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August 21, 2020

Travis Moseley
Forest Supervisor
Lincoln National Forest
3463 Palomas Rd
Alamogordo, New Mexico 88310
objections-southwestern-lincoln@usda.gov

Re: Comments on the Environmental Assessment for the New Mexico Meadow Jumping Mouse
Habitat Improvement Projects on the Sacramento Grazing Allotment

Dear Mr. Moseley:

Please accept these comments regarding the July 2020 Environmental Assessment (EA) for the New Mexico Meadow Jumping Mouse (NMMJM) Habitat Improvement Projects on the Sacramento Grazing Allotment. We object to the ongoing efforts by the Forest Service to unlawfully infringing on our property rights. By making these comments we neither expressly nor implicitly concede any rights to property we own.

Chapter 1. Purpose and Need

1.1 Introduction and Background

The Forest Service asserts it prepared the July 2020 Environmental Assessment (EA) “..... in compliance with the National Environmental Policy Act and other relevant federal and state laws and regulations.” (EA 1). However, the EA fails to mention what “other relevant federal and state laws and regulations” were used in preparing the EA for the New Mexico Meadow Jumping Mouse Habitat Improvement Projects. The EA is clearly not in compliance with the following applicable laws, orders and regulations. All relevant laws need to be adhered to when such important and consequential decisions are being determined.

- Federal Land Policy Management Act (FLPMA)-Title VII
- 1976 National Forest Management Act (NFMA)-Section 6(i)
- Endangered Species Act (ESA)-Section 5
- United States v. New Mexico, (1978)
- 1978 Lincoln National Forest Land and Resource Management Plan (Forest Plan)
- 2017 Sacramento Grazing Association License to Appropriate Water
- 2004 FEIS

The EA includes a very substantial list of “specific threats” to the NMMJM. (EA 1.) Yet, it fails to mention the massive elk presence as a threat to the NMMJM. Elk are the predominate factor that contribute to habitat loss. (See Figure 1-4) Yet, the EA puts the burden of protecting the NMMJM on the Sacramento Grazing Association (SGA). If your true desire is to protect the NMMJM, the elk problem must be addressed.



