chiquita and Sacramento Allotments, the temporary electric and barbed wire fences erected to enclose and protect critical habitat were shown to be ineffectual, as areas within the exclosures frequently appeared to exceed the applicable utilization standards. Additionally, barbed wire and electric fences were in various states of disrepair, some electric

fences were not charged, and cattle were observed within several such enclosures. The ineffectiveness of electric fences was also apparent when areas enclosed by the temporary fences were compared to areas enclosed by sturdier elk-fencing, which exhibited the tall, dense herbaceous vegetation the jumping mouse requires to survive.



Photo included in September, 13, 2019 Notice of Intent depicting a New Mexico meadow jumping mouse critical habitat enclosure in Upper Wills Canyon/Mauldin Springs area on the Sacramento Allotment. The electric fence is an ineffective barrier, as evidenced by the cow present within the enclosure. Herbaceous vegetation appears “mowed,” and is far shorter than the 24 inches required to support jumping mouse populations.



Photo included in September, 13, 2019 Notice of Intent depicting a New Mexico meadow jumping mouse critical habitat enclosure in Wills Canyon on the Sacramento Allotment. The electric fence is an ineffective barrier, as evidenced by the cows present within the enclosure.

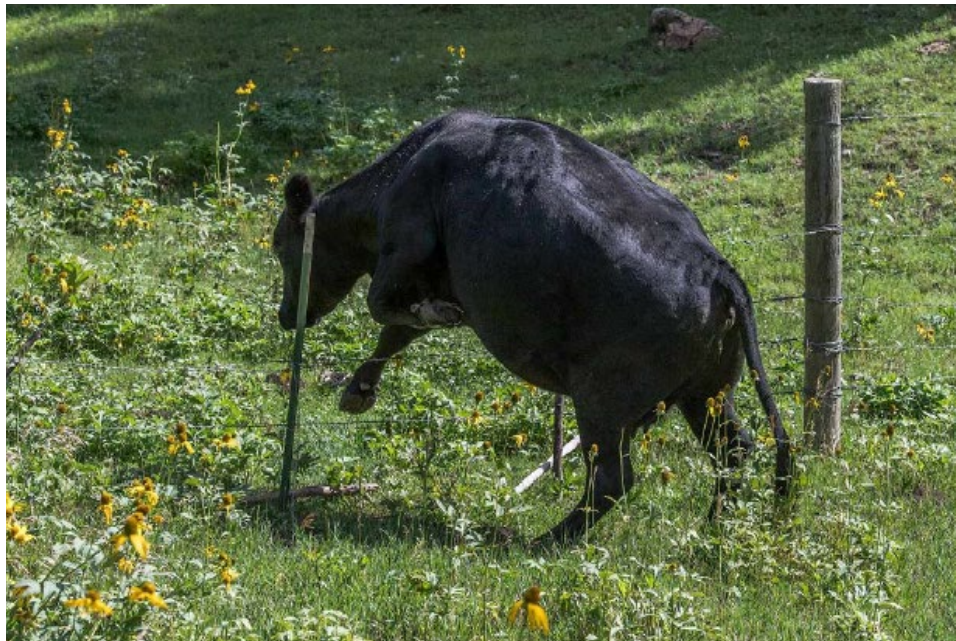


Photo included in September, 13, 2019 Notice of Intent depicting a New Mexico meadow jumping mouse critical habitat enclosure in the Middle Rio Peñasco on the Sacramento Allotment. A cow is shown exiting the critical habitat enclosure through the barbed wire fence, demonstrating that the barrier is ineffective.



Photo included in September, 13, 2019 Notice of Intent depicting cattle trespassing in a New Mexico meadow jumping mouse critical habitat enclosure in the Agua Chiquita Allotment.



Photo included in September, 13, 2019 Notice of Intent depicting a New Mexico meadow jumping mouse critical habitat enclosure in Lower Mauldin Springs on the Sacramento Allotment. The area within the electric fenced enclosure (left) shows significant utilization, and appears to exceed the 2018 Sacramento BiOp ITS's take threshold of 20 percent forage utilization within any given enclosure. In contrast, the area within the elk enclosure (right) contains the tall, dense herbaceous vegetation required to support jumping mouse survival and recovery.

