



February 5, 2024

Via Email and Certified Mail

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RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act.

Dear Secretary Haaland, Chief Moore, Director Williams, and Forest Supervisor Sanchez:

The U.S. Forest Service (“Forest Service”), U.S. Fish and Wildlife Service (“USFWS”), and the officers and supervisors to whom this letter is directed (collectively, “agencies”) are hereby notified that WildEarth Guardians, Western Watersheds Project, and Caldera Action (collectively, “Noticing Parties”) intend to bring suit for the agencies’ violation of Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536. The agencies have failed to reinitiate consultation on the Santa Fe National Forest’s grazing program despite previously unanticipated impacts to federally protected species. Specifically, the Forest Service’s grazing program has caused and is causing well-documented harm to the endangered Jemez Mountains salamander, the threatened Mexican spotted owl, and the endangered New Mexico meadow jumping mouse, as well as adverse modification of their respective critical habitats, due to the ongoing incursions of livestock from Forest Service allotments on the Valles Caldera National Preserve (“VCNP”). The agencies’ continued failure to reconsult on the Forest Service’s grazing program violates ESA Section 7.

The Forest Service has further violated Section 7 by failing to ensure that its actions will not jeopardize the continued existence of ESA-listed species or result in the adverse modification of critical habitat. *See id.* § 1536(a)(2). The Forest Service has also violated Section 9 of the ESA by authorizing activities resulting in the unlawful take of ESA-listed species. *See id.* § 1538(a).

Additionally, the trespass livestock issue constitutes significant new circumstances or information relevant to environmental concerns, necessitating further analysis under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* The existing NEPA documents

do not address the grazing program's cumulative impacts caused by the ongoing trespass of livestock on the VCNP and are thus no longer valid. The Forest Service cannot lawfully continue to authorize grazing on allotments abutting the VCNP until it complies with NEPA.

The names and addresses of the Noticing Parties are:

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The Noticing Parties have repeatedly communicated their concerns to and engaged in good-faith discussions with the agencies in an attempt to avoid litigation, but the agencies have failed to remedy the ongoing violations and fully comply with the ESA and NEPA. The Noticing Parties therefore intend to sue the agencies after the statutory 60-day period has run unless the violations described in this Notice are remedied promptly.

LEGAL BACKGROUND

I. The Endangered Species Act

Enacted in 1973, the ESA is “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). It provides a means to conserve imperiled species and the ecosystems upon which they depend, 16 U.S.C. § 1531(b), obligating federal agencies to use “all methods and procedures

which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3). The ESA is intended not only “to forestall the extinction of the species (i.e., promote species survival), but to allow a species to recover to the point where it may be delisted.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

As Congress specifically recognized,

classifying a species as endangered or threatened is only the first step in insuring its survival. *Of equal or more importance is the determination of the habitat necessary for that species’ continued existence.* . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then *the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*

H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

Critical habitat is “the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection;” and unoccupied areas “essential for the conservation of the species.” 16 U.S.C. § 1532(5); *see also id.* §§ 1533(a)(3)(A)(i); 1533(b)(6)(C). “[T]he 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.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). All federal agencies must therefore work towards the conservation and recovery of both ESA-listed species and their designated critical habitats.

Consistent with the Act’s sweeping goals, ESA Section 7 imposes a substantive obligation on federal agencies to “[e]nsure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” critical habitat. *Id.* § 1536(a)(2). “Jeopardize the continued existence of” means “engage in an action that 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 means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” *Id.*

Section 9 of the ESA prohibits any entity, including federal agencies, to “take” members of a listed species—which means to harass, harm, wound, kill, trap, capture, or collect any members of the species, or to attempt to engage in any such conduct. 16 U.S.C. §§ 1538(a)(1), 1532(19). “Harm includes significant habitat modification or degradation.” 50 C.F.R. § 17.3. This prohibition extends to incidental takings, which “result from, but are not the purpose of, carrying out an otherwise lawful activity.” 50 C.F.R. §§ 402.02; 4102.14(i).

To fulfill the ESA’s substantive mandates, federal agencies must consult with an expert agency—as relevant here, the USFWS—before undertaking any action that “may affect” affect listed species or their habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The ESA’s consultation requirement applies “to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. Agency actions requiring consultation are broadly defined to include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” and encompass “actions directly or indirectly causing modifications to the land, water, or air.” *Id.* § 402.02.

If listed species may be present in the area of proposed agency action, the “action agency” must prepare a biological assessment (“BA”) to determine whether any protected species may be affected. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species, it must engage in formal consultation with the USFWS. 50 C.F.R. § 402.12; *see also Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 99, 1018 (9th Cir. 2009). In addition to any direct effects, the agency must examine its action’s potential indirect effects, defined as “those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.” 50 C.F.R. § 402.02.

The threshold for a “may affect” determination is very low, and is met if “a proposed action may pose *any* effects on listed species or designated critical habitat.” USFWS & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at xvi (1998) (emphasis in original). In short, “actions that have *any chance* of affecting listed species or critical habitat—even if it is later determined that the actions are not likely to do so—require at least some consultation under the ESA.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012) (emphasis added); *see also WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 784 F.3d 677, 700 (10th Cir. 2015).

If the action agency concludes that the proposed activity may affect, but is not likely to adversely affect the listed species, and the USFWS concurs, the consultation is complete. 50 C.F.R. §§ 402.12, 402.14(b). If, however, the action agency determines that the activity is likely to adversely affect a protected species, the agencies must engage in formal consultation, and the USFWS must prepare a biological opinion (“BiOp”) explaining how the action will impact the species or critical habitat. *Id.* § 402.14.

The BiOp must include a summary of the information on which it is based, a detailed discussion of the effects of the action on listed species or critical habitat, and the USFWS’s opinion on whether the action is likely to jeopardize the species or result in destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). “[T]he USFWS is not permitted to base its compliance with the ESA ‘on speculation or surmise.’” *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 416 F. Supp. 3d 909, 926 (D. Ariz. 2019) (quoting *Bldg. Indus. Assoc. of Superior Calif. v. Norton*, 247 F.3d 1241, 1247-48 (D.C. Cir. 2001)). Instead, it must “use the best scientific and commercial data available” in assessing impacts to protected species during the consultation process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). There must be “a rational connection between facts found and conclusions made”

by the agency. *Conservation Cong. v. Finley*, 774 F.3d 611, 617 (9th Cir. 2014) (citation and internal quotation marks omitted).

If the USFWS determines that an action will jeopardize the species or adversely modify its critical habitat, the BiOp “shall include reasonable and prudent alternatives” to avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(5). If it determines that the action will not result in jeopardy or adverse modification of critical habitat, but may cause incidental take of individual members of the species, the USFWS must issue an incidental take statement (“ITS”). 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

An ITS shields the action agency from liability under Section 9 for any incidental take resulting from the proposed action—as long as the agency complies with its terms. 50 C.F.R. §§ 402.02; 4102.14(i). The ITS must articulate: (1) the amount of incidental take authorized and its impact on the species; (2) “reasonable and prudent measures” to minimize such impacts; and (3) mandatory terms and conditions to implement the reasonable and prudent measures. 16 U.S.C. §§ 1536(b)(4)(i)-(iv). If the action agency fails to implement the terms and conditions, or exceeds the level of take identified in the ITS, it loses its protection against section 9 liability and must reinitiate consultation with the USFWS. 16 § 1536(2)(B)(3), (4); 50 C.F.R. § 402.14(g)(7).

An agency’s duties do not end with the issuance of a BiOp and ITS. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1106 (10th Cir. 2010); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010). Section 7 of the ESA imposes an additional, independent, and continuing obligation upon the action agency to avoid jeopardizing the existence of a listed species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). An action agency “cannot be relieved of its duty to adhere to the ESA simply through compliance with the BiOp; it has an independent duty to ensure that its reliance is not arbitrary or capricious.” *Ctr. for Biological Diversity v. Bernhardt*, 595 F. Supp. 3d at 900 (citing *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990)). See also *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) (“relying on a faulty Biological Opinion violates [the ESA Section 7] duty”); *Grand Canyon Trust v. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1037 (D. Az. 2009).

This substantive obligation creates further procedural obligations: once consultation is complete, the agencies have a duty to ensure that it remains valid. To this end, an agency must reinitiate consultation if certain “triggers” occur. 50 C.F.R. § 402.16. This duty falls on both the action agency and the USFWS. See *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

The agencies must reinitiate consultation where discretionary federal involvement or control over the relevant action has been retained or is authorized by law and, as relevant here:

- (a) the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; or

(c) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.

50 C.F.R. § 402.16.

After consultation is initiated or reinitiated, ESA Section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures[.]” 16 U.S.C. § 1536(d). The 7(d) prohibition “is in force during the consultation process and continues” until formal consultation is complete. 50 C.F.R. § 402.09. Thus, when any of the reinitiation triggers occurs, the USFWS must issue a new BiOp and ITS before the agency action may continue to implement the relevant action. *Env’t Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th Cir. 2001). Agencies’ compliance with their ongoing duties under the ESA are crucial for the conservation and recovery of threatened and endangered species.

II. The National Environmental Policy Act

Congress enacted NEPA to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321. NEPA ensures that agencies carefully consider detailed information concerning the environmental impacts of their actions, and guarantees that the relevant information is made available to the public so that it may play a role in both the decisionmaking process and the implementation of the decision. *See Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004).

To accomplish these purposes, NEPA requires all federal agencies to prepare “detailed statement[s]” for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This Environmental Impact Statement (“EIS”) must describe, *inter alia*, the adverse environmental impacts of the proposed action and alternatives to it. *Id.*; *see also id.* § 4332(2)(E). For a “proposed action that is not likely to have significant effects or when the significance of the effects is unknown,” an agency may prepare a less rigorous Environmental Assessment (“EA”). 40 C.F.R. § 1501.5. Whether in an EIS or EA, the agency must analyze and describe the potential direct, indirect, and cumulative effects of its proposed action. 40 C.F.R. §§ 1501.5(c); 1502.16. Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.1(g). Cumulative effects “result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency ... or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* This analysis allows the decisionmaker to fully understand the environmental consequences of their actions and to make a reasoned choice between alternatives.

Agencies may not rely on outdated or inaccurate NEPA documents to support their decisions. An agency must supplement its existing NEPA analysis for a project when major federal action remains to occur and “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.*

§ 1502.9(d)(1)(ii); *see also Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 560 (9th Cir. 2006). The agency must consider and take a hard look at whether or not the new information or changed circumstances are within the scope and range of effects considered in the original analysis. Supplementation is also required when “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns.” 40 C.F.R. § 1502.9(d)(1)(i). A party need only raise “substantial questions whether a project may have a significant effect” to trigger supplementation. *See Boody*, 468 F.3d at 560 (9th Cir. 2006).

Although the triggers for NEPA supplementation are similar to those for ESA reconsultation, “they are independent inquiries resulting in independent evaluations.” *All. for the Wild Rockies v. U.S. Dep’t of Agric.*, 772 F.3d 592, 607 (9th Cir. 2014) (citing 40 C.F.R. § 1502.9(c)(1)). As such, agency action that satisfies one mandate does not constitute compliance with the other—an agency must meet its independent obligations under both the ESA and NEPA.

