

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**SAN DIEGO CATTLEMEN'S COOPERATIVE ASSOCIATION,  
OTERO COUNTY CATTLEMAN'S ASSOCIATION,  
CHEVY L RANCH, ORLANDO LUCERO, FRED LUCERO  
GABRIEL LUCERO, ERNIE TORREZ RANCH,  
CANDIDO TRUJILLO, HERNANDEZ SONS & DAUGHTERS, LLC,  
PABLO ARAGO CATTLE CO., LLC, LUCERO'S RANCH,  
SAN MIGUEL RANCH, BRANDON TRUJILLO, HENRY TRUJILLO,  
RAMON TRUJILLO, ROBERT TRUJILLO,  
VALENTIN L. MCCOY RANCH, WILLIE TRUJILLO,  
BRANDON TRUJILLO, DAVID SANCHEZ,  
RICHARD TRUJILLO, MERSHON LIVESTOCK,  
HOLCOMB FAMILY RANCH LLC  
EUGENE AND SONS RANCH, GURULE LAND AND  
CATTLE COMPANY, SACRAMENTO GRAZING ASSOCIATION  
PROTECT AMERICANS NOW, NEW MEXICO FARM AND  
LIVESTOCK BUREAU, SANDOVAL COUNTY FARM AND  
LIVESTOCK BUREAU, NEW MEXICO CATTLE GROWERS'  
ASSOC., NORTHERN NEW MEXICO PROTECTS LAND WATER  
AND RIGHTS, LINCOLN NATIONAL FOREST ALLOTMENT  
OWNERS' ASSOCIATION,**

**Plaintiffs,**

**v.**

**Civil Case No. \_\_\_\_\_**

**TOM VILSACK, Secretary, U.S. Dept. of Agriculture,  
SANDY JEWELL, Secretary, U.S. Dept. of Interior,  
CALVIN JOYNER, U.S. Forest Service, Southwest Regional Forester,  
BENJAMIN TUGGLE, U.S. Fish and Wildlife Service,  
Southwest Regional Director, WALLY MURPHY, USFWS  
Ecological Service Field Office Supervisor, ERIC HEIN, USFWS  
Endangered Species Biologist, MARIA GARCIA, Santa Fe National  
Forest Supervisor, TRAVIS MOSELY, Lincoln National Forest  
Supervisor, ERIK TAYLOR, Jemez District Ranger, ALLAN SETZER,  
Cuba District Ranger, JAMES DURAN, Sacramento District Ranger,**

**Defendants,**

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**I. INTRODUCTION**

1. Plaintiffs San Diego Cattlemen’s Cooperative Association and the above captioned Plaintiff parties bring this action for declaratory and injunctive relief against Federal Defendants Tom Vilsack and the above captioned Defendant parties for violations of the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.* and the Administrative Procedures Act, 5 U.S.C. §706.

2. The Plaintiffs or the respective Members of their Organizations either hold grazing rights on allotments located in the Santa Fe National Forest and the Lincoln National Forest or are organizations designed and created for advocacy to prevent the loss of important communities due to the loss of cultural practices or private property rights because of the misuse of government authority or laws.

3. The Defendants have taken actions or propose to take actions, or have collaborated in actions, as set forth in this Complaint, that will have a direct impact to the Plaintiffs’ rights in the Santa Fe National Forest and in the Lincoln National Forest.

4. Prior to and following the listing, on June 10, 2014, of the New Mexico meadow jumping mouse as an endangered species, the Defendants have taken actions and proposed actions that they claim are necessary to protect the “occupied habitat” of the New Mexico meadow jumping mouse. These actions include closing riparian areas in the Lincoln National Forest on which certain of the Plaintiffs have the right to graze their cattle and proposing to erect fencing on riparian areas in the Santa Fe National Forest on which other Plaintiffs have grazing rights.

5. Defendants have publically admitted that prior to taking action or proposing action that they made no scientific inquiry or assessment of habitat or range conditions at the proposed locations for removing cattle grazing. Defendants cannot affirmatively state that they have done the evaluation of the sites to conclude that action is necessary to protect habitat regardless of whether such action is legally proper or required.

6. The Defendants claim that, once the New Mexico meadow jumping mouse was listed as an endangered species, the Forest Service was under an affirmative duty to protect the occupied habitat of the mouse, even though critical habitat has not been designated. The Forest Service has not identified any statutory or regulatory provisions that impose such an affirmative duty.

7. In undertaking the actions in the Santa Fe National Forest and in the Lincoln National Forest, the Forest Service has failed to undertake environmental reviews required by NEPA. The Forest Service has set forth various rationales for their failure to comply with NEPA, none of which support their failure to undertake a NEPA analysis.

8. The sole purpose of the actions taken or proposed to be taken by the Forest Service is to prevent the grazing of cattle in areas that the Forest Service believes to be “occupied habitat” of the New Mexico meadow jumping mouse. The Forest Service claims that cattle grazing has the potential to jeopardize the species. However, the Forest Service is relying on flawed studies that do not represent the best available science. In addition, the Forest Service has ignored the fact that the range management practices set forth in the grazing permits are protective of the riparian areas at issue and there is no evidence of impacts from cattle grazing on these areas.

