



VIA CERTIFIED MAIL AND E-MAIL

June 4, 2021

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Dear Mses. Haaland, Williams, Lueders, Christiansen and Martin and Mr. Moseley,

RE: Sixty-Day Notice of Endangered Species Act Violations regarding (1) USFWS' April 20, 2021, Biological Opinion on Sacramento Allotment Grazing, (2) USFWS' April 16, 2021, Concurrence on Agua Chiquita Allotment Grazing, and USFS' reliance on this Biological Opinion and Concurrence on the Lincoln National Forest.

The U.S. Secretary of the Interior (“Secretary”), U.S. Fish and Wildlife Service (“USFWS” or “FWS”), and U.S. Forest Service (“USFS” or “Forest Service”) are hereby notified by the Center for Biological Diversity (“Center”) and Maricopa Audubon Society (“Maricopa Audubon”) of our intention to file suit 60 days after the filing of this Notice for unremedied violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and its implementing regulations, 50 C.F.R. §§ 402.01-402.17. We file this Notice in connection with: (1) USFWS' April 20, 2021, Biological Opinion (“2021 Sacramento BiOp”) authorizing the Forest Service to allow continued grazing in the Sacramento Allotment of the Lincoln National Forest; (2) the USFWS’s April 16, 2021, concurrence (“2021 Agua Chiquita NLAA Concurrence”) in the Forest Service’s determination that continued grazing in the Agua Chiquita Allotment of the Lincoln National Forest is not likely to adversely affect listed species or their critical habitat; and (3) the Forest Service’s reliance on these unlawful

and arbitrary consultation documents in allowing continued grazing in the Sacramento and Agua Chiquita Allotments.

In this Notice, the Center and Maricopa Audubon provide pertinent background information, and identify the legal violations that we intend to challenge in federal court should USFWS and USFS fail to correct these violations within sixty (60) days. Because time is of the essence in protecting the sole surviving, isolated and besieged population of New Mexico Meadow Jumping Mouse ("NMMJM"), we are not willing to delay filing a lawsuit should the agencies fail to correct these ongoing legal violations; however, we will continue to be available to discuss these matters at your convenience.

EXECUTIVE SUMMARY

The New Mexico Meadow Jumping Mouse ("NMMJM") represents the health of upper elevation meadows and streams. NMMJM is endangered primarily because of the destruction of its "suitable" habitat,¹ particularly by grazing.²

Regarding riparian habitat, Region 3 Forest Service's August 24, 2018, Southwestern Region Riparian and Aquatic Ecosystem Strategy says,

"Rivers and streambeds are conduits for life. In no other ecosystem can we as an agency have a greater impact in "*Caring for the land and serving people.*"³ Protection and enhancement of riparian and enhancement of riparian and aquatic areas is paramount in providing habitat and sustainable water for dependent fish, wildlife, plant species, and human communities alike. ..."⁴

The overarching goal of this strategy is to ensure that the ecological integrity of riparian and aquatic habitats is maintained and/or restored."⁵

NMMJM is currently only found in eight isolated and widely separated areas throughout the Southwest, none of which are likely viable without major management changes (*emphasis added*):

"Nearly all of the current populations are isolated and widely separated, and all of these populations are likely within patches of suitable habitat too small to support resilient populations of the jumping mouse. Therefore, *the New Mexico meadow jumping mouse 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.*"⁶

¹ Species Status Assessment Report for the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), Prepared by the U.S. Fish and Wildlife Service, Albuquerque, New Mexico, 1st Revision, January 30, 2020, page iv.

² Ibid.

³ "What We Believe ... The phrase, "Caring for the Land and Serving People," captures the Forest Service mission."; <https://www.fs.usda.gov/about-agency/what-we-believe> ; web accessed, January 28, 2020.

⁴ USDA Forest Service Southwestern Region Riparian and Aquatic Ecosystem Strategy, August 24, 2018, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd602126.pdf.; page 1.

⁵ Id., page 2.

⁶ Species Status Assessment Report for the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), Prepared by the U.S. Fish and Wildlife Service, Albuquerque, New Mexico, 1st Revision, January 30, 2020, page iv.; Endangered and

The survival of each and every surviving population is critical for NMMJM recovery (*emphasis added*):

"The New Mexico meadow jumping mouse needs to have multiple resilient populations distributed throughout different drainages within the eight geographic management areas to have high viability."⁷ ...

"Conservation of the subspecies requires the restoration of habitat within each of the eight geographic management areas to provide areas for local populations to expand and become established."⁸

USFWS has specifically recognized the critical nature and importance of NMMJM protection, survival and recovery in the Sacramento Mountains (*emphasis added*):

"We found that the conservation of the subspecies requires increasing the number and distribution of populations of the jumping mouse to allow for the restoration of new populations and expansion of current populations into areas that were historically occupied within the Jemez Mountains, Sacramento Mountains, and the middle Rio Grande."⁹

The situation for NMMJM in the Sacramento Mountains on the Lincoln National Forest is dire. In "Lincoln National Forest Jumping Mouse Annual Report for 2017," Dr. Carol Chambers reports,

"Because we had so few detections of jumping mice on the LNF [Lincoln National Forest], we did not live-trap or radio collar animals to avoid risk to individuals."¹⁰

In November 2020, the Lincoln National Forest itself found that ***"the count of surviving [NMMJM] subpopulations is teetering against zero."***¹¹

The management regime of fencing and monitoring since 2016¹² again perpetuated by the new 2021 Sacramento BiOp and the 2021 Agua Chiquita NLAA Concurrence has already failed

Threatened Wildlife and Plants; Designation of Critical Habitat for the New Mexico Meadow Jumping Mouse; Final Rule; Federal Register, Volume 81, Number 51, March 16, 2016, page 14296.

⁷ Species Status Assessment Report for the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), Prepared by the U.S. Fish and Wildlife Service, Albuquerque, New Mexico, 1st Revision, January 30, 2020, page iii.

⁸ Id., page iv.

⁹ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the New Mexico Meadow Jumping Mouse; Final Rule; Federal Register, Volume 81, Number 51, March 16, 2016, page 14296.

¹⁰ "Lincoln National Forest Jumping Mouse Annual Report for 2017," FS Agreement No.: 17-CR-11031000-003; Reporting Period: January – December 2017; Project Title: New Mexico meadow jumping mouse habitat and diet on the Lincoln National Forest; Carol L. Chambers, undated.

¹¹ "New Mexico meadow jumping mouse population and montane meadow status and analysis for strategic conservation of Critical Habitat on Lincoln National Forest including 2019 and 2020, November 2020; <https://www.biologicaldiversity.org/species/mammals/pdfs/lnf-report-20201100-NMMJM-POPULATION-AND-MONTANE-MEADOW-STATUS-LNF.pdf>.

¹² Correspondence, to: Sacramento Ranger District Ranger Elizabeth A. Humphrey; from: USFWS Field Supervisor Wally Murphy; RE: Biological Opinion on the continuation of livestock grazing for the Sacramento Allotment; Cons: # 02ENNM00-2016-F-0440, June 1, 2016.; Correspondence, from Susan Millsap, Field Supervisor, U.S. Fish and Wildlife Service New Mexico Ecological Services Field Office, Albuquerque, NM; to Elizabeth A. Humphrey, District Ranger, Sacramento Ranger District; RE: Concurrence of a "may affect, not likely to adversely affect" determination for New Mexico Meadow Jumping Mouse and Critical Habitat; October 4, 2017.; Correspondence, from: Susan S. Millsap, Field

proven by the facts that (1) the NMMJM population "is teetering against zero" and (2) Critical Habitat on the Agua Chiquita and Sacramento Allotments is not recovering because "the Forest Service has reported a high number (more than 100, annually) of unauthorized livestock incursions into exclosures."¹³

The Ninth Circuit Court of Appeals succinctly summarizes the purpose of Critical Habitat (*emphasis added*):

"...the purpose of establishing "critical habitat" is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery."¹⁴

USFWS' January 30, 2020, NMMJM Species Status Assessment describes Critical Habitat (*emphasis added*):

"Specifically, the jumping mouse requires tall (averaging 61 centimeters (24 inches)), dense riparian herbaceous vegetation primarily composed of sedges (plants in the Cyperaceae Family that superficially resemble grasses, but usually have triangular stems) and forbs (broad-leafed herbaceous plants). **This suitable habitat is only found when wetland vegetation achieves full growth potential associated with seasonally available or perennial flowing water.**"¹⁵

Supervisor, U.S. Fish and Wildlife Service New Mexico Ecological Services Field Office, Albuquerque, NM; to: Travis G. Mosely, Forest Supervisor, Lincoln National Forest, Alamogordo, NM; RE: Cons. #02ENNM00-2016-F-0440-R001, Biological Opinion for Ongoing Livestock Management on the Sacramento and Dry Canyon Allotments; October 5, 2018.

¹³ Correspondence, from USFWS New Mexico Field Supervisor Shawn Sartorius; to: Lincoln National Forest Supervisor Travis G. Moseley; RE: request to reinitiate formal consultation for ongoing livestock management on the Sacramento and Dry Canyon Allotments; April 20, 2021, page 76.

¹⁴ 16 U.S.C. § 1533(f)(1); GIFFORD PINCHOT TASK FORCE, et al., v. UNITED STATES FISH & WILDLIFE SERVICE, No. 03-35279; U.S. Court of Appeals for the Ninth Circuit, 378 F.3d 1059; 2004 U.S. App. LEXIS 16215; 59 ERC (BNA) 1110; 34 ELR 20068, June 7, 2004, Argued and Submitted, Seattle, Washington, August 6, 2004, Filed.

¹⁵ Species Status Assessment Report for the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), prepared by the U.S. Fish and Wildlife Service, Albuquerque, New Mexico, 1ST Revision, January 30, 2020, page iii.

USFS' website (accessed September 1, 2019) for jumping mouse, <https://www.fs.usda.gov/detail/r3/home/?cid=stelprd3809040>,¹⁶ also describes and includes a representative healthy habitat image for NMMJM (*emphasis added*):

“The jumping mouse has very specific habitat requirements. It requires perennial or seasonally perennial water and saturated soils that produce tall (24+ inch) herbaceous riparian plants, and intact adjacent uplands (see image below).”

Below: This image of critical habitat on the Santa Fe National Forest *displays the tall herbaceous riparian vegetation and adjacent intact upland habitat that is essential to the species.”*



¹⁶ USDA Forest Service website, NM Meadow Jumping Mouse: Home Page, <https://www.fs.usda.gov/detail/r3/home/?cid=stelprd3809040>; accessed, MAY 22, 2021.

Compare USFS' above image of healthy NMMJM Critical Habitat with the following images of Critical Habitat on the Agua Chiquita and Sacramento Allotments:



Poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a metal rod fenced NMMJM Critical Habitat enclosure, Agua Chiquita Allotment, August 2, 2019, © Robin Silver.



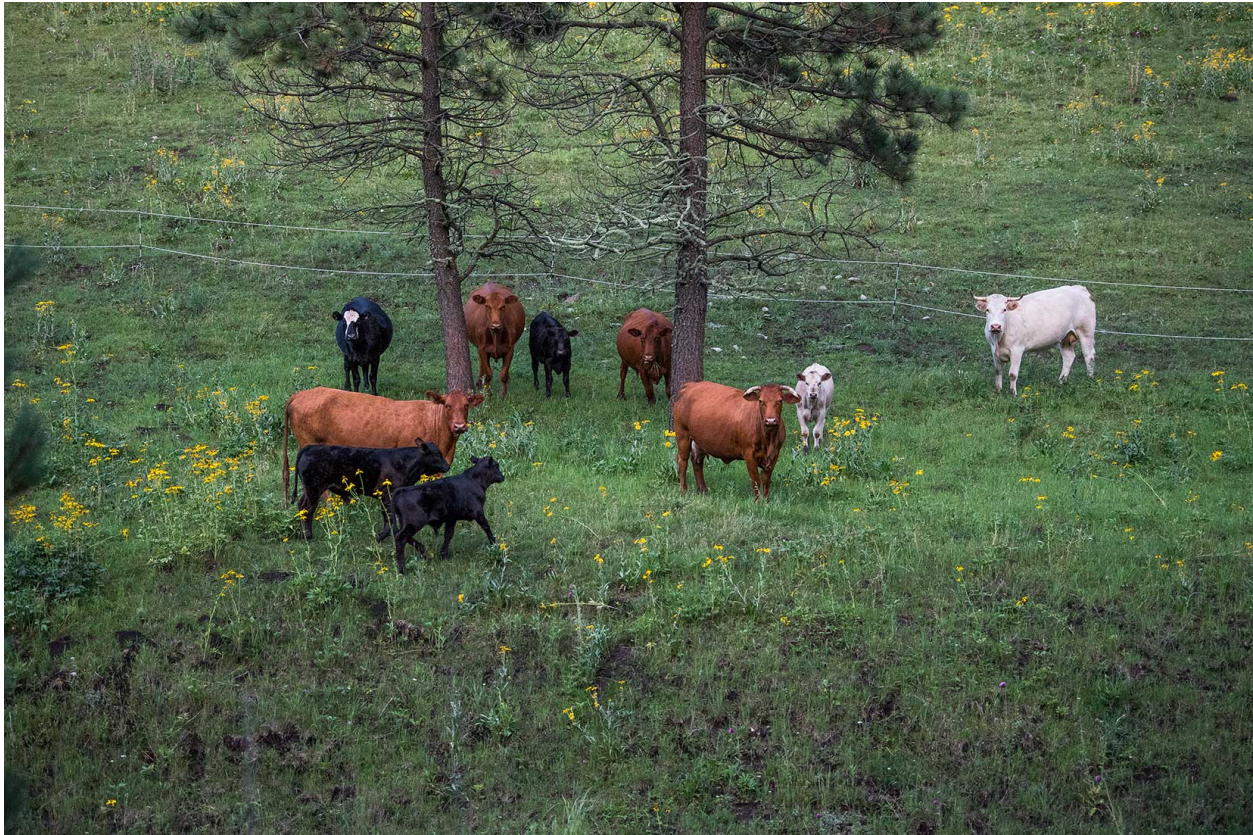
Poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a NMMJM Critical Habitat exclosure, Agua Chiquita Allotment, August 8, 2020, © Robin Silver.



Poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a metal rod rail fence NMMJM Critical Habitat enclosure, Agua Chiquita Allotment, August 8, 2020, © Robin Silver.



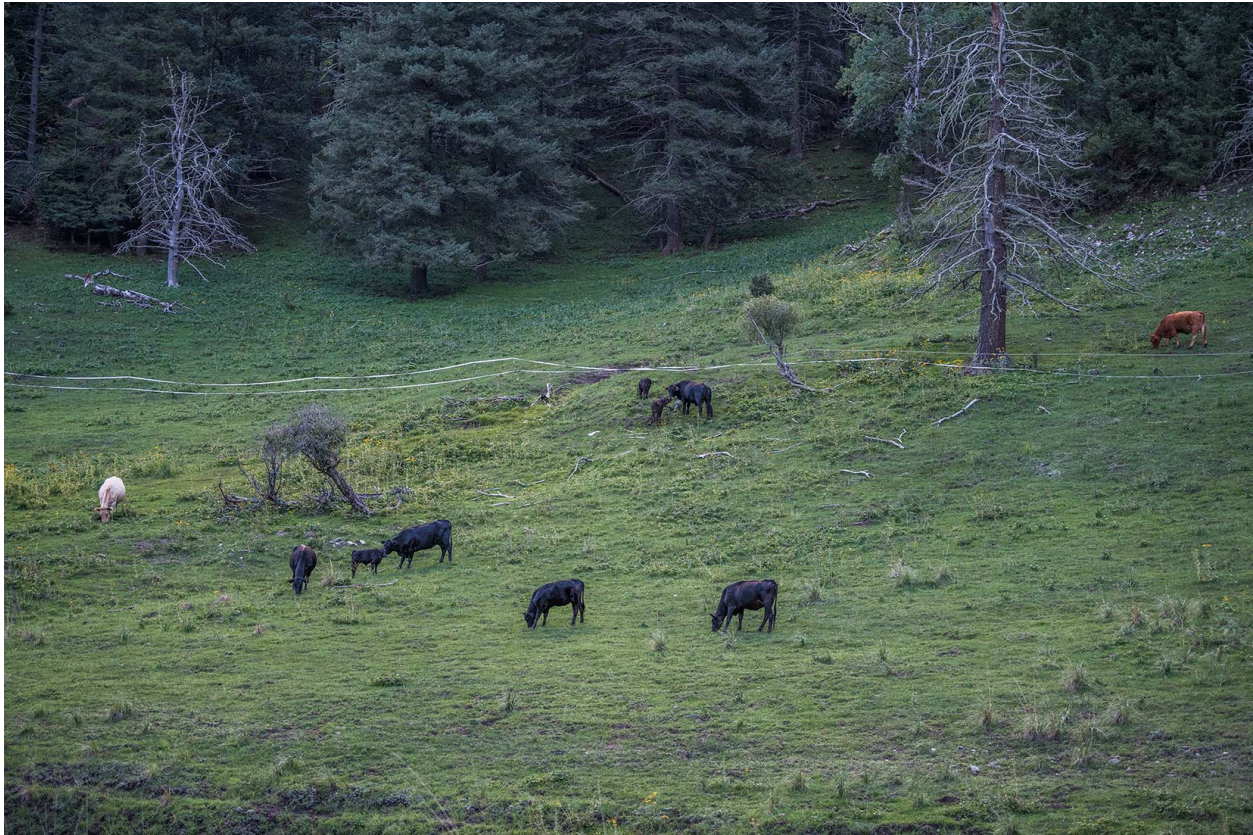
Trespass cattle and poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a NMMJM Critical Habitat enclosure, Agua Chiquita Allotment, August 7, 2020, © Robin Silver.



Trespass cattle and poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a Wills Canyon NMMJM Critical Habitat enclosure on the Sacramento Allotment, August 3, 2019. © Robin Silver



Trespass bull and poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a Wills Canyon NMMJM Critical Habitat enclosure on the Sacramento Allotment, August 3, 2019. © Robin Silver



Trespass cattle and poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a Wills Canyon NMMJM Critical Habitat enclosure on the Sacramento Allotment, August 7, 2020. © Robin Silver



Trespass cattle and less than the necessary 24 inches of riparian vegetation within a Wills Canyon NMMJM Critical Habitat enclosure on the Sacramento Allotment, August 8, 2020. © Robin Silver



Trespass bull and poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a Wills Canyon NMMJM Critical Habitat enclosure on the Sacramento Allotment, August 8, 2020. © Robin Silver



Trespass cattle and poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a NMMJM Critical Habitat enclosure in Upper Rio Penasco on the Sacramento Allotment, August 7, 2020. © Robin Silver



Trespass cattle and less than the necessary 24 inches of riparian vegetation within a NMMJM Critical Habitat exclosure in Upper Rio Penasco on the Sacramento Allotment, August 7, 2020. © Robin Silver

In 2020, the Lincoln National Forest NMMJM protection plan included double electric fencing immediately above and below the two elk-type Mauldin Springs enclosures where NMMJM are still surviving:



Upstream edge of the lower Maulding Springs NMMJM Critical Habitat elk-type enclosure with poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a double-stranded electric fencing enclosure, August 8, 2020. © Robin Silver



Downstream edge of the lower Maulding Springs NMMJM Critical Habitat elk-type enclosure with poor habitat recovery with less than the necessary 24 inches of riparian vegetation within a double-stranded electric fencing enclosure, August 8, 2020. © Robin Silver

As shown in the proceeding 2019 and 2020 images, there has been essentially no Critical Habitat recovery to the necessary 24 inches of riparian vegetation in spite of years' worth of trying to stop damaging trespass violations into Critical Habitat exclosures with expensive metal rod fencing, single or double electric fencing, four-strand barbed wire fencing and frequent monitoring. The Lincoln National Forest's protection plan continues to fail with "the count of surviving [NMMJM] subpopulations...teetering against zero"¹⁷ because of the "high number (more than 100, annually) of unauthorized livestock incursions into exclosures."¹⁸ The Lincoln National Forest's protection plan cost more the \$11 million from 2014-2019.¹⁹

And now in 2021, after the new 2021 Sacramento BiOp and the 2021 Agua Chiquita NLAA Concurrence, instead of prohibiting cattle grazing in the pastures containing NMMJM Critical Habitat until a new and functional plan has been instituted, cows have been allowed to return into the

¹⁷ "New Mexico meadow jumping mouse population and montane meadow status and analysis for strategic conservation of Critical Habitat on Lincoln National Forest including 2019 and 2020, November 2020; <https://www.biologicaldiversity.org/species/mammals/pdfs/Inf-report-20201100-NMMJM-POPULATION-AND-MONTANE-MEADOW-STATUS-LNF.pdf>.

¹⁸ Correspondence, from USFWS New Mexico Field Supervisor Shawn Sartorius; to: Lincoln National Forest Forest Supervisor Travis G. Moseley; RE: request to reinstate formal consultation for ongoing livestock management on the Sacramento and Dry Canyon Allotments; April 20, 2021, page 76.

¹⁹ Freedom of Information Act response, from Acting Regional Forester Elaine Kohrman, to Center for Biological Diversity Co-Founder and Board Member Dr. Robin Silver, RE: 1. From January 1, 2012 to date, March 30, 2020, the total amount of funds that the Lincoln National Forest, either solely and/or via money from Region 3 Region and/or from Headquarters, has spent on riparian exclosure fencing on the Agua Chiquita Allotment. This total should include but not be limited to money for surveying, site preparation, labor, materials, inspection and maintenance costs; 2. From January 1, 2012 to date, March 30, 2020, the total amount of money that the Lincoln National Forest, either solely and/or via money from Region 3 Region and/or from Headquarters, has spent on riparian exclosure fencing on the Sacramento Allotment. This total should include but not be limited to money for surveying, site preparation, labor, materials, inspection and maintenance costs; 3. From January 1, 2012, to date, March 30, 2020, the total worth amount of donated materials and donated funds that the Lincoln National Forest has used to provide for exclosure fencing along riparian areas on the Agua Chiquita grazing allotment. This worth amount should include but not be limited to materials from Yates Petroleum and/or funds from the New Mexico Game and Fish Habitat Stamp Program, and 4. From January 1, 2012, to date, March 30, 2020, the total worth amount of donated materials and donated funds that the Lincoln National Forest has used to provide for exclosure fencing along riparian areas on the Sacramento grazing allotment. This worth amount should include but not be limited to materials from Yates Petroleum and/or funds from the New Mexico Game and Fish Habitat Stamp Program; May 20, 2020.; Freedom of Information Act response, from Acting Regional Forester Sandra Watts, to Center for Biological Diversity Co-Founder and Board Member Dr. Robin Silver, RE: 1. From January 1, 2012 to date, April 3, 2020, the total amount of funds that the Lincoln National Forest, either solely and/or via money from Region 3 Region and/or from Headquarters, has spent on corrals and/or trick tanks on the Agua Chiquita Allotment. This total should include but not be limited to money for surveying, site preparation, labor, materials, inspection and maintenance costs; From January 1, 2012 to date, April 3, 2020, the total amount of money that the Lincoln National Forest, either solely and/or via money from Region 3 Region and/or from Headquarters, has spent on corrals and/or trick tanks on the Sacramento Allotment. This total should include but not be limited to money for surveying, site preparation, labor, materials, inspection and maintenance costs; From January 1, 2012, to date, April 3, 2020, the total worth amount of donated materials and donated funds that the Lincoln National Forest has used to provide for corrals and/or trick tanks on the Agua Chiquita grazing allotment. This worth amount should include but not be limited to materials from Yates Petroleum and/or funds from the New Mexico Game and Fish Habitat Stamp Program; and From January 1, 2012, to date, April 3, 2020, the total worth amount of donated materials and donated funds that the Lincoln National Forest has used to provide for corrals and/or trick tanks on the Sacramento grazing allotment. This worth amount should include but not be limited to materials from Yates Petroleum and/or funds from the New Mexico Game and Fish Habitat Stamp Program.; June 3, 2020.

pastures with NMMJM Critical Habitat with even weaker protections above and below the two elk-type Mauldin Springs exclosures and no other changes elsewhere.

Only single electric fencing is now found above and below the two elk type Mauldin Springs exclosures where NMMJM are still surviving. No modifications have been made to the lower elk-type exclosure where the stream is now changing course.

Our May 29, 2021, we documented that trespass NMMJM Critical Habitat exclosure violations are still occurring. On May 29, 2021, on the Agua Chiquita Allotment, we documented widespread trespass of cows into NMMJM exclosures and essentially free movement within and without of at least one of the metal rod exclosures. On the Sacramento Allotment, we found trespass cattle within at least one NMMJM Critical Habitat exclosure on the Upper Rio Penasco. And from Forest Service personal, we understand that there have already been multiple other trespass violations since cows were allowed back into the Mauldin Springs/South Pasture May 15.



Trespass cow within a NMMJM Critical Habitat exclosure on the Agua Chiquita Allotment, May 29, 2021. © Robin Silver



Trespass cow entering a NMMJM Critical Habitat metal rod enclosure on the Aqua Chiquita Allotment, May 29, 2021. © Robin Silver



One trespass cow exiting a NMMJM Critical Habitat metal rod enclosure while one remains on the Aqua Chiquita Allotment, May 29, 2021. © Robin Silver



Trespass cow exiting a NMMJM Critical Habitat metal rod enclosure on the Aqua Chiquita Allotment, May 29, 2021. © Robin Silver



Trespass cattle and poor habitat recovery of riparian vegetation within a NMMJM Critical Habitat enclosure on the Upper Rio Penasco on the Sacramento Allotment, May 29, 2021. © Robin Silver



Upstream edge of the lower Mauldin Springs NMMJM Critical Habitat elk-type enclosure with poor habitat recovery now only protected with a single-stranded electric fencing enclosure as compared with the double-stranded electric fencing enclosure documented on page 17 from August 8, 2020, May 29, 2021. © Robin Silver



Downstream edge of the lower Mauldin Springs NMMJM Critical Habitat elk-type enclosure with poor habitat recovery now protected with only a single-stranded electric fencing enclosure as compared with the double-stranded electric fencing enclosure documented on page 17 above from August 8, 2020, May 29, 2021. © Robin Silver



Unprotected stream that is now changing course on the upstream side of the lower Mauldin Springs elk-type enclosure, May 29, 2021. © Robin Silver

The 2021 Sacramento BiOp and the 2021 Agua Chiquita NLAA Concurrence inarguably violate the Endangered Species Act²⁰ and its implementing regulations²¹ by perpetuating the same failed grazing and management schemes that have resulted in that "the count of surviving [NMMJM] subpopulations is teetering against zero"²² and failure of Critical Habitat recovery because of the "high number (more than 100, annually) of unauthorized livestock incursions into enclosures."²³

In 60 days, if USFS and USFWS fail to correct these violations, the Center and Maricopa Audubon intend to file suit to seek injunctive judicial assistance.

