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Re: Objection to the New Mexico Meadow Jumping Mouse Habitat Improvement Projects on the Sacramento Grazing Allotment

WildEarth Guardians respectfully submits this objection to the Final EA, Finding of No Significant Impact (FONSI) and Draft Decision Notice (Draft DN) for the NMMJM Habitat Improvement Projects on the Sacramento Grazing Allotment. We are disappointed that the Forest Service failed address the significant issues raised in our comments, and the project's failure to resolve the impacts of livestock grazing and motorized recreation on the New Mexico Meadow Jumping Mouse (NMMJM) and Mexican Spotted Owl (MSO) and their critical habitats, the Sacramento Mountain Thistle, and a variety of Sensitive and Management Indicator species and their habitats in the Sacramento allotment. Our Scoping and Draft EA comments are incorporated in full into this objection.

- I. The stated Purpose and Need is too narrow and does not provide for the restoration and recovery of the Endangered, Threatened, Sensitive and Management Indicator Species on the Sacramento Allotment

An agency may not "define a project so narrowly that it forecloses a reasonable consideration of alternatives." *Fuel Safe Washington v. Fed. Energy Regulatory Comm'n*, 389 F.3d 1313, 1324 (10th Cir. 2004); *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002). That is exactly what happened here. The Final EA states that "no issues that would require the development of additional action alternatives that meet the project's purpose and need were identified." Yet, the Forest Service so narrowly defined the purpose of the project it foreclosed a reasonable consideration of alternatives and continues to favor grazing and motorized use over species and habitat restoration and recovery. Guardians raised this issue in our comments on the Draft EA, and the Forest Service turned a blind eye.

The Draft EA states that "The purpose of this proposal is to protect and improve the NMMJM critical habitat within the Sacramento Grazing Allotment by reducing impacts such as grazing and recreation, which decrease the cover and food essential for the continued survival of the NMMJM, while continuing to allow for livestock grazing and recreational activities." Draft EA, p. 6. The Final EA states that "The purpose of this proposal is to strategically protect and improve NMMJM critical habitat areas with high proportions of primary constituent elements within the Sacramento allotment by: constructing permanent exclosures around the best habitat, thereby reducing impacts such as grazing and recreation;

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and decommissioning a section of National Forest System trail that bisects habitat, thereby reducing impacts from recreation.” And “to continue to allow for livestock grazing and recreational activities by installing additional waterer developments and facilities and rerouting a section of National Forest System trail by constructing a new section, respectively.” Final EA, p. 5.

While we had concerns with the Draft EA’s too narrow purpose, the Final EA narrows the purpose even more, without explanation. In fact, it appears that the Forest Service developed the purpose to conform to its proposed alternative, instead of developing alternatives to address the underlying purpose and need to which the agency is responding. Our comments on the Draft EA explained why the stated purpose was too narrow and identified a more appropriate Purpose and Need as one that complies with the ESA and the NMMJM 2014 Recovery Outline¹, and provides for the protection, improvement and *increased connectivity of NMMJM critical habitat to expand the current NMMJM population and ensure its long-term viability*. WildEarth Guardians’ Comments on Draft EA, p. 1 (cited herein as “Draft EA Comments”) (*emphasis in original*). The Final EA and Decision go in the opposite direction, even more narrowly defining the purpose to conform to is only action alternative. Instead of developing alternatives to respond to the needs of the NMMJM and MSO and their critical habitats, and the Sacramento Mountain thistle, the Forest Service is more concerned with enabling grazing and motorized use to continue at unsustainable levels. The identified purpose and need fails to protect or restore critical habitat, fails to provide for increased connectivity, and will not ensure the long-term viability, much less recovery, of these species.

II. The Forest Service violated NEPA by failing to analyze a reasonable range of alternatives

NEPA regulations are generally meant to apply to EAs as well as to EISs. That is so because these NEPA obligation derive from Section 102(2) of the statute. 42 U.S.C. § 4332(2); 40 C.F.R. § 1500.3. Section 1500.3 states that “Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions” of NEPA, and that “[t]hese regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements).” 40 C.F.R. § 1500.3. Rather, “[t]he regulations apply to the whole of section 102(2).” *Id.* And an EA is expressly required to evaluate “alternatives *as required by section 102(2)(E)*.” 40 C.F.R. § 1509.8(b) (*emphasis added*).

The “heart” of a the NEPA document is the analysis of reasonable alternatives. 40 C.F.R. § 1502.14. An agency “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis of choice among options by the decision-maker and public. *Id.* To comply with the regulations implementing NEPA, an agency must “rigorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). “Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded. *New Mexico ex rel. Richardson v. Bureau of Land Mgt.*, 565 F.3d 683, 708 (10th Cir. 2009) (citing *Baltimore Gas and Elec. Co. v. Nat. Resources Def. Council, Inc.*, 462 U.S. 87 (1983)).