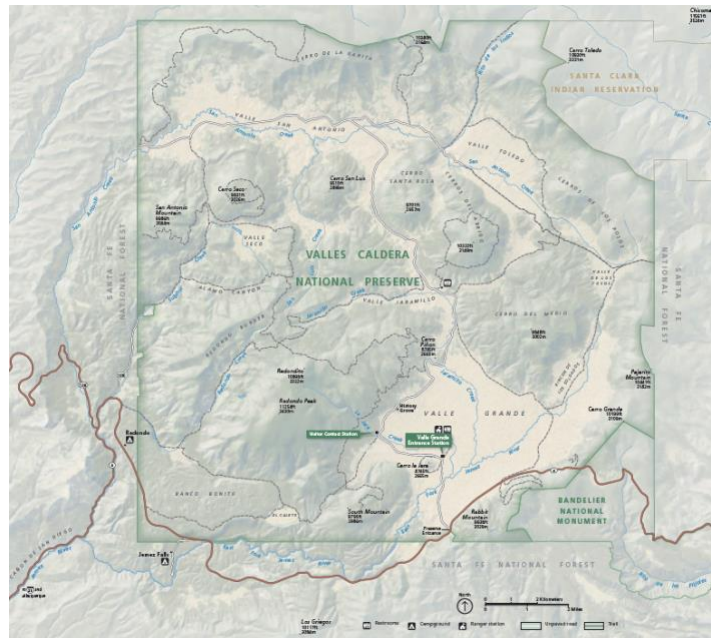
FACTUAL BACKGROUND

I. The Valles Caldera National Preserve

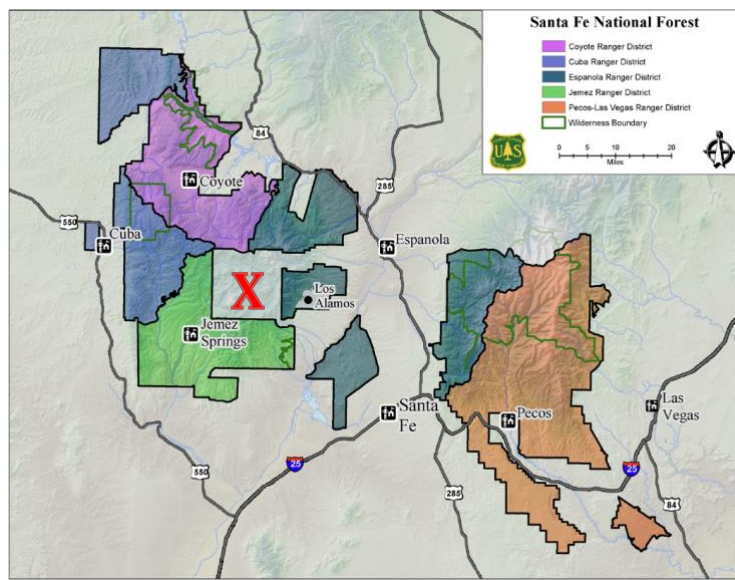
The VCNP was established in 2000 to protect, preserve, and restore the fish, wildlife, watershed, natural, scientific, scenic, geologic, historic, cultural, archaeological, and recreational values of the area. *See* P.L. 113-291, Dec. 19, 2014. 128 STAT. 3292, 113th Congress; *see also* Nat’l Park Serv., *Foundation Document, Valles Caldera National Preserve* at 3 (March 2018) (“Foundation Document”). Initially managed by the Valles Caldera Trust, the VCNP was designated as a unit of the National Park System in 2014, and the National Park Service (“NPS”) assumed management of the VCNP on October 1, 2015.

“The preserve is an ecosystem in recovery.” *Foundation Document* at 4. It “is a place where one can directly experience pre-agricultural heritage and reflect on inconspicuous cultural landscapes.” *Id.* at 6. Located at the top of the Jemez Mountains in north-central New Mexico, the VCNP encompasses 88,900 acres of large grassland meadows (or *valles*) and forest-covered volcanic domes, with elevations ranging from 8,000 to over 11,000 feet. *Id.* at 3. Most primary streams on the VCNP’s upper watersheds are ephemeral but provide important riparian habitat and contribute to the physical and biological health of the larger perennial streams. NPS, *Trespass Livestock Removal and Exclusion Biological Assessment* at 16–17 (May 31, 2023) (“2023 BA”). Wetlands and wet meadows fed by these streams are one of the most biologically diverse habitat types on the VCNP. *Id.* The area supports a wide variety of wildlife and plants, including threatened and endangered species protected under the ESA. *Foundation Document* at 18.

The VCNP is surrounded by Forest Service lands, the vast majority of which are subject to livestock grazing under permits issued by the Forest Service. The following map shows the VCNP with the Santa Fe National Forest almost completely encircling its boundaries:



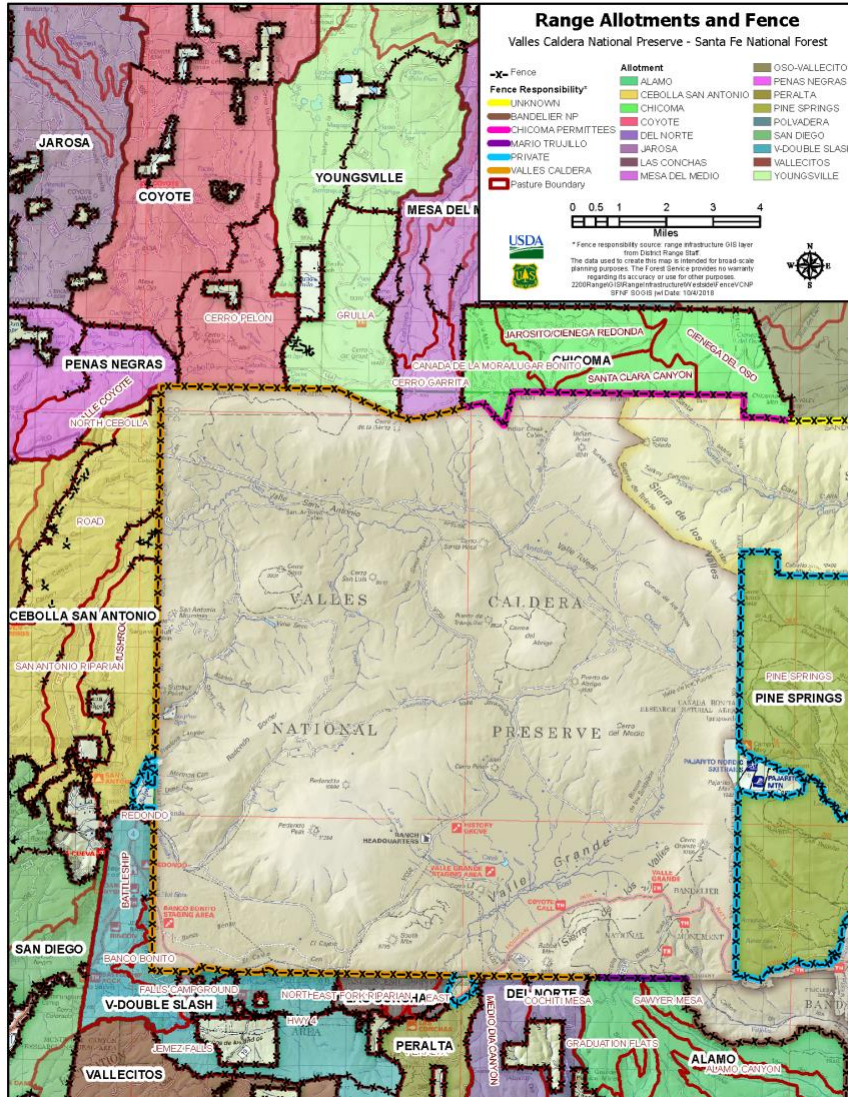
The next map shows the various Ranger Districts of the Santa Fe National Forest in relation to the VCNP, which is indicated by the red X:



The VCNP has a long history of overgrazing by domestic livestock and many wildlife species were extirpated from the area, though today the area is managed for ecological restoration and is considered an ecosystem in recovery. *Id.*, throughout. Based on information and belief, there has been no grazing authorized on the VCNP in recent years. *See* 2023 BA at 31.

II. Livestock Grazing on the Santa Fe National Forest.

The Forest Service authorizes permittees to graze livestock on the Santa Fe National Forest, including on allotments abutting the VCNP. *See* USFWS, Biological Opinion for Ongoing Term Grazing Permits, 02ENNM00-2016-F-0367 at 12, Table 3 (July 25, 2018) (“2018 Grazing BiOp”). The following map shows the Coyote, Youngsville, Mesa del Medio, Chicoma, Pine Springs, Alamo, Del Norte, Las Conchas, V-Double Slash, and Cebolla-San Antonio allotments bordering the VCNP:



For each allotment, the Forest Service develops Allotment Management Plans (“AMPs”) detailing the permitted numbers of livestock, season of use and length, stocking dates, and rotation schedules. *Id.* at 16. Prior to each grazing season, the Forest Service also develops Annual Operating Instructions (“AOIs”) for each allotment specifying the number of livestock to be grazed, developments planned, projects planned, maintenance activities, and any other

instructions necessary to carry out activities outlined in the AMP for that year.¹ *Id.* The AOI for a particular allotment should include any inspections, data collections, analyses, studies, routing schedules or other activities to be carried out during the grazing year. *Id.* The AOI should also detail required range infrastructure work such as repair and maintenance of existing structures like fences, tanks, corrals, wells, etc. *Id.* “Any proposed new range improvements will have site specific analysis done to determine effects to listed species.” *Id.*

Pursuant to the agencies’ duties under the ESA, the Forest Service has formally consulted with the USFWS on the impacts of its grazing program on the endangered Jemez Mountain salamander, the threatened Mexican spotted owl, and the endangered New Mexico meadow jumping mouse. As required by NEPA, the Forest Service has also analyzed the environmental impacts of the Santa Fe National Forest grazing program in a series of EAs, each of which consider the effects of continued grazing on one or more allotments. In none of its ESA consultations or its NEPA analyses, however, has the Forest Service considered and disclosed the effects of its permittees’ livestock trespassing on the neighboring VCNP—despite many years of recurring, widespread, and well-documented issues with trespass cattle.

III. The Federal Agencies Have Been Aware of Livestock Incursions on the Valles Caldera for at Least Six Years.

Trespass livestock entering the VCNP from adjacent grazing allotments on the Santa Fe National Forest has been a well-known and well-documented issue since at least 2017.² The livestock entering the VCNP primarily come from the Coyote and Jemez Ranger Districts—specifically, from the Coyote, Youngsville, Mesa del Medio, Chicoma, Del Norte, Las Conchas, and Cebolla-San Antonio allotments. *See* Presentation of Bob Parmenter, National Park Service, “Summary of Valles Caldera National Preserve Trespass Cattle Activities, May 1–Sept. 13, 2023” (Sept. 14, 2023) (Attachment A). The following is a summary of information demonstrating the USFWS, NPS, and Forest Service’s awareness of trespass livestock on the VCNP as an ongoing problem. By information and belief, the Forest Service is in possession of additional records documenting the presence and effects of trespass livestock on the VCNP.

2017

- January: the NPS issues a proposal to repair the boundary fence, noting that “[t]respass cattle continue to cross areas where the fence is down, causing severe resource damage.”³

¹ The Forest Service has not made the most recent AMPs and AOIs publicly available, despite requests from the Noticing Parties, nor has it responded to formal requests for these and other documents made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552 *et. seq.* The Forest Service is in custody of these agency documents and is therefore independently aware of their existence and contents.

² Much of this information was obtained from documents obtained through multiple FOIA requests, as noted throughout. Further pertinent documents from these requests have been electronically attached and provided on a USB drive in support of the allegations made in this Notice.

³ Attachment B, Excerpts from FOIA documents obtained in 2021 by Western Watersheds Project from the NPS, at 68–73. The documents obtained through this FOIA request all pertain to

- May: the Forest Service and NPS discuss the need to address boundary fence maintenance issues and the need to “button up” the boundary fence.⁴
- July: the Forest Service and NPS plan boundary fence work days.⁵

2018

- On information and belief, in 2018 the Park Service regional office notified the VCNP that it was failing to meet its obligations to protect natural resources.
- February: internal Forest Service email indicates the VCNP purchased fencing materials for use on the northern boundary between Forest Service- and NPS-managed lands.⁶
- September: the NPS initiated a trespass livestock roundup after visitor complaints.⁷ Roughly 300 cattle were reportedly removed during the single roundup.⁸ The VCNP Superintendent allows livestock to be driven, rather than trailered, off the preserve. The president of the Northern New Mexico Stockmen’s Association emails the Forest Service and state officials complaining about livestock being removed from the VCNP and providing “estimated costs incurred in the removal” of more than \$22,000.⁹
- September–December: the Forest Service and NPS communicate via email regarding Forest Service grazing permittee concerns about retrieving their livestock from the VCNP.¹⁰ The agencies agree to work cooperatively to address fencing issues and trespass livestock entering and remaining on the VCNP.¹¹
- November: the Forest Service plans to meet with the NPS about fencing and “producer relationships.”¹² The agencies discuss plans for working collaboratively on fencing issues in the 2019 grazing season.¹³ The NPS Superintendent identifies a possible solution to address grazing trespass from the example of Bandelier National Monument, which

the impacts of trespass cattle on the VCNP and, as such, constitute new information regarding previously unconsidered effects of the Forest Service’s grazing program. Further pertinent documents from this request have therefore been electronically attached and provided on a USB drive as Attachment O. The Noticing Parties include these documents in support of the allegations made in this Notice.