98. On December 4, 2019, the Forest Service responded to the Center’s Notice of Intent. The Forest Service conceded that the reinitiation of consultation for ongoing grazing activities on the Sacramento and Agua Chiquita Allotments was required. The Forest Service reported that although it intended to reinitiate consultation with FWS prior to the start of the next grazing season, “the timing and completion of consultation w[ould] depend upon the availability of agency resources” at both the Forest Service and FWS. Letter from Calvin N. Joyner, Reg’l Forester, U.S. Forest Serv., to Dr. Robin Silver, Co-Founder and Board Member, Ctr. for Biological Diversity 3 (Dec. 4, 2019) [hereinafter Forest Serv. NOI Response].

99. With respect to ongoing grazing activities on the Agua Chiquita Allotment, the Forest Service conceded that several management actions required under the previous consultation had either not been “fully implemented,” or “were not sufficient to prevent adverse effects on the species,” including that: grazing had occurred within riparian areas along the Agua Chiquita Creek; grazing had not been completely prevented in occupied and designated critical habitat; habitat assessments and monitoring protocols had not been implemented; and grazing of cattle in excess of half the typical herd had been permitted on the Agua Chiquita Pasture. Forest Serv. NOI Response at 2. The Forest Service further admitted that as a result of its failure to implement the conservation measures underlying its determination—and FWS’s concurrence—that grazing on the allotment would not adversely affect the jumping mouse or its critical habitat, the action had been modified in a manner that was affecting the New Mexico meadow jumping mouse and its critical habitat in ways not previously considered. Accordingly, the Forest Service acknowledged that the reinitiation of consultation was required.

100. With respect to ongoing grazing activities on the Sacramento Allotment, the Forest Service conceded that several terms and conditions of the 2018 Sacramento BiOp “were

either not fully implemented” or were “not sufficient” to prevent adverse effects on the species or its habitat, including that: compliance checks were not completed at the required frequency (i.e., 1 to 2 times per week); permittees either had not been contacted within 24 hours of an unauthorized incursion, or had not been contacted at all; and the impacts from unauthorized incursions were not analyzed and reported to FWS. Forest Serv. NOI Response at 2. The Forest Service further conceded that as a result of its failure to comply with the terms, conditions, and conservation measures outlined in the 2018 Sacramento BiOp, the action had been modified—and thus, may affect—the New Mexico meadow jumping mouse and its critical habitat in a manner not previously considered in the 2018 Sacramento BiOp. The Forest Service also admitted that because data indicated that the 20 percent forage utilization standard for exclosures on the Allotment appeared to have been exceeded, “incidental take” of the New Mexico meadow jumping mouse on the Sacramento Allotment “may” have been exceeded. *Id.* at 3-4. Forest Service acknowledged that the reinitiation of consultation was required.

101. Even as the Forest Service conceded that it had failed to implement management actions designed to limit livestock incursions into New Mexico meadow jumping mouse critical habitat, promote the use of areas outside of critical habitat, and monitor vegetation utilization, the Forest Service insisted that those same measures were sufficient to meet its obligations under Section 7(1) to “carry[] out programs for the conservation” of listed species. 16 U.S.C. § 1536(a)(1).

102. The Forest Service insisted that its actions did not jeopardize the continued existence of the New Mexico meadow jumping mouse because the findings of the 2017 Agua Chiquita Concurrence—i.e., that with the implementation of specified conservation measures, ongoing grazing activities on the Agua Chiquita Allotment were not likely to adversely affect the

jumping mouse or its critical habitat—and the 2018 Sacramento BiOp—i.e., that the implementation of ongoing grazing activities on the Sacramento Allotment “*as proposed*” in the 2016 Sacramento BA “is not likely to jeopardize the continued existence” of the jumping mouse—continued to apply. Forest Serv. NOI Response at 7-6. The Forest Service did not explain how it could continue to rely on FWS’s findings to avoid jeopardy when it had failed to implement the conservation measures and terms and conditions upon which those “not likely to adversely affect” and “no jeopardy” determinations relied.