## **II. JURISDICTION AND VENUE**

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331. Venue is proper pursuant to 28 U.S.C. §1391(e).

## **III. PARTIES**

10. Plaintiff San Diego Cattlemen's Cooperative Association holds an association term grazing permit on the San Diego Allotment located in the Jemez Ranger District, Santa Fe National Forest in the southwest part of the Jemez Mountains in New Mexico. The permit, issued by the United States Forest Service, allows the year-round grazing on the San Diego Allotment and includes specific grazing practices that the members of the Association must follow. The San Diego Allotment includes land within the former Cañon de San Diego Land Grant, which was awarded to Francisco and Antonio Garcia de Noriega and 18 other Spanish settlers in the area in 1798. Sheep herding and cattle grazing were important economic activities within the Land Grant. Over the years, portions of the Land Grant were sold to private individuals. In 1904, the last of the original grantees sold their land to the Jemez Land Company. Local families kept their grazing rights and continued to graze sheep, cattle and horses on the land. The Forest Service purchased the land grant in 1965 and, due to poor conditions, livestock were removed from the area between 1967 and 1972. When cattle were permitted back into the area, it was at an 80 percent reduction from historic grazing levels. Sheep and horses are no longer permitted to graze on the allotment. Approximately 264 cattle (252 cows and 12 bulls) graze the allotment during the summer months and 128 (116 cows and 12 bulls) graze in the winter months. The San Diego Cattlemen's Cooperative Association is comprised of various members and family entities whose families have engaged in ranching on the Santa Fe National Forest for multiple generations. The San Diego Allotment includes riparian

areas along the Lower Rio Cebolla that are used by the members of the San Diego Cattlemen's Cooperative Association in May and again in October. The actions proposed by the Defendants, the stated purpose of which is to prevent lawful grazing of cattle in riparian areas of the Lower Rio Cebolla, will interfere with the rights of the San Diego Cattlemen's Cooperative Association and its members to legally and lawfully graze cattle pursuant to the grazing permit issued by the United States Forest Service. If the actions proposed by the Forest Service are taken on the Lower Rio Cebolla, the San Diego Cattlemen's Cooperative Association and its members will be directly and irreparably harmed. They have a particularized interest in protecting their grazing rights under the association grazing permit.

11. Plaintiff San Diego Cattlemen's Cooperative Association has the following Plaintiffs as members Chevy L Ranch, Orlando Lucero, Fred Lucero, Gabriel Lucero, Candido Trujillo, Brandon Trujillo, Henry Trujillo, Ramon Trujillo, Robert Trujillo, Willie Trujillo, David Sanchez, Ivan Trujillo; and Hernandez Sons & Daughters, LLC, Pablo Aragon Cattle Company, Lucero's Ranch, San Miguel Ranch, Valentin L. McCoy Ranch, Ernie Torrez Ranch, Eugene and Sons Ranch, and Gurule Land and Cattle Company the following Plaintiffs are also allotment owners on the Santa Fe National Forest all of which graze cattle on the Santa Fe National Forest pursuant to the grazing permits issued by the United States Forest Service. Each of these parties will be negatively impacted and irreparably harmed by the proposed actions of the United States Forest Service done in collaboration with the United States Fish and Wildlife Service. These individual Plaintiffs have particularized interest in protecting the allotment rights to water and grazing recognized in the association grazing permit. Declarations from each of these individual Plaintiffs are attached hereto. *See Declarations attached hereto as Exhibits A thru S.*

12. Plaintiff Sacramento Grazing Association is an allotment owner on the Lincoln National Forest with rights for cattle to graze and for appropriation of water and holds a term grazing permit as result of those allotment rights located in the Sacramento Ranger District, Lincoln National Forest in the southern part of the Sacramento Mountains in New Mexico. The permit, issued by the United States Forest Service, allows the year-round grazing on the winter allotment, grazing between May 1<sup>st</sup> and November 1<sup>st</sup> on the summer allotment and includes specific grazing practices that the members of the Association must follow. Approximately 412 cattle graze the allotments during the year. The Sacramento Grazing Association is comprised of members of the Goss family who have engaged in ranching for multiple generations. The Sacramento Grazing Association allotments includes areas designated as riparian by the USFS in the Wills Canyon area. The actions taken by the Defendants, the stated purpose of which is to prevent lawful grazing of cattle in riparian areas of the Wills Canyon, Mauldin Springs and which includes building an electric fence around the privately owned water sources of the Sacramento Grazing Association,<sup>1</sup> will interfere with the rights of the Sacramento Grazing Association and its members to legally and lawfully graze cattle pursuant to the grazing permit issued by the United States Forest Service in accordance with the allotment rights owned by the Sacramento Grazing Association. Further, the electric fence coupled with the threats of fines and jail time will directly interfere with impending needs to access the pens enclosed in the electric fence in order to engage in herd management and animal husbandry. If the actions taken by the Forest Service are allowed to continue, Sacramento Grazing Association will be directly and irreparably harmed. They have a particularized interest in protecting their grazing and water