⁴ Attachment C, Excerpts from FOIA documents obtained in 2019 by Caldera Action from the Forest Service, at 36. The documents obtained through this FOIA request all pertain to the impacts of trespass cattle on the VCNP and, as such, constitute new information regarding previously unconsidered effects of the Forest Service’s grazing program. Further pertinent documents from this request have therefore been electronically attached and provided on a USB drive as Attachment P. Moreover, because the records in question were obtained from the Forest Service, it is already in custody of the documents and aware of their existence and content. The Noticing Parties include these documents in support of the allegations made in this Notice.

⁵ *Id.* at 11, 32.

⁶ *Id.* at 26.

⁷ Attachment D, 2018 Public Lands Newsletter.

⁸ *Id.*; *see also* Attachment B at 20.

⁹ Attachment C at 21–23.

¹⁰ *Id.* at 11–20.

¹¹ *Id.*

¹² *Id.* at 12.

¹³ *Id.* at 15.

successfully eliminated grazing and incursions by trespass livestock.¹⁴ The Forest Service and NPS identify 44 miles of needed boundary fencing.¹⁵

2019

- February: Forest Service staff from the Santa Fe National Forest discuss via email their plans to coordinate with the NPS to build boundary fencing and to address livestock entering the VCNP from adjacent grazing allotments.¹⁶
- The Forest Service and NPS continue to receive reports of trespass cattle on the VCNP.¹⁷ The NPS begins to keep record logs of observed cattle on the VCNP, but notes that the logs account for only the minimum number of cattle and extent of foraging, which it states “is greater than accounted for in existing logs.”¹⁸
- The NPS records a minimum count of 243 cattle, totaling 1,680 cattle-days.¹⁹
- The NPS begins to repair and construct boundary fence.²⁰

2020

- April: the Forest Service Rangeland Specialist requests “some clarity on the situation with ... the Valles Caldera Fence,” stating that no agreement with the NPS had been reached.²¹ The regional manager states that neither agency owned the fence but that “maintenance can be assigned to either or shared.”²²
- May–December: trespass cattle continue to be documented on the VCNP.²³ The NPS records a minimum of 415 trespass cattle, totaling 4,800 cattle-days.²⁴
- June: one VCNP ranger suggests that “it is best if [the Forest Service] just doesn’t have grazing allotments around [the VCNP]” due to the ongoing issue of trespass cattle.²⁵

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 31.

¹⁶ *Id.* at 1, 30.

¹⁷ Attachment B at 2–10, 24–25, 34–42, 48–49, 91, 115–16.

¹⁸ 2023 BA at 32.

¹⁹ *Id.*

²⁰ Attachment B at 20.

²¹ Attachment E, Excerpts from FOIA documents obtained in 2021 by Western Watersheds Project from the Forest Service, at 5–6. Excerpts from FOIA documents obtained in 2019 by Caldera Action from the Forest Service, at 36. The documents obtained through this FOIA request all pertain to the impacts of trespass cattle on the VCNP and, as such, constitute new information regarding previously unconsidered effects of the Forest Service’s grazing program. Further pertinent documents from this request have therefore been electronically attached and provided on a USB drive as Attachment Q. Moreover, because the records in question were obtained from the Forest Service, it is already in custody of the documents and aware of their existence and content. The Noticing Parties include these documents in support of the allegations made in this Notice.

²² *Id.* at 7–8.

²³ Attachment B at 11–15, 23, 28–30, 33, 50–52, 57–61, 75–80, 99–101, 105, 108–14; Attachment E at 3

²⁴ 2023 BA at 32.

²⁵ Attachment B at 29–30.

- July: a Forest Service District Ranger informs Caldera Action that the Forest Service and NPS are jointly responsible for maintaining the boundary fence, and states that the agencies are developing standard operating procedures to address the issue.²⁶
- November: VCNP Superintendent Jorge Silva-Banuelos tells Western Watersheds Project that efforts to address Forest Service permittees’ livestock trespassing onto the VCNP are ongoing but fencing is needed. Superintendent Silva-Banuelos also states that because New Mexico is a “fence-out” state, the NPS has no obligation to fence the livestock out.²⁷
- December: Western Watersheds Project notifies the Forest Service of its grave concerns about trespass livestock entering the VCNP from Forest Service grazing allotments.²⁸

2021

- Starting in 2021, NPS-permitted grazing on the VCNP was halted due to concerns regarding impacts to natural resources.²⁹
- February: Forest Service’s response to Western Watersheds Project’s December letter indicates the NPS did not notify the Forest Service about trespass livestock entering the VCNP from adjacent Forest Service-managed lands used by Forest Service permittees in 2019 or 2020.³⁰
- May: trespass cattle are again documented on the VCNP, starting almost immediately after livestock turn-out was authorized on adjacent Forest Service-managed grazing allotments.³¹
- May–October: the Forest Service and NPS continue to receive reports of trespass cattle from multiple sources.³² The NPS records a minimum of 1,026 trespass cattle, totaling 5,910 cattle-days.³³
- September: at least 160 trespass livestock are documented on the VCNP.
- October: Caldera Action notifies Forest Service about ongoing trespass livestock problems, more than 120 cattle, on the VCNP.³⁴ The livestock are eventually removed from the VCNP on trucks.

2022

- March: Caldera Action submits FOIA request for records related to surveys for threatened and endangered species on and around the Forest Service grazing allotments.
- May: the NPS informs Caldera Action that fences on the northern boundary of the VCNP were being cut by Forest Service permittees almost immediately after installation.

²⁶ Attachment E at 1–2.

²⁷ Attachment F, November 2020 email from Jorge Silva-Banuelos to Western Watersheds Project.

²⁸ Attachment G, December 2020 letter from Western Watersheds Project to Forest Service.

²⁹ NPS, *Grazing*, Valles Caldera National Preserve,

<https://www.nps.gov/vall/learn/management/grazing.htm> (last visited Jan. 30, 2024).

³⁰ Attachment H, February 2021 letter from Forest Service to Western Watersheds Project.

³¹ Attachment I, May 2021 letter from Caldera Action to the NPS.

³² Attachment B at 1.

³³ 2023 BA at 32.

³⁴ Attachment J, October 2021 letter from Caldera Action to the NPS.

Trespass livestock are again documented on the VCNP within a few days of turn-out on the Forest Service-managed grazing allotments.

- July: the NPS is repeatedly notified about trespass livestock on the VCNP.³⁵
- August: Caldera Action meets with the NPS at the VCNP to discuss the ongoing, multi-year problem of livestock on the VCNP. Caldera Action notifies the NPS that there are at least 130 livestock on the VCNP.
- October: the Noticing Parties send a Sixty-Day Notice of Intent to Sue for ESA violations stemming from the ongoing trespass livestock issue (“2022 NOI”). Notice is sent to the NPS, USFWS, Forest Service, and their respective officers and supervisors.
- November: the NPS, USFWS, and Forest Service meet to discuss the removal and exclusion of trespass livestock.³⁶
- December: the NPS and the Forest Service jointly respond to the Noticing Parties’ 2022 NOI, stating that they will continue to work collaboratively to address the trespass livestock issue.³⁷ The NPS commits to formal consultation with the USFWS regarding the effects of livestock removal and exclusion on ESA-listed species.³⁸

2023

- February: the NPS requests formal consultation with USFWS regarding its livestock removal and exclusion operations.³⁹
- March–September: the Noticing Parties meet repeatedly with agency personnel to discuss collaborative solutions for the ongoing trespass livestock issue.
- April: WildEarth Guardians submits FOIA request for AOIs, AMPs, monitoring reports, and other documents pertaining to Forest Service grazing operations on allotments abutting the VCNP.
- May–October: trespass cattle continue to be observed on the VCNP, and the Noticing Parties repeatedly alert the Forest Service and NPS of their recurring presence.⁴⁰ The NPS records a minimum of 371 cattle, totaling roughly 1,855 cattle-days.⁴¹ The Noticing Parties inform the agencies that their records indicate a significantly larger number of trespass livestock.
- May: the NPS submits a BA for its proposed livestock removal and exclusion operations, stating that the activities are “likely to adversely affect” the Jemez Mountains

³⁵ Attachment K, Email from Tom Ribe, Executive Director of Caldera Action to the NPS on July 6, 2022; Attachment L, August 2022 email to the NPS regarding trespass livestock in VCNP with descriptions and photos.

³⁶ USFWS, Biological Opinion for Trespass Livestock Removal and Exclusion, Valles Caldera National Preserve, 2023-0007837 at 8 (Dec. 4, 2023) (“2023 BiOp”).

³⁷ NPS & U.S. Forest Service, Re: The October 19, 2022 Notice of Intent to Sue for Violations of the Endangered Species Act related to Valles Caldera National Preserve from WildEarth Guardians, Caldera Action, and Western Watersheds Project (Dec. 19, 2022).

³⁸ *Id.* at 5.

³⁹ 2023 BiOp at 8.

⁴⁰ Attachment M, 2023 Combined reports of trespass livestock observations and correspondence with the Forest Service and NPS. Additional photographs submitted to the agencies in support of these reports have been electronically attached and submitted on a USB drive as Attachment R.

⁴¹ Attachment A at 1.

salamander, Mexican spotted owl, and New Mexico meadow jumping mouse.⁴² The agency also notes that the NPS currently lacks the ability to patrol the VCNP and remove cattle, that any removed cattle would “frequently” return to the VCNP until fence repairs were completed, and that “as long as grazing continues adjacent to the park it is unlikely that all livestock trespass will be eliminated.”⁴³

- December: USFWS completes a BiOp for the NPS proposal to remove and exclude livestock from the VCNP, concurring in the NPS’s “likely to adversely affect” determinations.⁴⁴

In short, the Forest Service has been aware of the trespass livestock issue since at least 2017, but it has failed to adequately address the ongoing problem. Moreover, the Forest Service has failed to formally analyze any future steps to reduce livestock trespass, conduct supplemental NEPA analysis of its grazing program, or reinitiate consultation on its grazing program with USFWS—despite evidence that the agency’s permitting of cattle on allotments abutting the VCNP continues to adversely impact ESA-listed species and create a range of negative environmental effects on the VCNP.

IV. ESA-Listed Species and Designated Critical Habitat on the Valles Caldera.

At least three ESA-listed species on the VCNP may be adversely impacted by trespass livestock grazing: the endangered Jemez Mountains salamander, the threatened Mexican spotted owl, and the endangered New Mexico meadow jumping mouse.

A. Jemez Mountains Salamander

FWS listed the Jemez Mountains salamander (*Plethodon neomexicanus*) as endangered in 2013. 78 Fed. Reg. 55,600 (Sept. 10, 2013). The average lifespan is unknown. *Id.* at 55,601. The age at first breeding is roughly three to four years for females and three years for males; breeding frequency is every two to three years with seven to eight eggs laid per breeding female. USFWS is currently compiling information for the five-year salamander status review and assessment since its listing. *See* 84 Fed. Reg. 144, 36,113 (July 26, 2019) (“USFWS 2019”). Based on this new information, USFWS intends to develop a recovery plan by 2022. *See* February 14, 2020 comment from M. Peyton, Wildlife Biologist, to the NPS regarding draft NRCA study plan. The salamander life history, characteristics, and sensitivity to disturbance have made surveying and monitoring this species extremely difficult.

Jemez Mountains Salamander Habitat

The salamander is strictly terrestrial and lives most of the year underground, making surveying for the challenging. Salamanders usually only surface after late summer rains saturate the soil and temperatures average 55 degrees Fahrenheit. The salamander lives primarily in mixed-conifer forests with well-developed understories and moist soils, and requires coarse woody

⁴² 2023 BA at 7.