103. On information and belief, the incidental take thresholds for grazing on New Mexico meadow jumping mouse habitat in the Sacramento Allotment have been exceeded. Indeed, between 2016 and 2019, the Forest Service’s own records indicate that cattle trespassed on fenced critical habitat in the Agua Chiquita Allotment on 136 separate occasions. During that same four-year period, the agency’s records indicate that cattle trespassed on fenced critical habitat in the Sacramento Allotment on 123 separate occasions.

104. In May 2020, the Forest Service reported on the history of New Mexico meadow jumping mouse survey efforts in the Sacramento Mountains which include the Agua Chiquita and Sacramento Allotments. The Forest Service reported that from 1988 to present day, survey efforts had detected jumping mice at 17 sites within the Sacramento Mountains. Between 2013 and 2018, detections rapidly declined. By 2019, detections of jumping mice were limited to just two sites on the Upper and Lower Mauldin Springs, located in Wills Canyon on the Sacramento Allotment. As a result of these survey efforts, the Forest Service suggested that the only remaining New Mexico meadow jumping mice in the Sacramento Mountains are restricted to the Upper Wills Canyon.

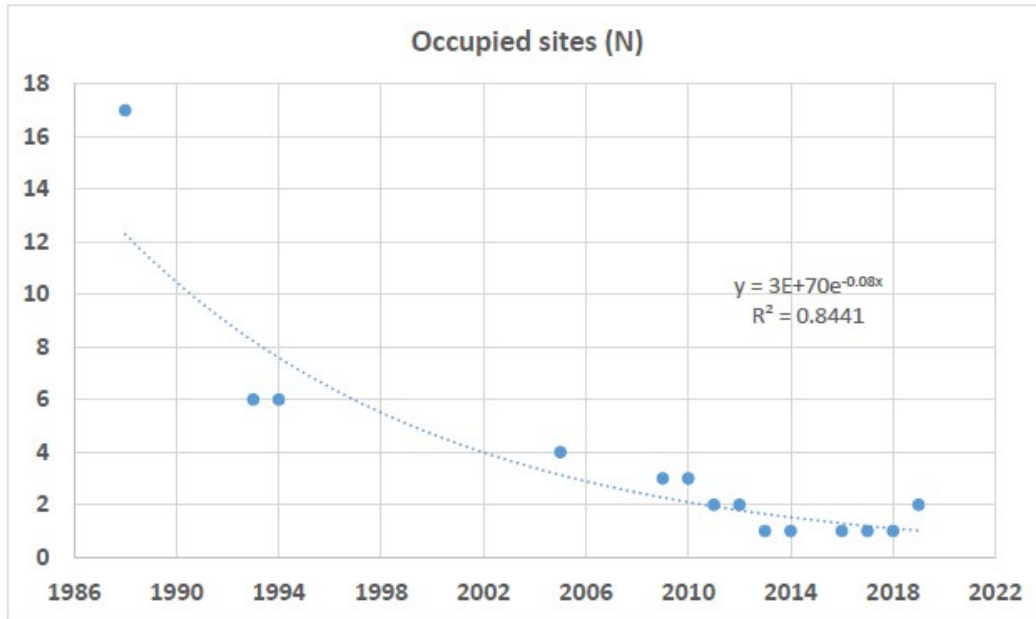


Chart taken from the Forest Service’s initial draft of its “Comprehensive History of the Known Distribution of [New Mexico Meadow Jumping Mice] in the Sacramento Mountains,” received by the Center in response to a FOIA request. The Chart depicts the rapid decline of jumping mouse populations in the Sacramento Mountains, as evidenced by the number of occupied sites.

D. FWS’s Updated Species Status Assessment For The New Mexico Meadow Jumping Mouse.

105. In January 2020, FWS issued an updated Species Status Assessment (“2020 SSA”) for the New Mexico meadow jumping mouse. The report reaffirmed that habitat loss, degradation, and fragmentation due to grazing pressure from livestock continue to threaten the survival and recovery of the New Mexico meadow jumping mouse.