The Tenth Circuit applies a “rule of reason” to determine whether an EIS analyzed sufficient alternatives to allow an agency to take a hard look at the available options. *Id.* at 709. The “rule of reason” measures

¹ The Recovery Outline, New Mexico Meadow Jumping Mouse, U.S. Fish & Wildlife Service, June 2014 is cited herein as “2014 Recovery Outline”.

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the reasonableness of the alternatives considered against two guideposts: (1) when an agency proposes an action pursuant to a statute, “an alternative is only reasonable if it falls within an agency’s statutory mandate; and (2) “reasonableness is judged with reference to an agency’s objectives for a particular project.” *Id.* This rule of reason applies to both EAs and EISs.

The Final EA continues the mistake of the Draft EA in only considering one action alternative. Final EA, p. 6. As explained above, the Final EA states that “no issues that would require the development of additional action alternatives that meet the project’s purpose and need were identified.” Final EA, p. 5. We object to this finding. Our Draft EA Comments identified a number of significant issues that require the development of additional action alternatives.

As an initial matter, we are concerned that the Forest Service changed the definition of “issues” in the Final EA. According to the Draft, “Issues are concerns about the potential effects of the proposed action to the environment.” Draft EA, p. 8. According to the Final EA, “Issues are cause and effect statements that guide the disclosure of potential effects of the proposed action to the environment.” The difference between the two is significant and necessitates a thorough explanation that is not found in the Final EA. According to [Merriam-Webster’s online dictionary](#), issue is defined as “a vital or unsettled matter” or “a matter that is in dispute between two or more parties.” This definition is more on par with “concerns about potential effects” rather than “cause and effect statements.” No matter how the Forest Service defines “issues,” Guardian’s scoping comments and Draft EA Comments raised significant issues that have not been addressed, much less resolved, in the Final EA, FONSI and Draft DN, and that warrant an analysis of additional alternatives.

Notably, the Final EA lists three additional issues that were not listed in the Draft EA - Soils, Sensitive Animal Species, and Management Indicator Species, and removed Elk, Monitoring and Recreation from the list of identified issues. *Compare* Final EA, p. 5, Draft EA, pp. 8-9. The changes are not explained in the Final EIS, and it is unclear why the Forest Service removed recreation as an identified issue in the Final EA when it added activities to the proposed action that purportedly address the impacts that recreation is currently having on NMMJM. In addition, Guardians specifically identified monitoring as a significant issue in our Draft EA Comments.

Guardians incorporates by reference our Draft EA comments which identify a number of issues, asks a number of important and relevant questions, and identifies additional alternatives. *See* Draft EA Comments, pp. 2-5 (range of alternatives; other significant issues are identified throughout our comments). The first issue that Guardians raised which necessitates additional alternatives is the failure of the Proposed Action to comply with the agency’s mandates under the ESA, NFMA, the Forest Plan, the 2016 BiOp, and the NMMJM 2014 Recovery Outline to conserve and recover the NMMJM and ensure its long-term viability. As we explained,

In particular, all alternatives must, at a minimum, comply with the requirements of the 2014 Recovery Outline and address those portions of the Biological Opinion from the U.S. Fish & Wildlife Service, dated October 20, 2016 (“2016 Bi-Op”) that the Forest Service has failed to comply with to date, and the ramifications of that non-compliance (i.e., take of listed species beyond that authorized in the BiOp’s Incidental Take Statement).

Draft EA Comments, p. 3. The proposed alternative in the Final EA and the Decision does not address this issue and the Forest Service violated NEPA by failing to include an alternative does.

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Related to the Rio Peñasco fencing, the Final EA and Decision do not answer the numerous questions we raised in our comments, as the description in the Final EA is almost identical to the Draft EA. The only difference is that the allowable number of days use changed from 14 to 12. *Compare*, Draft EA, p. 10 to Final EA, p. 6. Questions (issues) we raised that the Forest Service failed to answer are: Has the temporary fencing enabled this area to meet NMMJM habitat requirements? Is this area occupied or unoccupied critical habitat? If unoccupied, why is it currently unoccupied? What has past and ongoing monitoring of impacts from livestock grazing and monitoring for NMMJM found here? What evidence does the Forest Service have that the proposed grazing system will adequately conserve and restore NMMJM and its habitat? How many cows will be within this section of NMMJM critical habitat? (Draft EA, Comments, p. 3). The answers to these questions are essential to the identification of reasonable alternatives and baseline conditions, particularly given the history of non-compliance by the permittees and lack of monitoring or enforcement by the Forest Service.