²⁰ 16 U.S.C. §§ 1531-1544

²¹ 50 C.F.R. §§ 402.01-402.17

²² "New Mexico meadow jumping mouse population and montane meadow status and analysis for strategic conservation of Critical Habitat on Lincoln National Forest including 2019 and 2020, November 2020; <https://www.biologicaldiversity.org/species/mammals/pdfs/lnf-report-20201100-NMMJM-POPULATION-AND-MONTANE-MEADOW-STATUS-LNF.pdf>.

²³ Correspondence, from USFWS New Mexico Field Supervisor Shawn Sartorius; to: Lincoln National Forest Forest Supervisor Travis G. Moseley; RE: request to reinstate formal consultation for ongoing livestock management on the Sacramento and Dry Canyon Allotments; April 20, 2021, page 76.

LEGAL BACKGROUND

A. Statutory Framework

The ESA “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits any “person” from “taking” any member of an endangered or threatened species without authorization from the FWS. 16 U.S.C. § 1538(a).²⁴

Pursuant to Section 7 of the ESA, before undertaking any action that may have direct or indirect effects on any 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 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 critical] 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. Destruction or adverse modification of critical habitat is defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” *Id.*

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). Moreover, after the initiation of consultation, the action agency is prohibited from making “any irreversible or irretrievable commitment[s] 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.” *Id.* § 1536(d).

Consultation under Section 7 may be “formal” or “informal” in nature. Informal consultation is “an optional process” consisting of all correspondence between the action agency and the FWS, which is designed to assist the action agency, rather than the 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 the FWS a “biological assessment” that evaluates the potential effects of the action on listed species and critical habitat. 16 U.S.C. § 1536(c)(1). As part of the biological assessment, the action agency must make a finding as to whether the proposed action may affect listed species and submit the biological assessment to the FWS for review and potential concurrence with its finding. *Id.* If the action agency finds that the proposed action “may affect, but is not likely to adversely affect” any listed species or critical habitat and the FWS concurs with this finding, then the informal consultation process is terminated. 50 C.F.R. § 402.14(b).

²⁴ The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” *Id.* § 1532(19). The FWS has further defined “harass” to include “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, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

If, on the other hand, the action agency finds that the proposed action “may affect” listed species or critical habitat, then the action agency must undertake formal consultation. 50 C.F.R. § 402.14; *see also* FWS, Endangered Species Consultation Handbook (“Consultation Handbook”) at 3-13 (1998). The result of formal consultation is the preparation of a biological opinion (“BiOp”) by the FWS, which provides the FWS’s analysis of the best available scientific data on the pre-existing status of the species and how it would be affected by the proposed action on top of the species’ baseline condition.²⁵

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. *See* Consultation Handbook at 4-14 to 4-31. At the end of the formal consultation process, the FWS determines whether the proposed action—in addition to the pre-existing environmental baseline of the species—is likely to jeopardize the continued existence of a listed species or destroy or adversely modify any designated critical habitat. If the FWS determines that the proposed action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat, but that the proposed action will nevertheless result in the incidental taking of listed species, then the 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 that the [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). If the FWS determines that the action will jeopardize a listed species or destroy or adversely modify designated critical habitat, then the FWS must offer the action agency reasonable and prudent alternatives to the proposed action that will avoid jeopardy to a listed species or adverse critical habitat modification, if such alternatives exist. *Id.* § 1536(b)(3)(A).

Without an adequate BiOp and ITS in place (or, in the context of informal consultation, absent a lawful concurrence in a “not likely to adversely affect” determination), any activities likely to result in incidental take of members of listed species are unlawful. *Id.* § 1538(a)(1)(B). Accordingly, anyone who undertakes such activities, or who authorizes such activities, *id.* § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens for declaratory and injunctive relief, *see id.* § 1540. This includes action agencies, which must ensure their own compliance with the ESA; an action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species” merely by relying upon a BiOp, concurrence, or other consultation document issued by the FWS. *Pyramid Lake Paiute Tribe v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

B. Relevant Factual Background

This letter involves two grazing allotments in the Lincoln National Forest—the Sacramento Allotment and the Agua Chiquita Allotment—in which the Forest Service has, for decades, authorized ongoing grazing by domesticated livestock in habitat that is crucial to the survival and recovery of the New Mexico meadow jumping mouse (“jumping mouse”). The Center provides the

²⁵ When preparing a BiOp, the 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,” 50 C.F.R. § 402.14, using “the best scientific and commercial data available,” 16 U.S.C. § 1536(a)(2).

following factual background regarding the jumping mouse, as well as the Forest Service’s actions to date in these two allotments.

1. The Jumping Mouse in the Lincoln National Forest

The 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.

The 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, extensive habitat loss and fragmentation due to grazing pressure, water management and use, drought, and wildfire have severely reduced its population and distribution.

On June 20, 2013, the FWS proposed listing the jumping mouse as an endangered species under the ESA.²⁶ The FWS conducted a comprehensive status review of the jumping mouse, and on May 27, 2014, the FWS issued a Species Status Assessment (“2014 SSA”). In this report, FWS reviewed the jumping mouse’s life history, and detailed the threats to the species. As a result of this review, the 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, 2014 SSA at 2.²⁷

The 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. The riparian vegetation serves as an important food source for the 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.

The jumping mouse has a three-year lifespan. 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

²⁶ Although the New Mexico meadow jumping mouse is technically a “subspecies” listed under the ESA, the Center refers herein to it as a “species” to avoid confusion throughout.

²⁷ The 2014 SSA is available here: <https://www.fws.gov/southwest/es/newmexico/documents/New%20Mexico%20meadow%20jumping%20mouse%20final%20SSA.pdf>.

during the summer. Within this short active period, the 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 adequate 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.

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.

Because jumping mice have so few offspring each year, every litter is important to the survival and recovery of populations (and the jumping mouse species as a whole). 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).

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, degraded, or eliminated.

As explained in the FWS's update to the species' SSA, 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* ("2020 SSA") at vi.²⁸ 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.

Livestock grazing poses a particularly significant and acute 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

²⁸ The 2020 SSA is available here: https://www.fws.gov/southwest/es/NewMexico/documents/20200130_NMMJM_Revised_SSA_Report_final.pdf.

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.

At the individual level, the removal of vegetation reduces the availability of food resources for jumping mice. If a jumping mouse fails to accumulate sufficient fat reserves during its short active season, it will not survive the long overwinter hibernation. Accordingly, as the FWS observed in its 2014 SSA, 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 jumping mouse habitat results in reduced population sizes and, eventually, the extirpation of populations.

The reduction of suitable habitat due to grazing also places individual 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.

At the population level, grazing has repeatedly resulted in the permanent extirpation of local jumping mouse populations. 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.

On June 10, 2014, the FWS formally designated the 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). The FWS determined in its final listing rule that the 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. As explained by the FWS in the final listing rule, the remaining small, isolated 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.*

On March 16, 2016, the FWS issued a final rule designating critical habitat for the jumping mouse. *See* 81 Fed. Reg. 14,264 (Mar. 16, 2016). In the rule, FWS identified primary constituent elements (“PCEs”)—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 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.* The FWS identified over 13,000 acres of critical habitat in eight management units containing these PCEs. *Id.* at 14,297-99. However, most of the critical habitat designated by the FWS is unoccupied.

Today, the jumping mouse occurs within eight geographic management units that are defined by critical habitat units and occupied habitat. NMMJM has experienced a “82% reduction in population due to habitat loss.”²⁹ 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, the FWS determined in its 2020 SSA 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.* Indeed, the FWS found that the jumping mouse is “particularly vulnerable to extinction,” *id.* at 117—“from both random and nonrandom catastrophic natural or human-caused events,” *id.* at 121—ultimately concluding that “that *the subspecies’ overall viability is low*, given the ongoing and likely future losses of habitat in conjunction with the small and isolated nature of currently-known populations,” because “the status of the subspecies has been reduced to the point where individual populations are vulnerable to extirpation.” *Id.* at 118-19 (emphasis added).

Relevant here, the Sacramento Allotment in the Lincoln National Forest contains parts of two 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, the FWS observed that although no jumping mice were detected during surveys in 2005, Subunit 4B along the Rio Peñasco in the Sacramento Allotment “contains perennial flowing water with saturated soils and has a high potential of being restored to suitable habitat.” *Id.* The 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

²⁹ “New Mexico Meadow Jumping Mouse (*Zapus hudsonius luteus*), Overview,” USFS, undated, <https://www.fs.fed.us/rm/grassland-shrubland-desert/docs/projects/vulnerable-obligate-species/species-reports/new-mexico-meadow-jumping-mouse.pdf> .

and resiliency.” *Id.* The 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, the 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,” the 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).

The Agua Chiquita Allotment in the Lincoln National Forest also contains part of a 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 formerly occupied areas that were “located on Forest Service lands . . . within two of four fenced livestock enclosures.” *Id.* The 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 formerly occupied areas, “are considered *essential* to the conservation of the jumping mouse.” *Id.* (emphasis added).

2. Recent Consultation History in the Sacramento Allotment

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. 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.

By 2004, the allotment’s stocking levels were adjusted 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 at that time, overutilization of the forage by domestic livestock has 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.

a. The 2016 and 2018 Sacramento Biological Opinions

In 2016, in response to the FWS’s listing of the jumping mouse and designation of critical habitat in the Sacramento Allotment, the Forest Service and the FWS initiated formal consultation concerning the Forest Service’s ongoing authorization of grazing in the Sacramento Allotment. This consultation process culminated in an October 20, 2016 Biological Opinion (“2016 Sacramento BiOp”), which required the Forest Service to undertake various terms and conditions to protect

jumping mice and their habitat such as installing temporary fencing to exclude livestock from designated critical habitat, frequent monitoring by the Forest Service to ensure compliance by the permittee, and a requirement that the Forest Service immediately notify livestock owners in the event of incursions into fencing enclosures. On the basis of these terms and conditions being fully implemented to minimize take of jumping mice and harm to critical habitat, the FWS determined that continued grazing would not jeopardize the survival or recovery of the jumping mouse, nor result in destruction or adverse modification of its critical habitat. However, the Forest Service did not in fact fully implement the terms and conditions of the 2016 BiOp—a failure that resulted in significant unlawful take of the jumping mouse.

In January 2018, because the Forest Service failed to comply with several of the terms and conditions underlying the 2016 Sacramento BiOp, the FWS requested that Forest Service and the FWS reinstate formal consultation concerning the Forest Service’s ongoing authorization of grazing in the Sacramento Allotment. Although the agencies knew that significant unlawful take was occurring—and thus necessitated reinstatement of consultation—the Forest Service nevertheless continued to allow grazing during the 2018 grazing season while the consultation process took place, in direct violation of Section 7(d) of the ESA. *See* 16 U.S.C. § 1536(d). The reinstated consultation process culminated in an October 5, 2018 Biological Opinion (“2018 Sacramento BiOp”), which contained many of the same terms and conditions as the 2016 Sacramento BiOp, such as regular monitoring by the Forest Service and a requirement that the Forest Service immediately notify the permittee in the event of incursions. The 2018 Sacramento BiOp included a few additional conservation measures, such as converting some temporary enclosure fencing to permanent fencing. On the basis of these terms and conditions—which, again, in large part mirrored the terms and conditions of the 2016 Sacramento BiOp that the Forest Service repeatedly failed to satisfy, and which thus failed to protect the jumping mouse—the FWS once again determined that continued grazing would not jeopardize the survival or recovery of the species, nor result in destruction or adverse modification of jumping mouse critical habitat. At the request of the Forest Service, in April 2019 the FWS extended the scope of the 2018 Sacramento BiOp to cover the entire term of the Forest Service’s grazing permit for the Sacramento Allotment, which expires on February 11, 2029 (i.e., ten additional years of grazing in the 2019-2028 grazing seasons).