Figure 1. Will Canyon Trap



Figure 2. Upper Rio Penasco Shipping Trap

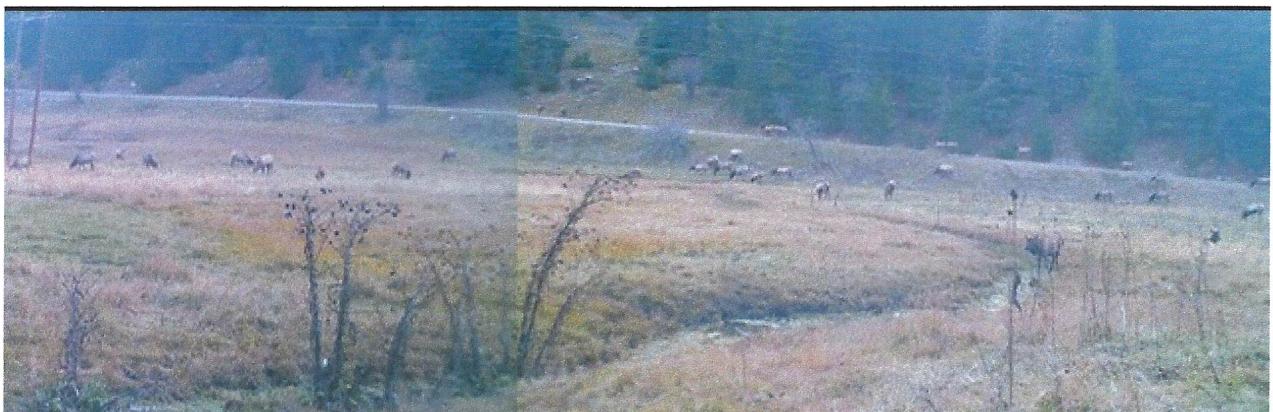


Figure 3. Upper Rio Penasco Exclosure

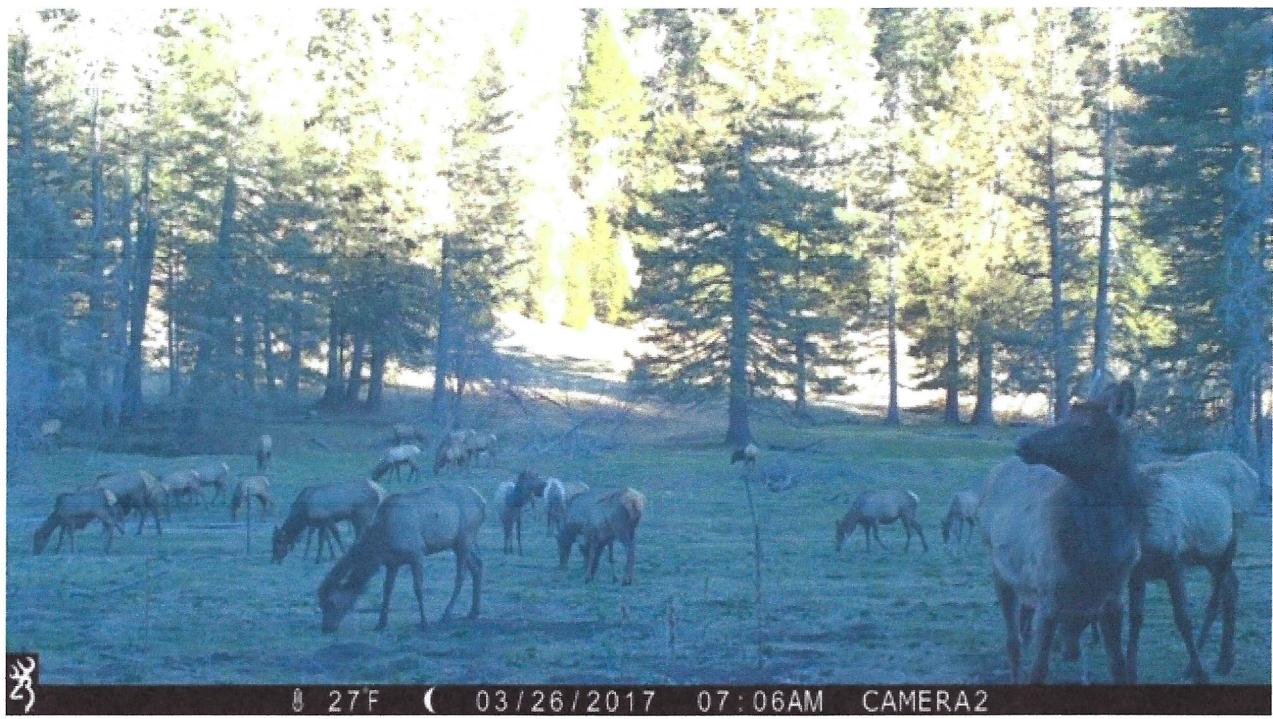


Figure 4. Upper Mauldin-Prior to Installation of Elk Fence. Elk fence will only cause elk to do more damage at other areas.

The EA claims that cattle utilization would need to be approximately 20%. (EA 1.) This is just not a realistic expectation due to the heavy elk use. (See Figure 5) We have attached pictures of our shipping trap in October 2017 and October 2018 before we began putting cattle in the trap to ship the calves. These pictures clearly show that it was well overgrazed before cattle were put in the trap. (See Figures 6-9)



United States
Department of
Agriculture

Forest
Service

Sacramento Ranger District

Hwy 82 & Curlew, PO Box 288
Cloudcroft, NM 88317
(505) 682-2551

File Code: 2630

Date: February 12, 2004

Roy Hayes
Chief, SE Operations Division
New Mexico Department of Game and Fish
1912 W 2nd Street
Roswell, NM 87504

Dear Roy:

I have enclosed the monitoring data for last summer's grazing season between May and early November. This is the same data that was shared with your folks at our February 25, 2004 meeting in Alamogordo. The data indicates that we did not meet the 35% utilization goal; the average use came out to be 82%. The pellet group data indicates that of the total pellet counts, 18% were cattle and 82% were elk; of the 82% forage utilization, 20% was attributed to cattle and 60% attributed to elk. This data indicates that there has been no change in elk use between 2002 and 2003 according to the current methodology for monitoring. Currently the number of cattle authorized in the winter unit for Sacramento Allotment is 230 head. The authorized number for last winter (2002-2003) was 330. The number for the summer season has not been determined as of this date.