106. In the 2020 SSA, FWS concluded that most livestock grazing is likely incompatible with the persistence of New Mexico meadow jumping mice populations due to the species’ extreme sensitivity to habitat disturbance. Studies have shown that even short periods of livestock grazing—indeed, just a few hours or days—may reduce the abundance of jumping mice. In fact, FWS reported that jumping mouse populations have been extirpated by grazing periods lasting only months, as opposed to years. For example, in at least two instances—

including one in the Agua Chiquita area—delays of mere months between the removal and replacement of enclosure fences resulted in the extirpation of local populations. Accordingly, citing the vulnerability of all known populations of jumping mice, FWS concluded that “it would be premature to conclude that even short-term grazing within the riparian zone would have minimal impact on the subspecies.” 2020 SSA at 87.

107. FWS explained that almost all jumping mice locations on National Forests are within active livestock grazing allotments and in areas inhabited by elk and feral horses. FWS reviewed the Forest Service’s grazing management practices and found that despite decades of population decline, the Forest Service had implemented only limited management changes on grazing allotments within the range of the jumping mouse. The difficulties of managing jumping mouse habitat were compounded by the Forest Service’s limited monitoring and reporting on the effects of forage utilization standards on the Carson, Santa Fe, and Lincoln National Forests. FWS concluded that “current grazing practices on National Forest lands are not conducive to the conservation of the jumping mouse and, in all likelihood, have resulted in the extirpation of many historical localities.” *Id.* at 88.

108. FWS explained that although many jumping mouse locations on National Forest land are in enclosures that exclude livestock (and sometimes wild ungulates), continued livestock grazing in areas surrounding the enclosures precludes the development of the tall, dense riparian herbaceous vegetation necessary to support the expansion of jumping mouse populations into areas adjacent to the enclosures. FWS further explained that without additional habitat to support the expansion of populations, and sufficient connectivity between habitats to enable re-colonization if populations are extirpated, the survival of the jumping mouse is unlikely. FWS

concluded that due to their small size and isolation from other populations, many current jumping mouse populations are not resilient.

109. In the 2020 SSA, FWS acknowledged that barbed wire fencing is not an effective method of livestock grazing protection, as it requires nearly constant maintenance and does not form an effective barrier to livestock intrusion. According to FWS, the continued use of barbed wire fencing for habitat exclosures “could continue to put many of the jumping mouse populations found since 2005 at risk of extirpation even when efforts are made to exclude cattle from suitable habitats.” 2020 SSA at 86.

110. Because of the magnitude and imminence of grazing pressures on the jumping mouse and its habitat, FWS concluded that livestock grazing is the most significant factor causing continuing adverse impacts to the species in five of the eight geographic management areas. The ongoing and expected future loss of habitat renders most of the remaining populations of jumping mice vulnerable to extirpation. FWS concluded that the New Mexico meadow jumping mouse’s overall viability is low, and that, without management intervention to increase habitat quality and connectivity, the species is unlikely to survive in the long term.

E. The Forest Service’s Failure To Correct The Legal Violations In Its Administration Of Ongoing Grazing Activities In The Lincoln National Forest

111. In May 2020, the Center attempted to work with the Forest Service to resolve its concerns with the Forest Service’s failure to comply with several of its statutory obligations under the ESA with respect to the New Mexico meadow jumping mouse and its critical habitat when authorizing ongoing grazing activities within the Sacramento and Agua Chiquita Allotments in the Lincoln National Forest.

112. On August 7–8, 2020, Center staff visited the Sacramento and Agua Chiquita Allotments to observe and document the condition of jumping mouse critical habitat. On these visits, Center staff photographed the continued deterioration of jumping mouse critical habitat both inside and outside of habitat exclosures—including the absence of the tall, dense herbaceous vegetation that the New Mexico meadow jumping mouse requires for its life history needs—and multiple instances of cattle trespass into habitat exclosures. These photographs demonstrate that any efforts that the Forest Service has made to protect the jumping mouse and its critical habitat have been ineffective. Additionally, these photographs evidence that the Forest Service has failed to remedy the legal violations identified in the Center’s 2019 Notice of Intent and set forth in this Complaint, namely that the Forest Service has failed to ensure against jeopardy by permitting grazing on New Mexico meadow jumping mouse habitat in the Agua Chiquita and Sacramento Allotments in the Lincoln National Forest without adequate protection, the Forest Service and FWS have failed to reinitiate consultation on the Forest Service’s continued implementation of ongoing grazing activities on these two Allotments, the Forest Service has failed to administer a program to conserve the jumping mouse in the Lincoln National Forest, and the Forest Service has unlawfully taken jumping mice in excess of the 2018 Sacramento BiOp ITS. In the Agua Chiquita Allotment, Center staff again photographed cattle trespassing in habitat exclosures. Photographs taken of the vegetation in the exclosures show significant grazing, and forage utilization in unfenced critical habitat appeared to far exceed the 35 percent utilization standard. Within exclosures, except for the two exclosures at Barrel Spring and Sand Springs, ground cover was completely absent, meaning that the habitat is not recovering and is continuing to be degraded.