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<sup>1</sup> The water rights described and interfered with are already the subject of another pending action in the Federal Court of Claims, Case No. 04-786L.

rights associated with the ownership of their allotment. *See Declarations attached hereto as Exhibit T.*

13. Plaintiff Holcomb Family Ranch, LLC is an allotment owner on the Lincoln National Forest with rights for cattle to graze and for appropriation of water and holds a term grazing permit as result of those allotment rights located in the Sacramento Ranger District, Lincoln National Forest in the southern part of the Sacramento Mountains in New Mexico. The permit, issued by the United States Forest Service, allows for grazing between May 1<sup>st</sup> and October 31<sup>st</sup> on the forest allotment and includes specific grazing practices that the Holcomb Family Ranch, LLC must follow. Approximately 335 cattle graze the allotments during the summer. The Holcomb Family Ranch, LLC is a family entity whose members have engaged in ranching for multiple generations. The Holcomb Family Ranch, LLC allotment includes areas designated as riparian by the USFS in the Agua Chiquita Springs area. The actions taken by the Defendants, the stated purpose of which is to prevent lawful grazing of cattle in riparian areas of the Agua Chiquita springs area and which includes building new permanent steel pipe and steel cable fencing around the privately owned water sources of the Holcomb Family Ranch, LLC will interfere with the rights of the Holcomb Family Ranch, LLC and its members to legally and lawfully graze cattle pursuant to the grazing permit issued by the United States Forest Service in accordance with the allotment rights owned by Holcomb Family Ranch, LLC. Further, the pipe fence was constructed with no regard for the environmental impacts of untested oilfield pipe and in times of drought will dangerously impact the ability to get cattle to water. If the actions taken by the Forest Service are allowed to continue and the Holcomb Family Ranch, LLC is not allowed to access its private property water rights for its cattle, the Holcomb Family Ranch, LLC will be directly and irreparably harmed. They have a particularized interest in protecting their

grazing and water rights associated to the ownership of their allotment. *See Declaration attached hereto as Exhibit U.*

14. Plaintiff Mershon Livestock is an allotment owner on the Lincoln National Forest with rights for cattle to graze and for appropriation of water and holds a term grazing permit as result of those allotment rights located in the Sacramento Ranger District, Lincoln National Forest in the southern part of the Sacramento Mountains in New Mexico. The permit, issued by the United States Forest Service, allows for year-long grazing on the forest allotment and includes specific grazing practices that Mershon Livestock must follow. Mershon Livestock is a family business whose members have engaged in ranching for multiple generations. Mershon Livestock allotment includes areas designated as riparian by the USFS in and proposed to be “occupied New Mexico meadow jumping mouse habitat.” The proposed action threatened to be taken by the Defendants, the stated purpose of which is to prevent lawful grazing of cattle in riparian areas of the Rio Penasco area and includes building new permanent steel pipe and steel cable fencing around the privately owned water sources of Mershon Livestock, will interfere with the rights of the Mershon Livestock and its members to legally and lawfully graze cattle pursuant to the grazing permit issued by the United States Forest Service in accordance with the allotment rights owned by Mershon Livestock. Further, the pipe fencing and electric fencing that has already been constructed has the potential to impact water flows downstream to Mershon Livestock and impair Mershon Livestock’s senior adjudicated water rights which in times of drought will dangerously impact the ability of to get cattle to water or to irrigate for forage. If the actions taken by the Forest Service are allowed to continue and Mershon Livestock is not allowed to access it private property water rights for its cattle or has its senior water rights impaired, Mershon Livestock will be directly and irreparably harmed. They have a



particularized interest in protecting their grazing and water rights associated to the ownership of their allotment. *See Declaration attached hereto as Exhibit V.*

15. Plaintiffs Otero County Cattlemen's Association, Lincoln County Allotment Owners' Association, New Mexico Farm and Livestock Bureau, Sandoval County Farm and Livestock Bureau, and New Mexico Cattlegrowers' Association are all organizations with members from the above described Plaintiff allotment owners. Plaintiffs herein described are comprised of various members and family entities whose families have engaged in ranching on the National Forest land for multiple generations. The actions taken or proposed by the Defendants, the stated purpose of which is to prevent lawful grazing of cattle in riparian areas of the National Forests, will interfere with the rights of the various organization's members and directly and irreparably impact the agricultural industry that they represent. If the actions proposed by the Forest Service are taken or allowed to continue in violation of the law the members of these organization will be directly and irreparably harmed. They have a particularized interest in protecting their grazing rights and water rights of their membership for the viability of their industry. *See Declarations attached hereto as Exhibits W thru AA.*

16. Plaintiffs Protect Americans Now and Northern New Mexico Protects Land Water and Rights are organizations with members from the above described communities. Many of the members of these organizations have livelihoods dependent on the continued viability of agriculture enterprises and impacted by the loss of private property rights. Plaintiffs herein described are organizations created to advocate for the heritage and culture of New Mexico's rural communities, which are timeless and once lost are gone forever. The actions taken or proposed by the Defendants, the stated purpose of which is to prevent lawful grazing of cattle in riparian areas of the National Forests, will interfere with the private property rights of the

community members, destroy the culture and heritage of New Mexicans by directly and irreparably impacting the ranchers in these communities that they represent. If the actions proposed by the Forest Service are taken or allowed to continue in violation of the law, the members of these organization will be directly and irreparably harmed. They have a particularized interest in protecting their grazing rights and water rights of their membership for the viability of their communities and for the protection of their cultural heritages. *See Declarations attached hereto as Exhibits BB and CC.*

