



VIA CERTIFIED MAIL AND E-MAIL

July 27, 2019

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Dear Messrs. Bernhardt, Joyner, and Best, and Mses. Everson, Lueders, and Christiansen,

**RE: Sixty-Day Notice of Endangered Species Act Violations, Apache-Sitgreaves Nat'l Forest**

The U.S. Secretary of the Interior (“Secretary”), U.S. Fish and Wildlife Service (“FWS”), and U.S. Forest Service (“Forest Service”) are hereby notified that the Center for Biological Diversity and Maricopa Audubon Society intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, to challenge (1) FWS’ May 13, 2015 Biological Opinion for the revised “Land Management Plan” for the Apache-Sitgreaves National Forest; (2) the Forest Service’s unlawful reliance on FWS’ May 13, 2015 Biological Opinion; (3) the failure of FWS and the Forest Service to reinstate ESA Section 7 consultation on the ongoing implementation of the Land Management Plan for the Apache-Sitgreaves National Forest; (4) the Forest Service’s failure to carry out a conservation program for the endangered New Mexico meadow jumping mouse on the Apache-Sitgreaves National Forest; and (5) destroying and adversely modifying critical habitat for the jumping mouse, and jeopardizing the continued existence of the jumping mouse. The Secretary, FWS, and the Forest Service have sixty days to remedy the violations identified herein.



Image from April 2019, USFS presentation.

## **EXECUTIVE SUMMARY**

Large numbers of non-native stray horses, stray cattle and non-native elk<sup>1</sup> are destroying high elevation meadow streams on the Apache-Sitgreaves National Forest. As a result, the critically endangered New Mexico meadow jumping mouse faces increasing jeopardy and decreasing chances of recovery as it experiences destruction of its federally designated Critical Habitat.

In 2015, the Forest Service completed a revised Land Management Plan (“LMP”) for the Apache-Sitgreaves National Forest. Recognizing that the LMP is an agency action under the ESA that may impact threatened and endangered species, the Forest Service consulted with FWS. The Forest Service completed a Biological Assessment on May 29, 2014, determining that the LMP may affect, and is likely to adversely affect, the New Mexico meadow jumping mouse (“jumping mouse”). On May 13, 2015, FWS issued its Biological Opinion, agreeing that the LMP may affect the jumping mouse, but concluding that implementation of the LMP will not jeopardize its continued existence.

FWS violated the ESA in preparing the 2015 Biological Opinion for at least the following reasons: (1) despite determining that the LMP is likely to adversely impact the jumping mouse, FWS

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<sup>1</sup> In 1913, 86 Yellowstone elk (*Cervus Canadensis nelsoni*) were imported from near Gardner, Montana and released into the Sitgreaves National Forest southeast of Winslow, Arizona after Arizona’s native elk (*Cervus elephus merriami*) were hunted to extinction. See, “Taxonomic Status of *Cervus elaphus merriami* (Cervidae),” Sydney Anderson and Richard Barlow, *The Southwestern Naturalist*, Vol. 23, No. 1 (Feb. 15, 1978), pp. 63-70.; “Elk status in Arizona,” Britt, T. L., 1982, Pages 10–12 in T. L. Britt and D. P. Theobald (eds.), *Proceedings of the Western States elk workshop*, 22–24 February 1982. Arizona Game & Fish Department, Flagstaff, 166 pp.; “Arizona’s Elk Restoration,” by David E. Brown and Jim Heffelfinger, in *Bringing Back the Game, Arizona Wildlife Management, 1912-1962*, David E. Brown, Editor, Arizona Game and Fish Department, 2012.

failed to include an Incidental Take Statement for the jumping mouse; (2) in determining no jeopardy for the jumping mouse, FWS failed to properly consider relevant factors and the overall cumulative impacts of authorized and unauthorized livestock grazing, stray horses, elk, climate change, drought, flooding, and wildfires on the critically endangered jumping mouse population; (3) FWS failed to articulate a rational connection between the facts found and the choice made in making its no jeopardy determination for the jumping mouse; and (4) FWS failed to properly analyze and consider the impacts of the LMP on the recovery of the jumping mouse and its critical habitat.

Following completion of the 2015 Biological Opinion, the Forest Service's reasoning for the no jeopardy determination has proven to be faulty. While the Forest Service reasoned that the majority of jumping mouse habitat on the Forest is excluded from livestock grazing, impacts to jumping mouse habitat has continued from stray horses, cows, and elk. While the Forest Service reasoned that the majority of occupied jumping mouse habitat is in New Mexico, that habitat has also continued to be degraded. And while the Forest Service relied on standards and guidelines in the LMP, those standards and guidelines have not been effectively implemented.

Similarly, FWS concluded in the 2015 Biological Opinion that implementation of the LMP will not destroy or adversely modify proposed critical habitat for the jumping mouse because (1) "the majority of proposed critical habitat is excluded from livestock grazing and/or protected," (2) "[n]ot all proposed critical habitat is within the planning area," (3) "[m]any of the desired conditions and objectives in the LMP...benefit riparian habitats proposed for critical habitat," and (4) "[m]any standards and guidelines within the LMP...serve as conservation measures that would benefit proposed critical habitat." Only one of these reasons is currently valid, which is that "[n]ot all proposed critical habitat is within the planning area." However, this rationale is not particularly relevant as (1) Critical Habitat on the Apache-Sitgreaves National Forest represents a significant portion of the jumping mouse's range, (2) significant amounts of Critical Habitat have been destroyed and adversely modified in New Mexico, and (3) a significant number of jumping mouse populations have been lost in New Mexico, particularly in the Sacramento Mountains.

The other three assumptions and conclusions of the 2015 Biological Opinion regarding exclusion and protection from grazing, and the benefit of the LMP's objectives and promised conservation measures, have proven to not be true, as grazing impacts have continued, and the desired conditions, standards, guidelines, and objectives have not been implemented or achieved.

More specifically, FWS assumed in the Biological Opinion that specific Forest Service programs consulted upon will take actions to prevent adverse modification and destruction of Critical Habitat and to prevent jeopardy. These programs include the Soils and Watershed Program (including fencing), the Wildlife, Fish, and Rare Plant Program (including monitoring, structures, and riparian fencing), and the Rangeland Management Program (including monitoring, and riparian fencing). New information provided in this Notice documents that effects of these actions and programs consulted upon in the 2015 Biological Opinion have affected and are affecting the jumping mouse and its critical habitat in a manner and to an extent not considered in the Biological Opinion.