We also identified the significant issue that, out of 530 acres of critical habitat, only 100 acres will be protected from livestock grazing and other uses and that “some large areas of critical habitat outside of the livestock trap would remain open in Willis Canyon.” Draft EA Comments, p. 4, Draft EA, p. 11, Final EA, p. 7. The Forest Service admits that the livestock facilities will ensure “the prohibition of NMMJM habitat development and any probability of re-colonization by NMMJM.” Final EA, p. 21. Allowing continued grazing in large areas of critical habitat will continue to harm and harass NMMJM and Sacramento Mountain thistle, does not adequately protect and restore the species’ habitats, will not ensure viability, and will not lead to recovery of the species, in violation of the Forest Plan, the ESA and the NMMJM 2014 Recovery Outline. As we stated, the “EA’s preferred alternative should protect all 530 acres of critical habitat and include at least one other action alternative that fences well over 100 acres of critical habitat.” Draft EA Comments, p. 4. Accordingly, we identified significant issues and reasonable alternatives that the Forest Service ignored in violation of NEPA.

Other issues and alternatives that we identified include:

- Design features that do not adversely affect NMMM PCEs. Draft EA Comments, p. 4.
- Ensure that any water diversions do not reduce water levels to such an extent that they impact riparian and wetland area, which will negatively affect NMMJM, thistle and MSO. All action alternatives must ensure adequate flows to conserve and restore these species’ habitats and PCEs. *Id.*
- All action alternatives should include active restoration efforts. “[W]ithout active restoration efforts, severely degraded riparian areas will continue to negatively impact water quality, water quantity, riparian and wetland function, channel stability and, thus, NMMJM, Sacramento Mountain Thistle, MSO and other species’ habitats. Active restoration is a reasonable action that should be incorporated as part of this project. *Id.*
- Protect Sacramento Mountain Thistle by ensuring they are included within exclosures and protected from livestock grazing, not just “where possible.” *Id.*, p. 5.

The Final EA states that the thistle “has been in a state of decline since 1999 and many of the management actions and environmental conditions that have contributed to the decline of Sacramento Mountains thistle are still present and are likely to continue into the reasonably foreseeable future.” Final EA, p. 45. The Forest Service failed to analyze an alternative to address this issue.

In addition, the Forest Service failed to analyze a range of alternatives related to recreation and motorized use. The Trail Decommission and Reroute was not analyzed in the Draft EA. Indeed, the Draft

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EA didn't even mention the Hubble Canyon Trail or the Upper Wills Canyon trail. "The Hubble Canyon trail (National Forest System trail 9277) is approximately 4 miles of class 3 trail that is open for motorized use (motorcycle, all-terrain vehicle, and utility-terrain vehicle) and connects to the Upper Wills Canyon trail (National Forest System trail 9278; approximately 3.18 miles)." Final EA, p. 13. While approximately 0.21 mile of the Hubble Canyon trail is within New Mexico meadow jumping mouse critical habitat, the Forest Service proposes to decommission and reroute only a 10-mile section. *Id.* The Forest Service should have analyzed at least one alternative that would decommission and reroute the entire section of trail that is in NMMJM Critical Habitat. In addition, the Forest Service failed to consider the fact that the Upper Wills Canyon trail is also in NMMJM critical habitat, and include an alternative that would remedy these impacts.

Accordingly, Guardians identified a number of significant issues and reasonable alternatives that the Forest Service failed to address in the Final EA, FONSI and Draft DN. The inclusion of only one action alternative which does not meet the requirements of the Forest Plan, ESA and the needs of Endangered and Threatened Species violates NEPA's requirement to analyze a reasonable range of alternatives.

III. The Forest Service violated NEPA by failing to prepare and Environmental Impact Statement (EIS) for this project

NEPA requires that federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). According to the NEPA regulations, determining significance requires considerations of both context and intensity. 40 C.F.R. §1508.27. "Intensity" refers to the severity of the impact. *Id.* When evaluating intensity, the Forest Service must consider a number of factor including, but no limited to, "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas," and "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." 40 C.F.R. §1508.27(b)(3) and (9).

As we explained in our Draft EA Comments and throughout this objection, the proposed action along with ongoing livestock grazing significantly affects wetlands, critical ecological areas, and three ESA-listed species and their critical habitats – NMMJM, Mexican Spotted Owl, and Sacramento Mountain Thistle, thus an EIS is required. Wetlands, riparian areas and upland vegetation on the allotment have been significantly degraded by decades of overgrazing and the numerous facilities, fences and water and other developments that continue to be constructed in order to enable the permittees to continue grazing at unsustainable levels. New information in the Final EA also makes clear the significant impacts that motorized trails and associated use have had, and will continue to have, on these species and their habitats.

Notably, as addressed below, the Forest Service failed to analyze the cumulative impacts of the proposed action along with the ongoing grazing and motorized use on the Sacramento Allotment. The 2016 Biological Opinion (2016 BiOp) evaluates the impacts to NMMJM and Mexican Spotted Owl (MSO) and their critical habitats, and the Sacramento Mountains thistle from ongoing livestock management on the Sacramento Allotment, and found a downward trend in range condition due to current grazing pressure, water use, and developments, which have significantly impacted soils, riparian areas, streams, upland vegetation, and habitat for all species, and particularly MSO, NMMJM and Sacramento Mountain Thistle. The 2016 BiOp's no-jeopardy decision is dependent on compliance with the identified grazing strategy and implementation of specific mitigation measures and monitoring, yet there's no evidence in either the

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Draft or Final EA or the FONSI and Draft DN of whether the permittees have complied with the 2016 BiOp, or whether the mitigation measures and monitoring has been conducted.