It also appears that the elk herd reduction in Unit 34 has not made a change in the degree of impact that elk have on the amount of forage use within the Sacramento Grazing Allotment. Last Summer before cattle were moved from the South Pasture into the North Pasture the use was measured at 33% in the key monitoring sites, mostly attributed to elk use, the goal was to utilize 35%. There have been some discussions in the past about possibly splitting Unit 34, which could give some flexibility in managing either part differently to help with the current use levels by elk. There have been other suggestions of fencing off meadows, reseeding meadows, creating openings in the uplands etc. to help reduce the degree of use in the meadows. As you well know it has been a challenge to find a way to balance the use between Elk and livestock.

Feel free to contact me or Rick Newmon of my staff with any questions at (505) 682-2551.

Sincerely,

/s/ Frank R. Martinez
FRANK R. MARTINEZ
Sacramento District Ranger

cc. Bruce Thompson NMDGF
Mike Nivison Otero Co.



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Figure 5. February 12, 2004 Letter from Frank Martinez to Roy Hayes



Figure 6-Penasco Shipping Trap



Figure 7. Penasco Shipping Trap



Figure 8. Penasco Shipping Trap



Figure 9. Penasco Shipping Trap

The EA contends that there is coordination between the Forest Service and the allotment owner to outline the grazing management for the upcoming year. (EA 2) Our Annual Operating Instructions (AOI) meeting and the EA fail to address valid existing water rights as a vital part of the discussion. To ensure true coordination during grazing management discussions our valid existing water rights must be recognized. See *United States v. New Mexico*, 438 U.S. 696 (1978) below.

The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree. United States v. New Mexico, 438 U.S. 696 (1978)

1.2 Need for the Proposal

The EA concedes that permanent enclosures will be constructed around the best habitat. (EA 5.) This “best habitat” is also our most reliable water sources and forage. When our cattle are moved from the winter range to the summer range it is crucial for them to have access to water

and forage in order for them to breed back more quickly and at a higher percentage. They are often sore footed, and it is difficult and stressful for them to travel unnecessarily to access water and forage.

The EA states, "Grazing and recreation have resulted in a decrease in the cover and food essential for the continued survival of the NMMJM." (EA 5.) However, the EA neglects to address the recreation at Bluff Springs. (See Figure 10) This picture clearly shows the damage being done to purportedly "critical habitat" yet nothing is being done to prohibit recreation in this area. Not only has the Forest Service declined to discourage recreation they brought in a work crew to rebuild the steps and trails to encourage recreation. (See Figure 11)



Figure 10. Bluff Springs



Figure 11. Bluff Springs Work Crew

The EA expresses the importance of improving riparian habitat and being in conformance with the Lincoln National Forest Land and Resource Management Plan (Forest Plan). Which include standards and guidelines that meet the goals intended in the Endangered Species Act (ESA) of 1973 (EA 5.) The Forest Plan states, “The Forest Plan replaces all previous resource management plans prepared for the Forest. Upon approval of the Forest Plan, all subsequent activities affecting these lands, including budget proposals, will be based on the Forest Plan [36 CFR 219.10 (e)]. In addition, all permits, contracts, and other instruments for the use and occupancy of these National Forest System Lands must be consistent with the Forest Plan [36 CFR 219.10 (e)].” Moreover, The Forest Plan obtains its authority from section 6(i) of the 1976 National Forest Management Act (NFMA) which states, “Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.” Therefore, section 6(i) of NFMA along with the Federal Land Policy Management Act (FLPMA) Title VII Section 701 (a) and

(h) which states, “[n]othing in this Act, or in any amendment made by this act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this act. All Actions by the secretary concerned under this act shall be subject to valid existing rights” undoubtedly establish that the Forest Service permit and permitting system is subject to our valid existing rights.