The Forest Service and FWS are in violation of the ESA for at least the following reasons:

- (1) FWS violated the ESA and APA in preparing and issuing the 2015 Biological Opinion for the LMP, 16 U.S.C. § 1536, 5 U.S.C. §§ 701-706;
- (2) the Forest Service violated Section 7 of the ESA in relying on the unlawful 2015 Biological Opinion, 16 U.S.C. § 1536(a)(2);
- (3) FWS and the Forest Service are in violation of the ESA for failing to reinitiate formal consultation, even though the anticipated amount and extent of incidental taking of

jumping mouse has been exceeded, despite new information revealing effects of the action that are affecting the jumping mouse and its Critical Habitat in a manner and to an extent not previously considered in the 2015 Biological Opinion, and even though the action has been modified in a manner that is causing effects to the jumping mouse and its critical habitat that were not considered in the 2015 Biological Opinion, 16 U.S.C. § 1536(a)(2), 50 C.F.R. 402.16;

- (4) the Forest Service is in violation of Section 7(a)(1) of the ESA, where “all” federal agencies “shall, in consultation with and with the assistance of the [FWS], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species,” as the Forest Service is jeopardizing the continued existence of the jumping mouse and allowing the continued destruction and adverse modification of its critical habitat, 16 U.S.C. § 1536(a)(1);
- (5) the Forest Service is authorizing and allowing the destruction and adverse modification of Critical Habitat for the jumping mouse, and jeopardizing the continued existence of the species, in violation of Section 7 of the ESA, 16 U.S.C. § 1536(a)(2).

Under the current circumstances, compliance with the ESA requires, at a minimum:

- (1) all stray horses and all stray cows are immediately removed from and prevented from further access into designated Critical Habitat for the jumping mouse;
- (2) non-native elk are similarly removed from and prevented from further access into designated Critical Habitat;
- (3) the Forest Service promptly embarks on all necessary habitat restoration and rehabilitation activities to ensure that damaged Critical Habitat recovers and that NMMJM recovery is no longer thwarted; and
- (4) the Forest Service and FWS immediately reinitiate consultation on the LMP, and FWS prepare a new or revised Biological Opinion that fully complies with the ESA.

### **FACTUAL BACKGROUND**

On June 10, 2014, the New Mexico meadow jumping mouse (“jumping mouse”) was listed as endangered by FWS.<sup>2</sup> The listing rule states,

“Our assessment concluded that the New Mexico meadow jumping mouse has an overall low viability (probability of persistence) in the near term (between now and the next 10 years) and a decreasing viability in the longterm future (beyond 10 years). [Page 33120] ...

The New Mexico meadow jumping mouse has exceptionally specialized habitat requirements to support these life-history needs and maintain adequate population sizes. Habitat requirements are characterized by tall (averaging at least 61 centimeters (cm) (24 inches (in)), dense riparian herbaceous vegetation (plants with no woody tissue) primarily

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<sup>2</sup> Determination of Endangered Status for the New Mexico Meadow Jumping Mouse Throughout Its Range, Final Rule, U.S. Fish and Wildlife Service, 79 Fed. Reg. 33119, June 10, 2014.

composed of sedges (plants in the Cyperaceae Family that superficially resemble grasses but usually have triangular stems) and forbs (broad-leafed herbaceous plants). This suitable habitat is found only when wetland vegetation achieves full growth potential associated with perennial flowing water. This vegetation is an important resource need for the New Mexico meadow jumping mouse because it provides vital food sources (insects and seeds), as well as the structural material for building day nests that are used for shelter from predators. [Pages 33120-1] ...

Since 2005, researchers have documented 29 remaining populations spread across the 8 geographic management areas (2 in Colorado, 15 in New Mexico, and 12 in Arizona). Nearly all of the current populations are isolated and widely separated, and all of the 29 populations located since 2005 have patches of suitable habitat that are too small to support resilient populations of New Mexico meadow jumping mouse. [Page 33121] ...

Considering the subspecies' biological status now and its likely status into the future, without active conservation (i.e., grazing management and water management) existing populations are vulnerable to extirpation (at least 11 have already undergone substantial impacts since 2011) and, therefore, the subspecies as a whole is currently at an elevated risk of extinction. None of the 29 populations known to exist since 2005 are of sufficient size to be resilient. Assuming this rate of population loss continues similar to recent years, the number of populations could be severely curtailed in the near term, eliminating the level of redundancy needed to withstand catastrophic drought and wildfire, along with the additive impacts of multiple threats. In addition to past sources of habitat loss, ongoing grazing, water shortages, and high-impact wildfire (the latter two exacerbated by climate change) will continue to put all of the remaining locations at considerable risk of extirpation in the near-term (between now and the next 10 years) and increasing over the long term." [Page 33122]

In the May 2015, Biological Opinion on the Apache-Sitgreaves National Forest LMP, FWS determined that even though the proposed action "may affect the endangered New Mexico meadow jumping mouse," implementation of the LMP "will not jeopardize the continued existence of the jumping mouse" because

- (1) "The majority of known occupied jumping mouse acreage is currently excluded from livestock grazing;"
- (2) "The majority of known occupied mouse sites is not within the planning area, but is within New Mexico;"
- (3) "Many of the desired conditions and objectives in the LMP, in particular desired conditions 34, 64, 81, 82, and objectives 4 and 6 benefit riparian habitats used by the jumping mouse;" and
- (4) "Many standards and guidelines within the LMP, in particular standard 3 and guidelines 32, 71, 76, and 132, serve as conservation measures that are beneficial to the jumping mouse.

Similarly, FWS determined in the 2015 Biological Opinion that implementation of the LMP will not destroy or adversely modify proposed critical habitat for the jumping mouse because,

- (1) "The majority of proposed critical habitat is excluded from livestock grazing and/or protected from other Forest Program activities;"

- (2) Not all proposed critical habitat is within the planning area; CHUs are also located in New Mexico and Colorado;”
- (3) “Many of the desired conditions and objectives in the LMP, in particular desired conditions 34 [Habitat and ecological conditions are capable of providing for self-sustaining populations of native, riparian dependent plant and animal species.], 64 [Herbaceous vegetation amount and structure (e.g., plant density, height, litter, seed heads) provides habitat to support wildlife and prey species.], 81 [Riparian obligate species within wet meadows, along streambanks, and active floodplains provide sufficient vegetative ground cover (herbaceous vegetation, litter, and woody riparian species) to protect and enrich soils, trap sediment, mitigate flood energy, stabilize streambanks, and provide for wildlife and plant needs.], 82 [Riparian soil productivity is optimized as described by the specific TES map unit under consideration as indicated by the vigor of the herbaceous vegetation community. Based on species composition, ungrazed plant heights range from 10 inches to 36 inches.], and objectives 4 [Annually, enhance or restore 5 to 15 miles of stream and riparian habitat to restore structure, composition, and function of physical habitat for native fisheries and riparian-dependent species.] and 6 [Annually, move 200 to 500 acres toward desired composition, structure, and function of streams, floodplains, and riparian vegetation.] (see Appendix B for plan decision descriptions) benefit riparian habitats proposed for critical habitat;” and
- (4) “Many standards and guidelines within the LMP, in particular standard 3 [Across the planning unit, within each PNVT [potential natural vegetation type], vegetation management activities shall be designed to maintain or move plant composition towards a moderate to high plant community similarity as compared to site potential.] and guidelines 71 { [Cool and/or dense vegetation cover should be provided for species needing these habitat components (e.g., Goodding’s onion (*Allium gooddingii*), black bear, White Mountains chipmunk (*Tamias sp.*), western yellow-billed cuckoo).] provides for management towards the dense, herbaceous vegetation needed by species requiring these habitat components which would include the jumping mouse.} and 76 [The needs of localized species (e.g., New Mexico meadow jumping mouse, Bebb willow, White Mountains paintbrush (*Castilleja sulphurea*) should be considered and provided for during project activities to ensure their limited or specialized habitats are not lost or degraded], serve as conservation measures that would benefit proposed critical habitat.”