In September 2019, the Center notified the Forest Service and the FWS that ongoing grazing in the Sacramento Allotment was once again resulting in severe overgrazing, adversely affecting the jumping mouse and its critical habitat in a manner not previously considered in the 2018 Sacramento BiOp, exceeding the level of take authorized in the 2018 Sacramento BiOp, and requiring immediate reinstatement of consultation. As documented extensively in the Center’s September 2019 notice letter and accompanying photographs, livestock incursions in jumping mouse critical habitat were rampant. Yet, despite this significant increase in harm to jumping mice and their habitat beyond what the 2018 Sacramento BiOp authorized or contemplated—and despite an explicit requirement in the 2018 Sacramento BiOp to timely notify the permittee of every incursion—the Forest Service remarkably had not sent a single notification of non-compliance to the permittee. Due to the lack of notice to the permittee, livestock often lingered for days in temporary and permanent enclosures, resulting in a situation in which the vegetation inside the enclosures looked the same as the completely denuded vegetation outside the enclosures.³⁰

³⁰ Attached to this letter is the Center’s September 2019 notice of intent to sue, which contains relevant photographs and other evidence of chronic, rampant violations of the ESA in the two

In August 2020, after informal negotiations failed, the Center filed suit in the U.S. District Court for the District of New Mexico to compel reinitiation of consultation. *See Ctr. for Biological Diversity v. Christiansen*, No. 1:20-cv-863 (D.N.M.). In response to the lawsuit, the Forest Service and the FWS agreed to settle the case and reinitiate consultation concerning ongoing grazing in the Sacramento Allotment.

b. The 2021 Sacramento Biological Assessment and the 2021 Sacramento Biological Opinion

i. The 2021 Sacramento BA

On March 3, 2021, the Forest Service submitted a final Biological Assessment (“2021 Sacramento BA”) to the FWS regarding ongoing grazing through the expiration of the relevant grazing permit on February 11, 2029. The Forest Service defined the action under consultation as the continuation of ongoing livestock grazing in the Sacramento Allotment, along with the proposed modification of several conservation measures, terms, and conditions imposed by the 2018 Sacramento BiOp.

In particular, the Forest Service proposed abandoning a conservation measure (and a corresponding term and condition) of the 2018 Sacramento BiOp that utilized a metric requiring less than 20% grazing utilization inside permanent or temporary exclosures within jumping mouse critical habitat (i.e., locations where grazing is generally prohibited), and proposed instead a “replacement method that would relate to light to moderate livestock grazing intensity.” 2021 Sacramento BA at 6. The cursory explanation provided by the Forest Service—which had severely failed to achieve the 20% maximum grazing utilization levels inside exclosures under the 2016 and 2018 Sacramento BiOps—was that while the prior grazing utilization metric “is commonly used to assess grazing intensity and inform range management,” it is “less useful in assessing the quality of [jumping mouse] critical habitat.” *Id.*; *see also id.* at 21.

Moreover, the Forest Service proposed reducing the frequency of compliance checks for permanent exclosures, despite the routine rate of incursions in prior years. *Id.* at 19. Although the Forest Service once again committed—as it did in 2016 and 2018—to notify the permittee within 24 hours of an incursion into a temporary or permanent exclosure, it did not explain why the Forest Service previously failed to send even a single Notice of Non-Compliance to the permittee,³¹ as required by the Forest Service Grazing Permit Administration Handbook³² in the face of 162 documented incursions between 2016 and 2020.³³

allotments at issue. *See* Attachment 1: <https://www.biologicaldiversity.org/species/mammals/pdfs/Inf-NOI-20190913-NMMJM-REININITIATION-FINAL.pdf>

³¹ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member Dr. Robin Silver, from: Acting Regional Forester Sandra Watts; RE: Final response to Freedom of Information Act Tracking Number 2020-FS-R3-05776-F; October 19, 2020.

³² FSH 2209.13 – Grazing Permit Administration Handbook, Chapter 10 – Permits With Term Status, Section 16.2 Suspension or Cancellation of Grazing Permits, including especially, Section 16.2a – Notices of Non-Compliance, Section 16.2b – Contents of Notice of Non-Compliance (NONC) Letter, 16.2c – Time to Demonstrate or Achieve Compliance, 16.2d – Permittee Actions to Demonstrate or Achieve Compliance, 16.2e – Forest Service Verification and Documentation of Compliance, 16.2g – Repeated Incidents of Noncompliance, and 16.2h – Decision to Suspend or

In addition, the Forest Service relied heavily on the fact that it intended in the future to install additional temporary and permanent fencing in certain areas of the Sacramento Allotment. However, the Forest Service explained that such measures would “depend[] on funds availability.” Likewise, the Forest Service conceded that it could only “sequentially implement [these measures] over a period of years,” such that even in the best case scenario with no funding limitations these measures would not be completed until at least 2023—i.e., after an additional three seasons of grazing (i.e., the 2021, 2022, and 2023 grazing seasons). *Id.* at 9-11.

Despite the leisurely pace with which the Forest Service proposed implementing measures to benefit jumping mouse habitat, and even then only if funding is available, the Forest Service acknowledged that “the only known occurrence[s] of the [jumping mouse] in the Sacramento Ranger District” of the Lincoln National Forest “are found in the Lower and Upper Mauldin Springs riparian enclosures in Wills Canyon.” *Id.* at 30. As a result, the Forest Service explained that “populations of [the jumping mouse] range-wide on the Sacramento Ranger District *may be trending toward extirpation.*” *Id.* (emphasis added). Nevertheless, the Forest Service explained that, as part of its proposed action, “[h]igh livestock use outside of permanent enclosures continues to fragment habitat for the [jumping mouse],” including in designated critical habitat. *Id.* at 38. Because unfenced critical habitat will be actively grazed under the Forest Service’s ongoing authorization of grazing in the Sacramento Allotment, the Forest Service committed to managing these areas with “the goal to meet 35% utilization levels.” *Id.*³⁴

ii. The 2021 Sacramento BiOp

On April 20, 2021, the FWS issued the 2021 Sacramento BiOp. Despite the FWS’s ultimate conclusion that the proposed action would neither jeopardize the species’ survival or recovery prospects nor destroy or adversely modify the species’ critical habitat, the agency explained the extremely precarious situation facing the jumping mouse across its range and in particular the two small extant populations of jumping mice remaining in the Lincoln National Forest on the Sacramento Allotment.

For example, the FWS explained that “[t]he New Mexico meadow jumping mouse needs to have multiple resilient populations distributed throughout different drainages within the eight geographic management areas to have high viability.” 2021 Sacramento BiOp at 25. Yet, the FWS noted that “the distribution and abundance of the jumping mouse has declined significantly range-

Cancel a Portion or All of a Term Grazing Permit, and 16.23 – For Violation of Terms and Conditions of Grazing Permits.

³³ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 7, 2020.; Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Final response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 13, 2020.; and, Correspondence, to: Center for Biological Diversity Open Government Coordinator Ann Brown, from: Lincoln National Forest Supervisor Travis Moseley; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-00421-F; January 12, 2021.

³⁴ It is difficult to overstate the dire state of the jumping mouse’s survival and recovery prospects. Indeed, the Forest Service’s own analysis of the species’ status—conducted in November 2020—explained that “the count of surviving subpopulations is *teetering against zero.*” Forest Service, *New Mexico meadow jumping mouse population and montane meadow status and analysis for strategic conservation of Critical Habitat on Lincoln National Forest* (Nov. 2020) at 21 (emphasis added).

wide.” *Id.* at 26; *see also id.* at 49 (“Documented populations are likely remnants of a much larger historical distribution that included other scattered locations, none of which contain extant populations.”). In fact, “[t]he majority of extirpations have occurred since the late 1980s to early 1990s, as we found about 70 historically occupied locations are now considered extirpated.” *Id.* at 26. The FWS explained that although researchers have identified 77 remaining populations spread across eight conservation areas in three states, “some populations may already be extirpated,” “[n]early all of the current populations are isolated and widely separated,” and “*all* of the 77 populations have patches of suitable habitat that are too small to support resilient populations of jumping mice.” *Id.*

With respect to livestock grazing, the FWS explained in the 2021 Sacramento BiOp that “[l]ivestock have frequently made unauthorized incursions into enclosures (temporary and permanent) to varying degrees, impacting jumping mouse habitat suitability.” *Id.* at 49. As a result of “poor grazing management,” the livestock traps and Upper Rio Peñasco enclosure in this critical habitat subunit do not contain suitable jumping mouse habitat, as the areas lack sufficient vegetation height and structure to fully support PCEs for the mouse.” *Id.* Likewise, the FWS explained that it is “likely that habitat fragmentation has led to poor survivorship conditions in the majority of Wills Canyon and it is not known whether the jumping mouse persists downstream of the riparian enclosures.” *Id.*

The FWS further explained that “[t]he jumping mouse has been confined to two isolated localities within the Sacramento Allotment: Cox Canyon in the middle Rio Peñasco, and Mauldin Spring in Wills Canyon.” *Id.* “This restriction of extant jumping mice to two locations within the action area is likely the result of combination of factors including poor grazing management,” because “[g]razing practices have historically resulted in overutilization of riparian and upland resources across the Sacramento Allotment [] which has altered many ecosystem functions and processes.” Importantly, the FWS noted that “[c]urrent grazing practices”—which the Forest Service seeks to continue until at least 2029 when the current permit expires—“have *not* resulted in habitat improvement across the allotment, as evidenced by the continual exceedance in grazing criteria reported over the past few years.” *Id.* (emphasis added).³⁵

When combined with water use, drought, climate change, and recreation effects, livestock grazing has “fragmented mouse habitat, reduced forage availability in riparian areas and adjacent uplands, and inhibited natural ecosystem functions and processes.” *Id.* at 50. “These impacts have caused adverse effects to jumping mice by reducing the number of extant populations, inhibiting population connectivity and dispersal, and potentially increasing adverse genetic effects to populations that persist in the action area.” *Id.*

In assessing “the consequences of ongoing grazing management on the jumping mouse,” the FWS stressed that “[d]egradation of stream and riparian areas has caused these types of habitats to become highly fragmented, which is the separation of extensive habitats into smaller, isolated patches, or completely lost and, as a result, caused populations of jumping mice to become isolated.” *Id.* at 69. “This isolation is evident by the substantial decline of jumping mouse survey detections that

³⁵ Further exacerbating the harm livestock grazing causes to jumping mice and their habitat (including critical habitat) in the Sacramento Allotment, the Forest Service has failed to collect information on the long-term range condition trends in this allotment as the Forest Service committed to doing in the 2004 Environmental Impact Statement for this grazing permit. *See* 2021 Sacramento BiOp at 45 (stating that “we have no information to assess long-term range condition” because “the Forest Service has not collected any data to assess long-term condition or trend as specified in the 2004 EIS”).

have been occurring over time in previously occupied habitat within the action area.” *Id.* As a result, the FWS determined that “[b]ecause habitat fragmentation has isolated jumping mice populations, remaining extant populations *are now at high risk* to stochastic and catastrophic events and a reduction in genetic diversity, reducing jumping mouse population resilience.” *Id.* at 70 (emphasis added). “Fragmented habitat also causes a lack of connectivity between patches of suitable habitat, inhibiting mice from completing long-distance movements or dispersal into new habitat areas and therefore limiting or preventing the establishment of new populations.” *Id.* Hence, the FWS explained that “[b]ecause jumping mouse habitat is fragmented and isolated, long-term conservation of the jumping mouse requires more than just the maintenance of status quo for the rivers”; “[i]t requires restoring the system to the point where floodplains rebuild with fine-soiled banks and terraces, which provide habitat for dense riparian vegetation, and the base-flow channel narrows with steeply sloping or overhanging banks.” *Id.* The FWS further noted that “[t]he primary causal factors to the impairment of stream channels and riparian areas within the action area is historic and continued grazing and, to a lesser degree, recreation activities that occur in these areas.” *Id.*

Importantly, the FWS determined that “[t]he streams in Upper Rio Peñasco Canyon and Wills Canyon *are extremely important and are a crucial part in the survival and recovery of the jumping mouse.*” *Id.* After explaining the myriad ways in which ongoing livestock grazing harms the jumping mouse and its habitat (including critical habitat), the FWS explained that “[a]ny effect that eliminates or greatly reduces reproduction or survival would severely deplete recruitment and persistence of jumping mice within the action area.” *Id.*

Turning to the species’ habitat, the FWS explained that the Forest Service’s longstanding use of a 40-45% forage utilization standard outside of jumping mouse critical habitat and its use of a 35% forage utilization standard within jumping mouse critical habitat located outside exclosures, is “detrimental to sustaining functional jumping mouse habitat and populations outside of exclosures because grazing to this use level reduces the availability of forage, increases risk of predation by removing vegetative cover, alters riparian habitat conditions through streambank trampling, soil compaction, and modification of vegetative communities, and alters microclimates from moist habitats to mesic or xeric habitats.” *Id.* at 71. As these changes to jumping mouse habitat occur, jumping mouse riparian and upland habitat become non-functional and unable to support mouse populations.” *Id.*

With respect to the limited areas containing permanent exclosures where livestock grazing is prohibited, the FWS pointed out that “[m]aintenance of these exclosures has been an ongoing challenge for the Forest Service and livestock incursion into exclosures is common within the action area . . . with this unauthorized grazing negatively affecting the herbaceous component within the exclosures and removing PCEs necessary to support functional jumping mouse habitat.” *Id.* at 71-72. The FWS noted that several temporary exclosures had been discontinued in 2019, which “will expose jumping mouse critical habitat to livestock grazing that will reduce or eliminate PCEs necessary to support jumping mouse critical habitat,” and explained the resulting “[l]oss of critical habitat will directly impact jumping mice in these areas through reduced forage availability, increased risk to predation and harassment, and decreased ability to disperse to more suitable critical habitat.” *Id.* at 72. The FWS explained that “by the end of 2023”—i.e., after three more grazing seasons—an additional 94 acres of jumping mouse critical habitat will be protected by new temporary or permanent fencing. *Id.*