17. Federal Defendants are employees of either the United States Department of Agriculture or the United States Fish and Wildlife Service. Secretary Vilsack and Secretary Jewell are heads of their respective agencies with responsibilities to ensure that agency actions are in accordance with the laws and regulations of the United States of America. Defendants Joyner, Tuggle, Murphy, are supervisors and decision makers for their respective agencies responsible for either making decisions that have or will irreparably impact Plaintiffs or for supervision of employees carrying out agency directives or collaborating in actions in violation of the law and regulations of the United States. Defendants Garcia, Mosely, Hein, Seltzer, Taylor and Duran have either taken actions, proposed actions, or collaborated/consulted in actions that are arbitrary and capricious and in violation of the laws and regulations of the United States of America.

#### **IV. STATUTORY FRAMEWORK UNDERLYING THE COMPLAINT**

##### **A. Endangered Species Act**

18. The Endangered Species Act (ESA) requires the United States Fish and Wildlife Service (FWS) to identify species of wildlife and plants that are endangered or threatened based on the best available scientific and commercial information. 16 U.S.C. §1533(b)(1)(A).

19. The ESA defines “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. §1532(6).

20. The ESA also provides for the designation, by FWS, of critical habitat for an endangered or threatened species, based on “the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. §1533(b)(2).

21. The ESA defines “critical habitat” as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, on which are found the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection and specific areas outside the geographical area occupied by the species that are determined to be essential for the conservation of the species. 16 U.S.C. §1532(5).

22. The FWS may exclude any area from critical habitat if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [the Secretary] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.” 16 U.S.C. §1533(b)(2).

23. When the FWS proposes a critical habitat designation, notice is published in the Federal Register and public comments are requested on the proposed designation. After reviewing the best scientific data available, considering the probable economic and other impacts of the designation, and considering public comments, the FWS publishes a final rule designating critical habitat in the Federal Register.

**B. National Environmental Policy Act**

24. The National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.* (NEPA) and the Council for Environmental Quality (CEQ) Regulations, 40 C.F.R. parts 1500-1508, require federal agencies to conduct environmental impact analyses for regulatory actions.

25. The goals of NEPA reflect “the continuing policy of the Federal Government and other concerned public and private organizations, to use all practicable means and measures...in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. §4331.

26. The Council on Environmental Quality (CEQ) established by NEPA formulates and recommends national policies to promote the improvement of the quality of the environment. 42 U.S.C. §4342.

27. The CEQ regulations that implement NEPA require federal agencies, to the fullest extent possible, to use the NEPA process to identify and assess reasonable alternatives to proposed actions “that will avoid or minimize adverse effects...upon the quality of the human environment,” and “[u]se all practicable means...to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” 40 C.F.R. §§1500.2(a), (f).

28. Pursuant to CEQ regulations, federal agencies are required to “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” 40 C.F.R. §1501.2.

29. NEPA requires all federal agencies to prepare an Environmental Impact Statement (EIS) for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. §4332(C).

30. Whether an action significantly affects the environment includes considerations of both “context” and “intensity.” A consideration of context “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. An evaluation of intensity, which refers to the severity of the impact, includes assessment of “the degree to which the proposed action affects public health or safety,...the degree to which the effects on the quality of the human environment are likely to be highly controversial,...the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks...the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” 40 C.F.R. §1508.18.

31. Effects or impacts include direct and indirect effects and “ecological, aesthetic, historic, cultural, economic, social or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes the effect will be beneficial.” 40 C.F.R. §1508.8

32. A major federal action includes “actions with effects that may be major and which are potentially subject to Federal control and responsibility...(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.” 40 C.F.R. §1508.18.

33. Federal actions requiring NEPA analysis include “[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.” 40 C.F.R. §1508.18(b)(4).

34. As part of the NEPA analysis, federal agencies are required to consider alternatives to the proposed action. 42 U.S.C. §4332(C)(iii). The agency must identify “all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered” and must identify all the factors and considerations “which were balanced by the agency in making its decision.” 40 C.F.R. §1505.2.

35. As part of the NEPA analysis, federal agencies must also identify “any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. §4332(C)(iv).

36. Federal actions that change the legal or regulatory status quo trigger NEPA review.

37. The CEQ regulations provide for categorical exclusions under NEPA for projects or actions “that do not individually or cumulatively have a significant environmental effect,” in which case neither an EIS nor an environmental assessment (EA) is required. However, the agency’s procedures for determining categorical exclusions must include a determination that there are no extraordinary circumstances in which a normally excluded action has or may have a significant environmental effect, as defined under NEPA. 40 C.F.R. §§1508.4, 1507.3(b)(2)(ii).