FWS thus assumed and concluded in the Biological Opinion that the Forest Service would take actions pursuant to specific programs that were consulted upon to prevent adverse modification of critical habitat and to prevent jeopardy, including, the Soils and Watershed Program (“fencing”), the Wildlife, Fish, and Rare Plant Program (“monitoring,” “structures,” and “riparian fencing”), and the Rangeland Management Program (“monitoring,” and “riparian fencing”).

Specifically, with respect to the Rangeland Management Program, FWS stated in the Biological Opinion,

“Livestock grazing (both authorized and unauthorized), in addition to feral horses and elk herbivory, can affect jumping mouse habitat when it eliminates or reduces herbaceous plants or alters the riparian plant species composition and structure (USFWS

2014b)<sup>3</sup>. The majority of known occupied jumping mouse sites and those proposed for critical habitat are currently protected from livestock grazing by specific pasture management or exclosures that were implemented to protect Apache trout and loach minnow or other important riparian values. While most mouse sites are protected from livestock, they can still be affected by feral horses and elk.” [Page 14]

“Livestock grazing has been identified as an adverse effect to streamside vegetation and jumping mouse habitat on the ASNFs (Dodd 1986, Morrison 1991, Frey 2011). The primary concern is the removal of important vegetation that serves as cover and removal or prevention of the development of graminoid seeds needed as food by the mice.

Eleven of twelve known jumping mouse capture sites are excluded from livestock grazing. The Service defines occupied habitat as all suitable habitats for 0.5 miles up and downstream of the site in which jumping mice were captured during past surveys (USFWS 2013a). Occupied habitat is located on 12 livestock grazing allotments. However, occupied habitat is excluded from grazing on five of the twelve allotments by fenced exclosures, retirement of portions of the allotments for conservation reasons, or non-use due to no grazing permit being issued. Grazing management within occupied habitat on the remaining seven allotments is described in Table 2. (Pages 15-16)

There are four desired conditions, 60 [Vegetative ground cover (herbaceous vegetation and litter cover) is optimized to protect and enrich soils and promote water infiltration. There is a diverse mix of cool and warm season grasses and desirable forbs species.], 64 [Herbaceous vegetation amount and structure (e.g., plant density, height, litter, seed heads) provides habitat to support wildlife and prey species.], and 82 [Riparian soil productivity is optimized as described by the specific TES map unit under consideration as indicated by the vigor of the herbaceous vegetation community. Based on species composition, ungrazed plant heights range from 10 inches to 36 inches.] that guide range management activities that would benefit jumping mouse habitat. There are four relevant desired conditions that guide rangeland management on the ASNFs, including jumping mouse habitat. Desired condition 170 [not found in Appendix B], greater cover in grasses and forbs, would help contribute to lower intensity wildfires that allow ground cover to readily re-sprout, limiting sediment flow into riparian areas where jumping mouse occurs. Desired conditions 60 [Vegetative ground cover (herbaceous vegetation and litter cover) is optimized to protect and enrich soils and promote water infiltration. There is a diverse mix of cool and warm season grasses and desirable forbs species.], 64 [Herbaceous vegetation amount and structure (e.g., plant density, height, litter, seed heads) provides habitat to support wildlife and prey species.], and 82 [Riparian soil productivity is optimized as described by the specific TES map unit under consideration as indicated by the vigor of the herbaceous vegetation community. Based on species composition, ungrazed plant heights range from 10 inches to 36 inches.] address the need for tall, vigorous herbaceous riparian vegetation (cool and warm season growing species), including the need for seed heads for an important food source. [Page 17]

Seven guidelines protect or restore riparian or wetland habitat that may provide jumping mouse habitat. Guideline 136 [Forage, browse, and cover needs of wildlife, authorized livestock, and wild horses should be managed in balance with available forage]

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<sup>3</sup> Species status assessment report: New Mexico meadow jumping mouse (*Zapus hudsonius luteus*). U.S. Fish and Wildlife Service, Albuquerque, New Mexico; May 27, 2014.

requires that livestock stocking rates are in balance with available forage. Guideline 133 [Grazing use on seasonal allotments should be timed to the appropriate plant growth stage and soil moisture.] requires that grazing is done at the proper times relative to plant growth needs. Guideline 32 [Active grazing allotments should be managed to maintain or improve to desired riparian conditions.] requires that grazing allotments are managed to maintain or improve to desired riparian conditions. Guideline 132 [Critical areas should be managed to address the inherent or unique site factors, conditions, values, or potential conflicts associated with them.] requires that critical areas (*e.g.* riparian areas) should be managed to address special concerns. Critical areas for grazing management are those that should be treated with special consideration because of inherent site factors, size, location, condition, values, or significant potential conflicts. These areas are evaluated separately from the remainder of a management unit because they contain special or unique values. One of the critical areas in the LMP is jumping mouse habitat in riparian areas. [Page 17] ...”

FWS did not examine further the destructive effects of stray horses and non-native elk within the Biological Opinion.

Specifically, with respect to the Watershed and Soil Management Program, FWS stated in the Biological Opinion,

“The BA does not specify watersheds or riparian or stream areas that would be treated under the LMP for this program. However, the BA notes that projects to improve watershed and soil conditions could include, but are not limited to, vegetation reestablishment, nonnative invasive plant treatments, erosion control, instream habitat improvement, adjusting the timing and season of grazing, or fence construction. Projects in the riparian areas would promote recruitment and maintenance of native riparian vegetation needed by the jumping mouse. Projects in the riparian and stream habitats would have localized, short-term effects including streambank disturbance, vegetation reduction, sediment deposition into the stream, and disturbance to wildlife, including jumping mice.

