Comments and Response of the Otero County Cattlemen's Association (OCCA) To the Environmental Assessment dated July 2020, On the "New Mexico Meadow Jumping Mouse Habitat Improvement Projects on the Sacramento Grazing Allotment"

Introduction and Summary Statement of Opposition:

In a document titled "New Mexico Jumping Mouse Habitat Improvement Projects on the Sacramento Grazing Allotment" dated July, 2020, the Sacramento Ranger District Ranger's "Proposed Action" "designed to meet the project's purpose and need… and the management directions from the forest plan" calls for "construction and maintenance" of a large amount of "exclosure fencing" that will deprive the Sacramento Grazing Allotment "surface owner" of a large amount of his "forage crops", the "value of the land for grazing", access to "stockwatering rights", and "improvements" that are all the property of the Allotment Owner. The Allotment Owner's property rights are "valid existing rights" protected by federal law. The Sacramento Grazing Association (SGA) Allotment Owner is a member of the Otero County Cattlemen's Association. Thus, the proposed actions by the United States Forest Service (USFS) will not only affect the SGA Allotment Owner, but will impact all other similarly situated OCCA members. Therefore, the OCCA directly opposes the "Proposed Action" and all other similar actions proposed by the USFS.

To be clear the OCCA opposes all actions by the USFS and it's employees that infringe on the property rights of local grazing allotment owners, and therefore oppose any proposed actions by the USFS to take the use of the "surface owner" (SGA) in order to convert those private interests into "New Mexico Jumping Mouse Habitat." Not only would such an action violate the 5th Amendment prohibition on the taking of private property, but would also be in direct violation of the purposes for which National Forests were created in the first place (see United States v New Mexico, 1978). Additionally, such action (even if done with the consent of the Allotment Owner under a "permit" or "cooperative agreement") cannot extinguish valid existing property rights. National Forests were created for economic reasons to support rural communities, National Forests are not the same as National Parks and were not created for recreational, environmental, aesthetic, or wildlife and fish preservation purposes (United States v New Mexico, 1978). Although National Forests can be managed for such secondary things as Jumping Mouse habitat improvement, that purpose is by Act of Congress subordinate to the original purposes of National Forests (Multiple Use Sustained Yield Act, MUSY 1960), and is subject to valid existing rights (National Forest Management Act, NFMA 1976, Section 6(i); Federal Land Policy Management Act, FLPMA 1976, Title VII).

National Forests west of the 100th Meridian are split estate lands where the "merchantable timber" and the "mineral deposits" are interests retained by the United States for disposal

separate from the "surface" grazing allotment. The Sacramento Grazing Association has been the "surface owner" of the Sacramento Grazing Allotment since prior to the establishment of the Lincoln National Forest. Even if the allotment owner as the "surface owner" consented to the conversion of part of his grazing allotment to critical habitat for the New Mexico Meadow Jumping Mouse, it simply cannot be done as it would violate the restrictions of the Migratory/Endangered Species Act 1929/1974 which requires that critical habitat wildlife areas cannot be established in National Forests without compensation to the "surface owner" and without the consent of the State Legislature (United States v New Mexico, 1978, citing the Migratory/Endangered Species Acts 1918-1978). For the foregoing reasons the OCCA opposes the "Proposed Action" and demands the removal of all fencing or other impediments that interfere with the "valid existing rights" of OCCA member Sacramento Grazing Association.

Factual and Legal History of Grazing in the West:

Range rights or grazing rights had existed as property under the laws of the Western States and Territories from before those territories were even a part of the United States. See Laws and Ordinances of the State of Oregon 1845, Kearney's Code 1846, Laws of the State of California 1850, Laws and Ordinances of the State of Deseret 1851. There had been an implied license for livestock to "range and feed" upon the public lands since 1834 if not before (Ash Sheep Co. v United States, 1920). By the Mineral Land Act of 1866, Congress clearly intended to create a split-surface mineral land disposal system.

From 1866, forward Congress intended to dispose of the surface of mineral lands separate from the mineral deposits/mineral rights (Barden v Northern Pacific RR, 154 US 288 (1894), Great Northern RR v United States, 315 US 262 (1942), United States v Union Pacific RR, 353 US 112 (1957)). In Barden v Northern Pacific RR, Justice Field wrote in rejecting to the railroad's assertion that it owned both the surface and the mineral rights: "*Such a conclusion can only arise from an impression that a grant of land cannot be made without carrying the minerals therein, and yet the reverse is the experience of every day. The granting of lands, either by the government or individuals, with a reservation of certain quarries therein, as of marble or granite or slate or of certain mines, as of copper or lead or iron, found therein is not an uncommon proceeding, and the knowledge or want of knowledge at the time by the grantee, in such cases, of the property reserved in no respect affects the transfer to him to the title to it. No one will affirm that want of such knowledge on the identification of the lands granted, containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason, from that cause, for eliminating the reservation of minerals in the present case from the grant of the government than for eliminating for a like cause the reservation of quarries or mines in the cases supposed. And it will hardly be pretended that Congress has not the power to grant portions of the public land with a reservation of any severable products thereof, whether minerals or quarries contained therein and whether known or unknown; yet such must be the contention of the plaintiff or its conclusion will fall to the ground.*"