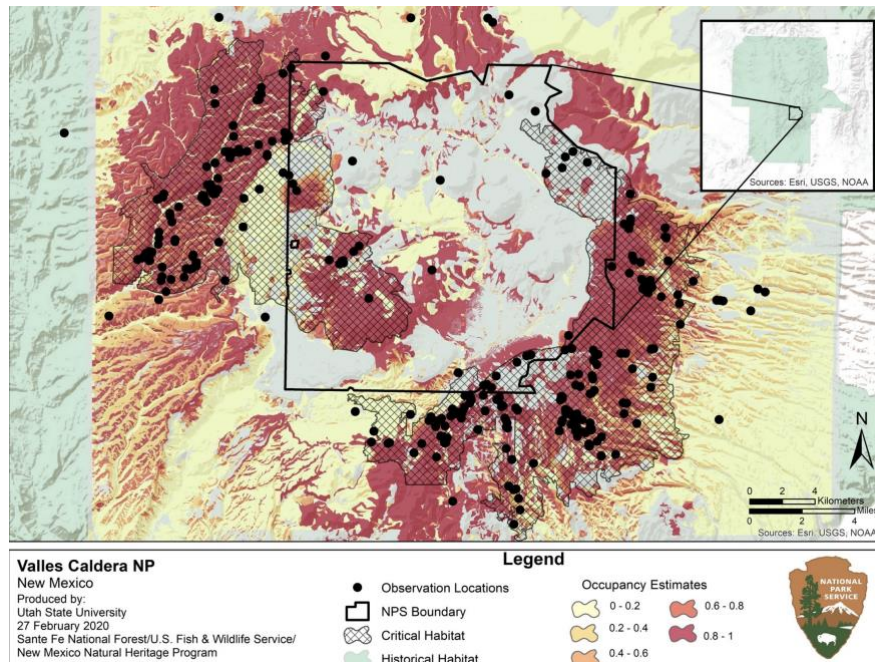
⁴³ *Id.* at 12, 35.

⁴⁴ 2023 BiOp at 2.

debris and rocky soil with spaces that allow for horizontal and vertical movement below the surface. A high volume of large, downed trees (primarily Douglas fir) provides refuge while salamanders are above ground. The salamander is usually found at elevations between 7,200 to 9,500 feet, although it may exceed this range if conditions are favorable. Many aspects of the salamander’s ecology, particularly with respect to reproduction, are poorly understood. In addition to mixed-conifer stands, the salamander’s habitat includes a shrub understory dominated by Rocky Mountain maple, New Mexico locust, oceanspray, or shrubby oaks. Salamander habitat also should include bark, moss mats, rotted tree root channels, and/or rodent burrows.

The Jemez Mountains Salamander on the VCNP

The salamander is restricted to the Jemez Mountains in northern New Mexico around the rim of and within parts of the caldera. 2023 BiOp at 15. The VCNP “is one of the largest fully protected areas throughout this species’ historical range, and the preserve contains 26% of the critical habitat identified for the species.” NPS, *An Endangered Amphibian on an Active Volcano: The Jemez Mountains Salamander at Valles Caldera*, Valles Caldera National Preserve, https://www.nps.gov/articles/000/nrca_vall_2021_jemezmtsalamander.htm (last accessed Jan. 17, 2024). The following map shows occupancy estimates for the salamander in and around the VCNP:



A recent Natural Resource Condition Assessment focused on seven resources on the VCNP, including the salamander. NPS, *Natural Resource Conditions at the Valles Caldera National Preserve* (June 2022), <http://npshistory.com/publications/vall/nrr-2022-2409.pdf> (“NRCA”). This assessment found that many sites where salamander were found historically were unoccupied; the currently occupied sites contained fewer individuals than were historically present. *Id.* at 94. Approximately 350 salamanders were recorded in and around the VCNP in 1992, but

observations have since dropped dramatically and in recent years only a handful of salamanders have been observed annually. *Id.* at 98.

Threats to the Jemez Mountains Salamander

The salamander faces “numerous threats of high magnitude.” 78 Fed. Reg. at 55,600. Principal threats to its habitat include historical fire exclusion and suppression and severe wildland fires; forest composition and structure conversions; post-fire rehabilitation activities; forest and fire management activities; roads, trails, and habitat fragmentation; and recreation. *Id.* at 55,610. The USFWS noted that “[h]istorical livestock grazing contributed to changes in the Jemez Mountains ecosystem by removing understory grasses, contributing to altered fire regimes and vegetation composition and structure, and increasing soil erosion.” *Id.* at 55,619.

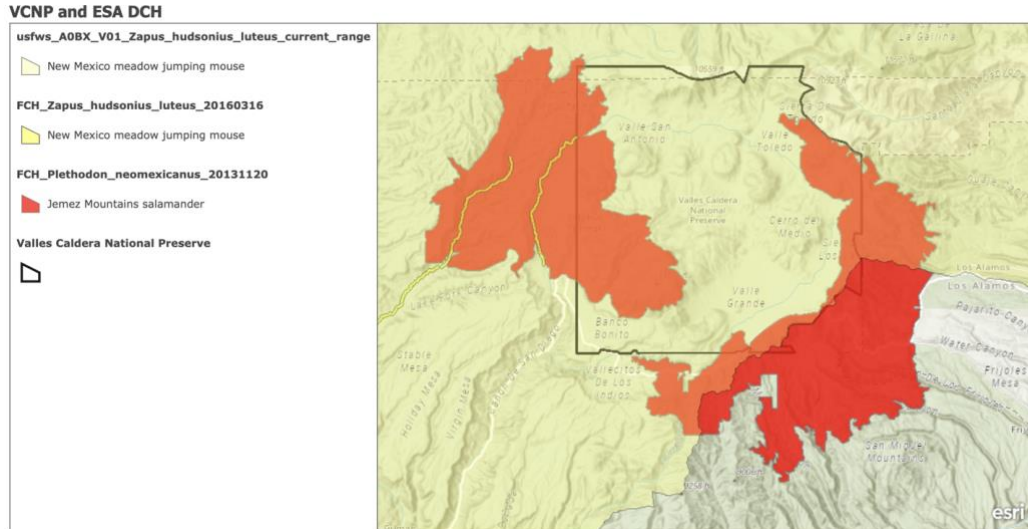
The USFWS did not identify livestock grazing as a primary threat, stating “[l]ivestock grazing generally does not occur within salamander habitat, because cattle concentrate outside forested areas where grass and water are more abundant” and “[w]e have no information that indicates livestock grazing is a direct or indirect threat to the salamander and its habitat.” *Id.* However, the USFWS admitted that “small-scale habitat modification, such as livestock trail establishment or trampling in occupied salamander habitat, is possible.” *Id.* More recently, the USFWS stated that livestock passage through salamander habitat, during either ingress or egress from the VCNP, as well as wrangling and fence repair activities, could impact salamander habitat and individuals.

Trespass Cattle on the VCNP May Impact the Jemez Mountains Salamander

Cattle that enter and remain on the VCNP may impact the salamander in numerous ways, including but not limited to directly trampling individuals; disease transfer; habitat modification due to livestock trail establishment or moving habitat components during grazing; and soil compaction that could deter salamander movement. *See* 78 Fed. Reg. at 55,617. In addition, use of trucks or other vehicles to round up the cattle on the VCNP may cause soil disturbance and compaction, alteration to local habitat conditions, and an increased likelihood that salamanders may be disturbed, trampled, or crushed and habitat suitable to support them may become altered. *See* 2023 BiOp at 21. Roads and trails may eliminate or reduce the quality or quantity of salamander habitat, reducing blocks of native vegetation to isolated fragments, and creating a matrix of native habitat islands that have been altered by varying degrees from their natural state. 78 Fed. Reg. at 55,617. Addressing these threats is critical given the decline in salamander populations and its highly restricted range.

Jemez Mountains Salamander Designated Critical Habitat

In November of 2013, the USFWS designated 90,716 acres of critical habitat for the Jemez Mountains salamander in Los Alamos, Rio Arriba, and Sandoval Counties—the only region where the salamander is found. 78 Fed. Reg. 69,569 (Nov. 20, 2013). The following map shows designated salamander critical habitat, all of which is in or around the VCNP:



The USFWS has identified habitat features essential to the conservation of the salamander in areas occupied at the time of listing, focusing on the primary constituent elements (those specific elements that provide for a species’ life history processes and are essential to the conservation of the species). *Id.* at 69,580. The salamander’s primary constituent elements were identified as: (1) moderate to high tree canopy cover (50 to 100 percent canopy closure that provides shade and mountains moisture), (2) elevations from 6,988 to 11,254 feet, (3) ground surface in forest areas with moderate to high volumes of large fallen trees and other woody debris, or structural features such as rocks, bark, and moss mats, and (4) underground habitat in forest or meadow areas containing interstitial spaces. *Id.* at 69,580–69,581. The USFWS noted that these habitat features may require special management considerations or protection to reduce certain threats, including but not limited to historical and current fire management practices, forest composition and structure conversions, post-fire rehabilitation, forest management, and habitat fragmentation from roads and trails. *Id.* at 69,581. Management activities suggested to ameliorate some of these threats included removing unused roads or trails and restoring habitat. *Id.*

Cattle on the VCNP May Adversely Modify or Destroy Jemez Mountains Salamander Critical Habitat

Cattle that enter and remain on the VCNP may impact salamander critical habitat in numerous ways as, described above, including through direct harm through crushing and habitat degradation through cattle trampling, soil compaction, and the removal of habitat components. *See* 2023 BiOp at 21–23. Use of trucks or other vehicles to round up the cattle on the VCNP may result in further trampling of habitat as well as habitat fragmentation. *Id.* Roads and trails, including those created by livestock or used to repair fence and patrol for trespass cattle, may also eliminate or degrade salamander habitat, reducing blocks of native vegetation to isolated fragments and creating a matrix of native habitat islands that have been altered by varying degrees from their natural state. *See* 78 Fed. Reg. at 55,617. Accordingly, the agencies must reinitiate consultation on the impacts of the Forest Service’s grazing program to the Jemez Mountains salamander and its critical habitat.

B. Mexican Spotted Owl

Almost thirty years ago, the USFWS listed the Mexican spotted owl (*Strix occidentalis lucida*) as a threatened species in need of protection under the ESA. 58 Fed. Reg. 14248 (Mar. 16, 1993). It identified (1) the destruction and modification of habitat from timber management, and (2) the threat of these practices continuing as evidenced in existing national forest plans as the primary threats to the survival of the owl. *Id.* At that time, the USFWS estimated that 1,037,000 acres of owl habitat was at risk of becoming unsuitable in the future. It attributed over seventy-five percent of the conversion to human activities, primarily timber harvest, and twenty-one percent to natural causes, primarily fire.

In 2004, the USFWS designated Mexican spotted owl critical habitat, including 8.6 million acres on federal lands in Arizona, Colorado, New Mexico, and Utah. 69 Fed. Reg. 53182 (Aug. 31, 2004). Owl critical habitat only includes those areas within designated critical habitat boundaries that are defined as “protected habitats”—protected activity centers (“PACs”) and steep slopes that have not had timber harvest in the last 20 years—and “recovery habitats”—unoccupied owl foraging, dispersal, and future nest and roost habitat. *Id.* Since the Mexican spotted owl was listed as a threatened species, populations of the species in New Mexico have not increased. The USFWS’s 2012 Recovery Plan lists 1,324 known owl sites in the United States. *See* U.S. Fish and Wildlife Service, 2012 Final Recovery Plan for the Mexican Spotted Owl, First Revision (“2012 Recovery Plan”); 77 Fed. Reg. 74688 (Dec. 17, 2012). The majority of Mexican spotted owls in the United States are found on National Forest System lands.