The Draft and Final EAs found that the proposed action is likely to adversely affect each of the ESA-listed species, but writes those impacts off as insignificant. The impacts identified in the Final EA are not insignificant, and include prohibition of NMMJM habitat development and re-colonization, and further declines to Sacramento Mountains thistle, which has been declining for over 20-years. *See e.g.*, Final EA, pp. 21, 42-43. These significant impacts must be analyzed in detail in an EIS.

The Forest Service failed to analyze the cumulative impacts with past and ongoing grazing on the allotment, the South Sacramento Project, ongoing motorized use, and other activities. *See below* discussion on cumulative impacts. Because these impacts are significant, including unauthorized take of T&E species and destruction of critical habitat, the Forest Service violated NEPA by failing to prepare an EIS for this project.

IV. The Forest Service violated NEPA by failing to analyze existing/baseline conditions and take a “hard look” at direct, indirect and cumulative impacts

NEPA requires the Forest Service to “describe the environment of the areas to be affected or created by the alternatives under consideration.” 40 C.F.R § 1502.15. The establishment of the baseline conditions of the affected environment is a practical requirement of the NEPA process. In *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, the Court stated that “without establishing the baseline conditions... there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA.” 857 F.2d 505, 510 (9th Cir. 1988).

NEPA has dual goals: it “is intended to foster 1) informed agency decision-making and 2) informed public participation in the agency decision-making process.” *Sierra Club v. U.S. Forest Service*, No. 1:09-vs-131 (March 7, 2012) (citing *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1177-78 (10th Cir. 2008)). NEPA imposes an obligation on the Forest Service to disclose and analyze environmental information and consequences of federal action. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (agency must take “hard look” at environmental consequences before taking action). “The purpose of the ‘hard look’ requirement is to ensure that the ‘agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.’” *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1250 (D. Colo. 2012) (citing *Baltimore Gas & Elec. Co.*, 462 U.S. at 97).

Federal “[a]gencies must ‘take a hard look at the environmental consequences of proposed actions utilizing public comment and the best available scientific information.’” *Biodiversity Cons. Alliance v. Jiron*, 762 F.3d 1036, 1086 (10th Cir. 2014) (internal citation omitted). This hard look “assessment of all ‘reasonably foreseeable’ impacts must occur at the earliest practicable point, and must take place before an ‘irretrievable commitment of resources’ is made.” *Colo. Envtl. Coal. v. Ofc. of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1208 (D. Colo. 2011) (citing *New Mexico ex rel Richardson v. Bur. of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) reconsid. granted in part on other grounds, 2012 WL 628547 (D. Colo. Feb. 27, 2012). “An agency meets the ‘hard look’ requirement when it has ‘made a reasoned evaluation of the available information and its method was not arbitrary or capricious.’” *Jiron*, 762 F.3d at 1086 (internal citation omitted).

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NEPA requires the Forest Service to disclose and analyze the direct, indirect, and cumulative impacts and consequences of its activities. 40 C.F.R. §§ 1502.16(a), 1502.16(b), 1508.25(c), 1508.27(b)(7). Direct effects include that “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). Indirect effects are those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Cumulative impacts include “impact on the environment which results from the incremental impact of the action when added other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. Importantly, “[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

NEPA statutory standards found in Council on Environmental Quality (“CEQ”) regulations recognize that intelligent decision-making can only derive from high quality information. *See* 40 C.F.R. §§ 1500 *et seq.* “Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in [EISs].” 40 C.F.R. § 1502.24. Information included in NEPA documents “must be of high quality.” Accurate scientific analysis . . . [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b). If an agency has outdated, insufficient, or no information on potential impacts, it must develop information as part of the NEPA process.

Here, our Draft EA Comments identified a number of places where the Forest Service had insufficient or no information on baseline conditions or impacts, yet in the two years since then, the Forest Service failed to collect or develop this information. Draft EA Comments, pp. 6-9. This failure to develop or incorporate high quality information renders the Final EA, FONSI and DN woefully inadequate, and the Final EA fails to address our concerns, answer our questions or remedy the numerous inadequacies we identified.