In short, the FWS summarized that the “35 percent utilization standards within most upland habitat . . . is not likely to provide suitable habitat” and that “[t]his level of grazing will likely result in additional habitat loss and/or fragmentation, loss of food resources during the mouse’s active season, or inadequate residual vegetation being available after jumping mice emerge from hibernation.” *Id.* “Upgrading the fencing on several existing riparian exclosures and installing new permanent exclosures will assist in the maintenance and restoration of jumping mouse habitat within these exclosures but jumping mouse habitat will still be limited or non-existent outside of these areas due to grazing.” *Id.*

In reviewing the effects of the proposed action on the species’ critical habitat, the FWS explained that once all fencing is installed by the end of 2023, 233 acres of critical habitat in the Sacramento Allotment will be within exclosures (i.e., 138 acres in permanent fencing and 95 acres in temporary fencing), while 325 acres of critical habitat in the allotment will remain completely unprotected by fencing. *Id.* at 75. Rather than acknowledging that the proposed action will leave 58% of critical habitat in this allotment entirely exposed to unfettered livestock grazing—and an additional 17% of critical habitat in this allotment within temporary fencing that has been documented to regularly fail to prevent livestock incursions—the FWS instead asserted that the unfenced portion of critical habitat in this allotment is only 2% of “the total amount of designated critical habitat for the species range wide.” *Id.* At the same time, the FWS explained that continued livestock use of areas “outside of permanent exclosures . . . will continue to inhibit the attainment of PCEs I, II and III thereby preventing the development of suitable riparian habitat to support jumping mouse populations.” *Id.* Thus, the FWS concluded that “the livestock impacts to critical habitat described above, will disproportionately affect jumping mice because these areas will serve as barriers to the species dispersal.” *Id.*

With respect to the chronic problem of “unauthorized livestock incursions into exclosures,” the FWS noted that “[s]ince 2016, the Forest Service has reported a high number (more than 100, annually) of [livestock incursions].” *Id.* at 76. “Incursions by livestock into areas that are temporarily fenced using electric fencing are likely to be substantially higher than exclosures with permanent fencing.” *Id.* Yet, despite the Forest Service’s repeated failure to monitor for incursions and timely notify the permittee to remove livestock from exclosures, the FWS noted that the Forest Service once again proposed regular (weekly) inspections and notifying the permittee within 24 hours to remove the livestock. *Id.* Despite finding that “[u]nprotected critical habitat (420 acres) will be adversely affected by livestock trampling, the loss of protective cover from livestock use, and a reduction in the amount of food available to jumping mice,” the FWS concluded that “these [e]ffects are not anticipated to appreciably reduce the function of designated critical habitat within Critical Habitat Unit 4 because these areas on the . . . allotment (subunits 4b and 4d) are relatively small (453 acres) as compared to all designated critical habitat within Unit 4 (1,924 acres).” *Id.* at 77. Accordingly, the FWS “determine[d] that the proposed action, if implemented as described, will not reduce the critical habitat unit’s functionality to support recovery of the jumping mouse or impede the unit’s ability to contribute to the recovery of the species within the watershed.” *Id.*

Importantly, the FWS made clear that its assessment and ultimate conclusion concerning critical habitat were contingent on the assurance that “the Forest Service is initiating long-term conservation measures . . . to ensure protection of riparian habitats and watersheds that will assist in the survival and recovery of the jumping mouse.” *Id.* “*Without these measures, the survival and recovery of the jumping mouse would be in greater peril in these allotments.*” *Id.* (emphasis added). “*Once the proposed actions and conservation measures are fully implemented, they will limit*

trampling of streambanks and alteration of dense herbaceous riparian vegetation in approximately 233 acres (94 hectares) of designated critical habitat within exclosures, allowing PCEs for jumping mice to reestablish or persist, and generally manage livestock in such a way as to allow riparian areas to make progress towards meeting proper functioning condition.” *Id.* Despite the fact that these measures will not be completed until at least the end of 2023 and only then pending the availability of funding, the FWS did not contemplate (let alone analyze) the foreseeable effects to critical habitat that will occur *before* such measures can be completed.

Despite the FWS’s finding that “the survival and recovery of the jumping mouse would be in greater peril” until various conservation measures are undertaken that are at least three grazing seasons from completion, *id.*, the FWS ultimately concluded that the proposed action “is not likely to jeopardize the continued existence of the endangered New Mexico meadow jumping mouse nor is it likely to destroy or adversely modify its critical habitat.” *Id.* at 100. In reaching this conclusion, the FWS focused heavily on: (1) the fact that only 2% of the species’ total critical habitat, including both occupied and unoccupied habitat, would be impacted by the proposed action; (2) the proposed conservation measures, which would not be completed at the earliest before the end of the 2023; and (3) the Forest Service’s commitment to regularly monitor exclosures and timely notify the permittee of any incursions. *Id.*; *see also id.* at 106 (“The [FWS] based this determination on the small amount of habitat that would be temporarily impacted and because we expect that connectivity will be improved through livestock management and new fencing.”).

However, the FWS did not evaluate whether the loss of *this* exceptionally important critical habitat—which supports two of the last remaining extant jumping mouse populations—constitutes destruction or adverse modification of critical habitat at the overall critical habitat level, the watershed level, the unit level, or the subunit level. Nor did the FWS evaluate whether the two small extant jumping mouse populations are likely to be extirpated before the fencing measures are completed in late 2023 (assuming funding availability), let alone address whether the loss of one or both of these populations would constitute jeopardy by impairing the species’ survival or recovery prospects. Nor, for that matter, did the FWS explain how it could logically base its conclusions on the Forest Service’s commitment to regularly monitor exclosures and timely notify the permittee of incursions, when the FWS had before it years of information and data documenting the Forest Service’s repeated, chronic failure to comply with essentially the same requirements under the 2016 and 2018 Sacramento BiOps.

In addition, although the Forest Service’s 2021 Sacramento BA proposed to abandon the longstanding grazing utilization metrics in favor of a more subjective metric of assessing impacts to jumping mouse critical habitat, the FWS based the ITS for the proposed action on the grazing utilization metrics previously applied to this allotment in the 2018 Sacramento BiOp—i.e., a maximum 20% grazing utilization within permanent exclosures, and a maximum 35% grazing utilization for jumping mouse critical habitat outside permanent exclosures. *Id.* at 105-06. If those metrics are exceeded during the Forest Service’s routine inspections of the jumping mouse’s habitat, the Forest Service and the FWS must reinitiate consultation. *Id.* However, the FWS failed to explain how continuing to utilize a 35% grazing utilization standard *outside* of exclosures will avoid jeopardy, let alone destruction or adverse modification of critical habitat, when the FWS concluded that the 35% utilization metric was insufficient to support the species’ life cycle needs and the PCEs necessary for critical habitat to adequately serve as suitable jumping mouse habitat.

On the basis of the FWS's 2021 Sacramento BiOp, the Forest Service is actively authorizing grazing in the Sacramento allotment, including in jumping mouse critical habitat using a 35% grazing utilization standard that FWS itself concluded is "detrimental to sustaining functional jumping mouse habitat and populations outside of exclosures." 2021 Sacramento BiOp at 71.

3. Recent Consultation History in the Agua Chiquita Allotment

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

The Agua Chiquita Pasture contains the Agua Chiquita Creek, a perennial stream that supports the only jumping mouse critical habitat in the allotment. Although jumping mice were last detected on the allotment in 2010, as FWS observed in its 2014 SSA, 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. In any event, despite the lack of recent detections, the Forest Service continues to treat this portion of critical habitat as "occupied." 2021 Agua Chiquita BA at 24. Regardless of its status as occupied or unoccupied, the Agua Chiquita Creek critical habitat is essential to improving species resiliency and redundancy.

a. The 2017 Agua Chiquita Consultation

In April 2017, the Forest Service submitted its 2017 Agua Chiquita BA to the FWS requesting the FWS's concurrence that the continuation of ongoing grazing activities in the Agua Chiquita Allotment "may affect," but is "not likely to adversely affect" the jumping mouse or its critical habitat.

In the 2017 Agua Chiquita BA, the Forest Service proposed to implement several changes to its grazing management to support its determination that grazing was not likely to adversely affect the jumping mouse or its critical habitat. 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 new permanent and temporary fencing to exclude livestock from jumping mouse habitat along the Agua Chiquita Creek. The Forest Service also proposed to limit forage utilization to 35% in either pasture. 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 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 jumping mouse habitat before and after the grazing season using approved methods.

On April 28, 2017, the FWS issued its 2017 Agua Chiquita NLAA Concurrence, in which it concurred with the Forest Service’s determination that the proposed action “may affect, but 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.” The 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 set forth in the 2017 Agua Chiquita BA. *Id.*

In September 2019, in the same letter notifying the Forest Service and the FWS of rampant incursions and violations of the ESA in the Sacramento Allotment, the Center notified the agencies of similar legal violations in the Agua Chiquita Allotment. In particular, the Center relied on photographs and other evidence to document extensive levels of livestock incursions in exclosures in the Agua Chiquita Allotment, which resulted in widespread and chronically heavy grazing in exclosures where livestock grazing is prohibited. Outside of exclosures, grazing utilization far exceeded the 35% metric required by the 2017 Agua Chiquita BA and the 2017 Agua Chiquita NLAA Concurrence. Moreover, agency records that we have secured established that the permittee’s livestock had unlawfully entered exclosures in this allotment on at least 173 occasions in the 2016-2020 grazing seasons,³⁶ but the Forest Service failed to provide the permittee with even a single Notice of Non-Compliance³⁷ as required by the Forest Service Grazing Permit Administration Handbook.³⁸ As a result, both inside and outside the exclosures in the Agua Chiquita Allotment, significant harm occurred to jumping mice and their critical habitat in this allotment—i.e., a far cry from the “not likely to adversely affect” determination previously made by the Forest Service and the FWS in 2017.

In August 2020, after informal negotiations failed, the Center filed suit in the U.S. District Court for the District of New Mexico to compel reinitiation of consultation with respect to this action, which accompanied the parallel challenge to the 2018 Sacramento BiOp. *See Ctr. for Biological*

³⁶ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 7, 2020.; Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Final response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 13, 2020.; and, Correspondence, to: Center for Biological Diversity Open Government Coordinator Ann Brown, from: Lincoln National Forest Supervisor Travis Moseley; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-00421-F; January 12, 2021.

³⁷ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member Dr. Robin Silver, from: Acting Regional Forester Sandra Watts; RE: Final response to Freedom of Information Act Tracking Number 2020-FS-R3-05776-F; October 19, 2020.

³⁸ FSH 2209.13 – Grazing Permit Administration Handbook, Chapter 10 – Permits With Term Status, Section 16.2 Suspension or Cancellation of Grazing Permits, including especially, Section 16.2a – Notices of Non-Compliance, Section 16.2b – Contents of Notice of Non-Compliance (NONC) Letter, 16.2c – Time to Demonstrate or Achieve Compliance, 16.2d – Permittee Actions to Demonstrate or Achieve Compliance, 16.2e – Forest Service Verification and Documentation of Compliance, 16.2g – Repeated Incidents of Noncompliance, and 16.2h – Decision to Suspend or Cancel a Portion or All of a Term Grazing Permit, and 16.23 – For Violation of Terms and Conditions of Grazing Permits.

Diversity v. Christiansen, No. 1:20-cv-863 (D.N.M.). In response to the lawsuit, the Forest Service and the FWS agreed to settle the case and reinstate consultation concerning ongoing grazing in the Sacramento Allotment.

b. The 2021 Agua Chiquita Biological Assessment and the 2021 Agua Chiquita NLAA Concurrence

Despite the renewed opportunity for formal consultation that would candidly evaluate the effects of ongoing grazing on the jumping mouse and its critical habitat in the Agua Chiquita Allotment, the Forest Service and the FWS once again opted for the more convenient path of informal consultation despite the obvious adverse impacts to the species and its critical habitat that have resulted—and will continue to result—from the Forest Service’s actions here.

i. The 2021 Agua Chiquita Biological Assessment

In March 2021, the Forest Service submitted to the FWS its 2021 Agua Chiquita BA. Despite the years-long chronic failure of the Forest Service to adequately monitor for, and enforce against, livestock incursions in the Agua Chiquita Allotment, the Forest Service nevertheless determined that continuing livestock grazing—with a few relatively modest changes—would somehow not adversely affect the jumping mouse or its critical habitat. *See* 2021 Agua Chiquita BA at 26.