The EA expresses the importance of “.....meeting the goals and intent of the Endangered Species Act of 1973. (EA 5) We would also like to point out the importance of adhering to Section 5 of the ESA which states, “LAND ACQUISITION SEC. 5. (a) [16 U.S.C. 1534] PROGRAM.— The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary— (1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and (2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition vested in him. (b) ACQUISITIONS. — Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.” Endangered Species Act 1973

Riparian habitat and areas are referred to throughout the EA. However, it is important to understand that New Mexico is not under Riparian Law, it is under Prior Appropriations Water Law. (See Figure 12)

U.S. Water Rights Policy

Water considered a common resource in the United States – No national policy
Two systems of water law:

1. **Prior Appropriation doctrine** in western States – “first in time, first in right”
 - Reflects scarcity of water
 - Rigid in allocating new users water
2. **Riparian doctrine** in the eastern States – water belongs to the land owner for reasonable use
 - Reflects abundance of water
 - Vague, no means to protect certain uses



Figure 12. U.S. Water Rights Policy. Pahrump Water Rights 2018

Chapter 2. Alternatives

2.1.1 Alternative 1-Proposed Action

The EA claims the construction and maintenance of enclosure fences will be completed by the Forest Service. (EA 6.) The claim that the Forest Service maintains the enclosure fences is just not true. Some of the existing enclosure fences have been down in the same place for years. The proposal of fencing in the Rio Penasco trap (EA 6.) is unacceptable and unjustified. Our traps are already too small and overgrazed by elk. We just cannot have our traps size reduced. In addition, the EA acknowledges that the only known NMMJM are at Mauldin. (EA 20.) Therefore, with no NMMJM found in the Upper Rio Penasco and with a lack of sound science proving that the area is even suitable for NMMJM habitat, no justification exists for fencing in the Upper Rio Penasco.

The proposed action of constructing additional water developments (EA 6.) is unrealistic and poses numerous undo burdens on us. Constructing water developments will infringe on the water rights of downstream users and will most certainly be protested by them. Requiring us to maintain any water developments will be virtually impossible due to the calcium buildup in the water lines and float valves. Vandalism from hunters and recreationist also make maintaining water sources nearly impossible. We neither have the financial resources or manpower to add these impractical and unnecessary duties to our management responsibilities. This will only place additional burdens and further alter our business from running cattle to managing for the endangered species.

The EA proposes permanent fencing if livestock use is determined to be the direct cause for the NMMJM decline. (EA 6.) However, it fails to explain the method for differentiating between livestock, wildlife, and recreation utilization.

The EA confirms that "Any water rights would be verified or obtained through the New Mexico Office of the State Engineer." (EA 8) But fails to explain whose water rights need to be verified or obtained. Our water rights have already been verified. (See Attachment 1- 2017 Sacramento Grazing Association License to Appropriate Water. License No. SD-05076 and Attachment 2- United States v. New Mexico, 438 U.S. 696 1978)

If the EA is referring to the Penasco corrals when it states they could be moved to a more practical location, this is just not possible. (EA 8) Due to the lay of the land, historic summer to winter and winter to summer transition as well as getting semi-trucks in to ship cattle the corrals are in the absolute most practical location.

2.1.1.3 Monitoring Requirements

According to the EA the responsibility for making sure monitoring guidelines are not exceeded fall on us. (EA 18) This is once again asking us to do something that is impossible due to variables that are out of our control. (See Figures 13-17) These ridiculous, erroneous, and

unreasonable monitoring expectations only add unrealistic and excessive burdens and set us up to fail.



Figure 13. Cathy Canyon Key Site



Figure 14. Benson Canyon Key Site



Figure 15. Russia Canyon Key Site



Figure 16. Near Lucas Canyon Key Site



Figure 17. Evidence of overgrazing by elk before cattle even reach this area in the spring.

Chapter 3. Environmental Consequences

3.2. Range

The EA claims that fencing would allow cattle to access water through “strategically placed” water lanes. (EA 19) However, there are times when those “strategically placed” water lanes are dry. Which cause cattle to travel longer distances to access water, as a result causing addition stress to our cattle herd. (See Figures 18 & 19)