Photo taken on August 8, 2020 of jumping mouse critical habitat along the Agua Chiquita Creek in the Agua Chiquita Allotment showing severe habitat degradation. Herbaceous vegetation appears “mowed,” and is far shorter than the 24 inches required to support jumping mouse populations.



Photo taken on August 8, 2020 of jumping mouse critical habitat along the Agua Chiquita Creek in the Agua Chiquita Allotment showing severe habitat degradation. Herbaceous vegetation appears “mowed,” and is far shorter than the 24 inches required to support jumping mouse populations. Additionally, the streambank is denuded and trampled, adversely impacting habitat recovery.



Photo taken on August 8, 2020 of jumping mouse critical habitat along the Agua Chiquita Creek in the Agua Chiquita Allotment showing trespass cows and severe habitat degradation. Herbaceous vegetation appears “mowed,” and is far shorter than the 24 inches required to support jumping mouse populations. As illustrated by this photograph, jumping mouse habitat recovery is being adversely impacted by livestock grazing.

113. On information and belief, the Forest Service has not requested to reinstate either formal or informal consultation with FWS for ongoing grazing activities in the Agua Chiquita Allotment.

114. On August 7-8, 2020, Center staff again photographed cattle trespassing in habitat enclosures in the Sacramento Allotment. Forage utilization within the enclosures appeared to far exceed the 2018 Sacramento BiOp ITS’s take threshold of 20 percent. Forage utilization in critical habitat outside of enclosures appeared to far exceed the 2018 Sacramento BiOp ITS’s take threshold of 35 percent. Critical habitat located below the Lower Mauldin Springs elk-type enclosure continues to show severe degradation. Ground cover in essentially all critical habitat areas was completely absent, indicating both a failure of the habitat to recover and continued degradation.



Photo taken on August 8, 2020, of jumping mouse critical habitat on the northern side of the lower Mauldin Springs enclosure. The area of critical habitat outside of the enclosure shows significant utilization, and appears to exceed the 2018 Sacramento BiOp ITS's take threshold of 35 percent forage utilization within unfenced critical habitat.



Photo taken on August 8, 2020, of jumping mouse critical habitat on the southern side of the lower Mauldin Springs exclosure. The area of critical habitat outside of the exclosure shows significant utilization, and appears to exceed the 2018 Sacramento BiOp ITS's take threshold of 35 percent forage utilization within unfenced critical habitat.



Photo taken on August 7, 2020 of jumping mouse critical habitat along Wills Canyon in the Sacramento Allotment. The electric fence is an ineffective barrier, as evidenced by the cows present within the enclosure. The area within the electric fenced enclosure shows significant utilization, and appears to exceed the 2018 Sacramento BiOp ITS's take threshold of 20 percent forage utilization within any given enclosure. Herbaceous vegetation appears "mowed," and is far shorter than the 24 inches required to support jumping mouse populations. Habitat recovery is being adversely impacted.



Photo taken on August 8, 2020 of jumping mouse critical habitat along Wills Canyon in the Sacramento Allotment. The electric fence is an ineffective barrier, as evidenced by the cows present within the enclosure. The area within the electric fenced enclosure shows significant utilization, and appears to exceed the 2018 Sacramento BiOp ITS's take threshold of 20 percent forage utilization within any given enclosure. Herbaceous vegetation appears "mowed," and is far shorter than the 24 inches required to support jumping mouse populations. Habitat recovery is being adversely impacted.