Mexican Spotted Owl on the VCNP

When signing the VCNP’s enabling legislation into law, President Bill Clinton noted that it provides habitat to a broad range of species, including the Mexican spotted owl. *See* Statement on Signing the Valles Caldera Preservation Act, William J. Clinton (July 25, 2000). The VCNP is “included in the suitable habitat for the endangered New Mexico meadow jumping mouse and threatened Mexican spotted owl,” Foundation Document at 25, but Forest Service surveys expressly exclude the VCNP. *See, e.g.,* Rocky Mountain Bird Observatory, Site Occupancy by Mexican Spotted Owls in the US Forest Service Southwestern Region at 4 (March 30, 2015). Prior to 2021, owls were not known to occur within the preserve. Surveys conducted in 2021 documented a pair of subadult owls near Sulphur Creek on the western boundary of the Park and a provisional PAC was established in coordination with the Forest Service. 2023 BiOp at 20. The following is a map of Mexican spotted owl observations, excluding the VCNP, showing abundant owl sites adjacent and up to the border of the VCNP:

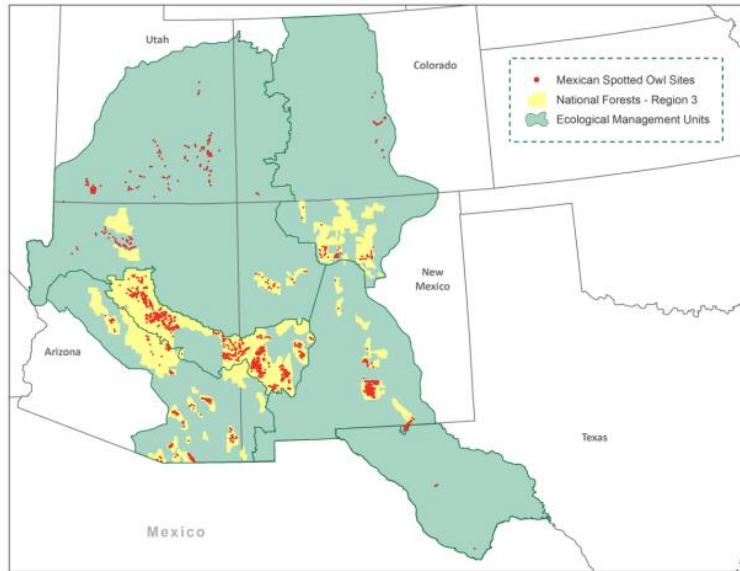


Figure 1. Range of the Mexican Spotted Owl in the United States and extent of US Forest Service lands (excluding National Grasslands) in the Southwestern Region. Mexican Spotted Owl sites are from the Recovery Plan, First Revision (2012).

Cattle on the VCNP May Impact Mexican Spotted Owl

Effects on the Mexican spotted owl from livestock grazing are complex, and multiple factors determine the particular impacts. *See* 2012 Recovery Plan at 42. These factors include local and regional climatic patterns, biotic community associations and ecology, soil types and conditions, and the timing, intensity, and duration of vegetation removal associated with the presence of grazing animals. *Id.* Adding to the complexity are the interrelationships of grazing and other ecological processes such as changes in herbaceous plant composition, woody vegetation structure, soil stability, ecology, and fire regimes. *Id.* Livestock grazing, and the clearing of vegetation and human disturbance related to livestock grazing, may adversely impact owls by disturbing or disrupting individual owls, disturbing habitat, and ultimately causing dispersal. *Id.* at 11. The ongoing need to maintain and repair fences after natural or intentional damage creates both short and long-term disturbances to the owl. 2023 BiOp at 24–25. The Forest Service must reinitiate consultation on its grazing program with the USFWS to properly analyze impacts to Mexican spotted owls.

C. New Mexico Meadow Jumping Mouse

The State of New Mexico originally recognized the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*) as “threatened” in 1983, later uplisting its state designation to “endangered” in 2006. N.M. Dep’t of Game and Fish, 2022 Biennial Review of Threatened and Endangered Species of New Mexico at 16 (Oct. 14, 2022). The USFWS eventually listed the jumping mouse as “endangered” ten years ago due to 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. 79 Fed. Reg. 33,119 (June 10, 2014).

New Mexico Meadow Jumping Mouse Habitat, Biology, and Status

The jumping mouse is a habitat specialist, nesting in dry soils, but requiring moist, streamside, dense riparian/wetland vegetation up to an elevation of about 8,000 feet. USFWS, Species Status Assessment Report for the New Mexico Meadow Jumping Mouse at 19 (Jan. 30, 2020) (“2020 SSA”). The jumping mouse appears to only utilize two riparian community types: 1) persistent emergent herbaceous wetlands (i.e., beaked sedge and reed canarygrass alliances); and 2) scrub-shrub wetlands (i.e., riparian areas along perennial streams that are composed of willows and alders). *Id.* at 17. To achieve sufficient growth, vegetation must be associated with seasonally available (ephemeral) or perennially flowing water. *See id.* at ii. 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. *Id.* Jumping mice also regularly use adjacent upland habitats for dispersal, day nesting, maternal nests, and hibernating.

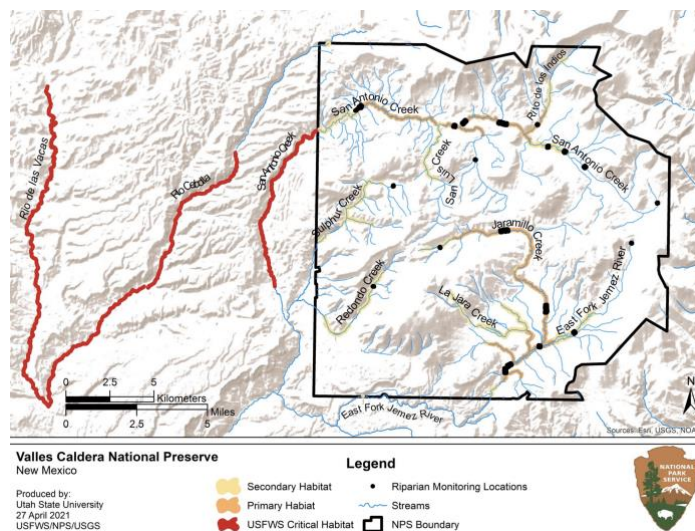
Jumping mouse home ranges vary between 0.37 and 2.7 acres (0.15 and 1.1 hectares) and may overlap. *Id.* at 23. To support movements of individual jumping mice, sufficient habitat—i.e., habitat boasting the tall, dense riparian vegetation essential to the species’ life history needs—must extend approximately 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 hibernates for eight to nine months out of the year and is only active during the summer from approximately June 1st through September 30. 2023 BiOp at 16–17. Within this short time frame, it must breed, birth, raise young, and store up sufficient fat reserves to survive the next year’s hibernation period. In addition, the species only lives up to three years and has one litter annually with an average of five young. *Id.* It is likely that jumping mouse females 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 individuals, populations, and the species as a whole. Consequently, if resources are not available in a single season, populations are greatly stressed and jumping mice have lower reproductive success and over-winter survival rates. *Id.*

The jumping mouse has limited dispersal capability, and exhibits extreme site fidelity during daily activities. *Id.* Individual mice typically move less than 330 feet per day, and are unlikely to cross areas 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. Ensuring connectivity of suitable habitat along riparian corridors is important to facilitating both 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. *Id.* at 17.

The jumping mouse is endemic to New Mexico, Arizona, and a small area of southern Colorado. 79 Fed. Reg. at 33,119. The species’ 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 northern New Mexico, the Sacramento Mountains in 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. *See* 2020 SSA at ii. However, extensive habitat loss and fragmentation due to grazing pressure, water management and use, drought, and wildfire have severely reduced its population and distribution. *Id.* at iii; *see also* USFWS, Biological Opinion on Impacts to the New Mexico Meadow Jumping Mouse and Its Designated Critical Habitat from Ongoing Livestock Management on the San Miguel, San Diego, and Cebolla/San Antonio Allotments, Jemez Ranger District, Santa Fe National Forest at 14–16 (May 6, 2016) (“2016 Mouse Grazing BiOp”).

The VCNP contains primary and secondary mouse habitat, as shown on the following map:



In 2018 the NPS documented a male jumping mouse in Redondo Creek in 2018, but prior to that time no surveys inside the VCNP had been conducted. NRCA at 73. The lack of authorized livestock grazing has allowed riparian vegetation to recover to levels conducive to jumping mouse recovery in many parts of the VCNP, but trespass grazing by cattle reverses this hopeful trend.

Today, the jumping mouse occurs within eight geographic management units and in 77 current populations (18 in Colorado, 22 in New Mexico, and 37 in Arizona). *Id.* at ii. The distribution and number of jumping mouse populations have declined significantly range-wide with the majority of local extirpations occurring since the late 1980s and early 1990s. *Id.* at 81. In light of this, the USFWS has determined that the 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.” *Id.* at iii. Indeed, the USFWS has concluded that the jumping mouse is “particularly vulnerable to extinction” “from both random and nonrandom catastrophic natural or human caused events,” 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 117-21.

New Mexico Meadow Jumping Mouse Designated Critical Habitat

In 2016, the USFWS designated 13,973 acres and 169.3 miles of flowing streams, ditches, and canals as critical habitat for the jumping mouse. 81 Fed. Reg. 14,264 (March 16, 2016). It identified primary constituent elements essential for conservation of the jumping mouse as: (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.* at 14,293. The Tenth Circuit Court of Appeals recently upheld the critical habitat designation, noting that habitat conservation is “particularly important for the Jumping Mouse, which has ‘exceptionally specialized habitat requirements’ and is highly dependent on its habitat for survival.” *N. New Mexico Stockman's Ass’n v. U.S. Fish & Wildlife Serv.*, 30 F.4th 1210, 1231 (10th Cir. 2022).

The USFWS has identified primary threats to mouse habitat that may require special management considerations or protection, notably including excessive grazing pressure, water use and management, unregulated recreation, and the reduction in the distribution and abundance of beaver ponds. *Id.* The agency specifically noted that “compared to other forms of habitat loss, grazing has the greatest potential for negative impacts on the jumping mouse and riparian habitat . . . [M]ost livestock grazing is likely to be incompatible with the persistence of jumping mouse populations.” 81 Fed. Reg. at 14,275. The USFWS therefore recommended protecting occupied habitat from livestock intrusion and fencing riparian areas, especially in the Santa Fe National Forest. *Id.* at 14,293–14,294; *see also* 2016 Mouse BiOp at 23 (stating that reduced cattle utilization and improved fencing around riparian areas would “assist in the maintenance and restoration of jumping mouse habitat”).

Designated critical habitat for the jumping mouse is located just outside the VCNP to the west. These subunits include the San Antonio Creek (two current populations), the Rio Cebolla (six current populations), and the Rio de las Vacas (one current population). The USFWS considers a 100-foot buffer along a perennial stream of at least 5.6 miles as required to support multiple, resilient jumping mouse populations. 2020 SSA. When the USFWS designated critical habitat in 2016, the population along Redondo Creek on the VCNP had not yet been discovered, although there is a historical record of mouse presence at this location from the 1970s.

Primary Threats to the New Mexico Meadow Jumping Mouse

Current primary threats to the jumping mouse include small, isolated populations, grazing (particularly by livestock), water utilization, loss of beaver, wildfires, severe flooding, and habitat loss. *Id.* at 81; *see also* 79 Fed. Reg. at 33,121–22. Cattle grazing, in particular, is not

compatible with maintaining suitable mouse habitat, and even light grazing prescriptions extirpate the species in a given area. *See* Forest Service, Biological Assessment for San Diego and Cebolla/San Antonio Grazing Allotments Environmental Analysis at 36–37 (May 2020) (“2020 BA”); *see also* 2016 Mouse BiOp at 20–23 (“The jumping mouse has been and continues to be negatively affected by domestic livestock grazing . . . Effects to dense herbaceous riparian vegetation from livestock grazing and trampling can be extremely detrimental [to the jumping mouse]”). As the USFWS has concluded, without active interventions including “grazing management and water management,” existing mouse populations are “vulnerable to extirpation.” 79 Fed. Reg. at 33,122; *see also* 2016 Mouse BiOp at 20–23 (“[L]ivestock grazing has frequently resulted in the extirpation of jumping mouse populations.”).