There are nine relevant desired conditions that guide management and activities for this program. Desired condition 22 [Vegetation and soil conditions above the floodplain protect downstream water quality, quantity, and aquatic habitat.] would provide vegetation and soil conditions above the floodplain that protect water quality and aquatic habitat. Desired condition 299 [Watershed condition rating is at satisfactory.] directs management to move toward or maintain satisfactory watershed conditions including soil conditions. Desired condition 77 [Sedimentation and soil compaction from forest activities (*e.g.*, vehicle use, recreation, and livestock grazing) does not negatively impact riparian areas.] protects upland soils so they do not degrade riparian habitat. Desired condition 34 [Habitat and ecological conditions are capable of providing for self-sustaining populations of native, riparian dependent plant and animal species.] would help provide continuous habitat to spatially support self-sustaining jumping mouse populations. This includes floodplains and adjacent upland areas used by nesting or hibernating jumping mouse. Desired conditions 292 [ASNFs water rights are secure and contribute to livestock, recreation, wildlife, and administrative uses.] and 293 [Surface water is not diminished by groundwater pumping.] ensure that water is available and not diminished by securing ASNFs water rights and preventing groundwater pumping from diminishing surface water flow. Desired conditions 81 [Riparian obligate species within wet meadows, along streambanks, and active floodplains provide sufficient vegetative ground cover

(herbaceous vegetation, litter, and woody riparian species) to protect and enrich soils, trap sediment, mitigate flood energy, stabilize streambanks, and provide for wildlife and plant needs.] and 83 [Floodplains and adjacent upland areas provide diverse habitat components (e.g., vegetation, debris, logs) as necessary for migration, hibernation, and brumation (extended inactivity) specific to the needs of riparian-obligate species (e.g., New Mexico meadow jumping mouse, Arizona montane vole (*Microtus montanus arizonensis*), narrow-headed gartersnake).] will help to ensure that streambanks, floodplains, and adjacent upland areas would have diverse habitat components such as vegetative ground cover to stabilize streambanks and provide wildlife habitat which could be used by the jumping mouse for foraging, breeding and hibernation. Desired condition 78 [Riparian vegetation consists mostly of native species that support a wide range of vertebrate and invertebrate species and are free of invasive plant and animal species.] provides for native vegetation, including that used by the jumping mouse.

The objectives under this program are to improve watershed condition and function, and riparian conditions across the ASNFs. The eight objectives provide for a treatment level of approximately 1,000 to 10,000 acres per year, which will improve the overall conditions for the six code watersheds and riparian areas receiving treatments. Collectively these desired conditions and objectives could potentially result in long-term improvements for the jumping [P. 18] mouse if done in occupied or suitable habitats. There are approximately 48,300 acres of riparian PNV, 22,700 acres of which may be potential jumping mouse habitat on the ASNFs (USFS 2014). The maximum treatment level discussed would eventually lead to improvements in jumping mouse habitat during the life time of the LMP.

Objectives 4 [Annually, enhance or restore 5 to 15 miles of stream and riparian habitat to restore structure, composition, and function of physical habitat for native fisheries and riparian-dependent species.] and 6 [Annually, move 200 to 500 acres toward desired composition, structure, and function of streams, floodplains, and riparian vegetation.] could improve riparian vegetation composition (native grasses and sedges) and structure (vigorous, tall plant heights) needed by jumping mice. Objective 5 [During the planning period, complete at least five projects (e.g., remove barriers, restore dewatered stream segments, or connect fragmented habitat) to provide for aquatic and riparian associated species and migratory species.] (removing barrier to movement, restoring dewatered stream segments, or connecting fragmented habitat) would help retain and possibly expand potential riparian corridors, which are necessary for jumping mouse movements. Objective 10 [Annually, work with partners to reduce animal damage to native willows and other riparian species on an average of 5 miles of riparian habitat.] reduces animal damage to native willows and other riparian species on an average of 5 miles of riparian habitat. [Page 19]

Specifically, with respect to the Wildlife, Fish, and Rare Plant Program, FWS stated in the Biological Opinion,

“This program includes inventory and monitoring, habitat assessments, habitat improvements through land treatments and structures, species reintroductions, conservation strategy development, administrative studies, research collaboration, and information and education. This program also covers research natural areas and recommended research natural areas. There are five relevant desired conditions that guide management and activities here that may benefit the jumping mouse. Desired condition 6

[Habitat configuration and availability allows wildlife populations to adjust their movements (*e.g.*, seasonal migration, foraging) in response to climate change and promote genetic flow between wildlife populations.] directs management and activities to provide for habitat configuration and availability to allow for adjustments in wildlife movements (seasonal, migration, foraging, etc.) in response to climate and to provide for genetic diversity. This is very important for the jumping mouse due to its current isolated and disjunct populations. Desired conditions 197 [Habitat is well distributed and connected.] and 200 [Localized rare plant and animal communities are intact and functioning.] direct management and activities to maintain and support recovery of wildlife populations and their habitats, which would include the jumping mouse. Desired condition 7 [Habitat quality, distribution, and abundance exist to support the recovery of federally listed species and the continued existence of all native and desirable nonnative species.] addresses habitat quality, distribution, and abundance to support the recovery of federally listed species, such as jumping mouse. Desired condition 72 [Beavers occupy capable stream reaches and help promote the function and stability of riparian areas.] supports the presence of beavers and the wetland habitat they create, which can also provide jumping mouse habitat.

Objective 10 [Annually, work with partners to reduce animal damage to native willows and other riparian species on an average of 5 miles of riparian habitat.] could help maintain and protect willows and alders by potentially limiting ungulate browsing in riparian habitats that may be occupied by the jumping mouse. Objective 17 [Annually, control or eradicate invasive species (*e.g.*, tamarisk, bullfrogs) on at least 2 stream miles.], annually controlling or eradicating invasive species on at least two stream miles, would improve affected jumping mouse habitat.