Photo taken on August 7, 2020 of jumping mouse critical habitat along the Rio Peñasco in the Sacramento Allotment. The pipe metal fence is an ineffective barrier, as evidenced by the cattle present within the enclosure. The area within the fenced enclosure shows significant utilization, and appears to exceed the 2018 Sacramento BiOp ITS's take threshold of 20 percent forage utilization within any given enclosure. Herbaceous vegetation appears "mowed," and is far shorter than the 24 inches required to support jumping mouse populations. Habitat recovery is being adversely impacted.



Photo taken on August 7, 2020 of jumping mouse critical habitat along the Rio Peñasco in the Sacramento Allotment. The area which is within the jumping mouse's critical habitat shows significant utilization, and appears to exceed the 2018 Sacramento BiOp ITS's take threshold of 35 percent forage utilization within unfenced critical habitat. Herbaceous vegetation appears "mowed," and is far shorter than the 24 inches required to support jumping mouse populations. Habitat recovery is being adversely impacted.

115. On information and belief, the Forest Service has not requested to reinstate formal consultation with FWS for ongoing grazing activities in the Sacramento Allotment.

PLAINTIFF'S CLAIMS FOR RELIEF

Claim I – The Forest Service's Failure To Insure Against Jeopardy Violates The ESA

116. Plaintiffs hereby incorporate all preceding paragraphs by reference.

117. Except in extraordinary circumstances not present here, the ESA mandates that federal agencies, in consultation with FWS, "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species" that has been determined to be "critical." 16 U.S.C. § 1536(a)(2). Accordingly, with respect to

every discretionary action undertaken by an agency, the ESA “requires that [the] agency ‘insure’ that the actions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats.” *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666-67 (2007). The Forest Service is in flagrant violation of that overarching mandate. Through its grazing management and permitting activities, the Forest Service is responsible for the degradation and destruction of the herbaceous riparian habitat—including critical habitat—that the highly endangered New Mexico meadow jumping mouse requires to survive. Moreover, the Forest Service has consistently failed to implement conservation measures designed to ensure that grazing activities do not adversely affect or jeopardize the jumping mouse or its critical habitat. Yet, beyond merely announcing its intent to reinstate consultation for the Sacramento and Agua Chiquita Allotments if agency resources allow, the Forest Service has neither undertaken, nor committed to implement, any of the mitigation measures that are necessary to address the devastating impacts of its actions. Thus, the Forest Service has violated the ESA, its implementing regulations, and the APA.

118. The Forest Service’s mere declaration that it will reinstate consultation when agency resources allow—particularly when its declaration is unaccompanied by any commitment to curtail or halt the grazing activities that are harming the jumping mouse and its critical habitat—is not tantamount to avoiding species jeopardy or the destruction or adverse modification of critical habitat, as required by the ESA and its implementing regulations. The Forest Service has not ensured that its actions are unlikely to jeopardize the jumping mouse or impair its critical habitat by merely announcing that it will eventually undergo consultation on continuing actions that are presently harming the species’ ability to survive and recover. Rather, the Forest Service can only satisfy the unequivocal statutory mandate of Section 7(a)(2) by

taking the concrete measures necessary to mitigate the impacts of its jeopardizing actions—most important, by immediately curtailing or halting grazing in jumping mouse habitat and restoring riparian habitat to improve connectivity and mitigate the habitat losses that the Forest Service’s grazing management practices have caused and will continue to cause—measures that the Forest Service simply has not taken here. Thus, the Forest Service has violated the ESA, its implementing regulations, and the APA.

119. The Forest Service’s complete failure to insure, through formal consultation with FWS, that its ongoing grazing activities on the Agua Chiquita and Sacramento Allotments and the devastating impacts such management continues to cause to the New Mexico meadow jumping mouse and its critical habitat is not jeopardizing the continued existence of the jumping mouse, destroying its critical habitat, and impairing its survival and recovery prospects, is arbitrary, capricious, and in contravention of Section 7(a)(2), 16 U.S.C. § 1536(a)(2), and the ESA’s implementing regulations, 50 C.F.R. § 402.14(a).