38. If the agency has not determined that its action is one that normally requires an EIS, or is covered by a categorical exclusion, the agency must prepare an EA to determine

whether the agency must prepare a full EIS or issue a finding of no significant impact on the environment (FONSI). 40 C.F.R. §§1501.4, 1508.9, 1508.13.

39. The USDA, of which the Forest Service is a constituent agency, has expressly incorporated and adopted all of the CEQ regulations. 7 C.F.R. §1b.1(a).

40. Pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Services*, 75 F.3d 1429 (10<sup>th</sup> Cir. 1996), the FWS is required to undertake a National Environmental Policy Act (NEPA) analysis when designating critical habitat in States within the Tenth Circuit, which includes New Mexico. 79 FR 19313 (April 8, 2014).

41. The USDA has identified certain categories of activities that have been determined not to have a significant individual or cumulative effect on the human environment and which are therefore excluded from the preparation of either an EIS or an EA, unless individual agency procedures require otherwise. 7 C.F.R. §1b.3(a).

42. Agencies within the USDA are required to “identify in their own procedures the activities which normally would not require an environmental assessment or environmental impact statement.” 7 C.F.R. §1b.3(b).

43. Regardless of the exclusions identified in 7 C.F.R. §1b or in agency procedures, “agency heads may determine that circumstances dictate the need for preparation of an EA or EIS for a particular action. Agencies shall continue to scrutinize their activities to determine continued eligibility for categorical exclusion.” 7 C.F.R. §1b.3(c).

44. The Forest Service has identified specific categories of actions which are excluded from documentation under NEPA. 36 C.F.R. §220.6.

**C. Administrative Procedures Act**

45. The Administrative Procedures Act, 5 U.S.C. §551 *et seq.* (APA), provides that “[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. §702.

46. Final agency action for which there is no other adequate remedy in court is subject to judicial review. 5 U.S.C. §704.

47. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law.” 5 U.S.C. §§706(2)(A), (C), and (D).

**V. FACTS GIVING RISE TO PLAINTIFFS’ CLAIMS FOR RELIEF**

**A. Listing of the New Mexico meadow jumping mouse as endangered and proposed designation of critical habitat**

48. On June 20, 2013, the U.S. Fish and Wildlife Service (FWS) proposed to list the New Mexico meadow jumping mouse as an endangered species pursuant to the ESA. (78 FR 37363)

49. On June 10, 2014, the FWS published the final rule identifying the New Mexico meadow jumping mouse as an endangered species. (79 FR 33119)

50. The FWS also proposed, on June 20, 2013, to designate critical habitat for the New Mexico meadow jumping mouse pursuant to the Act. (78 FR 37328)

51. On April 8, 2014, the FWS reopened the comment period for the proposed designation of critical habitat and extended the comment period to May 8, 2014. The FWS also



announced the availability of and comment period for a draft economic analysis, draft environmental assessment of the proposed habitat designation, and amended required determinations of the proposal. The FWS requested comments on specific topics concerning the designation of critical habitat. (79 FR 19307)

52. In the Federal Register Notice, the FWS states that it proposes “to designate approximately 310.5 kilometers (km)(193.1 miles (mi))(5,892 hectares (ha)) (14,560 acres (ac)) in eight units as critical habitat within Bernalillo, Colfax, Mora, Otero, Rio Arriba, Sandoval, and Socorro Counties, in New Mexico.” 79 FR 19308 (April 8, 2014).

53. The FWS has not completed its NEPA analysis for the designation of critical habitat for the New Mexico meadow jumping mouse.

54. The FWS has not made a final critical habitat designation for the New Mexico meadow jumping mouse.

**B. Proposed project on the Lower Rio Cebolla, Jemez Ranger District**

55. The proposed critical habitat for the New Mexico meadow jumping mouse includes riparian areas on the Lower Rio Cebolla in the Jemez Ranger District of the Santa Fe National Forest.

56. On July 8, 2014, Allan R. Setzer, District Ranger for the Jemez Ranger District, provided notice of a proposed project to “improve the New Mexico jumping mouse occupied habitat in the Lower Rio Cebolla.” The project area is within the San Diego grazing allotment. Exhibit DD.

57. The proposed project consists of the construction of 5-foot pipe fencing with cables. The sole purpose of the fencing is to “prevent livestock grazing but allow other wildlife

access to the riparian areas.” The Forest Service proposes to build the fences “as soon as possible.”

58. In the July 8, 2014 Notice, Forest Service states that, because the New Mexico jumping mouse was listed as an endangered species, “Federal agencies must ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any listed species. Actions also cannot result in the destruction or adverse modification of designated critical habitat of these species. In the listing notice dated June 10, 2014, the US Fish and Wildlife Service found that livestock grazing has the potential to jeopardize the species.”

59. The Forest Service states that “[b]ecause the area is not fenced, permitted livestock grazing occurs.”

60. Under “Existing Condition,” the Forest Service states that “vegetation in the project area does not meet the specialized habitat requirements” for the New Mexico meadow jumping mouse.”