The Forest Service based its conclusion on several factors. For example, it relied on the fact that there have been no documented jumping mouse detections in the Agua Chiquita Allotment since 2010. *Id.* In addition, the Forest Service relied heavily on the fact that it proposed to install and/or upgrade some temporary and permanent fencing in the allotment, *id.*, but failed to address the effects that would occur in the interim in light of the fact that such projects are based merely on a “tentative plan” that is entirely dependent on funding availability and even in the best circumstance these projects would not be completed until “the end of 2025” (i.e., after five more grazing seasons). *Id.* at 25. Indeed, the Forest Service relied on the *benefits* that the installation of additional temporary and permanent fencing might provide to the jumping mouse and its critical habitat in order to avoid a finding that the proposed action is likely to adversely affect the species or its critical habitat, *id.* at 25-26, again without addressing at all how this action will severely impact the species and its critical habitat *until* those measures—the timing of which is uncertain at best—can be completed in five or more years. Finally, the Forest Service committed to ensuring that neither livestock pasture in the Agua Chiquita Allotment would not exceed 35% grazing utilization, *id.*, although the Forest Service has never been able to effectively satisfy that metric during grazing seasons under the 2017 Agua Chiquita NLAA Concurrence.

Despite concluding that the proposed action is “not likely to adversely affect” the species or its critical habitat, the Forest Service failed to provide any coherent rationale for how the proposed action—and especially its effects prior to the end of 2025 (or later depending on funding availability)—would have only beneficial, insignificant, or discountable effects to the jumping mouse and its critical habitat, as is required for such a determination. Even had the Forest Service supplied an explanation for its conclusion that the effects will be beneficial, insignificant, or discountable, such a finding would directly contradict the extensive evidence of significant effects under essentially identical conditions for the four grazing seasons that occurred pursuant to the 2017 Agua Chiquita NLAA Concurrence.

ii. The 2021 Agua Chiquita NLAA Concurrence

In April 2021, the FWS issued the 2021 Agua Chiquita NLAA Concurrence (rather than a BiOp). In this short letter, the FWS concurred with the Forest Service's determination that the proposed action was not likely to adversely affect the jumping mouse or its critical habitat. *See* 2021 Agua Chiquita NLAA Concurrence at 5.

As with the Forest Service's 2021 Agua Chiquita BA, the FWS relied heavily on the Forest Service's proposed tentative conservation measures that might eventually provide some benefit to the jumping mouse and its critical habitat, *see* 2021 Agua Chiquita NLAA Concurrence at 4, but only once these measures are completed in late 2025 or later depending on funding availability—a fact the FWS did not disclose or analyze. The FWS's concurrence also relied on the assumption that the Forest Service would adhere to specified grazing utilization standards within and outside exclosures in this allotment, *id.*, again without discussing why the Forest Service was in any better position to satisfy those standards than when it severely failed to meet the same standards for four grazing seasons under the 2017 Agua Chiquita NLAA Concurrence. Further, the FWS's concurrence relied on the Forest Service's stated commitment to conduct regular compliance checks of exclosures and to notify the permittee of incursions to ensure timely removal, *id.*, but the FWS did not address or analyze the chronic problems with similar commitments to conduct regular compliance checks and permittee notifications in the past, and why the FWS believed it reasonable to assume that the Forest Service's behavior would change significantly as part of the proposed action.

On the basis of the FWS's 2021 Agua Chiquita NLAA Concurrence, the Forest Service is actively authorizing grazing in the Agua Chiquita Allotment, including in jumping mouse critical habitat using a 35% grazing utilization standard that FWS concluded in a parallel consultation is "detrimental to sustaining functional jumping mouse habitat and populations outside of exclosures." 2021 Sacramento BiOp at 71.

LEGAL VIOLATIONS

A. The Forest Service's "Not Likely to Adversely Affect" Determination, the 2021 Agua Chiquita NLAA Concurrence, and The Forest Service's Reliance on the 2021 NLAA Concurrence Violate Sections 7 and 9 of the ESA

The FWS's 2021 Agua Chiquita NLAA Concurrence and the Forest Service's 2021 Agua Chiquita BA determining that the proposed action is not likely to adversely affect the jumping mouse or its critical habitat—as well as the Forest Service's reliance on the 2021 Agua Chiquita NLAA Concurrence to satisfy its own substantive obligations under the ESA—all violate the ESA in several ways.

First, the agencies' "not likely to adversely affect" determination and concurrence unlawfully rely on the purported beneficial aspects of the proposed action in order to avoid formal consultation and a resulting BiOp. However, neither the 2021 Agua Chiquita BA nor the 2021 Agua Chiquita NLAA Concurrence discuss—let alone analyze—whether the proposed action will adversely impact the jumping mouse and its critical habitat *before* any purported benefits will accrue for the jumping mouse and its critical habitat, which will not occur until late 2025 *at the earliest*. Thus, because the

proposed action entails at least five grazing seasons (i.e., 2021-2025) that are essentially a continuation of the status quo that has resulted in extensive, chronic damage to jumping mouse critical habitat in the Agua Chiquita Allotment, the FWS and the Forest Service failed to accurately account for the foreseeable impacts (similar to those experienced under the 2017 NLAA Concurrence) that will inevitably occur pending the completion of purportedly beneficial actions in late 2025 at the earliest. Accordingly, by skewing the impacts of the action to focus on anticipated benefits that might accrue years in the future—rather than the severe impacts that will occur *for the next five grazing seasons* before any conservation measures are executed—the agencies have failed to incorporate the best scientific evidence available, have failed to candidly assess the effects of the proposed action, and have failed to ensure that the proposed action *prior* to any purported benefits accruing will not jeopardize the jumping mouse and will not destroy or adversely modify the species' critical habitat, in violation of Section 7(a)(2). *See* 16 U.S.C. § 1536(a)(2).

Second, even with respect to the purportedly beneficial measures which the Forest Service intends to complete by the end of 2025 at the earliest, those measures are merely part of a “tentative plan” that is entirely contingent on “funding availability.” Given the highly uncertain prospect that these measures may come to fruition in light of the tentative nature of the plan and the contingency regarding funding availability, it was incumbent on the Forest Service and the FWS to analyze the realistic odds that such measures will either be abandoned entirely or completed later than projected, thereby causing additional harm to the jumping mouse and its critical habitat after 2025. Yet, nowhere in the consultation documents is there any evaluation of the likelihood that these measures will actually be completed, let alone any discussion about whether such measures are likely to be completed on time. For these reasons, the 2021 Agua Chiquita NLAA Concurrence (and the Forest Service’s “not likely to adversely affect” determination)—which directly rely upon these measures to avoid formal consultation—failed to consider the best available scientific evidence concerning the effects of the proposed action; unlawfully skewed the analysis of the proposed action’s effects; and failed to ensure that the proposed action will not jeopardize the jumping mouse and will not destroy or adversely modify its critical habitat, in violation of Section 7(a)(2). *See* 16 U.S.C. § 1536(a)(2).

Third, the 2021 Agua Chiquita NLAA Concurrence is based in part on the assumption that the Forest Service will ensure that certain grazing utilization standards are met within and outside of exclosures in the Agua Chiquita Allotment. But the FWS failed to provide any explanation as to why the FWS (or the public) can expect the Forest Service to ensure compliance with grazing utilization standards in this allotment when extensive evidence from prior grazing seasons establishes a uniform pattern of non-compliance with these standards both within and outside of exclosures in this allotment. In the absence of any explanation by the Forest Service or the FWS as to *how* the Forest Service will be significantly modifying its management actions and behavior from the status quo, the FWS’s concurrence in the Forest Service’s “not likely to adversely affect” determination while relying on this obviously inaccurate assumption is arbitrary, capricious, and unlawful under Section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1536(a)(2).

Likewise, it is especially troubling that the Forest Service and the FWS determined that the proposed action is unlikely to adversely affect the jumping mouse or its critical habitat—which is a particularly low threshold—despite the fact that the Forest Service’s proposed action contains a 35% grazing utilization standard in certain areas of critical habitat in the Agua Chiquita Allotment, when the FWS elsewhere concluded that a 35% forage utilization standard in the *same* national forest is “detrimental to sustaining functional jumping mouse habitat and populations outside of exclosures because grazing to this use level reduces the availability of forage, increases risk of predation by

removing vegetative cover, alters riparian habitat conditions through streambank trampling, soil compaction, and modification of vegetative communities, and alter microclimates from moist habitats to mesic or xeric habitats.” 2021 Sacramento BiOp at 71; *see also id.* (explaining that a 35% grazing utilization standard renders “jumping mouse riparian and upland habitat [] non-functional and unable to support mouse populations”); *id.* at 72 (finding that the “35 percent utilization standards within most upland habitat . . . is not likely to provide suitable habitat” and “[t]his level of grazing will likely result in additional habitat loss and/or fragmentation, loss of food resources during the mouse’s active season, or inadequate residual vegetation being available after jumping mice emerge from hibernation”). By failing to analyze whether a 35% grazing utilization standard was actually likely to avoid adverse effects to the jumping mouse or its critical habitat—a conclusion made impossible by the FWS’s statements and findings in the nearby Sacramento Allotment—the agencies violated ESA Section 7(a)(2) in this way as well, and failed to rely on the best available scientific evidence in avoiding formal consultation.

Fourth, likewise, the 2021 Agua Chiquita NLAA Concurrence is based in part on the assumption that the Forest Service will conduct routine compliance monitoring of all exclosures and immediately notify the permittee of any incursions to ensure prompt livestock removal. But, as explained, there were at least 173 documented incursions into exclosures in the Agua Chiquita Allotment between 2016-2020,³⁹ and yet the Forest Service failed to provide the permittee with even a single Notice of Non-Compliance⁴⁰ as required by the Forest Service Grazing Permit Administration Handbook.⁴¹ Given the Forest Service’s repeated failure to satisfy this crucial element for the administration of grazing permits, it was arbitrary, capricious, and unlawful for the FWS to assume—without any discussion or explanation for the assumption—that the Forest Service will now undertake specific actions that it has repeatedly refused to conduct, and relying on that baseless assumption to avoid formal consultation and render a not likely to adversely affect determination. This, too, violates ESA Section 7(a)(2) and its implementing regulations, and also constitutes a failure to rely on the best available scientific evidence of the likely effects of the proposed action.

Fifth, for all of the reasons explained above, the FWS and the Forest Service have failed to provide any coherent, non-arbitrary, and lawful explanation for the agencies’ “not likely to adversely affect” determination, in violation of ESA Section 7(a)(2) and its implementing regulations. Indeed, the fact that the agencies have repeatedly found that functionally indistinguishable livestock grazing

³⁹ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 7, 2020.; Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Final response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 13, 2020.; and, Correspondence, to: Center for Biological Diversity Open Government Coordinator Ann Brown, from: Lincoln National Forest Supervisor Travis Moseley; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-00421-F; January 12, 2021.

⁴⁰ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member Dr. Robin Silver, from: Acting Regional Forester Sandra Watts; RE: Final response to Freedom of Information Act Tracking Number 2020-FS-R3-05776-F; October 19, 2020.

⁴¹ FSH 2209.13 – Grazing Permit Administration Handbook, Chapter 10 – Permits With Term Status, Section 16.2 Suspension or Cancellation of Grazing Permits, including especially, Section 16.2a – Notices of Non-Compliance, Section 16.2b – Contents of Notice of Non-Compliance (NONC) Letter, 16.2c – Time to Demonstrate or Achieve Compliance, 16.2d – Permittee Actions to Demonstrate or Achieve Compliance, 16.2e – Forest Service Verification and Documentation of Compliance, 16.2g – Repeated Incidents of Noncompliance, and 16.2h – Decision to Suspend or Cancel a Portion or All of a Term Grazing Permit, and 16.23 – For Violation of Terms and Conditions of Grazing Permits.

in the nearby Sacramento Allotment *does* adversely affect the same species and its critical habitat makes the unexplained contradictory finding with respect to the Agua Chiquita Allotment legally insupportable and fails to comport with the best available scientific evidence. Because the not likely to adversely affect determination is unlawful and not supported by the best available scientific evidence, formal consultation was—and still is—required to analyze whether the proposed action will cause jeopardy to the jumping mouse by impairing its survival or recovery, or will destroy or adversely modify the species’ critical habitat. Until and unless such consultation is properly completed, the Forest Service and the FWS have failed their substantive and procedural obligations under Section 7(a)(2), and thus have failed—and continue actively to fail—to ensure against jeopardy and destruction or adverse modification of jumping mouse critical habitat.

Sixth, because the agencies unlawfully determined that the proposed action would not likely adversely affect the jumping mouse or its critical habitat, the FWS failed to analyze as a threshold matter whether the species *already* faces jeopardy and thus whether the additive effects of this action on top of the environmental baseline will impede the species’ survival or recovery prospects, as required by the ESA. The failure to conduct an adequate analysis of the environmental baseline and jeopardy is especially egregious in the context of the Agua Chiquita Allotment, where livestock grazing—the continuation of which the Forest Service seeks to allow here—has likely, in recent years, resulted in the permanent extirpation of a population of jumping mice in this allotment that long resided here. Yet, the agencies did not even attempt to analyze whether continued grazing has already resulted in, or will soon result in, the localized extirpation of the species from this allotment, and whether the loss of this population constitutes jeopardy to the species at the range-wide, management unit, or other scale. Given the FWS’s own findings in its 2020 SSA that the jumping mouse is “particularly vulnerable to extinction,” 2020 SSA at 117, and thus that “*the subspecies’ overall viability is low, given the ongoing and likely future losses of habitat in conjunction with the small and isolated nature of currently-known populations,*” because “the status of the subspecies has been reduced to the point where *individual populations are vulnerable to extirpation,*” *id.* at 118-19 (emphases added), the Forest Service’s request to continue the very action that primarily caused (or soon will cause) the localized extirpation of the jumping mouse underscores both that this action has adversely affected, and will continue to adversely affect, the jumping mouse and its critical habitat, and that the FWS was required to analyze whether the recent or future loss of this population as a result of livestock grazing constitutes jeopardy under the ESA. The failure to do so—and the Forest Service’s reliance on the 2021 NLAA Concurrence in this respect—violate Section 7(a)(2), its implementing regulations, and the duty to rely upon the best available scientific evidence.