Claim II – The Forest Service’s Failure To Develop And Implement A Program To Conserve The New Mexico Meadow Jumping Mouse And Its Habitat Violates The ESA

120. Plaintiffs hereby incorporate all preceding paragraphs by reference.

121. The Forest Service has violated its affirmative obligation to “carry[] out programs for the conservation” of listed species, 16 U.S.C. § 1536(a)(1), by failing to implement a program that conserves the New Mexico meadow jumping mouse and instead, carrying out its grazing program in a manner that knowingly and significantly impairs the jumping mouse’s habitat, including critical habitat, and by otherwise subverting the jumping mouse’s prospects for recovery. Indeed, the Forest Service has conceded that it has repeatedly *failed* to implement conservation measures that FWS deemed necessary for the species’ survival and recovery. Under such circumstances, the agency’s citation to a few minor actions taken to reconstruct fences

around ineffective exclosures cannot suffice to demonstrate that the agency has developed, in consultation with FWS, a comprehensive program designed to meaningfully conserve the jumping mouse and its habitat. Thus, the Forest Service has violated the ESA, its implementing regulations, and the APA.

122. Because the Forest Service failed, in response to the ongoing harm wrought by its authorization of ongoing grazing activities, to meaningfully offset the devastating impacts of the agency's grazing program on the New Mexico meadow jumping mouse and its designated habitat, and, rather, has simply stated that it will undergo consultation at some indefinite time in the future, even as it continues to implement the grazing program without developing any mitigation plan whatsoever to address ongoing harm to the jumping mouse and its habitat, the Forest Service has violated and continues to violate Section 7(a)(1) of the ESA.

Claim III – The Forest Service And FWS's Failure To Pursue Formal Consultation Concerning The Full Scope Of The Forest Service's Authorization Of Grazing Without Committing To Any Mitigation Measures Violates The ESA

123. Plaintiffs hereby incorporate all preceding paragraphs by reference.

124. Under 50 C.F.R. § 402.16, an action agency is required to reinitiate consultation with FWS “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the biological opinion or written concurrence” or “[i]f the amount or extent of taking specified in the incidental take statement is exceeded.” The Forest Service has conceded that both of these triggers were met here many months ago. Specifically, with respect to the Agua Chiquita Allotment, the Forest Service has conceded that it has failed to implement the conservation measures relied upon by FWS in its 2017 Agua Chiquita Concurrence with the Forest Service's determination that ongoing grazing activities would not adversely affect the New Mexico meadow jumping mouse or its critical habitat.

Likewise, with respect to the Sacramento Allotment, the Forest Service conceded that it had failed to implement the conservation measures, and nondiscretionary terms and conditions implementing the reasonable and prudent measures, required by the 2018 Sacramento BiOp. Likewise, the Forest Service conceded that the amount and extent of incidental take had likely been exceeded for the jumping mouse on the Sacramento Allotment.

125. The Forest Service's admitted failure to comply with the conservation and mitigation requirements designed to protect the New Mexico meadow jumping mouse and its habitat, including critical habitat, from degradation and fragmentation due to grazing appears to be a chronic issue. For example, the Forest Service's failure to comply with the terms and conditions of the 2016 Sacramento BiOp—which were largely identical to those required by the 2018 Sacramento BiOp—necessitated the reinitiation of consultation that culminated in the 2018 Sacramento BiOp. Yet, the Forest Service continues to conduct its grazing management program as if those measures were actually being implemented and were effective at protecting and conserving jumping mouse habitat. Indeed, the Forest Service continues to authorize grazing on the Agua Chiquita and Sacramento Allotments in the 2020 grazing season under the terms of the 2017 Agua Chiquita Concurrence and the 2018 Sacramento BiOp, despite the fact that its ongoing failure to comply with those terms has caused deleterious impacts to jumping mouse habitat, including critical habitat, and without committing to additional conservation or mitigation measures. The Forest Service failed to consider the cumulative effects of its consistent failure to implement conservation and mitigation measures designed to protect jumping mouse habitat, including critical habitat, from the adverse effects of grazing. Additionally, the Forest Service failed to consider the direct and indirect effects of continuing to implement its grazing program on the significantly compromised jumping mouse habitat on the Lincoln National

Forest. Given the magnitude of such direct, indirect, and cumulative effects, the Forest Service and FWS were required to engage in formal consultation regarding the full complement of ongoing adverse effects associated with the Forest Service's authorization of grazing activities on the Lincoln National Forest. The failure to do so violates the ESA, its implementing regulations, and the APA.