61. The Forest Service claims that “[c]ontinuing to allow grazing...in the mouse’s occupied habitat would not meet the intent of the Endangered Species Act.”

62. The Forest Service claims that the proposed project is categorically excluded from either an environmental assessment or an environmental impact statement pursuant to the following Forest Service categorical exclusion:

(6) Timber stand and/or wildlife habitat improvement activities that do not include the use of herbicides or do not require more than 1 mile of low standard road construction. 36 C.F.R. §220.6(e)(6).

63. Examples of actions that come within the exclusion in §220.6(e)(6) include:

(i) girdling trees to create snags;

- (ii) thinning or brush control to improve growth to reduce fire hazard including the opening of an existing road to a dense timber stand;
- (iii) prescribed burning to control understory hardwoods in stands of southern pine;
- (iv) prescribed burning to reduce natural fuel build-up and improve plant vigor.

64. The Forest Service concluded that “[p]reliminary analysis indicates that there are no extraordinary circumstances that would result in significant effects.”

65. In 2004, the Forest Service completed an EIS for revisions to the grazing program on the San Diego Allotment in order to address archaeological and other resource concerns, and to incorporate specific management procedures as part of the administration of the allotment. The revised grazing program included specific management practices related to riparian areas on the Rio Cebolla. (Exhibit EE, Final Environmental Impact Statement for the San Diego Range Allotment, Jemez Ranger District).

66. The 2004 EIS specifically concluded that grazing within the San Diego Allotment “would not cause a trend to Federal listing or decrease in the overall population” of the New Mexico meadow jumping mouse. As stated in the EIS: “Riparian meadows in the Fenton, Virgin Canyon, Lower Guadalupe, and Jemez River areas are closed to grazing and would be available to the mouse with no associated grazing disturbance. Other riparian pastures in the allotment would have low potential for impacts to jumping mice because of the short amount of use these areas would receive.” (Exhibit EE, p.49).

67. Under the current grazing practices on the San Diego Allotment, the area that Forest Service proposes to fence off is only used from the beginning of October to mid-October,

during which time the New Mexico meadow jumping mouse is hibernating, and for a brief period in the spring for breeding and comes within those areas that, based on the 2004 EIS, “have low potential for impacts” due to the short amount of use the areas would receive.

68. A recent inspection of the San Diego Allotment indicates that the riparian areas in question are in excellent shape under current range management practices, with very little to no evidence of grazing by cattle or of impacts from grazing by cattle, although the cattle currently have uninhibited ingress and egress from the areas.

69. The proposed project, which consists erecting substantial fences in order to prevent cattle from entering certain riparian areas, despite the fact that the cattle are legally allowed to graze these areas, does not come within the categorical exclusion set forth in 36 C.F.R. 220.6(e)(6) and is not consistent with the examples provided in the regulation.

70. The Forest Service did not provide any analysis or evidence supporting the conclusion, in relation to the use of the categorical exception, that “there are no extraordinary circumstances that would result in significant effects.”

71. The proposed fencing project is a new federal construction activity located within a defined geographic area that comes within the definition of federal action requiring NEPA analysis. 40 C.F.R. §1508.18(b)(4).

72. The Forest Service has failed to undertake any NEPA analysis for the proposed project.

73. The Forest Service has not conducted any analysis of the potential impact of the proposed fencing project on the New Mexico meadow jumping mouse habitat.

74. The Forest Service has specifically stated that the purpose of the proposed fencing project is to prevent “permitted livestock grazing” from occurring, which represents a change in the legal or regulatory status quo, thus triggering a NEPA review.

75. The Forest Service has not considered or identified any other potential environmental impacts that could result from the erection of the proposed fencing.

76. The Forest Service has not provided any record of alternatives to the proposed fencing considered by the Forest Service.

77. The Forest Service has not identified “any irreversible or irretrievable commitment of resources” that would occur as a result of the proposed fencing project.

78. The Forest Service has not identified any legal or regulatory provisions that require the Forest Service to take affirmative action, including substantial changes in an existing grazing program, in order to protect “occupied habitat.”

79. The Forest Service has not demonstrated that there are any current actions that they fund, authorize or carry out that are likely to jeopardize the continued existence of the New Mexico meadow jumping mouse or its critical habitat, which has not yet been designated, that justify the proposed project.

80. The studies cited to by the Forest Service to support the conclusion that livestock grazing is a threat to the New Mexico meadow jumping mouse do not follow commonly practiced scientific procedures in reaching any conclusions regarding the impacts of grazing on the mouse populations and possible critical habitat. All conclusions regarding livestock impacts were based on anecdotal information and author bias rather than on the best available science.

**C. Wills Canyon Mauldin Spring Riparian Area Special Closure Order**

81. The proposed critical habitat includes a riparian area in Wills Canyon, within the Sacramento Ranger District of the Lincoln National Forest.

82. Following the listing of the New Mexico meadow jumping mouse as endangered on June 10, 2014, the Forest Service began taking actions to prevent cattle from grazing in the Mauldin Springs riparian area of Wills Canyon.

83. On July 14, 2014, the Forest Service issued a notice of Special Closure for Resource Protection Wills Canyon (Mauldin Springs Occupied Habitat)(Closure Notice). Exhibit FF.