Most notably, the Forest Service is considering the proposed action in a vacuum, without addressing the grazing management and motorized use on the Sacramento Allotment and the impacts that these uses have had, and will continue to have, on species and their habitats, soils, watershed health and other resources. The Final EA states that the proposed livestock facilities and water developments “are needed to effectively manage livestock and prevent resource damage due to the changes that proposed exclosure fencing would have on livestock distribution.” Final EA, p. 7. First, his statement makes clear that the Forest Service is more concerned with appeasing the permittees and maintaining the existing unsustainable levels of grazing, than in restoring habitat and ensuring the recovery of NMMJM, MSO, Mountain Thistle and other species and their habitats. Second, this demonstrates that livestock management and distribution are the overarching issue here. As such, the Forest Service cannot consider the proposed developments without analyzing the significant impacts that grazing management and distribution have had, and will continue to have on the allotment. Similarly, given the Final EA’s recognition of motorized use as a significant impact, the Forest Service cannot analyze the one small token road decommission and reroute in a vacuum, and must analyze and address the impacts that motorized trails and use have had, and will continue to have, on the species and their habitats.

Both the Draft and Final EAs state that the actions to protect NMMJM habitat include a combination of administrative actions and infrastructure developments. “Administrative actions would be handled through annual operating instructions for the Sacramento allotment, which are developed in coordination with the grazing permit holder and outline the grazing management for each year.” Draft EA, p. 6, Final EA, p. 2. However, the requirement for the permittees to comply with the AOIs was removed from the Final EA. “Management requirements for the NMMJM, in addition to all other requirements outlined in

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the Annual Operating Instructions and the Allotment Management Plan will be followed by the grazing permit holder.” *Compare* Draft EA, p. 23 to Final EA, p. 17. Thus, it is unknown what these administrative actions are, and the public has had no input into the grazing management on the allotment. The allotment has no Allotment Management Plan or updated grazing permit - it appears that the permit subject to the 2016 BiOp expired in 2019. Given the inextricable relationship between the proposed action and grazing management and distribution, these administrative actions must be identified and included in the analysis of existing conditions and impacts. In addition, the Forest Service must conduct NEPA for a new grazing permit and an Allotment Management Plan.

Our Draft EA comments raised the issue of the inadequate analysis of existing/baseline conditions. Draft EA, pp. 25-29. Instead of remedying this problem, the Final EA is even worse, as it is devoid of any such analysis. Neither the Draft nor Final EA incorporate the baseline conditions from the 2016 BiOp, provide any information as to whether the BiOp’s non-discretionary measures have been undertaken and the terms and conditions implemented, or the condition of the Sacramento allotment over three years after the BiOp was issued. While the 2016 BiOp has a number of monitoring requirements, there is no evidence that the Forest Service has complied with them. Just as in the draft EA, the Final EA fails to provide sufficient information relative to existing habitat conditions for NMMJM, MSO, Sacramento Mountain thistle, and Sensitive and MIS species, and fails to answer the questions we raised, such as what vegetation species currently exist relative to what should be there? What is the current status of the species within the project area? Has the NMMJM, MSO or Sacramento Mountain thistle population increased or declined since the 2016 BiOp? What is the status of MSO prey species’ habitat? This baseline information is essential for the Forest Service to identify an adequate range of alternatives and develop proper mitigation and monitoring protocols, and to comply with NEPA’s requirements to provide high quality scientific information for informed public participation in the agency’s decision-making process.

Just as in the Draft EA, the Final EA identifies a number of new water developments and facilities but fails to provide specifics on where they will be located. *See* Draft EA Comments, p. 7; Final EA, p. 8. It’s impossible to fathom that in the two years since the Draft EA was issued that the Forest Service could not identify the specific locations. Without knowing their locations, it is impossible to determine the impacts. The Forest Service failed to address the issues we raised, or answer any of our questions concerning the proposed developments. Draft EA Comments, p. 7. These questions are directly relevant to existing conditions and the impacts of the proposed action.

The Final EA recognizes that the impacts of invasive species are a significant problem and that this problem is likely to increase due to the proposed developments, motorized use, and most of the projects identified in the cumulative effects section. “Invasive plant species have invaded a number of Sacramento Mountains thistle sites and pose a significant threat to maintenance of resident populations.” Final EA, p. 42.

However, some of these improvements, such as new water developments and especially spring developments may have indirect and adverse effects to the Sacramento Mountains thistle because water extraction/water diversion from springs curtails the natural surface flows, and thus is likely to negatively affect the thistle. Also, the loss of available water within Sacramento Mountain thistle habitat can lead to retractions of habitat boundaries, habitat fragmentation, a reduction in the numbers of individuals, and in some cases, a loss of all plants at previously occupied sites (refer to the “Exclosure fencing” section above). In addition, decreased natural water flows at travertine springs

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and along riparian corridors create conditions that produce a competitive advantage for introduced non-native invasive species (Thomson 1991). Non-native invasive species are also known to adversely affect Sacramento Mountains thistle individuals and its suitable habitat by altering disturbance regimes, nutrient cycles, and hydrologic cycles.

Final EA, p. 43. Notably, in the analysis of effects to NMMJM, the Forest Service doesn't mention the impacts of invasive species on the mouse's riparian habitats. This is not an adequate analysis of the direct, indirect and cumulative impacts. The Forest Service must provide site-specific data and information about the impacts to the thistle, NMMJM, and all other species.