Six guidelines address potential impacts of habitat improvement projects on the jumping mouse and its habitat. Guideline 19 [Projects and activities should avoid damming or impounding free-flowing waters to provide stream flows needed for aquatic and riparian-dependent species.] requires that stream flows not be impeded such that riparian-dependent species like jumping mouse or their habitat is impacted. Guideline 29 [Projects should include quantitative and/or qualitative objectives for implementation monitoring and effectiveness monitoring to assist in moving toward or maintaining desired conditions.] requires monitoring to provide feedback about project implementation effects or effectiveness of mitigation measures to meet LMP desired conditions, which would include riparian areas occupied by the jumping mouse. Guideline 71 [Cool and/or dense vegetation cover should be provided for species needing these habitat components (*e.g.*, Goodding's onion (*Allium gooddingii*), black bear, White Mountains chipmunk (*Tamias sp.*), western yellow-billed cuckoo).] provides for management towards the dense, herbaceous vegetation needed by species requiring these habitat components, which would include the jumping mouse. Guideline 67 [Modifications, mitigations, or other measures should be incorporated to reduce negative impacts to plants, animals, and their habitats and to help provide for species needs, consistent with project or activity objectives.] requires project and activity mitigation to help provide for and reduce negative impacts to wildlife and their habitat, which would include the jumping mouse. Guideline 65 [Activities occurring within federally listed species habitat should apply habitat management objectives and species protection measures from recovery plans.] requires activities to comply with listed species recovery plans, which would benefit jumping mice after a recovery plan is developed. Guideline 76 [The needs of localized species (*e.g.*, New

Mexico meadow jumping mouse, Bebb willow, White Mountains paintbrush (*Castilleja sulphurea*) should be considered and provided for during project activities to ensure their limited or specialized habitats are not lost or degraded.] requires that the needs of jumping mice should be considered and provided for during project activities so that their habitats are not lost or degraded.” [Page 22]

According to the August, 2018, Biennial Monitoring Evaluation Report [for FY 2016 and 2017] for the Apache-Sitgreaves National Forests, essentially no restoration, no fencing and no monitoring has occurred, as anticipated and required by the 2015 Biological Opinion. The August 2018, Biennial Monitoring Report states that “[t]he forests implemented their revised Land Management Plan (Plan) (USDA-Forest Service, 2015) on October 25, 2015.” Report, p. 6. On Table 1 of the Report, the Forest Service provides a “Summary of findings for 20 monitoring items scheduled for reporting for the 2016-2017 biennium.” Report, 1. Included is Question 7a, “Riparian Ecological Indicator,” which asks “What is the effect of management upon habitat trends of ecological indicators (aspen, riparian) across the forests?” Report, p. 1, 19. The response is: “No data; capacity shortfall.” Report, p. 1.

More explanation is provided at p. 20 of the Report:

“Due to lack of resources in fiscal years 2016 and 2017, riparian plots have not been established, and no data collection has been accomplished. Plot establishment and data collection are tentatively funded for FY 2019. Reporting has therefore been deferred until the 2018-2019 Monitoring Evaluation Report.” Report, p. 20.

Question 31 of the Report asks whether LMP objectives are being achieved. Report, p. 61. During the planning period, the Forest Service is to complete at least five projects to provide for aquatic and riparian associated species and migratory species. Report, p. 63. None were completed in 2016 or 2017. *Id.*

Within the planning period, the Forest Service is to “enhance or restore 5 to 25 wet meadows, spring, seep, or cienegas to proper hydrologic function and native plant and animal species composition.” Report, p. 63. None were completed in 2016 or 2017. *Id.*

The Forest Service further required to “Annually, work with partners to reduce animal damage to native willows and other riparian species on an average of 5 miles of riparian habitat.” Report, p. 63. The Report states that “0.75 miles of fence was repaired or erected in 2016, and none in 2017. *Id.*

For threatened and endangered species, the Report asks whether the Forest Service is complying with the terms and conditions from the 2015 Biological Opinion. Report, p. 16. For the jumping mouse, the 2015 Biological Opinion fails to include an incidental take statement for the jumping mouse, and therefore does not include any terms and conditions, and thus this question is “not applicable.” *Id.*

The Report further asks whether the Forest Service is complying with the Conservation Recommendations from the 2015 Biological Opinion. Report, p. 16. The Conservation Recommendations for the jumping mouse are as follows:

- (1) “We recommend that the ASNFs work with the Service to conduct jumping mouse surveys over the next several years to attempt to find additional jumping mouse populations in areas outside of exclosures and closed areas. This information will aid us in understanding the short- and long-term impacts of these LMP activities on the jumping mice, and their subsequent effect on the status of the species.

- (2) Implement actions to collect vegetation data inside and outside of protected areas to determine whether the PCEs of jumping mouse proposed critical habitat can be met under current Forest Program activities. Annual reports will provide information to assist the Service in determining whether these activities, outside of protected areas, are providing suitable habitat for the jumping mouse.”

2015 Biological Opinion, p. 24. The Forest Service asserts in the Report that these measures are being implemented. Report, p. 16. The Forest Service, however, provides no results of any monitoring but rather simply asserts:

“To implement conservation measures for the New Mexico meadow jumping mouse, the ASNFs entered into an agreement with Carol Chambers (NAU) to conduct surveys during 2016 and 2017. Survey work includes collection of vegetation information.” Report, p. 17.

With respect to the question, “Are habitats for threatened, endangered, sensitive, and other species for the forests being maintained or enhanced; meeting recovery objectives; moving toward desired conditions; and contributing to species viability?” the Forest Service asserts “Yes.” Report, p. 83. The Forest Service, however, provides no supporting information, particularly for the jumping mouse. *Id.* Based on the best available information, habitat for the critically endangered jumping mouse is not being maintained or enhanced, recovery objectives are not being met, and habitat is not moving towards desired conditions or contributing to species viability.

The habitat required for New Mexico meadow jumping mouse is consistently well described and documented. The 2015 Biological Opinion describes representative jumping mouse habitat:

“The jumping mouse is a riparian-wetland obligate species; it requires dense riparian herbaceous vegetation associated with perennial or intermittent water surface flow. ... Habitat requirements are characterized by tall herbaceous vegetation, primarily composed of sedges, rushes, and forbs. Often these are within the understory of streamside willows (*Salix sp.*) or alder (*Alnus sp.*).” [Page 11]

FWS, in its March 16, 2016, Final Rule for Critical Habitat designation describes essential jumping mouse habitat similarly:

“Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species’ life-history processes (see chapter 2 in the SSA Report (Service 2014)), we determine that the PCEs [primary constituent elements] specific to the jumping mouse consist of the following:

- (1) Riparian communities along rivers and streams, springs and wetlands, or canals and ditches that contain:
  - (a) Persistent emergent herbaceous wetlands especially characterized by presence of primarily forbs and sedges (*Carex spp.* or *Schoenoplectus pungens*); or
  - (b) Scrub-shrub riparian areas that are dominated by willows (*Salix spp.*) or alders (*Alnus spp.*) with an understory of primarily forbs and sedges; and
- (2) Flowing water that provides saturated soils throughout the jumping mouse’s active season that supports tall (average stubble height of herbaceous vegetation of at least 61 cm (24 inches)) and dense herbaceous riparian vegetation composed primarily of sedges ... and forbs ... and ...

- (3) Sufficient areas of 9 to 24 km (5.6 to 15 mi) along a stream, ditch, or canal that contain suitable or restorable habitat to support movements of individual New Mexico meadow jumping mice...” [P.14293]<sup>4</sup>

Frey (2017)<sup>5</sup> also describes jumping mouse habitat similarly,

“Habitat used by the New Mexico meadow jumping mouse in the White Mountains was similar to that reported for other montane populations, characterized by tall, dense herbaceous vegetation composed primarily of forbs and sedges on saturated soil in close proximity to flowing water. However, there was significantly more cover provided by alders (*Alnus* spp.) at capture sites at both the stream reach and microhabitat scales.