Livestock grazing and poor water management (e.g., water diversion) result in the loss of the riparian vegetation that the mice need to survive; consequently, grazing poses a particularly significant and acute threat to the jumping mouse. *See* 2023 BiOp at 23–24; NRCA at 70, 113; 2016 Mouse BiOp at 20–23. Livestock concentrate in riparian areas due to their productivity and proximity to reliable water sources, and preferentially graze native riparian vegetation. 2023 BiOp at 24. Grazing eliminates or reduces the tall herbaceous vegetation and density that the jumping mouse relies upon for its biological functions and life history. Additionally, grazing can alter the composition and structure of the riparian habitats that are essential to the jumping mouse’s survival. *Id.* 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. *See* NRCA at 25–27.

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. *See* 2014 SSA at 89. 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. *See* 2023 BiOp at 23–24. 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. *See* 79 Fed. Reg. at 33,124, 33,129.

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. *See* 2023 BiOp at 16–17; 79 Fed. Reg. at 33,129. 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. *See* 2016 Mouse BiOp at 20–23.

At the population level, grazing has repeatedly resulted in the permanent local extirpation of jumping mouse populations. *Id.* Indeed, research has shown that the jumping mouse does not persist in areas that are subject to heavy livestock grazing pressure. *See* 79 Fed. Reg. at 33,128,

33,135. The fragmentation and isolation of jumping 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 source populations with robust numbers. *See id.*

These threats can be reduced by implementing changes in grazing practices within riparian habitat that lead to recovery of the physical or biological features required by the New Mexico meadow jumping mouse. *See id.* at 33,128 (“Importantly, the presence of a functioning livestock enclosure has been reported as the best predictor of New Mexico meadow jumping mouse occupancy in montane riparian areas.”); Mouse BiOp at 7. Protection and restoration of suitable riparian and upland habitat, particularly in areas vulnerable to the potential effects of climate change, are necessary to ensure the viability of the subspecies. USFWS, Recovery Plan for New Mexico Meadow Jumping Mouse at 7 (Jan. 2023) (“2023 RP”). Modification or removal of livestock grazing is a key step towards the jumping mouse’s conservation and recovery. *See* 2023 BiOp at 23–24; 2023 RP at 10. Indeed, the USFWS has identified “design[ing], install[ing], and maintain[ing] effective barriers or enclosures to control livestock and other incompatible grazing pressures in riparian areas and protect habitat from damage” as the primary conservation measure needed for jumping mouse conservation and recovery. 2023 RP at 10; *see also id.* at 15, 17.

Cattle on the VCNP May Impact the New Mexico Meadow Jumping Mouse

As discussed above, cattle that enter and remain on the VCNP may impact the jumping mouse in numerous ways, including but not limited to “alteration and destruction of New Mexico meadow jumping mouse habitat,” as shown by the best commercial and scientific data available. *See* 79 Fed. Reg. at 33,125 (discussing “evidence that livestock grazing and recreational activities can negatively impact the required vegetation for mouse habitat”); *see also* 2023 RP at 7–10, 15, 17, 33; 2023 BiOp at 23–24; 2016 Mouse BiOp at 1 (stating grazing will continue to have adverse effects on jumping mouse), 20–23 (“The jumping mouse has been and continues to be negatively affected by domestic livestock grazing[.]”); 81 Fed. Reg. at 14,275 (“[C]ompared to other forms of habitat loss, grazing has the greatest potential for negative impacts on the jumping mouse and riparian habitat.”). Even a few hours of livestock grazing may reduce the population abundance of jumping mice; grazing for as little as seven days in a riparian area may eliminate suitable mouse habitat altogether. 81 Fed. Reg. at 14,275; *see also* 2020 BA at 37 (herbaceous cover can be lost “very quickly” due to grazing; adverse effects to critical habitat are evident even after a “short period” of cattle use). As explained previously, trespass livestock are consistently present on the VCNP throughout the grazing season (typically in large groups), the cattle preferentially seek out riparian areas to graze, and—as the NPS has stated—livestock are present on the VCNP for an average of five days *after* their presence is reported to the NPS, and for unknown lengths of time before reporting. *See* Attachment A at 1; 2023 BA at 32 (explaining limitations of livestock logs). Trespass cattle from Forest Service allotments are thus present on the VCNP in large enough numbers and for long enough time periods to cause substantial damage to the jumping mouse and its habitat.

In light of the outsized impacts of livestock grazing on jumping mouse habitat, the USFWS has specifically stated that “[i]f a Federal agency implements, authorizes, or funds water use or livestock grazing activities that may affect the New Mexico meadow jumping mouse, then they

[sic] must enter into consultation with the [USFWS].” 79 Fed. Reg. at 33,124. The USFWS has further explained that such consultation must “analyze and determine to what degree” the jumping mouse is impacted by the grazing. *Id.* And the USFWS has committed to “work[ing] with Federal agencies . . . to ensure that any actions they fund, authorize, or carry out would not jeopardize the continued existence of the New Mexico meadow jumping mouse” and “determine whether the management of a Federal livestock permit jeopardizes the continued existence of the New Mexico meadow jumping mouse.” That is precisely what must occur here—both the Forest Service and the USFWS are legally obligated to consult on and analyze effects on the jumping mouse from trespass cattle entering and remaining on the VCNP. The agencies must further ensure that the continued issuance of grazing permits on allotments bordering the VCNP does not jeopardize the existence and recovery of the New Mexico meadow jumping mouse.

V. ESA Consultation for the Valles Caldera and Adjacent Grazing Allotments

While the Forest Service has consulted with the USFWS regarding the impacts of its grazing program on ESA-listed species, the agencies never have discussed the effects of trespass cattle incursions. The NPS very recently completed consultation on the potential impacts of its planned work to exclude and remove trespass livestock from the VCNP, but it did not consider the direct impacts of the trespass cattle’s presence in the preserve.

A. Forest Service Grazing Program Consultations

The Forest Service and the USFWS have completed some ESA Section 7 consultation related to livestock grazing on the Santa Fe National Forest but, based on information and belief, they have never considered impacts from the ongoing presence of trespass cattle on the VCNP.⁴⁵

The agencies engaged in formal consultation on impacts to the New Mexico meadow jumping mouse from grazing on three allotments, culminating in a 2016 biological opinion in which the USFWS determined that ongoing grazing on these allotments was likely to adversely affect the jumping mouse. The USFWS stated that

The action area is defined as all areas to be affected directly or indirectly by the Federal action and *not merely the immediate area involved in the action* (50 CFR section 402.02). In delineating the action area, we evaluated the farthest-reaching physical, chemical, and biotic effects of the action on the environment. For this consultation, *the action area includes the San Miguel, San Diego and Cebolla/San Antonio Allotments on the Santa Fe National Forest.*

Id. at 4 (emphasis added). The BiOp also purported to consider the indirect effects of the action, *Id.* at 20, but, while noting that the Cebolla-San Antonio allotment abutted the VCNP, the BiOp

⁴⁵ In addition to the three BiOps discussed here, the USFWS has also consulted on habitat restoration activities on the Santa Fe National Forest grazing allotments and made at least one determination regarding the grazing program’s impacts on the Mexican spotted owl. *See* Consultations Nos. 02ENNM00-2016-F-0300; 02ENNM00-2016-F-0252; and 02ENNM00-2016-I-0295, referenced in the 2018 Grazing BiOp at page 1.

did not include the preserve in its analysis or discuss the potential for any effects outside the designated allotments. *See id.*, throughout.

In the 2016 BiOp, the USFWS stated repeatedly that grazing had “serious adverse effects” on the jumping mouse. *Id.* at 20–23. It explained that reduced cattle utilization and exclusion (through improved fencing) of livestock from riparian areas would “assist in the maintenance and restoration of jumping mouse habitat,” *id.* at 23, but that the continued grazing would still likely adversely affect the species and its habitat. *Id.* at 1. Although the USFWS concluded that continued grazing on the three allotments at issue would not jeopardize the continued existence of the species, it warned that without measures to “ensure protection of riparian habitats and watersheds . . . the survival and recovery of the jumping mouse would be in peril.” *Id.* at 26. It based this conclusion on “full implementation of the project,” including increased monitoring and exclusion of livestock from riparian habitat. *Id.* at 28.

In the 2016 incidental take statement, the USFWS defined take with reference to incursions by livestock into exclosure areas, stating that reinitiation of formal consultation would be required in the event of: (1) 0–5 percent herbaceous utilization on 15 percent of any given exclosure per year; (2) 6–20 percent herbaceous utilization on 5 percent of any given exclosure per year; (3) over 20 percent herbaceous utilization on 1 acre per exclosure per year; or (4) “[m]ore than two incursions of unauthorized livestock . . . in any of the exclosures protecting occupied jumping mouse habitat.” *Id.* at 30. It further imposed multiple terms and conditions to ensure regular monitoring, compliance checks, and reporting; and required the Forest Service to work with grazing permittees to “reduce and eventually eliminate incursions” into exclosures. *Id.* at 30–32. The USFWS did not, however, discuss the issue of livestock incursions on the VCNP or their potential effect on the endangered New Mexico meadow jumping mouse.

The Forest Service has also engaged in formal consultation regarding the impacts of its ongoing grazing permit program on the endangered Jemez Mountains salamander and critical salamander habitat. This consultation culminated in the USFW’s publication of the 2018 Grazing BiOp, in which the USFWS concurred with the Forest Service’s determination that livestock grazing was “likely to adversely affect” the salamander on 19 of the 33 allotments in which the species was present, and likely to adversely affect its critical habitat on 12. *Id.* at 2. The agencies determined that grazing not likely to adversely affect the salamander on 13 of the 33 allotments and made a “no effect” determination for the remaining 21 allotments on the Forest because they contain no designated salamander critical habitat. *Id.*

For 13 of the 14 allotments abutting the VCNP, the agencies determined that grazing was likely to adversely affect the endangered salamander.⁴⁶ *Id.* at 3–4. They additionally concluded that grazing was likely to adversely affect the salamander’s critical habitat on seven of these allotments. *Id.*

The USFWS concluded that the implementation of ongoing term grazing permits on the Jemez Mountains District of the Santa Fe National Forest, as proposed in the 2018 BA, was not likely

⁴⁶ The 14th—the Recreation allotment—received a “no effect” determination because no grazing was permitted there. *Id.* at 4.

jeopardize the continued existence of the Jemez Mountains salamander. *Id.* at 32-33. In its incidental take statement, the USFWS measured take with reference to cattle utilization rather than a specific numerical value of individual salamanders. *Id.* at 34. To comply with the terms of the BiOp and ITS, the Forest Service must limit average use by cattle to (1) up to light to moderate use (approximately 35% forage utilization) averaged across all allotments, and (2) up to moderate use (approximately 50% forage utilization) within any one allotment. *Id.* More intensive livestock use would exceed the authorized level of take and trigger reinitiation of formal consultation on the grazing program. *Id.*

Based on information and belief, livestock utilization has exceeded authorized limits as set forth in the 2018 BiOp on at least one of the grazing allotments abutting the VCNP, resulting in unlawful take of the Jemez Mountains salamander.

As with its analysis of the jumping mouse, the USFWS defined the action area as

all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action (50 CFR § 402.02). In delineating the action area, we evaluated the farthest reaching physical, chemical, and biotic effects of the action on the environment. For the proposed action, the action area includes all grazed areas on the Jemez Mountains Ranger Districts of the Santa Fe National Forest . . . The action area may also extend beyond the allotment boundaries where livestock trail to and from allotments, as well as areas downstream of the project area where water quality and quantity may be affected by the proposed action.

Id. at 18. It did not, however, discuss any impacts on the VCNP or from trespass livestock more generally, instead restricting its analysis to effects within the Santa Fe National Forest.

In 2020, the Forest Service revisited the impacts of grazing on the San Diego and Cebolla-San Antonio allotments on the Mexican spotted owl, Jemez Mountains salamander, New Mexico meadow jumping mouse, and their respective critical habitats.⁴⁷ 2020 BA. Based on its assumptions that “[t]he implementation of the proposed action would occur as written,” and “[f]ences and infrastructure would be built, regularly maintained and would perform as intended,” *id.* at 9, the Forest Service determined that continued grazing on the relevant allotments may affect, but was unlikely to adversely affect salamander critical habitat or the owl and its critical habitat. *Id.* at 52. The grazing was, however, likely to adversely impact the salamander, jumping mouse, and mouse critical habitat—indeed, with regards to the jumping mouse, the Forest Service stated that “[b]ased upon the impacts to the species and its habitat associated with cattle grazing, it does not appear that cattle grazing is compatible with maintaining suitable mouse habitat. It is unclear whether a ‘light’ grazing prescription can allow the species to persist.” *Id.* The Forest Service did not address the (by then well-documented) issue of grazing permittees’ livestock trespassing on the VCNP. *See id.*, throughout.