The Final EA admits that, for many of the projects identified for the cumulative impacts analysis, "the most substantial cumulative effect to the three threatened and endangered species analyzed in this document would be a landscape-scale increase in the presence of non-native invasive plant species" and that "many of the project areas are already infested" and "with the amount of disturbance occurring throughout the project area, invasive plant populations may continue to spread beyond our ability to effectively treat and manage them." Final EA, pp. 63, 64. Yet, these impacts are improperly written off as insignificant, and the Final EA does not include past, present and future grazing and motorized use on the Sacramento allotment as a significant cause of the spread of invasive species or the cumulative impacts on the three ESA-listed species (or any other species). These impacts are significant, requiring a detailed analysis and preparation of an EIS.

Nor does the Final EA analyze the impacts of protecting less acreage than the Recovery Outline recommends (68 to 181 acres), and significantly less critical habitat than is present on the allotment (100 out of 530 acres) on the viability of NMMJM. See Draft EA Comments, p. 8. The same applies to the Sacramento Mountain Thistle. The Forest Service failed to answer the question of how much and to what extent will habitat for these two species continue to be impacted by livestock grazing and the associated developments and facilities, and how will this affect their long-term viability and recovery. *Id.*

By failing to consider the existing condition of the Sacramento Allotment and the impacts of past, present and future grazing and motorized use, the Final EA fails to analyze the existing condition and impacts to Mexican Spotted Owl and answer our relevant questions. Draft EA Comments, pp. 8-9. The questions remain, how has grazing impacted MSO on the Sacramento allotment? Have the existing facilities and developments impacted MSO and prey species' habitats? What impacts will the new facilities and developments have? And new questions arise with the Final EAs attention to motorized use. The Forest Service failed to provide the site-specific, high-quality data and analysis necessary to comply with NEPA, NFMA and the ESA.

As to the Regional Forester's Sensitive Species (RFSS), the Final EA does not remedy the inadequacies of the Draft EA. See Draft Comments, p. 9. It appears that during the two-year period between the Draft and Final EAs, the Forest Service failed to conduct monitoring for these species, and there's no high-quality, site-specific information about their current population status and habitat conditions. Further, because the locations of the proposed developments are unknown, there's no site-specific analysis of the direct, indirect and cumulative impacts of the proposed action on the species or their habitats. As just one example, "[t]o the extent that project locations may occur in moist mixed conifer and aspen forests, activities associated with the project could have direct impacts on Sacramento Mountains salamanders and result in some loss of habitat." Final EA, p. 46. Such a vague reference to possible impacts does not suffice.

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The Final EA similarly fails to analyze the existing conditions of, and direct, indirect and cumulative impacts of the proposed action on, MIS species and their habitats. See Draft EA Comments, p. 9. As with RFSS species, the EA provides some general habitat descriptions and makes vague assumptions about whether they may be present. There's no high-quality, site-specific information about population status or habitat conditions on the allotment. In our Draft EA comments, we identified numerous instances where the Forest Service admitted that it had not conducted the required systematic surveys of MIS species. *Id.* The Final EA leaves out these admissions, but does not remedy them by providing any monitoring data or statements that the agency has, over the past two years, conducted any of the required monitoring.

Just as the Draft EA did, the Final EA fails to analyze the impacts of the barbed wire enclosure fencing on wildlife species. Draft EA Comments, p. 9. In fact, the Draft EA's design requirements relating to fencing has been removed from the Final EA: "All permanent fences will be constructed using New Mexico Game and Fish design recommendations to reduce wildlife entanglement risks. Further, certain visualization techniques (e.g. PVC pipe on top fence wire or vinyl tabs placed on wire) will be used to increase visibility and minimize entrapment and will be placed where signs of extensive elk and/or deer crossing or trailing are obvious." Compare Draft EA, p. 23 to Final EA, p. 17. We do not support the use of 4 strand barbed wire fencing and request that the Forest Service use wildlife friendly fencing. This should be included in all action alternatives, and the failure to analyze the impacts of using barbed wire fencing on wildlife species violates NEPA's hard look requirement.

Finally, just as the EA did, the Final EA fails to analyze the existing condition of hydrology on the allotment and leaves for some later time, the identification of where and how much water will be diverted from springs and streams to new water developments. Draft EA Comments, p. 9. While the Forest Service admits that water diversions and new facilities will impact riparian and wetland-dependent species such as the thistle and NMMJM, and some RFSS and MIS species, the Forest Service fails to provide sufficient site-specific analysis and data on the direct, indirect and cumulative impacts. This information is essential for a proper site-specific and science-based analysis and meaningful public participation.