...these results confirm that the New Mexico meadow jumping mouse is a riparian specialist that utilizes tall, dense herbaceous vegetation on saturated soil. P. 51

...because herbaceous riparian habitat is limited in distribution and is particularly sensitive to disturbances, it is the availability of this foraging habitat that is a key limiting factor for the New Mexico meadow jumping mouse.”

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<sup>4</sup> Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the New Mexico Meadow Jumping Mouse, Fish and Wildlife Service, Final Rule, 81 FR 14264, March 16, 2016.

<sup>5</sup> “Landscape Scale and Microhabitat of the Endangered New Mexico Meadow Jumping Mouse in the White Mountains, Arizona, Jennifer K. Frey, Journal of the Fish and Wildlife Management, June 2017.

On May 19, 2019 and June 3-5, 2019, we visited eight of the 12 population sites of New Mexico meadow jumping mouse from Table 1 on page 13 of the 2015, Biological Opinion. All locations that we visited are within designated Critical Habitat, which was finalized on March 16, 2016.<sup>6</sup> In addition, we also visited two Critical Habitat sites in the Little Colorado River drainage, the upper West Fork of the Little Colorado River and the East Fork of the Little Colorado River where jumping mouse have been detected since completion of the 2015 Biological Opinion.

The 2015 Biological Opinion, on page 13 provides Table 1, “New Mexico meadow jumping mouse locations and captured numbers from surveys conducted between 2007 and 2012 on the ASNFs, Arizona (ASNFs Mouse Site Names).”

Mr. Tom Osen, Forest Supervisor

<b>Location</b>	<b>Frey 2007-2011<sup>1</sup></b>	<b>AGFD 2012<sup>2</sup></b>
East Fork Little Colorado River (Montlure)	6	3
San Francisco River (Tal-wi-wi)	1	0
San Francisco River (Noble))	6	0
East Fork Black River (Three Forks)	7	2
Nutrioso Creek (Nutrioso)	3	1
West Fork Black River (Thompson Ranch)	1	0
West Fork Black River (Forest Road 68)	3	2
West Fork Black River (PS Ranch)	2	1
Boggy Creek (Boggy)	4	1
Centerfire Creek (Centerfire)	3	0
Corduroy Creek (Corduroy)	1	1
Campbell Blue Creek (Campbell Blue)	3	0

<sup>1</sup>Frey 2011; <sup>2</sup>Hicks 2012

For our On May 19, 2019 and June 3-5, 2019 surveys, we used this table and the map, “ZAHU surveyed sites 2016” from the April 2019, Forest Service presentation at the Apache – Sitgreaves Ranching Alliance, New Mexico meadow jumping mouse presentation. We visited eight sites East Fork Black River (Three Forks), West Fork Black River (Thompson Ranch), West Fork Black River (Forest Road 68), West Fork Black River (PS Ranch), Boggy Creek (Boggy), Centerfire Creek (Centerfire), and Corduroy Creek (Corduroy). We did not visit Campbell Blue Creek (Campbell Blue) as we were advised by multiple Forest Service personnel that the habitat there was completely lost after the Wallow Fire in 2011. We also visited two Critical Habitat sites in the Little Colorado River drainage, the upper West Fork of the Little Colorado River and the East Fork of the Little Colorado River.

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<sup>6</sup> Ibid.

Table 1 in the 2015 Biological Opinion is immediately followed by the statement,

“...While the current trend in most ASNFs riparian areas is away from desired riparian conditions, all of the above mouse location sites were likely at or near desired conditions, primarily due to exclusion of livestock grazing, over the last several years (USFS 2014<sup>7</sup>).” [Page 13]

This statement is demonstrably no longer true.

The current Forest Service website (accessed June 13, 2019) for jumping mouse, <https://www.fs.usda.gov/detail/r3/home/?cid=stelprd3809040>, also describes and includes a representative habitat image for the mouse,

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

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



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<sup>7</sup> Final Biological Assessment for the Apache-Sitgreaves National Forests USDA Forest Service, Southwestern Region (R3) Apache, Coconino, Greenlee, and Navajo Counties, Arizona Land Management Plan. May 29, 2014. U.S. Forest Service, Springerville, Arizona.

The following two June 4, 2019, images are from jumping mouse Critical Habitat at Boggy Creek. They show widespread destruction with severe streamside trampling, denuding and loss of the essential dense and at least minimally 24-inch tall herbaceous forbs and sedges. They also show near complete destruction and removal of the essential woody scrub-shrub riparian willows or alders. A woody habitat enclosure is visualized in the background of the first image. A damaged, herbaceous habitat enclosure is visualized in the background of the second image.