⁴⁷ In 2023, the Cebolla-San Antonio allotment was the second largest source of identified trespass cattle on the VCNP. Attachment A at 2.

The USFWS concurred in the Forest Service’s effects determinations. USFWS, Concurrence Letter for the San Diego and Cebolla/San Antonio Grazing Allotments Environmental Analysis Project at 3–4 (Dec. 21, 2020). The USFWS recommended “[r]egular coordination with the [USFWS] on future monitoring methods and implementation ... for the duration of this project in order to protect these species and incorporate new information.” Biological Opinion for Cebolla/San Antonio and San Diego Grazing Allotments, Cons. No. 02ENNM00-2018-F-0550, at 12 (Dec. 21, 2020) (“2020 BiOp”). It also identified several mandatory terms and conditions for the salamander and jumping mouse, including “[a]ctively check fencing when livestock are in grazing or holding pastures ... If fences are damaged, they shall be immediately repaired. If any livestock occupy these closed areas where they are not authorized to graze, they will be immediately removed.” *Id.* at 36. The USFWS did not, however, discuss the impact of livestock trespassing on the VCNP. *See id.* at 14 (defining effects-analysis area as “the total area of the San Diego and Cebolla/San Antonio Allotments”).

In the 2020 BiOp and ITS, the USFWS once again defined authorized take limits for the jumping mouse based on levels of livestock grazing in riparian areas within and outside of exclosures. *See id.* at 34. Based on information and belief, grazing utilization has exceeded the amount authorized by the ITS in at least one riparian exclosure, resulting in unlawful take of the New Mexico meadow jumping mouse.⁴⁸ Authorized take for the salamander was similarly pegged to livestock utilization of upland vegetation within critical habitat, *see* 2020 BiOp at 35; based on information and belief, grazing utilization in salamander critical habitat on the Cebolla-San Antonio has exceeded the limits set forth in the ITS, resulting in unlawful take of the Jemez Mountains salamander.

Based on information and belief, none of the ESA consultations completed to date by the Forest Service and USFWS (including, but not limited to the ESA documents described above) considered the effects of livestock incursions on the neighboring VCNP. The Forest Service is well aware of the ongoing problem, both independently and through communications with the Noticing Parties. *See supra* at pp. 9–14. As discussed in the following section, the USFWS is also well aware of the issue and of the potential impacts to ESA-listed species from the pervasive incursion of trespass cattle onto the VCNP. Additionally, the Forest Service has exceeded the authorized amount of incidental take on multiple grazing allotments, resulting in the unlawful take of the Jemez Mountains salamander and the New Mexico meadow jumping mouse and necessitating formal reconsultation.

⁴⁸ Attachment N, New Mexico meadow jumping mouse surveys on the Cebolla-San Antonio allotment, excerpted from FOIA documents obtained in 2021 by Caldera Action from the Forest Service. The documents obtained through this FOIA request all pertain to the impacts of trespass cattle on the VCNP and, as such, constitute new information regarding previously unconsidered effects of the Forest Service’s grazing program. Further pertinent documents from this request have therefore been electronically attached and provided on a USB drive as Attachment S. Moreover, because the records in question were obtained from the Forest Service, it is already in custody of the documents and aware of their existence and content. The Noticing Parties include these documents in support of the allegations made in this Notice.

Based on this new information regarding trespass cattle and on the exceedance of authorized take, both agencies have a legal duty to reinstate formal consultation on the Forest Service's grazing program.

B. NPS Livestock Removal and Exclusion Consultation

Subsequent to receiving the Noticing Parties' 2022 NOI, the NPS requested formal consultation with the USFWS regarding the impacts of its proposed livestock removal and exclusion activities on VCNP. *See* 2023 BiOP at 8–9; Joint Response to 2022 NOI at 5. The NPS 2023 BA explained that

Trespass of domestic livestock (cattle) has been observed along the northern, western, and southern boundaries of the park, with counts of 50–200 cattle observed at the same time utilizing park resources during the summer grazing season. These cattle are owned by private individuals who are permitted to graze by the USDA Forest Service on adjacent grazing allotments of the Santa Fe National Forest (SFNF). Cattle may enter the park from SFNF lands through breaks in the boundary fence between the SFNF and the park, which have resulted from damage due to past wildfires, falling trees, and deliberate fence-cutting by unknown individuals. These trespass cattle move from the north, west, and south boundaries of the park downslope into the lower-elevation valleys, and congregate in wetlands and along streams where forage is abundant. Continued cattle grazing may impact threatened and endangered species and their habitat.

2023 BA at 6.

The NPS proposed to “round up and remove trespass livestock, while repairing the boundary fences to prevent/reduce further incursions,” *id.*, although it noted that it lacked the resources to patrol the VCNP or to employ wranglers to remove the cattle, and it stated that livestock would continue to enter the preserve “frequently” until the fences were repaired. *Id.* at 12. The NPS determined that these activities were likely to adversely affect the endangered Jemez Mountains salamander, threatened Mexican spotted owl, and endangered New Mexico meadow jumping mouse. *Id.* at 7. The agency explained that the proposed actions, if implemented, would benefit the listed species by reducing cattle incursions and the adverse effects thereof. However, as the fences are in need of frequent repair due both to natural events, such as wildfires and fallen trees, and to intentional destruction and removal by humans, the fencing project will never actually be “complete.”⁴⁹ Thus, the NPS also warned that “as long as grazing continues adjacent to the park it is unlikely that all livestock trespass will be eliminated.” 2023 BA at 35.

The USFWS concurred with the “likely to adversely affect” determination for these listed species. 2023 BiOP at 2. It also agreed that the removal and exclusion activities were not likely to adversely affect the species' respective critical habitats, but cautioned that reconsultation might be required if new information indicated a different or greater impact to habitat than anticipated. *Id.*

⁴⁹ *See* Attachment B at 20.

The NPS consultation did not directly address the impacts of trespass cattle on ESA-listed species and critical habitat. Because the cattle at issue enter the VCNP from adjoining allotments on the Santa Fe National Forest, their presence on the VCNP is not the result of NPS action. Instead, the trespass livestock's impacts are a foreseeable and well-documented effect of the Forest Service's continued issuance of grazing permits for allotments abutting the preserve.

The ongoing and widespread issue of trespass livestock constitutes both a subsequent modification of the grazing program as analyzed in previous consultations and new information revealing a previously unanalyzed effect to listed species and their critical habitats. The Forest Service and the USFWS must therefore reconsult on the Santa Fe National Forest's grazing program. As neither agency has reinitiated formal consultation as required, both are in continuing violation of their legal obligations under the ESA.

VI. NEPA Analysis of the Forest Service Grazing Program

In accordance with its obligations under NEPA, the Forest Service has also analyzed the environmental impacts of its grazing programs under a series of EAs, most of them completed well over a decade ago. In none of the publicly available grazing EAs did the Forest Service consider the impacts of its grazing program on the VCNP, although the presence of and damage caused by trespass cattle on the preserve constitute foreseeable and, at this point, well-known indirect and cumulative effects of grazing on the adjoining allotments.

For example, in 2006 the Forest Service prepared an EA for its proposal to continue issuing grazing permits for four allotments on the Jemez Ranger District, including the Alamo and Del Norte, which border the VCNP. U.S. Forest Service, Alamo, Bear Springs, Bland, and Del Norte Range Allotment Analysis at 10 (May 30, 2006) ("2006 Grazing EA"). The agency did briefly discuss the possibility of and impacts from trespass cattle in the 2006 Grazing EA, but only *within* the allotments at issue. *See id.* at 37, 45, 46, 77. There was no acknowledgement or analysis of the potential impacts of livestock entering the VCNP. *See id.*, throughout.

The Forest Service prepared a similar EA for its proposal to continue issuing grazing permits on the Polvadera, Chicoma, Mesa del Medio, and Youngsville allotments, all of which but Polvadera border the VCNP.⁵⁰ U.S. Forest Service, Environmental Assessment for the Cerro Pedernal Allotments at 3, 6, 8, 9 (July 2009) ("2009 Grazing EA"). For the three allotments abutting the VCNP, the Forest Service proposed to issue a total of 31 grazing permits for a combined 1,050 head of cattle. *Id.* at 3. The 2009 Grazing EA did not discuss the potential for livestock to leave the allotments, nor the potential environmental impacts of livestock trespassing on the VCNP. *See id.*, throughout. The cumulative effects analysis for soils, water, and riparian areas extended beyond the boundaries of the four allotments, but it did not include the VCNP despite purporting to "represent[] the extent in which permitted livestock grazing and other Forest Service activities result in modification of vegetation and soil properties that would cause impacts to these watersheds." *Id.* at 45 (describing analysis area). The analysis was otherwise

⁵⁰ Trespass cattle from the Chicoma and Mesa del Medio allotments were identified on the VCNP in 2023. Attachment A at 2.

largely restricted to the allotments themselves. The Forest Service thus failed to consider the impacts of trespass cattle to, *inter alia*, soil, invasive species, watershed condition and riparian areas, water quality, wildlife and wildlife habitat, vegetation, migratory birds, heritage/cultural resource sites, and climate/greenhouse gas emissions, although it described adverse effects continued grazing—even with mitigating measures in place—would have on these resource areas within the allotments. *See id.*, throughout.

The 2009 Grazing EA stated that “[ESA-]listed, proposed, threatened or endangered species and habitats are limited or do not occur on the allotments,” concluding that no direct, indirect, or cumulative effects to Mexican spotted owls—the only species it considered—were anticipated. *Id.* at 56–57. In its cursory discussion of cumulative impacts to protected species, the Forest Service stated that

The geographic area considered for cumulative effects [] on threatened, endangered and sensitive species for the four grazing allotments is the allotment boundaries. This cumulative effects area was selected because it represents the extent in which permitted livestock grazing and other Forest Service activities result in modification of threatened, endangered and sensitive species or their habitat, and direct or indirect effects on threatened, endangered and sensitive species would occur.

Id. at 57. It thus concluded that the cumulative impacts of grazing on the Polvadera, Chicoma, Mesa del Medio, and Youngsville allotments “would be an additional temporary disturbance” but, in the long run, would be insignificant. *Id.*

Similarly, when the Forest Service analyzed continued grazing on the Las Conchas allotment in 2010, it again failed to consider effects on ESA-protected species—or any other environmental impacts—on the VCNP, although it did note the importance of monitoring and maintaining fences and other range infrastructure. *Id.* at 12–13. U.S. Forest Service, Proposed Action, and Alternatives for 30-Day Comment for the Las Conchas Grazing Allotment (August 2010).

The Forest Service’s most recent environmental analysis of its continued issuance of grazing permits for allotments abutting the VCNP was completed in 2021. *See* U.S. Forest Service, Cebolla-San Antonio and San Diego Range Allotments Environmental Assessment (May 2021) (“2021 Grazing EA”). The discussion was once again limited to impacts of livestock within the allotments,⁵¹ and the agency once again failed to acknowledge the (by now well-known) issue of trespass cattle on the VCNP. *See id.*, throughout. Indeed, in its analysis of potential impacts to

⁵¹ In the EA’s only allusion to the potential for livestock to leave permitted grazing areas, the Forest Service once again limited its analysis to impacts within the Santa Fe National Forest, stating that “[c]ompliance on the allotment has not been much of an issue recently. Most of the infrastructure needed is in place and members of the grazing association have been proactive so that any problems are addressed promptly when livestock do trail into unauthorized areas. There are areas where fences are lacking and natural barriers are not sufficient to stop livestock, specifically on the . . . west side. Livestock do manage to find areas that are passable and do occasionally travel down to the Riparian Areas.” *Id.* at 14 (emphasis added).