Seventh, to the extent that the Forest Service’s “not likely to adversely affect” determination—and the FWS’s concurrence in that determination—are based on the fact that harm to jumping mouse critical habitat will primarily be to “unoccupied” critical habitat or to critical habitat that currently lacks certain PCEs that are necessary to supply suitable habitat for the jumping mouse, the determination and the concurrence are not legally sufficient for a “not likely to adversely affect” determination. By definition, all designated critical habitat—whether occupied or unoccupied—has already been formally determined by the FWS to be “essential to the conservation of the species.” 16 U.S.C. § 1532(5)(a); *see also id.* § 1532(3) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which [ESA protections] are no longer necessary”). Because the primary reason that any critical habitat in the Agua Chiquita Allotment is currently unoccupied or lacks adequate PCEs is due to intense livestock grazing for decades—which has dramatically reduced a “much larger historical distribution” of occupied jumping mouse habitat, 2021 Sacramento BiOp at 49—the agencies cannot now rely upon

the loss of suitable habitat (and its now-unoccupied status) to reach a "not likely to adversely affect" determination in connection with continuation of *the very activity* that caused the degraded situation to begin with. Rather, because the grazing activities subject to consultation have caused—and will continue to cause—severe degradation of jumping mouse critical habitat in the Agua Chiquita Allotment, the agencies' not likely to adversely affect determination is legally deficient under ESA Section 7(a)(2), and is arbitrary and capricious.

Eighth, because new consultation is required to address the serious deficiencies in the 2021 Agua Chiquita NLAA Concurrence (including a failure to ensure against jeopardy and destruction or adverse modification of critical habitat), Section 7(d) imposes an obligation on the Forest Service to avoid "mak[ing] any irreversible or irretrievable commitment of resources" until such consultation is lawfully completed. Accordingly, the Forest Service's current grazing authorization for the Agua Chiquita Allotment—which is based on a fatally flawed not likely to adversely affect determination—violates Section 7(d) of the ESA and must be immediately suspended until a lawful consultation is completed. *See* 16 U.S.C. § 1536(d).

Ninth, because the 2021 Agua Chiquita NLAA Concurrence is severely deficient in several respects and arbitrarily and unlawfully determined that the proposed action is "not likely to adversely affect" the jumping mouse or its critical habitat, the Forest Service is in ongoing violation of Section 9 of the ESA by authorizing activities that—as was the case under similar conditions pursuant to the 2017 Agua Chiquita NLAA Concurrence—are taking jumping mice in myriad ways and adversely affecting jumping mouse critical habitat in the Agua Chiquita Allotment. Because the Forest Service lacks any authorization from the FWS to take even a single jumping mouse or to harm its critical habitat in any way in the Agua Chiquita Allotment, the Forest Service's actions are in ongoing—and significant—violation of the ESA Section 9. *See* 16 U.S.C. § 1538(a)(1)(B).

For these reasons, the Forest Service and the FWS are in ongoing violation of the ESA. These violations cannot be cured absent formal consultation that comes to grips with the full spectrum of foreseeable effects resulting from the proposed action (including prior to the end of 2025), which culminates with a BiOp that imposes serious and meaningful terms, conditions, and measures that will actually avoid jeopardy, as well as destruction and adverse modification of critical habitat. Until that consultation can be completed, the agencies are in ongoing violation of the ESA absent immediate suspension of the Forest Service's grazing authorization that relies on the fatally flawed 2021 Agua Chiquita NLAA Concurrence.

B. The FWS's 2021 Sacramento BiOp, and The Forest Service's Reliance on the 2021 Sacramento BiOp, Violate Sections 7 and 9 of the ESA

Although the Forest Service and the FWS at least engaged in formal consultation for continued grazing in the Sacramento Allotment, the 2021 Sacramento BiOp—and the Forest Service's reliance on the BiOp—violate Sections 7 and 9 of the ESA in many of the same, as well as some distinct, ways as the 2021 Agua Chiquita NLAA Concurrence.

First, the FWS's conclusion in the 2021 Sacramento BiOp that the proposed action would not jeopardize the jumping mouse's survival or recovery prospects and would not destroy or adversely modify its critical habitat was grounded in a highly skewed characterization of the proposed action that relied heavily on the purported benefits that may eventually accrue if the Forest Service completes certain conservation measures (i.e., installing new temporary and permanent fencing),

which will not occur until the end of 2023 at the earliest, after three more grazing seasons. Nowhere in the 2021 Sacramento BiOp did the FWS analyze, as it must, whether the proposed action will jeopardize the species' survival or recovery prospects, or destroy or adversely modify its critical habitat, in the three grazing seasons (or more) in which there will be merely a continuation of the status quo in grazing management in this allotment. Given the FWS's dire acknowledgment that “[w]ithout these measures, the survival and recovery of the jumping mouse would be in greater peril in these allotments,” 2021 Sacramento BiOp at 77 (emphasis added), it is especially glaring that the FWS failed to candidly confront the fact that the proposed action *includes* at least three grazing seasons upfront—before any purported benefits may accrue—that could, and likely will, extirpate the two small extant populations of jumping mice in the Sacramento Allotment. Indeed, in light of years of extensive and repeated incursions into exclosures in this allotment, coupled with years of repeated failures by the Forest Service to comply with the grazing utilization standards required by the 2016 and 2018 Sacramento BiOps both within and outside exclosures, the failure even to acknowledge this crucial aspect of the proposed action and to analyze its effects for jeopardy and adverse modification purposes is flagrant. Accordingly, the 2021 Sacramento BiOp and the Forest Service's reliance upon it violate the agencies' procedural and substantive obligations under ESA Section 7(a)(2), including the requirements to ensure against jeopardy and the destruction or adverse modification of critical habitat, as well as the duty to rely upon the best available scientific evidence of the foreseeable impacts of the proposed action. *See* 16 U.S.C. § 1536(a)(2).

Second, as with the Agua Chiquita Allotment, even with respect to the purportedly beneficial measures which the Forest Service intends to complete by the end of 2023, those measures are merely an intention that is entirely contingent on “funding availability.” Given the highly uncertain prospect that these measures may come to fruition in light of the contingency regarding funding availability, it was incumbent on the Forest Service and the FWS to analyze the realistic odds that such measures will either be abandoned entirely or completed later than expected, thereby causing additional harm to the jumping mouse and its critical habitat after the 2023 grazing season. Yet, nowhere in the consultation documents is there any evaluation of the likelihood that these measures will actually be completed, let alone any discussion about whether such measures are likely to be completed on time. For these reasons, the 2021 Sacramento BiOp (and the Forest Service's reliance on it) failed to consider the best available scientific evidence concerning the effects of the proposed action; unlawfully skewed the analysis of the proposed action's effects; and failed to ensure that the proposed action will not jeopardize the jumping mouse and will not destroy or adversely modify its critical habitat, in violation of ESA Section 7(a)(2). *See* 16 U.S.C. § 1536(a)(2).

Third, as with the Agua Chiquita Allotment, the 2021 Sacramento BiOp and its findings of no jeopardy and no destruction or adverse modification of critical habitat are based in part on the unwarranted assumption that the Forest Service will ensure that specified grazing utilization standards are met within and outside of exclosures in the Sacramento Allotment. But the FWS failed to explain how the FWS (or the public) can realistically expect the Forest Service to ensure compliance with grazing utilization standards in this allotment when extensive evidence from prior grazing seasons establishes a uniform pattern of non-compliance with these standards both within and outside of exclosures, as the FWS itself extensively documented in the 2021 Sacramento BiOp. *See* 2021 Sacramento BiOp at 76 (“Since 2016, the Forest Service has reported a high number (more than 100, annually) of [livestock incursions].”). In the absence of any explanation by the Forest Service or the FWS as to *how* the Forest Service will be significantly modifying its management actions and behavior from the status quo—and faced with the FWS's own evidence of the Forest Service's repeated violations of the same grazing utilization standards that are part of the proposed action—the

FWS’s conclusions regarding jeopardy and destruction or adverse modification of critical habitat while relying on this obviously inaccurate assumption is arbitrary, capricious, and unlawful under Section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1536(a)(2).⁴²

Fourth, the FWS’s conclusion that the proposed action will not jeopardize the jumping mouse or destroy or adversely modify its critical habitat is contradicted by the 2021 Sacramento BiOp’s imposition of a 35% grazing utilization standard in critical habitat outside of exclosures in the Sacramento Allotment, as the level of authorized take under the ITS. Because the FWS concluded that the 35% utilization standard is “*detrimental to sustaining functional jumping mouse habitat and populations outside of exclosures* because grazing to this use level reduces the availability of forage, increases risk of predation by removing vegetative cover, alters riparian habitat conditions through streambank trampling, soil compaction, and modification of vegetative communities,” *id.* at 71 (emphasis added), the FWS violated its obligations under the ESA (as did the Forest Service in relying on the 2021 Sacramento BiOp) by failing to explain how the use of a “detrimental” 35% grazing utilization standard outside of exclosures can avoid jeopardy and/or destruction or adverse modification of critical habitat. The failure to reconcile—or even address—these inconsistent findings violates Section 7 of the ESA, its implementing regulations, and is arbitrary and capricious.

Fifth, as with the Agua Chiquita Allotment, the 2021 Sacramento BiOp is based on the assumption that the Forest Service will conduct routine compliance monitoring of all exclosures and immediately notify the permittee of any livestock incursions to ensure prompt removal. But, as explained, there were at least 162 documented incursions into exclosures in the Sacramento Allotment between 2016-2020,⁴³ and yet the Forest Service failed to provide the permittee with a single Notice of Non-Compliance⁴⁴ as required by the Forest Service Grazing Permit Administration Handbook⁴⁵ for these incursions. despite an identical requirement in the 2016 and 2018 Sacramento

⁴² There is ambiguity between the proposed action in the Forest Service’s 2021 Sacramento BA (which proposes to abandon grazing utilization standards in this allotment), and the ITS and the trigger for reinitiation of consultation in the FWS’s 2021 Sacramento BiOp (which appears to require the use of the long-standing grazing utilization standards to determine when the level of authorized take has been exceeded). To the extent that the Forest Service intends, as part of the proposed action, to abandon these grazing utilization standards in favor of a more subjective metric, such adoption of a less rigorous and more subjective metric violates the ESA and is arbitrary and capricious by failing to supply a legally adequate and sufficiently objective metric to trigger reinitiation of consultation when the level of authorized take has been exceeded.

⁴³ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 7, 2020.; Correspondence, to: Center for Biological Diversity Co-Founder and Board Member, from: Acting Regional Forester Elaine Kohrman; RE: Final response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-06502-F; April 13, 2020.; and, Correspondence, to: Center for Biological Diversity Open Government Coordinator Ann Brown, from: Lincoln National Forest Supervisor Travis Moseley; RE: Interim response for Freedom of Information Act (FOIA) Request, Case Number 2019-FS-R3-00421-F; January 12, 2021.

⁴⁴ Correspondence, to: Center for Biological Diversity Co-Founder and Board Member Dr. Robin Silver, from: Acting Regional Forester Sandra Watts; RE: Final response to Freedom of Information Act Tracking Number 2020-FS-R3-05776-F; October 19, 2020.

⁴⁵ FSH 2209.13 – Grazing Permit Administration Handbook, Chapter 10 – Permits With Term Status, Section 16.2 Suspension or Cancellation of Grazing Permits, including especially, Section 16.2a – Notices of Non-Compliance, Section 16.2b – Contents of Notice of Non-Compliance (NONC) Letter, 16.2c – Time to Demonstrate or Achieve Compliance, 16.2d – Permittee Actions to Demonstrate or Achieve Compliance, 16.2e – Forest Service Verification and Documentation of Compliance, 16.2g – Repeated Incidents of Noncompliance, and 16.2h – Decision to Suspend or Cancel a Portion or All of a Term Grazing Permit, and 16.23 – For Violation of Terms and Conditions of Grazing Permits.

BiOps. Given the Forest Service’s repeated failure to issue a single Notice of Non-Compliance, it was arbitrary, capricious, and unlawful for the FWS to assume—without any discussion or explanation for the assumption—that the Forest Service will now undertake specific actions that it has repeatedly refused to conduct, or to rely on that baseless assumption to conclude that the proposed action will not jeopardize the jumping mouse’s survival or recovery prospects, or destroy or adversely modify its critical habitat. This, too, violates ESA Section 7(a)(2), and is arbitrary and capricious.