84. Citing to 16 U.S.C. §551, 36 C.F.R. §261.50(a) and 36 C.F.R. §261.53(a), the Closure Notice prohibits entry into areas that are described as “occupied habitat” for the New Mexico meadow jumping mouse in the Mauldin Springs riparian area, on the Lincoln National Forest, Sacramento Ranger District, Otero County, New Mexico.

85. The stated purpose of the closure is “[t]o allow for protection of the endangered NMMJM occupied habitat encompassing Mauldin Spring in Wills Canyon within the Sacramento Ranger District in compliance with the Endangered Species Act and recent listing of the NMMJM as endangered by the US Fish and Wildlife Service.”

86. The purpose of the Closure Order is to prevent livestock from grazing in the riparian area, even though such grazing is allowed by the applicable grazing permit.

87. The Closure Order remains in effect until November 30, 2014 and violations of the Closure Order “is punishable by a fine of not more than \$5,000 for individuals and \$10,000 for organizations, by imprisonment for not more than six (6) months, or both. [Title 16 USC 551, Title 18 USC 3571(b)(6), Title 18 USC 3581(b)(7)].”

88. As part of the closure of the Mauldin Springs Riparian Area, the Forest Service constructed an electric fence in order to keep livestock out of the “occupied habitat.”

89. The Forest Service has also erected or proposes to erect fences in the Agua Chiquita Springs area in the Lincoln National Forest and in riparian areas of the Rio Penasco in the Lincoln National Forest.

90. The Forest Service has not identified any legal or regulatory provisions that require the Forest Service to take affirmative action, including closure of grazing areas, the erection of fences, and changes in an existing grazing program, in order to protect “occupied habitat.”

91. The statutory and regulatory provisions cited in the Closure Notice do not give the Forest Service authority to take the actions identified in the Closure Notice, including the erection of an electric fence, without undertaking a NEPA analysis.

92. The Forest Service has not completed a NEPA analysis for the actions taken in the Mauldin Springs riparian area, in the Agua Chiquita Springs area, or in the riparian areas of the Rio Penasco.

93. The Forest Service has not provided any factual basis for the need to restrict access to the Mauldin Springs riparian area.

## **VI. CLAIMS FOR RELIEF**

### **A. Count One: Violation of the National Environmental Policy Act, 42 U.S.C. 4332(C)**

94. Plaintiffs hereby restate and incorporate by reference the foregoing paragraphs as though fully set forth herein.

95. The Forest Service proposal to erect a 5-foot pipe fence with cables on the Lower Rio Cebolla, with the express purpose of preventing permitted cattle grazing without first

conducting an environmental review and producing either an EA or an EIS according to the requirements of the National Environmental Policy Act, is a violation of the requirements of NEPA and the CEQ's implementing regulations. The Forest Service has acted arbitrarily and capriciously, and without following procedures required by law, in violation of the Administrative Procedures Act, 5 U.S.C. §§706(2) *et seq.*

96. The Forest Service closure of the Mauldin Springs Riparian area and the erection of a fences in the Mauldin Springs, Agua Chiquita and Rio Penasco riparian areas, with the express purpose of preventing permitted cattle grazing without first conducting an environmental review and producing either an EA or an EIS according to the requirements of the National Environmental Policy Act, is a violation of the requirements of NEPA and the CEQ's implementing regulations. The Forest Service has acted arbitrarily and capriciously, and without following procedures required by law, in violation of the Administrative Procedures Act, 5 U.S.C. §§706(2) *et seq.*

97. Defendants' conduct is the legal and factual cause of Plaintiffs' injuries alleged in this Complaint.

**B. Count Two: Violation of the APA, 5 U.S.C. §§706(2)**

98. Plaintiffs hereby restate and incorporate by reference the foregoing paragraphs as though fully set forth herein.

99. By proposing to erect a 5-foot pipe fence with cables on the Lower Rio Cebolla without conducting a NEPA analysis, by refusing to consider any alternatives to the proposed fencing, and by relying on the claim that the Endangered Species Act requires the Forest Service to make a change to a legally implemented and approved grazing program to protect the "occupied habitat" of the New Mexico meadow jumping mouse without providing any legal or



regulatory support, the Forest Service has abused its discretion, has acted arbitrarily and capriciously and not in accordance with the law, in violation of the Administrative Procedures Act, 5 U.S.C. §§706(2).

100. By closing the Mauldin Springs riparian area and erecting fences in the Mauldin Springs, Agua Chiquita and Rio Penasco riparian areas to keep out grazing cattle without conducting a NEPA analysis, by relying on inapplicable regulatory and statutory provisions, and by relying on the claim that the Endangered Species Act requires the Forest Service to make a change to a legally implemented and approved grazing program to protect the “occupied habitat” of the New Mexico meadow jumping mouse without providing any legal or regulatory support, the Forest Service has abused its discretion, has acted arbitrarily and capriciously and not in accordance with the law, in violation of the Administrative Procedures Act, 5 U.S.C. §§706(2).