V. The Forest Service violated NEPA, NFMA and the ESA by failing to include adequate monitoring, mitigation and enforcement requirements

The Final EA fails to address our concerns about the lack information on monitoring or enforcement, or answer our questions, merely stating that some monitoring "would" occur. Draft EA Comments, p. 10. Notably, the Final EA changes "will" to "would" without explaining the difference or what this might mean for implementation. For example, compare "Fenced enclosure areas *will* be monitored to ensure desired NMMJM habitat conditions are being achieved or are progressing towards achievement" (Draft EA, p. 24, emphasis added) with "Fenced enclosure areas *would* be monitored to ensure desired NMMJM habitat conditions are being achieved or are progressing towards achievement" (Final EA, p. 18, emphasis added).

The lack of detailed information about monitoring and enforcement is not sufficient to ensure the viability and recovery of NMMJM, MSO, Sacramento Mountains thistle, and their habitats, or any other species. The Final EA and Decision are devoid of the specific monitoring, mitigation, and enforcement requirements from the 2014 Recovery Outline, 2012 MSO Recovery Plan, 2016 BiOp, and Forest Plan. As discussed below, the 2016 BiOp contains non-discretionary measures, terms and conditions that must be undertaken by the Forest Service and the permittee. These must be identified and information provided about whether they have been complied with. This is especially important given lack of monitoring

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information in the Draft and Final EAs, the historic and ongoing overuse and failure to comply with grazing utilization and stubble height standards, and the lack of Forest Service enforcement or any ramification to the permittee for noncompliance. The monitoring plan must include, at a minimum, strict parameters for determining progress towards recovery of the species, achieving habitat conditions, when and where monitoring will occur, the specific types of monitoring that will be done, terms and conditions, identified acceptable levels of resource impacts and incidental take, and what actions the Forest Service will take when those acceptable levels are exceeded.

VI. The Forest Service violated NFMA and the Forest Plan, must develop an Allotment Management Plan and assess the allotment's grazing capacity

Under the National Forest Management Act (NFMA), specific projects like this must be consistent with the governing forest plan. 16 U.S.C. § 1604(i). While the Draft EA provides a brief summary of supposed Forest Plan consistency, the Final EA leaves out any reference to, or analysis of, compliance with the applicable Forest Plan standards, guidelines and desired conditions. See Draft EA, p. 18.

The Forest Plan requires the Forest Service to:

Protect and manage essential and critical habitats of threatened, endangered, and sensitive species through ensuring that legal and biological requirements of designated plant and animal species are met; Identify, protect and enhance existing and potential habitat of all T&E and sensitive species; prohibit activities likely to cause disturbance, including public use, in the vicinity of any essential habitat for T&E species (p. 205). Provide for the improvement of habitat for threatened and endangered species to meet the goals and intent of the Endangered Species Act of 1973 (replacement p. 12). Manage riparian areas to provide optimum vegetation and ecological diversity (replacement p. 13).

Draft EA, p. 18; Final EA, p. 5. The legal and biological requirements for NMMJM are found in the Forest Plan, NMMJM 2014 Recovery Outline, MSO 2012 Recovery Plan, and the 2016 BiOp. The Forest Service failed to demonstrate how grazing on the Sacramento Allotment and the proposed action ensure that the requirements are being met. And, given the degraded condition of the riparian areas as identified in the 2016 BiOp, it is clear that they are not being managed to provide optimum vegetation and ecological diversity.

While the Draft EA provided some references to management areas, neither the Draft or Final EAs provide the management requirements for motorized use and whether these requirements are being met on the Sacramento allotment. This is essential given the road and motorized use impacts identified, albeit minimally, in the Final EA. The Forest Service must address the impacts that motorized use has had and will continue to have on the T&E, RFSS and MIS species on the allotment and whether motorized use on the allotment is in compliance with the Forest Plan and Travel Management Plan (if there is one).

As to grazing management, the Forest Plan requires that "forage use by grazing ungulates will be maintained at or above a condition which assures recovery and continued existence of threatened and endangered species (replacement p. 35); in consultation with US Fish and Wildlife Service, develop site-specific forage use levels." Draft EA, p. 18. The 2016 BiOp reported on the excessive forage use, yet the Final EA, FONSI and DN failed to determine whether the BiOp's assumptions of compliance with utilization levels, and these Forest Plan requirements, are being met.

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The Sacramento Allotment does not have an up-to-date Allotment Management Plan, and it appears that the grazing permit expired in 2019. We requested that, as part of this project, the Forest Service determine the allotment's grazing capacity and develop an AMP that will provide for the protection and restoration of T&E and other species, and ensure habitat connectivity and improved vegetative conditions on the allotment. Draft EA Comments, p. 12. The Forest Service did not address our concerns. Because the proposed action is directly tied to livestock management and distribution, the Forest Service should have prepared an AMP and must issue a new grazing permit (after sufficient NEPA analysis and ESA consultation).

Further, the Final EA does not address our comment that the Forest Service has not complied with the Lincoln Forest Plan's monitoring requirements for RFSS and MIS species.