Sixth, for the reasons stated above, the FWS’s no jeopardy conclusion is arbitrary, capricious, and unlawful, as is the Forest Service’s reliance on it to comply with its own substantive obligation to avoid jeopardizing a listed species. Further, the no jeopardy conclusion is fatally flawed for several other reasons as well. For example, the 2021 Sacramento BiOp fails to even consider (let alone determine) whether the baseline condition of the jumping mouse across its range, in this management unit, and/or in the Lincoln National Forest is currently jeopardized, prior to the implementation of the proposed action that will only appreciably worsen its condition at every scale. Likewise, the 2021 Sacramento BiOp fails to determine the tipping point or dividing line at which the jumping mouse—whether at the range-wide, management unit, or Lincoln National Forest scale—cannot withstand any additional take without resulting in (or causing additional) jeopardy to the species, as required by the ESA. Indeed, perhaps most glaring is the lack of any analysis in the 2021 Sacramento BiOp evaluating the likelihood that either or both of the small, isolated extant populations of jumping mice in the Sacramento Allotment will be extirpated during the course of the proposed action, and in particular before any purported benefits may begin to accrue to the species after at least three more seasons of livestock grazing. Indeed, had the FWS confronted this question as it was required to do, it would have been impossible to explain how extirpating either or both of these populations does not appreciably diminish the species’ recovery efforts, especially in light of the FWS’s own findings in its 2020 SSA that the jumping mouse is “particularly vulnerable to extinction,” *id.* at 117—“from both random and nonrandom catastrophic natural or human-caused events,” *id.* at 121—and thus that “*the subspecies’ overall viability is low*, given the ongoing and likely future losses of habitat in conjunction with the small and isolated nature of currently-known populations,” because “the status of the subspecies has been reduced to the point where *individual populations are vulnerable to extirpation.*” *Id.* at 118-19 (emphases added). In the absence of these legally required analyses—or any attempt to explain how the proposed action does not result in jeopardy in light of the FWS’s own recent findings about the species’ substantial extinction risk—the 2021 Sacramento BiOp and no jeopardy conclusion (and the Forest Service’s reliance on it) fundamentally violates the Section 7(a)(2) prohibition against jeopardy, as well as the FWS’s obligations to analyze the environmental baseline and the effects of the proposed action when added to baseline conditions, and the FWS’s duty to rely upon the best available scientific evidence in assessing whether an action will result in jeopardy. *See* 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(g).

Seventh, for the reasons stated above, the FWS’s conclusion that the proposed action will not destroy or adversely modify jumping mouse critical habitat is arbitrary, capricious, and unlawful, as is the Forest Service’s reliance on it to comply with its own substantive adverse modification obligation. This conclusion is fatally flawed for several other reasons as well. For example, while documenting the severe harm caused by livestock to jumping mouse critical habitat in recent years (which will continue for at least three more years), the FWS rejected the possibility that the proposed action will destroy or adversely modify critical habitat based on a simplistic calculation that the unfenced portion of critical habitat comprises only 2% of “the total amount of designated critical habitat for the species range wide.” 2021 Sacramento BiOp at 75; *see also id.* at 100 (same). But this overly simplistic calculation fails to address important questions including: (1) whether the occupied

status of this critical habitat by one of the few remaining populations of the jumping mouse elevates the importance of this habitat over unoccupied portions of critical habitat; (2) whether this critical habitat has elevated importance for the separate reason that if these two small extant populations are lost, jumping mice will be completely extirpated from the Lincoln National Forest; and (3) whether the extensive degradation of this important, occupied critical habitat will have disproportionately significant impacts on the species' critical habitat at the unit or subunit scale. In fact, the FWS's facile mathematical calculation avoids conducting the necessary analysis, and in the process masks the significance of localized (but highly consequential) effects of the proposed action by only considering the larger scale of the whole critical habitat designation to the exclusion of the significant effects occurring at the smaller scale of this single allotment, in the Lincoln National Forest, and/or in this critical habitat subunit or unit. Such an outcome is completely at odds with Section 7(a)(2) of the ESA and its implementing regulations, and the FWS's critical habitat conclusion (and the Forest Service's reliance on it) is illegal, arbitrary, and capricious for these reasons as well.

Relatedly, to the extent that the FWS's failure to seriously consider the localized impacts to jumping mouse critical habitat in the Sacramento Allotment merely due to its small size relative to the overall critical habitat designation (much of which is comprised of *unoccupied* habitat) is based on an application of the FWS's new regulations promulgated in 2019, the relevant provision violates the ESA both facially and as applied to this action. *See* 50 C.F.R. § 402.02 (2019) (defining destruction or adverse modification as “ a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species” (emphasis added)); 84 Fed. Reg. 44,976, 44,983-85 (Aug. 27, 2019) (discussing the addition of “as a whole” to the definition). Simply put, the additional requirement that destruction or adverse modification be analyzed only relative to *the whole* critical habitat designation can, as here, mask extremely significant localized impacts in the most important of occupied habitat simply because in relative terms the critical habitat size is “small” compared to the overall designation, which may include significant amounts of unoccupied habitat. Hence, although the FWS has itself previously stated that “the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding,” 84 Fed. Reg. at 44,983, the FWS did not even attempt in the 2021 Sacramento BiOp to analyze and determine whether the inevitable impacts to the affected critical habitat, which supports the last two small extant populations of jumping mice in the Lincoln National Forest, would constitute destruction or adverse modification, *despite* their small size relative to the overall critical habitat designation. The failure to conduct this analysis is especially egregious in light of the FWS's own finding in the same BiOp that these areas “*are extremely important and are a crucial part in the survival and recovery of the jumping mouse.*” *Id.* (emphasis added). Accordingly, for these reasons as well, the conclusion that the proposed action will not destroy or adversely modify critical habitat—including the FWS's reliance on and application of its new critical habitat regulation—is arbitrary, capricious, and violates the ESA and its implementing regulations.

Eighth, because new consultation is required to address the serious deficiencies in the 2021 Sacramento BiOp (including a failure to ensure against jeopardy and destruction or adverse modification of critical habitat), Section 7(d) imposes an obligation on the Forest Service to avoid “mak[ing] any irreversible or irretrievable commitment of resources” until such consultation is lawfully completed. Accordingly, the Forest Service's current grazing authorization for the Sacramento Allotment—which is based on a fatally flawed BiOp—violates Section 7(d) of the ESA

and must be immediately suspended until a lawful consultation is completed. *See* 16 U.S.C. § 1536(d).

Ninth, because the 2021 Sacramento BiOp is severely deficient in several respects and fails to candidly assess or lawfully authorize the foreseeable effects of the proposed action (especially prior to the completion of any conservation measures), the Forest Service is in ongoing violation of Section 9 of the ESA by authorizing activities that—as was the case under similar conditions pursuant to the 2016 and 2018 Sacramento BiOp—are taking jumping mice in myriad ways and destroying and adversely affecting jumping mouse critical habitat in the Sacramento Allotment. Because the Forest Service lacks legally adequate authorization from the FWS to take jumping mice or harm its critical habitat in light of the highly deficient nature of the 2021 Sacramento BiOp, the Forest Service’s actions are in ongoing—and significant—violation of the Section 9. *See* 16 U.S.C. § 1538(a)(1)(B).

For these reasons, the Forest Service and the FWS are in ongoing violation of the ESA. These violations cannot be cured absent completion of formal consultation that comes to grips with the full spectrum of foreseeable effects resulting from the proposed action (including prior to the end of 2023), which culminates with a BiOp that imposes serious and meaningful terms, conditions, and measures that will actually avoid jeopardy, as well as the destruction or adverse modification of critical habitat. Until such consultation can be completed, the agencies are in ongoing violation of the ESA absent immediate suspension of the Forest Service’s grazing authorization that relies on the fatally flawed 2021 Sacramento BiOp and removal from the allotment of the livestock that are continuing to take this species.

C. The Forest Service Has Violated, and Is in Ongoing Violation of, Section 7(a)(1) of the ESA

By allowing continued heavy livestock grazing in the Sacramento and Agua Chiquita Allotments that has for years decimated localized jumping mice populations to the point of extirpation and destroyed significant acreage of the species’ critical habitat in the Lincoln National Forest, the Forest Service has violated—and continues to violate—its fundamental duty to affirmatively conserve this highly imperiled species.

In addition to the obligation to avoid jeopardizing species or destroying or adversely modifying their critical habitat under Section 7(a)(2) of the ESA, Section 7(a)(1) imposes an obligation on all federal agencies, in consultation with the FWS, to “carry[] out programs for the conservation” of listed species. 16 U.S.C. § 1536(a)(1). This provision imposes an “affirmative duty on each federal agency to conserve each of the species listed.” *Sierra Club v. Glickman*, 156 F.3d 606,616 (5th Cir. 1998); *accord Pyramid Lake Paiute Tribe*, 898 F.2d at 1416-17 (noting that federal agencies have “affirmative obligations to conserve under [S]ection 7(a)(1)”). “Conserve” is defined by the ESA to mean *recovery*, *i.e.*, the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [in the ESA] are no longer necessary.” 16 U.S.C § 1536(a)(1).

The Forest Service’s actions in the Lincoln National Forest—and in particular the continued authorization of heavy livestock grazing in the Sacramento and Agua Chiquita Allotments, without any serious efforts by the Forest Service to permanently fence all jumping mouse critical habitat, let alone monitor for or notify the permittee of incursions into the few small permanent exclosures that have been constructed—constitute the direct *opposite* of a program designed to avoid extirpation of

the jumping mouse from the Lincoln National Forest, let alone a program that is specifically aimed at *recovering* the species. Especially because the Forest Service’s discretionary authorization of livestock grazing in these allotments is the primary contributing factor to the species’ demise in the Lincoln National Forest, Section 7(a)(1) imposes on the Forest Service an affirmative duty to immediately develop, in consultation with the FWS, a comprehensive program that will timely implement all measures necessary to conserve—i.e., *recover*—the jumping mouse before the two small extant populations are wiped out entirely by the Forest Service’s repeatedly unlawful actions.

Until and unless the Forest Service develops such a program, the agency is in flagrant violation of Section 7(a)(1). *See, e.g., Ctr. for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1030-32 (D. Nev. 2017) (holding that an agency violated Section 7(a)(1) where its actions “did nothing to reverse or end the damage to the [species’] habitat inflicted by (and continuing to be inflicted by) the [agency’s actions]” especially where the agency “was clearly aware of the accelerating deterioration of the [species’] habitat and the increasing urgency of its obligation under Section 7(a)(1) to engage in conservation efforts”).

CONCLUSION

Our culture and our morality require that we protect all species. The biblical teachings of Noah and his Ark are clear:

Genesis 9: 8 - 9 Then God said to Noah and to his sons with him: “I now establish my covenant with you and your descendants after you and with every living creature that was with you - the birds, the livestock, and all the wild animals, all those that came out of the ark with you - every living creature on the earth.

Genesis 9: 12 - 13 And God said, “This is the sign of the covenant I am making between me and you and every living creature with you, a covenant for all generations to come; I have set my rainbow in the clouds, and it will be the sign of the covenant between me and the earth.

Consistent with our culture and morality of protecting all species, the Endangered Species Act reflects the biblical teachings of Noah and his Ark as our Nation’s policy and law:

“It Is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act. ... The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species...”⁴⁶

Correspondingly and contemporaneously, our Public Lands have become our Nation’s Ark. The upper elevation meadows and streams in the Sacramento Mountains represented by NMMJM are an example of Public Lands treasures that USFWS and Forest Service officials are charged with protecting.

It is beyond legitimate dispute that the continuation of the status quo facilitated by the 2021 Agua Chiquita NLAA Concurrence and the 2021 Sacramento BiOp—prior to the completion of all conservation measures in roughly half a decade—will result in severe harm to the New Mexico

⁴⁶ Endangered Species Act of 1973, 16 U.S.C. 1531 et seq., Sections 2(b) and (c).

meadow jumping mouse and its critical habitat, which very likely will permanently extirpate the jumping mouse from the Lincoln National Forest and thereby severely impede the species' survival and recovery prospects in this management unit and range-wide. Accordingly, the Center and Maricopa Audubon strongly urge the Forest Service to immediately suspend the grazing permits in these two allotments, timely engage in formal consultation regarding continued grazing in both allotments, and as part of that consultation candidly confront the effects that will occur to the jumping mouse and its critical habitat *prior* to any purported benefits that might accrue years down the road from tentative, funding-dependent conservation measures.

The Center and Maricopa Audubon look forward to hearing from you in response to this Notice. While the Center would welcome the opportunity to discuss this matter by conference call, the Center will not delay the filing of a lawsuit if the agencies fail to take appropriate corrective actions within sixty days of receiving this letter.

The Center and Maricopa Audubon will be represented by Eubanks & Associates, PLLC, should litigation be necessary.

If you have further questions, please contact Robin Silver, M.D., Center for Biological Diversity, P.O. Box 1178, Flagstaff, AZ 86002, by mail; by phone: (602) 799-3275, or by Email: rsilver@biologicaldiversity.org.

Sincerely,



Robin Silver, M.D.
Co-Founder and Board Member
Center for Biological Diversity

cc: New Mexico Game and Fish Department Director Michael Sloane
(via email: Michael.Sloane@state.nm.us)