© Robin Silver

And,

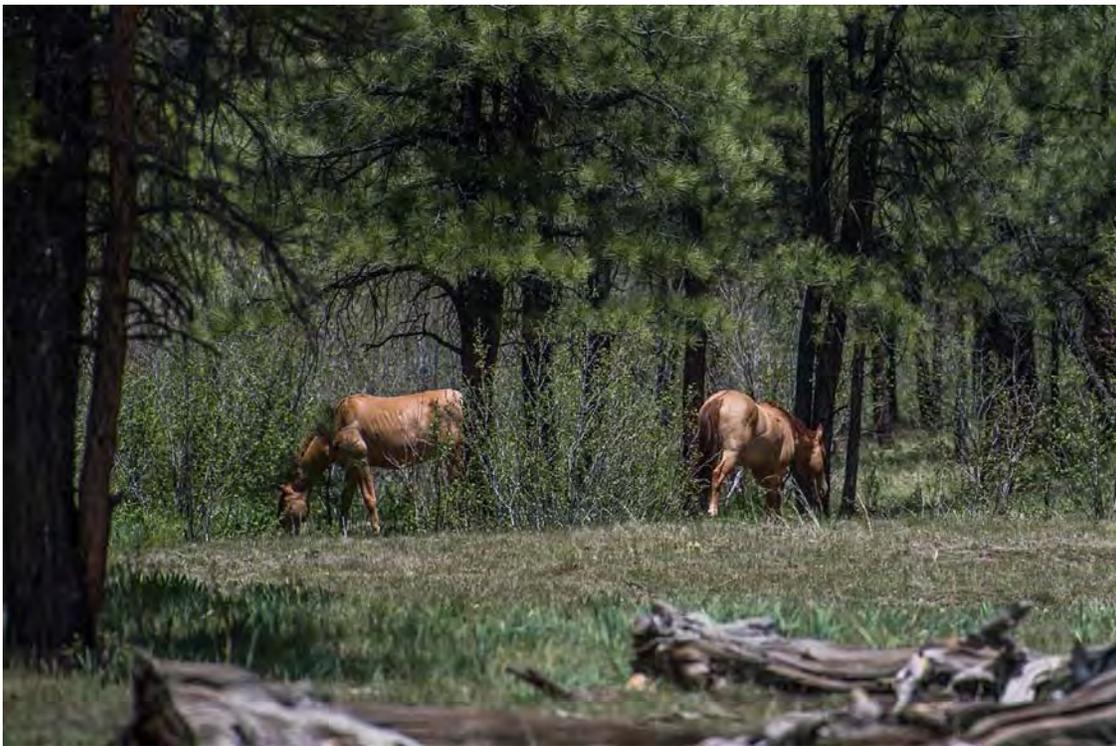


© Robin Silver

Images of the stray horses and cattle causing this trampling and denuding follow. The first image shows a damaged herbaceous habitat enclosure with the damaged, denuded riparian area, grazed woody streamside plants, and grazing stray horses in the background.



© Robin Silver



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© Robin Silver



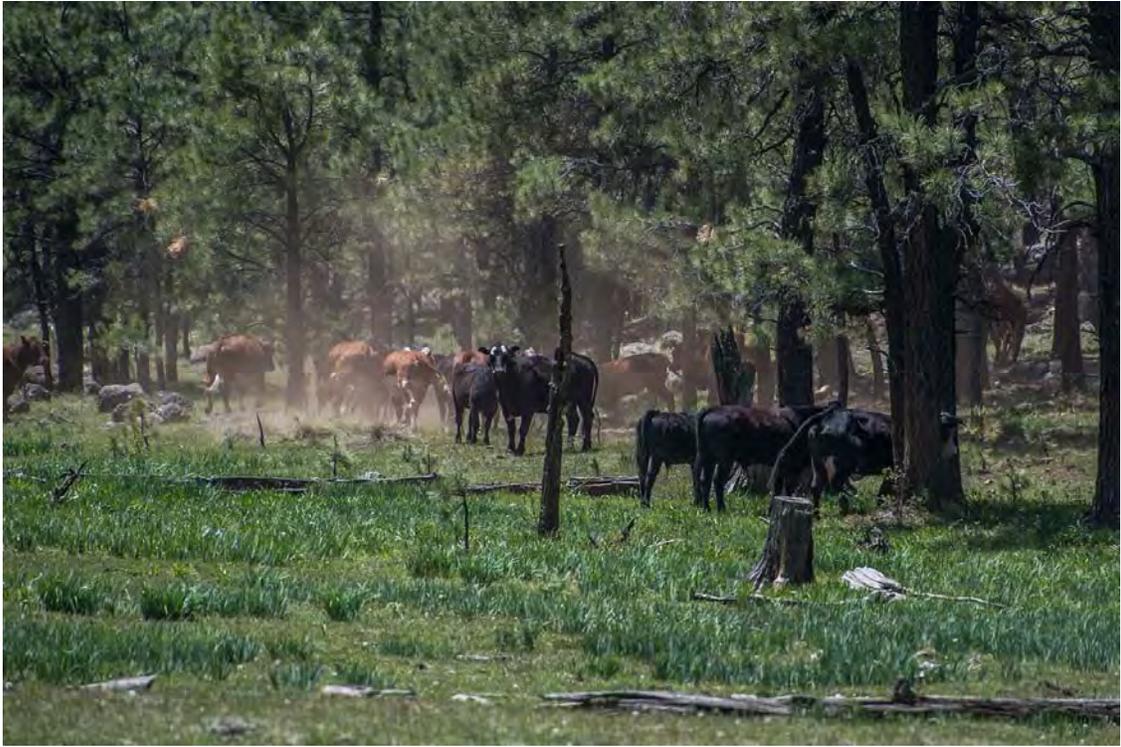
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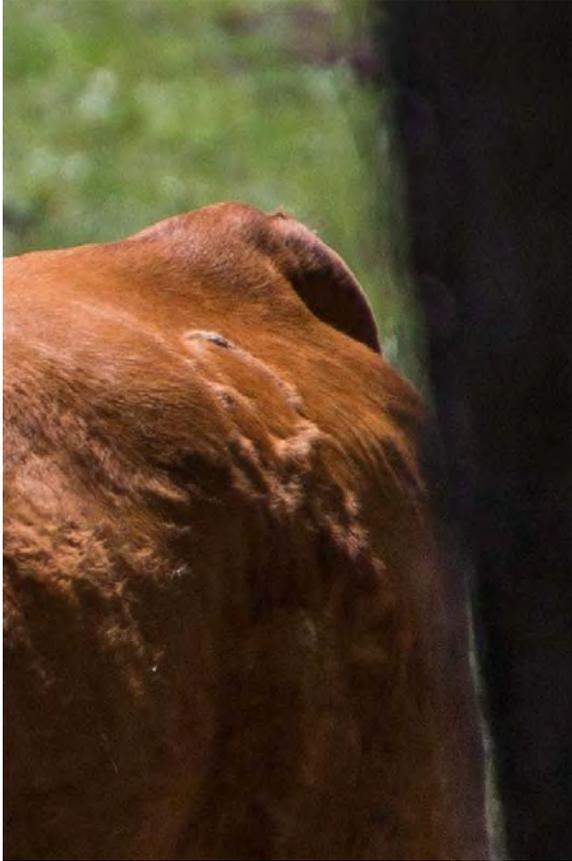


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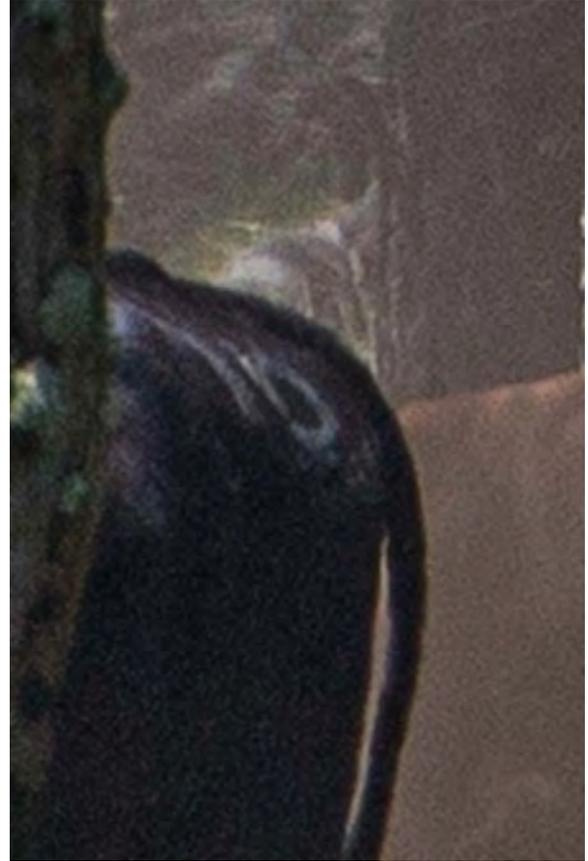


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Cropped and enlarged images of an ear tag, and two brands follow. No brands were observed on the horses.