“important bird areas,” the Forest Service specifically stated that “[a]lthough the Valles Caldera National Preserve is adjacent to the Cebolla/San Antonio allotment, no impacts to this IBA is [sic] anticipated as no actions would occur there.” *Id.* at 40.⁵²

In considering potential cumulative effects from continued grazing on the allotments in question, the Forest Service again limited its analysis to the “planning area scale or . . . the Cebolla/San Antonio and San Diego allotment boundaries scale. *Since neither of the alternatives would impact areas outside of these administrative boundaries, this analysis boundary is appropriate.*” *Id.* at 33, 36, 41, 42, 45 (emphasis added); *see also id.* at 30–33. The agency thus failed to account for the impact of trespass livestock on, *inter alia*, soils, invasive species, watershed condition and riparian areas, water quality, wildlife and wildlife habitat,⁵³ vegetation, migratory birds, heritage/cultural resource sites, and climate/greenhouse gas emissions,⁵⁴ although it described adverse effects continued grazing—even with monitoring, livestock exclusion from sensitive areas, and other mitigation measures—would have on these resource areas within the allotments.

From information and belief, the Forest Service never has analyzed the impacts of its permittees’ livestock trespassing from allotments on the Santa Fe National Forest to the neighboring VCNP, although the issue of trespass cattle has been well-documented and known to the agency for at least seven years. The ongoing incursions by these cattle, and the consequent environmental impacts thereof, constitute significant new information and necessitate new or supplemental NEPA analysis of the Forest Service’s grazing permit program. The Forest Service’s continued issuance of grazing permits, AOIs, and AMPs in the absence of such analysis is thus a violation of NEPA.

ESA VIOLATIONS

The USFWS and the Forest Service have violated and continue to violate Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, by failing to reinitiate and complete consultation on the Forest Service’s grazing program.

As explained above, the ongoing, multi-year presence of trespass livestock on the VCNP constitutes new information revealing effects of the grazing program that may affect listed species—namely, the Jemez Mountains salamander, Mexican spotted owl, and New Mexico meadow jumping mouse—in a manner *and* to an extent not previously considered in the agencies’ previous consultation. *See* 50 C.F.R. § 402.16(a)(2). The Grazing BiOps acknowledged that grazing has significant adverse impacts to these listed species, particularly

⁵² The EA pagination contains a discontinuity such that page 44 is followed by a second page 33.

⁵³ The EA refers to a BA prepared for the proposed action, *id.* at 36, and concludes that continued grazing was likely to adversely affect the Jemez Mountains salamander and New Mexico meadow jumping mouse, but its analysis area was limited to the Cebolla-San Antonio and San Diego allotments on the Santa Fe National Forest. *See id.* at 36–33 (pagination error in original).

⁵⁴ Indeed, the 2021 Grazing EA did not discuss climate impacts at all, which is itself a serious omission and violation of NEPA.

when livestock are permitted to graze without restriction or to enter the species' habitat. The 2016 Grazing BiOp for the jumping mouse, in particular, linked intrusion of cattle into riparian habitat to the extirpation of mouse populations, and warned that failure to curtail such violations would jeopardize the continued existence of the species. The Grazing BiOps imposed restrictions of livestock grazing intensity and access to sensitive riparian habitat; their analysis of the grazing program's impacts was based on the assumption that these mandatory terms and conditions would be followed. Yet neither BiOp considered the impact of allowing cattle to repeatedly trespass onto the theoretically protected VCNP, where livestock were able to graze without restrictions or monitoring and could actively seek out and damage riparian zones. These effects were not anticipated in the Grazing BiOps, which considered only the impacts of rigorously monitored and controlled grazing confined to the designated Forest Service allotments. Grazing in a larger area *without* monitoring, cattle rotation, herd-size limitations, or effective fencing creates different and greater impacts than those contemplated in the Grazing BiOps. The agencies must reinitiate consultation on the grazing program due to this new information. *See id.*

The Forest Service's continued failure to adequately control livestock incursions onto the VCNP, and their permittees' failure to promptly remove their trespass cattle, also constitute a subsequent modification of the grazing program in a manner that causes an effect to listed species and critical habitat that was not considered in the Grazing BiOps. *See* 50 C.F.R. § 402.16(a)(3). As described in the BAs on which the Grazing BiOps were based, the Forest Service grazing program allows livestock to graze only on specific, enclosed allotments on the Santa Fe National Forest—not outside the allotments. The Forest Service did not contemplate a grazing program that allowed hundreds or thousands of cattle to enter and remain on the adjoining VCNP for days or weeks before removal, nor the impacts of their eventual removal (which the USFWS has already determined is itself likely to adversely affect listed species). But the Forest Service has permitted this practice to continue for at least six years, constituting a significant modification to its grazing program as described and analyzed in the Grazing BiOps. For this reason, too, the agencies are obligated to reinitiate consultation on the grazing program. *See id.*

Moreover, the Forest Service has exceeded the authorized level of incidental take on multiple allotments within the Santa Fe National Forest. On all allotments bordering the VCNP, average cattle use is limited to 35 percent forage utilization across all units containing Jemez Mountains salamander critical habitat and to 50 percent utilization on any one unit containing critical habitat. 2018 BiOp at 34. On information and belief, these limits have been exceeded on at least one allotment bordering the VCNP, causing unauthorized take of salamanders and necessitating reconsultation with the USFWS on the impacts of the Forest Service's grazing program. *See* 50 C.F.R. § 402.16(a)(1). On the Cebolla-San Antonio allotment, authorized take of jumping mice was pegged to livestock incursions and use of herbaceous vegetation in riparian exclosures. *See* 2020 BiOp at 34–35. Surveys completed the next year indicate heavy grazing in one or more riparian exclosures on the Cebolla-San Antonio allotment, exceeding the level of take authorized in the 2020 ITS, causing unauthorized take of jumping mice, and triggering reconsultation on the impacts of the Forest Service's grazing program.⁵⁵

⁵⁵ *See* Attachment N.

Despite knowledge and repeated notice of the trespass livestock and the resultant harms to threatened and endangered species and designated critical habitat, the Forest Service has repeatedly failed to promptly remove livestock from the VCNP. Despite knowledge and repeated notice of the trespass livestock and the resultant harms to threatened and endangered species and designated critical habitat, the Forest Service has failed to maintain fencing to prevent livestock incursions on the VCNP. By continuing to permit grazing on allotments adjoining the VCNP, the Forest Service authorized activities that adversely affect and may jeopardize the continued existence of threatened and endangered species without the requisite ESA consultation.

The agencies' failure to reinitiate and complete consultation on these actions violates the procedural consultation requirements of ESA section 7. The Forest Service's actions in continuing to authorize grazing on allotments directly adjacent to the VCNP also violates its substantive duty to ensure that its actions do not jeopardize any threatened or endangered species or adversely modify any designated critical habitat. These are significant violations under the ESA. Such actions constitute an "irreversible and irretrievable commitment of resources" and warrant an injunction to halt the ongoing damage to imperiled species and prevent jeopardy to their continued existence. *See* 16 U.S.C. §1536(d).

Based on information and belief, the Forest Service has also violated Section 9 of the ESA by authorizing activities that have resulted in the take of ESA-listed species without a valid incidental take statement. *Id.* § 1538(a). By issuing grazing permits for cattle that trespass on the VCNP in substantial numbers, the Forest Service has caused and continues to cause jeopardy, adverse modification of critical habitat, and illegal take of the Jemez Mountains salamander, Mexican spotted owl, and New Mexico meadow jumping mouse. These actions, too, constitute a significant legal violation and warrant an injunction until such time as the Forest Service complies with all provisions of the ESA.

NEPA VIOLATIONS

In addition to its multiple ESA violations, the Forest Service has also violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, by failing to analyze the environmental impact of cattle from the Santa Fe National Forest trespassing on the VCNP. This well-documented, multi-year issue constitutes "significant new circumstances or information relevant to environmental concerns and bearing on" the Forest Service's ongoing grazing program. 40 C.F.R. § 1502.9(d)(1)(ii). The Forest Service's failure to prevent livestock incursions on the VCNP also constitutes a "substantial change[]" from its grazing program as described in the Grazing EAs that is "relevant to environmental concerns." *Id.* § 1502.9(d)(1)(i). The grazing program itself is an ongoing major federal action, and the Forest Service still has "proposed actions" left to take: it must issue grazing permits and AMPs for each allotment, and before each year's grazing season it must issue an AOI for each of its permits. The Forest Service is therefore obligated to complete a NEPA analysis of the trespass cattle and their impacts before it further implements its grazing program on allotments bordering the VCNP. *See Id.* § 1502.9(d)(1); *Boody*, 468 F.3d at 560. An injunction is therefore warranted until such time as the Forest Service fully complies with NEPA.

CONCLUSION

By failing to reinitiate consultation on the Santa Fe National Forest's grazing program, the Forest Service and USFWS have violated and remain in ongoing violation of ESA Section 7. By continuing to issue grazing permits for allotments adjoining the VCNP, the Forest Service has also violated ESA Sections 7 and 9. And by failing to properly analyze significant new information concerning the environmental impacts of its grazing program, the Forest Service has violated its obligations under NEPA. The agencies have been aware of these issues for several years, but have failed to remedy these violations and comply with federal law—despite multiple good-faith attempts by the Noticing Parties to reach a collaborative solution with the agencies.

At the conclusion of the 60-day notice period initiated by this letter, the Noticing Parties intend to file a lawsuit against the U.S. Forest Service, the U.S. Fish and Wildlife Service, and the officers and supervisors of the federal agencies named herein under the citizen suit provisions of the Endangered Species Act, 16 U.S.C. § 1540. The Noticing Parties intend to bring additional claims against the Forest Service and its officers and supervisors under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* The Noticing Parties will seek declaratory and injunctive relief necessary to prevent further ESA and NEPA violations.

Sincerely,

s/Megan Backsen
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s/ Erin Hogan-Freemole
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ATTACHMENTS

- A.** Bob Parmenter, National Park Service, Presentation to Noticing Parties and U.S. Forest Service (Sept. 14, 2023): Summary of Valles Caldera National Preserve trespass cattle activities, May 1–Sept. 13, 2023
- B.** Excerpts from Freedom of Information Act Records, Produced by National Park Service in Response to Dec. 14, 2020 Request by Western Watersheds Project
- C.** Excerpts from Freedom of Information Act Records, Produced by U.S. Forest Service in Response to 2019 Request by Caldera Action
- D.** 2018 Public Lands Newsletter
- E.** Excerpts from Freedom of Information Act Records Produced by U.S. Forest Service in Response to Dec. 14, 2020 Request by Western Watersheds Project
- F.** Email from VCNP Superintendent Jorge Silva-Banuelos to Western Watersheds Project (Nov. 5, 2020)
- G.** Letter from Western Watersheds Project to U.S. Forest Service (Dec. 16, 2020)
- H.** Letter from U.S. Forest Service to Western Watersheds Project (Feb. 1, 2021)
- I.** Letter from Caldera Action to National Park Service (May 28, 2021)
- J.** Letter from Caldera Action to National Park Service (Oct. 5, 2021)
- K.** Email from Tom Ribe, Executive Director of Caldera Action, to National Park Service (July 6, 2022)
- L.** Email to National Park Service (Redacted) (Aug. 18, 2022)
- M.** 2022 Reports of Trespass Cattle Observations
- N.** U.S. Forest Service, Results of New Mexico Meadow Jumping Mouse Surveys on Cebolla-San Antonio Grazing Allotment, Produced by U.S. Forest Service in Response to 2021 Freedom of Information Act Request by Caldera Action
- O.** Freedom of Information Act Records, Produced by National Park Service in Response to Dec. 14, 2020 Request by Western Watersheds Project*
- P.** Freedom of Information Act Records, Produced by U.S. Forest Service in Response to 2019 Request by Caldera Action*

- Q.** Freedom of Information Act Records, Produced by U.S. Forest Service in Response to Dec. 14, 2020 Request by Western Watersheds Project*
- R.** 2022 Reports of Trespass Cattle Observations with Supporting Photographs*
- S.** Freedom of Information Act Records, Produced by U.S. Forest Service in Response to 2021 Request by Caldera Action*
- T.** Map of Threatened and Endangered Species' Critical Habitat, Santa Fe National Forest Grazing Allotments, and Reported Trespass Cattle Locations*

* Submitted as electronic attachment and on USB drive.