Figure 18. Dry Water Lane Wills Canyon-July 30, 2020

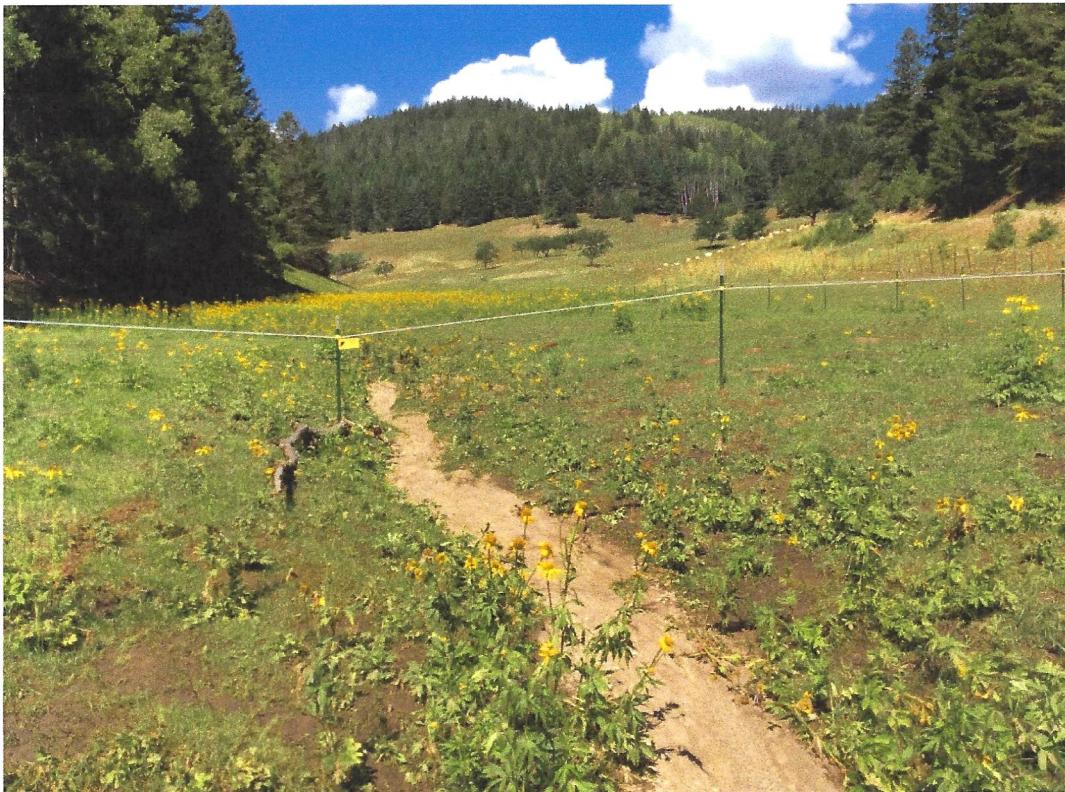


Figure 19. Dry Water Lane Wills Canyon 2014

3.3 Threatened and Endangered Species

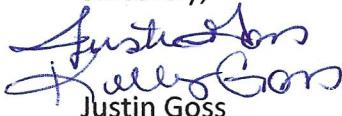
The EA provides no justification for fencing in Rio Penasco. As previously mentioned, the EA itself acknowledges that the only known NMMJM still in existence is in Mauldin. (EA 20) Therefore, there is no sound reasoning for any fencing in Upper Rio Penasco, which includes our shipping trap.

3.5.1.7 Elk

The EA claims the elk population for Game Management Unit 34 to be 6,010 to 6,262. (EA 54) This seems to be grossly underestimated. Nevertheless, the 2004 Final Environmental Impact Statement (FEIS) clearly says, "Alternative B would follow the current 5-year plan being implemented by New Mexico Department of Game and Fish to reduce elk numbers to 1,000 animals for Management Unit 34." (See pages 3-3, 3-20, and Appendix D pg. 9 of the FEIS) The EA has failed to adhere to the FEIS prepared by the Forest Service. Had the Forest Service followed its own 2004 FEIS and analyzed their own monitoring data then critical habitat would not be in the dire condition it is in today.

In conclusion, we adamantly oppose the proposed actions in the EA. As it does nothing to protect the NMMJM, however it does a great deal to take our valid existing rights. It also, further changes our cattle operation from managing cattle to managing for the endangered species. The responsibilities placed on us by the EA are egregious and quite frankly not attainable. We have many more pictures and 20 years of monitoring data which clearly confirms that we are not the ones doing what the Forest Service claims is overgrazing. We also have a chain of title that undoubtedly confirms that we are the owners of the Sacramento Allotment. Finally, we would like to reiterate Section 6(i) of the National Forest Management Act which states, "Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans. When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights."

Sincerely,



Justin Goss

Kelly Goss

Sacramento Grazing Association