101. Defendants’ conduct is the legal and factual cause of Plaintiffs’ injuries alleged in this Complaint.

**C. Count Three: Request for Injunctive Relief**

102. Plaintiffs hereby restate and incorporate by reference the foregoing paragraphs as though fully set forth herein.

103. “To obtain a preliminary injunction, the moving party must demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant’s favor; and (4) that the injunction is in the public interest. (2008).” *Roda Drilling Co. v. Siegal*, 552 F.3d 1203 (10th Cir. 2009) (internal citation omitted).

104. Plaintiffs request a preliminary injunction to prevent the Forest Service from erecting fencing or other structures or taking any other actions to prevent legal and lawful

grazing in areas that the Forest Service believe constitute “occupied habitat” for the New Mexico meadow jumping mouse on the Lower Rio Cebolla and in the Wills Canyon, Maudlin Spring riparian area, the Agua Chiquita Springs riparian area and riparian areas on the Rio Penasco without completing the required NEPA analysis.

105. The Plaintiffs are likely to succeed on the merits because the actions taken by the Forest Service are federal actions that require a NEPA analysis pursuant to the provisions of NEPA and the CEQ regulations. The Forest Service has relied on inapplicable statutory and regulatory provisions to avoid the requirements of NEPA in order to take actions that have a direct impact on the Plaintiffs’ grazing rights. In addition, there are no statutory or regulatory provisions that require the Forest Service to take affirmative actions to protect “occupied habitat” after the listing of the New Mexico meadow jumping mouse as endangered. The record will demonstrate that there is no need or basis for the Forest Service to prevent cattle grazing in the identified areas on the Lower Rio Cebolla and in the identified riparian areas in the Lincoln National Forest.

106. The Plaintiffs who have grazing interests in the San Diego Allotment are likely to suffer irreparable harm without injunctive relief because the erection of the proposed fencing will have a direct impact on their grazing rights on the Lower Rio Cebolla and there is a strong likelihood that, if the fence is erected, it will become a permanent structure that will change the permitted grazing rights of these Plaintiffs.

107. The Plaintiffs who have grazing interests in the identified riparian areas of the Lincoln National Forest are likely to suffer irreparable harm without injunctive relief because the closure of the riparian area and the construction of an electric fence is having a direct impact

on their grazing rights and there is a possibility that the fencing will become a permanent structure that will change the permitted grazing rights of these Plaintiffs.

108. The actions proposed by the Forest Service on the Lower Rio Cebolla and in the Lincoln National Forest are a change in the status quo and the granting of the requested injunctive relief would maintain the status quo.

109. The balance of equities tips in the favor of the Plaintiffs. The purpose of NEPA and the CEQ regulations is to ensure that federal agencies take a hard look at the environmental consequences of their actions. It is undisputed that the Forest Service has not undertaken the required NEPA analysis. There is no immediate need for the Forest Service to take action to protect the “occupied habitat” of the New Mexico meadow jumping mouse and the Forest Service is not required by any statutory or regulatory provisions to take such action. The areas that the Forest Service proposes to fence off on the Lower Rio Cebolla are in good condition and there are appropriate range management practices in place for the riparian areas at issue. Neither the Forest Service nor New Mexico meadow jumping mouse or its habitat will be harmed if the requested injunctive relief is granted. However, if the requested injunctive relief is not granted and the Forest Service moves forward with its proposal, the Plaintiffs who hold grazing rights in the area will be immediately and irreparably harmed.

110. The injunction is in the public interest because it would require the Forest Service to follow the mandates of NEPA and the CEQ regulations, whose purpose is to promote the improvement of the quality of the environment. The injunction would also ensure that the Forest Service does not take unnecessary actions that would be an irreversible commitment of federal resources.

111. The Plaintiffs request that the preliminary injunction be made permanent.

WHEREFORE, the Plaintiffs request that the Court issue an Order:

1. Declaring that the Forest Service proposal to erect a fence in order to prevent grazing in the identified riparian area of the Lower Rio Cebolla without the required NEPA review is arbitrary and capricious, not in compliance with the applicable statutory and regulatory procedures, and not in accordance with the Administrative Procedures Act or the National Environmental Procedures Act;
2. Declaring that the closure by the Forest Service of the Wills Canyon, Maudlin Springs riparian area and the erection of fences in the Maudlin Springs, Agua Chiquita and Rio Penasco riparian areas without the required NEPA review is arbitrary and capricious, not in compliance with the applicable statutory and regulatory procedures, and not in accordance with the Administrative Procedures Act or the National Environmental Procedures Act;
3. Setting aside the Closure Order for the Wills Canyon Maudlin Springs;
4. Preliminarily and permanently enjoining the Forest Service from erecting fencing or other structures or taking any other actions to prevent legal and lawful grazing in areas that the Forest Service believe constitute “occupied habitat” for the New Mexico meadow jumping mouse on the Lower Rio Cebolla and in the Wills Canyon, Maudlin Spring, Agua Chiquita and Rio Penasco riparian area without completing the required NEPA analysis;
5. Awarding Plaintiffs costs and reasonable attorneys’ fees; and
6. Granting Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

DOMENICI LAW FIRM

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