Our Draft EA comments requested that the Forest Service identify what actions will occur in each specific management area, the Forest Plan standards, objectives and desired conditions of each management areas, and provide an analysis of how the project will comply with them. We also requested a map of the proposed action relative to the Forest Plan Management Areas. Draft EA Comments, p. 11. The Final EA fails to provide any of this information. Accordingly, it is impossible to determine whether the proposed action, along with ongoing grazing management and motorized use, complies with NFMAs Forest Plan consistency requirement.

VII. The Forest Service failed to ensure compliance with the ESA

Section 7 of the ESA imposes a substantive obligation on 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 or threatened species or result in the destruction or adverse modification of" habitat that has been designated as critical for the species. 16 U.S.C. § 1536(a)(2); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). The Forest Service must consult with the U.S. Fish and Wildlife Service (FWS) under section 7 of the ESA as to the impacts of the project on species listed under the ESA and designated critical habitat. The Forest Service must ensure that this project will not harm NMMJM, MSO, and Sacramento Mountain Thistle, or degrade critical habitat.

As an initial matter, there is no evidence that the Forest Service initiated consultation as to the impacts of the proposed action on the ESA-listed species and critical habitat. Assuming that the Forest Service prepared a Biological Assessment, it failed to provide the BA or any other evidence of consultation, such as a Biological Opinion, on the agency's website for this project. Without the ability to review these documents, we were unable to assess the agency's analysis of impacts to the threatened, endangered species and sensitive species in the project area, and particularly the FWS's expert opinion. Providing this information allows the public to view these critical documents, and other documents in the project record, without the need to submit a formal Freedom of Information Act request. Without this information being publicly available during the comment and objection period, we are unable to meaningfully object to the agencies' determinations or analysis.

We request that the Forest Service make all ESA consultation documents available immediately, and initiate a new objection period to enable all interested parties sufficient time and opportunity to incorporate the information from those documents into their objections. This is essential because the Final EA fails to provide any information on whether the proposed action and ongoing grazing and

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motorized use on the allotment complies with the requirements of the 2014 Recovery Outline, the 2012 MSO Recovery Plan, or the 2016 BiOp.

The ESA and its implementing regulations prohibit “take” of threatened and endangered species. “Take” is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. “Harm” is further defined (50 CFR 17.3) to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. “Harass” is defined (50 CFR 17.3) as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. See 2016 BiOp, p. 53.

According to the 2016 BiOp:

The measures described below are non-discretionary, and must be undertaken by the Forest Service so that they become binding conditions of any grant or permit issued to an applicant/permittee, as appropriate, for the exemption in section 7(o)(2) to apply. The Forest Service has a continuing duty to regulate the activity covered by this incidental take statement. If the Forest Service (1) fails to assume and implement the terms and conditions or (2) fails to require the (applicant) to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, the Forest Service must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement [see 50 CFR 402.14(i)(3)].

2016 BiOp, p. 54. There is no information in the Draft or Final EA, or on the agency’s website, of the Forest Service’s and permittee’s compliance with the non-discretionary measures, terms and conditions. Given the history of this allotment, non-compliance is highly likely and thus the Forest Service and the permittees are in violation of the ITP and the ESA.

Importantly, under the terms of ESA sections 7(b)(4) and 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement. 2016 BiOp, p. 54. Here, by not fencing out all of the NMMJM critical habitat or thistle habitat on the allotment as a compromise between maintaining livestock grazing and protecting NMMJM habitat (Final EA, p. 1), taking of NMMJM and the thistle are intended as part of the agency action and the Forest Service is authorizing unlawful take of NMMJM and Sacramento Mountain thistle.

Conclusion

In sum, the Forest Service is violating NEPA, NFMA, and the ESA in numerous respects, causing significant harm to T&E, MIS, and RFSS species and their habitats on the Sacramento allotment. With this project, the Forest Service continues to put livestock grazing and motorized use ahead of species and resource protection and restoration, threatening the species’ viability and recovery, and jeopardizing the continued existence of NMMJM, MSO and Sacramento Mountains thistle. ***Accordingly, no grazing or any part of the proposed action should be authorized or implemented until a proper progress report on compliance with the 2016 BiOp is submitted by the Forest Service and verified by the FWS, an AMP is***

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prepared with proper NEPA compliance and ESA consultation and signed by both the permittee and the Forest Service, and a new permit is issued, also with proper NEPA compliance and ESA consultation.

Thank you for considering our objection. If you have questions or wish to discuss our concerns further, please reach out us at the information provided below. Finally, please add our name and organization to the contact list to receive any future public notices regarding this action.

Sincerely,

A handwritten signature in black ink, appearing to read 'Judi Brawer', with a long, horizontal, wavy line extending to the right.

Judi Brawer
Wild Places Program Director, WildEarth Guardians
jbrawer@wildearthguardians.org
(208) 871-0596