126. The Forest Service has both "retained" and is "authorized by law" to engage in "discretionary Federal involvement or control" of ongoing grazing activities on National Forest System lands, including those within the Lincoln National Forest. 50 C.F.R. § 402.16(a)(2), (3). The Forest Service's decision to authorize grazing activities in New Mexico meadow jumping mouse habitat, including critical habitat, without implementing the conservation or mitigation measures set forth in the 2017 Agua Chiquita Concurrence and 2018 Sacramento BiOp "subsequently modified" the action "in a manner that causes [] effect[s] to the listed species or critical habitat that w[ere] not considered in the biological opinion or written concurrence." *Id.* § 402.16. Additionally, available evidence indicates that the amount of incidental take specified in the 2018 Sacramento BiOp ITS has been exceeded. Consequently, the Forest Service and FWS must reinitiate consultation *prior* to authorizing any further grazing on the Lincoln National Forest, and FWS must timely produce a BiOp that fully addresses all of the direct, indirect, and cumulative effects associated with the Forest Service's activities, including the effects of the Forest Service's consistent failure to implement necessary conservation and mitigation measures.

127. For these reasons, the Forest Service and FWS have violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and 50 C.F.R. §§ 402.14, 402.16, by failing to reinitiate formal consultation prior to allowing grazing to continue on the Lincoln National Forest, which

constitutes arbitrary and capricious agency action in violation of 5 U.S.C. § 706(2) or, alternatively, constitutes agency action “unlawfully withheld or unreasonably delayed” in violation of 5 U.S.C. § 706(1).

Claim IV – The Forest Service’s Unauthorized Take Of The New Mexico Meadow Jumping Mouse In Violation Of The ESA

128. Plaintiffs hereby incorporate all preceding paragraphs by reference.

129. Under the ESA, incidental take in excess of the amount or extent specified in the ITS is prohibited. The 2018 Sacramento BiOp ITS specified two thresholds for the New Mexico meadow jumping mouse, using suitable habitat within exclosures, as well as riparian and upland habitat outside of exclosures as surrogates: (1) for areas within exclosures, a 20 percent forage utilization standard; and (2) for areas of critical habitat outside of exclosures where grazing is authorized, a 35 percent forage utilization standard. On information and belief, the Forest Service has exceeded these incidental take thresholds by allowing forage utilization in areas of critical habitat to exceed the applicable standards. Additionally, these thresholds continue to be exceeded during the 2020 summer grazing season. Accordingly, by authorizing grazing in excess of the incidental take thresholds in the 2018 Sacramento BiOp ITS—especially in light of the Forest Service’s knowledge that such exclosures have repeatedly proven ineffective at excluding domestic livestock—the Forest Service is authorizing activities that are unlawfully taking New Mexico meadow jumping mice, in violation of the ESA and its implementing regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter an Order:

1. Declaring that Defendants have violated the Endangered Species Act and the Administrative Procedure Act;

2. Enjoining the Forest Service from authorizing grazing in New Mexico meadow jumping mouse habitat on the Agua Chiquita and Sacramento Allotments until consultation has been reinitiated and completed;
3. Setting aside the 2017 Agua Chiquita Concurrence and 2018 Sacramento BiOp—and any grazing permits relying upon those invalid consultation decisions—and ordering the Forest Service and FWS to reinitiate consultation to address all of the impacts of the Forest Service’s actions on the New Mexico meadow jumping mouse and its critical habitat prior to authorizing grazing activities on the Lincoln National Forest;
4. Ordering the Forest Service to develop an appropriate conservation program pursuant to Section 7(a)(1) of the ESA to address the impacts of livestock grazing on the New Mexico meadow jumping mouse and its critical habitat;
5. Awarding Plaintiff its attorneys’ fees and costs in this action; and
6. Granting Plaintiffs any further relief as the Court may deem just and proper.

Respectfully submitted,

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