The Grazing Rights Act of March 3, 1875 (18 Stat 481), made it a criminal "trespass" to drive cattle or allow them to graze on an active Military Reservation to injure grass or trees, however, Section 3, specifically authorized livestock "grazing" on all land open under the Homestead, preemption and Mineral Land laws. On the same day Congress ended its policy of making large land grants to railroads by passage of the Act Granting Railroad Right of Ways (18 Stat 4820). An Act For the Disposal of Military Reservations 1884 (23 Stat 103), specifically provided that lands "containing mineral deposits" would be disposed of under the mineral land laws.

The case of Atherton v Fowler, 96 US 513 (1877), held that where land claimed under a Mexican Land Grant (later proven to be defective and void), the settler that had purchased, settled on, improved and enclosed it first had legally taken that claimed land out of the class of "public lands" and that occupying settler had the preference right to obtain the government's title. The settler's occupancy was sufficient to prevent anyone from trying to claim it under the land disposal laws. The Desert Land Act of 1877 (19 Stat 377), was passed about this same time and allowed a single individual to obtain title to 640 acres of land by conducting water onto the land to "irrigate" or to "reclaim" the land (which included "grazing").

While the multitude of land disposal laws invited confusion and conflict, in Smelting Co v Kemp, 104 US 636 (1881), the Supreme Court explained that the acreage limits Congress put into the land disposal laws of 160 acres was merely to keep a single individual from obtaining a monopoly over a huge area of land that would prevent other claimants from attempting to settle under the Mineral land laws. *The Court said this acreage limitation was not intended to apply where 2 or more "associated" locators claimed much larger areas of land together under the mineral land laws.*

Therefore, members of local stockraising "associations" would claim a "homestead" as a home-ranch or headquarters and would then make "surface" "locations" of stockwaters under the Desert Land Act and would jointly claim a "stock range" of a size sufficient to support their families in accordance with State and Territorial range laws. See Griffith v Godey, 113 US 89 (1885), Cameron v United States, 148 US 301 (1893), Grayson v Lynch, 163 US 468 (1896), Salina Stock Co v Salina Creek Irr Co, 163 US 109 (1896), Ward v Sherman, 192 US 168 (1904), Curtin v Benson, 222 US 78 (1911). About the same time the Supreme Court upheld a "stock range" as property rights, Congress passed the Enclosure Act of 1885 (23 Stat 321), which made it a trespass for a single "person" to enclose more than 160 acres, but, specifically made it legal for "persons" or an "association" of persons having a "claim or color of title" under any of the US land laws to enclose their grazing lands (Cameron v United States, supra).

The Validation Act of 1890 (26 Stat 391) "validated" all occupancy, entry and settlement West of the 100th Meridian, and the General Revision/Forest Reserve Act of 1891 (26 Stat 1099), directed the Secretary of Interior to "confirm" withing two years all prior existing settlement claims. Thereafter, the Interior Department could not challenge any claimant's title after 6 years. Lane v Hoglund, 244 US 174 (1917), Payne v United States, 255 US 438 (1921), Stockley v

United States, 260 US 532 (1923). The 1897 Forest Organic Act (29 Stat 484) required the Secretary to "survey" all land occupied by actual settlers, to issue them an official survey map, and those maps would have the force and effect of perfecting and recording the stockraising settler's surface title (Whitney v Morrow, 112 US 693 (1885), Shaw v Kellogg, 170 US 312 (1898)). Once an "allotment" was made it could not be rescinded (Ballinger v Frost, 216 US 240 (1910)).

Teddy Roosevelt, recommended amending all the land settlement laws to conform them to the overall split surface-mineral-timber policy of the mineral land laws in 1910. The National Forest Homestead Acts of 1899/1904/1906/1908 construed together were split-estate land disposal laws that instead of requiring payment of $1.25 per acre, reserved minerals and merchantable timber while requiring construction of improvements worth $1.25 per acre (30 Stat 1095, 33 Stat 547, 34 Stat 233, 35 Stat 554). As the result of Teddy Roosevelt's recommendations to Congress all the land disposal laws were amended and revised to adopt the split-estate policy beginning with the Act For Protection of Surface Rights of Entrymen of 1909 (35 Stat 844) In 1912 Congress "directed and required" the Secretary of Agriculture identify all unsettled land in National Forests for disposal (Acts of 1912 and 1913, 37 Stat 287, 37 Stat 842, 38 Stat 113). Congress amended and revised all the land disposal laws to reflect the intent to grant stockraising settlers the surface while retaining the minerals and merchantable timber for separate disposal. The culmination of these laws was the Agricultural Entry Act 1914 (38 Stat 509) and StockRaising Homestead Act of 1916 (38 Stat 862). See Kinney Coastal Oil v Kieffer, 277 US 488 (1928), and Watt v Western Nuclear, 462 US 36 (1983).

The Stockraising Settlers Relief Act of 1923 (42 Stat1445), cured all defects in title for all allotment owners both inside and outside of National Forests. The Pickett Act of 1910/1912 (36 Stat 847, 37 Stat 497, 41 Stat 1089), clearly intended to dispose of land as split-estates and the President began creating Grazing Districts outside National Forests in 1921 (EO 3450). See also EO 5004 (1928), EO 5428 (1930), and EO 5711 (1931). The Clarke-McNary Act of 1924 (43 Stat 653) authorized the Secretary of Agriculture to create a "national forest system" by entering into voluntary cooperative agreements with allotment owners to provide fire-fighting service and forestry or range management advice. The Taylor Grazing Act of 1934/1936 (48 Stat 1269, 49 Stat 1976) authorized the Secretary of Interior to dispose of land outside National Forests as split-estate Grazing Districts under the "mineral land laws" while offering cooperative agreements to grazing allotment owners. See EO 6910 (1934) and EO 7048 (1935).

Grazing Allotments are split estate property rights where the stockraiser is the "surface owner for all agricultural and ranching purposes" Watt v Western Nuclear, supra. See also Kinney Coastal Oil v Kieffer, supra, and United States v New Mexico, 438 US 696 (1978). Therefore Congress protected all of allotment owners valid existing rights by Section 6(i) of the National Forest Management Act (90 Stat 2955) "revision of all present or future permits, contracts and other instruments shall be subject to valid existing rights"; and Title VII of the Federal Land Policy

Management Act (90 Stat 2786) "all actions by the Secretary concerned under this Act shall be subject to valid existing rights".

Factual and Legal History of the Sacramento Grazing Allotment:

The Sacramento Grazing Association (SGA) is the surface owner of the Sacramento Grazing Allotment. The original owners were an association of actual stockraisers that settled in the Sacramento Mountains in the 1860s and 1870s under the Homestead and Mineral Land Laws. The surface title of the SGA grazing allotment came via mesne conveyances into the ownership of the Goss family in the early 1900's and has passed by decent to the present owners. The pattern of land settlement by individuals and "associated" stockraisers that jointly settled on a "stock range" and eventually divided the surface title of their range amongst themselves was accomplished via sections nine, ten and eleven of the Mineral Land Act of 1866 construed with the Survey Acts of 1831/1853 as referenced in the Mineral Land Act amendments of 1870/1872 construed with the Grazing Rights Act of 1875. The system of split-estate land disposal is explained clearly by Justice Field in Smelting Co v Kemp, 1881. The terms "surface claimant", "superficies", "surface rights" or "surface owner" are used over twenty times in over a dozen statutes beginning with the Townsite Act of Mineral Land Act of 1865 (13 Stat 530).

All Grazing Allotments in National Forests were adjudicated by the end of calendar year 1914, and the Supreme Court held in Kinney Coastal Oil v Kieffer, 1928 that ranchers were the surface owners of their grazing allotments. Once an Allotment was adjudicated it could not be taken away (Ballinger v Frost, 1910), and the owner of range or grazing allotment rights under the Mineral Land laws could not be forced to obtain a "permit" before using those property rights (Curtin v Benson, 1911).

Additionally, the Riparian Water Doctrine is of no force or affect in the State of New Mexico (see California v United States, 1978). The SGA is the owner of the Sacramento Grazing Allotment and the owner of the senior water rights to all sources on the Allotment. The only authority the United States has is over the "commercial" or "merchantable timber" and the "minerals". The National Forest Management Act of 1976 Section 6(i) states that all "permits, contracts and other instruments" shall be subject to valid existing rights. Therefore, the Forest Plan, the Grazing Permit, and all other "permits, contracts and other instruments" must be subject to valid existing rights of the SGA. See United States v New Mexico, 1978, and Watt v Western Nuclear, 1983).

Conclusion, and Statement of Opposition to Proposed USFS Decision:

For the above stated reasons, the Otero County Cattlemen's Association, is opposed to the "New Mexico Jumping Mouse Habitat Improvement Projects on the Sacramento Grazing Allotment" dated July, 2020, the Sacramento Ranger District Ranger's "Proposed Action" "designed to meet

the project's purpose and need… and the management directions from the forest plan" calls for "construction and maintenance" of a large amount of "exclosure fencing" that will deprive the Sacramento Grazing Allotment "surface owner" of a large amount of his "forage crops", the "value of the land for grazing", access to "stockwatering rights", and "improvements" that are all the property of the Allotment Owner. The Allotment Owner's property rights are "valid existing rights" protected by federal law. In Curtin v Benson, 1911, the US Supreme Court was absolutely clear, that a rancher (such as the SGA) did not need a grazing "permit" in order to use his grazing allotment land. The Forest Plan, and any other plan for management of secondary purposes such as Jumping Mouse or "wildlife" are subject to SGA's valid existing rights (see United States v New Mexico, 1978). No plan can be implemented that affects SGA's grazing Allotment rights.

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