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The following May 19, 2019, images are from jumping mouse Critical Habitat at Centerfire Creek. They show widespread habitat destruction with severe streamside trampling, denuding and loss of the essential dense and minimally required 24-inch tall herbaceous forbs and sedges. The images also document loss of essential woody scrub-shrub riparian willows or alders. The only woody vegetation in the drainage is now found inside an elk-fenced exclosure. Heavy fresh horse, cow and elk sign were seen throughout the drainage. Cattle fencing is found along parts of the drainage. It does not exclude horses or elk, and obviously, does not exclude cows.

The difference between inside and outside of the elk-fenced exclosure is dramatic:



© Robin Silver

And,



© Robin Silver

A healthy, recovering riparian area is visible with the elk-fenced enclosure. Note the stream's channelization, streamside herbaceous vegetation, and present, though still sparse woody plants:



© Robin Silver

And,



© Robin Silver

Outside of the elk-fenced enclosure, please note the devastation, a pile of horse manure and a denuded riparian area:



© Robin Silver

Trampling and denuding of Centerfire Creek outside of the enclosure is shown in the following images. An ineffective non-elk type fence can be observed in the background. Besides the extreme grazing of the streamside herbaceous vegetation, please note the absence of riparian woody vegetation:



© Robin Silver

And,



And,



While fresh signs of horse, cattle and elk were observed on May 19, 2019, I was only able to photograph elk in the drainage:



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Severely damaged jumping mouse Critical Habitat at Corduroy Creek is shown from June 5, 2019 in the following images. They show widespread destruction with severe streamside trampling, denuding and loss of essential dense, and minimally required 24-inch tall herbaceous forbs and sedges. Note the near total loss of essential woody scrub-shrub riparian willows or alders. Heavy fresh cow and elk sign were seen throughout the drainage. Cattle fencing is found along parts of the drainage. It does not exclude elk, and obviously, does not exclude cows. Severe trampling by elk and cattle is pervasively evident:



© Robin Silver

And,



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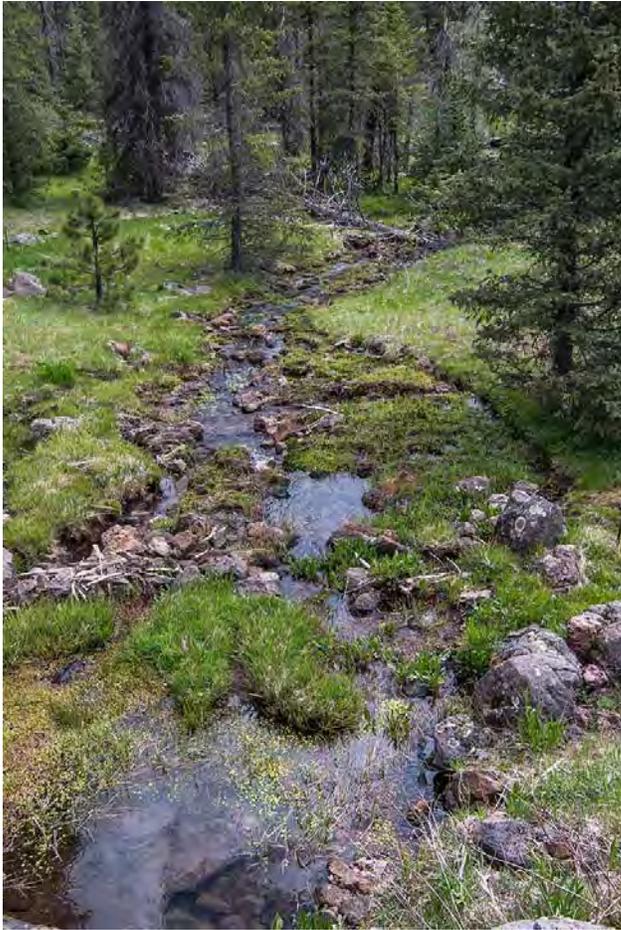
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Trampling by cows and trails of cow manure are everywhere:



© Robin Silver



© Robin Silver

Some cattle fencing is present but is not functional, and even if it were, cattle fencing does not work for elk.



© Robin Silver

Large numbers of cows are present in the upper part of the Corduroy Creek drainage immediately connected to Corduroy Creek:



© Robin Silver

Many stray horses were observed in the areas immediately above the jumping mouse Critical Habitat riparian areas of the West Fork of the Black River near the FR 68 bridge:



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Light to moderate grazing impacts were noted on June 4, 2019 in the jumping mouse Critical Habitat riparian areas of the West Fork of the Black River near the FR 68 bridge:



© Robin Silver

Fresh horse sign including unshod hoof prints were noted in this jumping mouse Critical Habitat in the riparian area near the FR 68 bridge:



© Robin Silver

On May 19, 2019, stray horses were observed in the forest immediately above and near the jumping mouse Critical Habitat at Arizona Game and Fish Department's PS Ranch:



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Based on review of the April 2019, Forest Service presentation on the jumping mouse (*Zapus hudsonius leuteus*), we also visited the West and East Forks of the Little Colorado River. On June 3, 2019, at the West Fork Little Colorado River in jumping mouse Critical Habitat at SR 273, we note moderate grazing damage, inadequately fenced riparian habitat and fresh stray horse sign.



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Inadequately fenced riparian Critical Habitat:



© Robin Silver

Unshod, stray horse footprints were observed:



© Robin Silver

We did not observe any impediment to movement of the stray horses in the West Fork Little Colorado River to the East Fork Little Colorado River where we observed little streamside woody vegetation outside of an elk-fence enclosure also at SR 273:



© Robin Silver

In summary, stray horses, stray cows, likely owned cows and non-native elk are destroying and adversely modifying jumping mouse Critical Habitat in the western Apache National Forest in the West Fork of the Black River and its drainages and in the West Fork of the Little Colorado. The stray horses, stray cows, and non-native elk have caused severe damage to Boggy Creek and to Centerfire Creek. Critical Habitat along the West Fork of the Black River has been moderately damaged by stray horses. Stray horses are present just above the riparian Critical Habitat of the West Fork of the Black River with no barriers to prevent their continued movement into Critical Habitat along the West Fork of the Black River. Critical Habitat along the lower East Fork of the Black River has been moderately damaged by stray horses and cows. No barriers are present to prevent continued invasion and damage from the stray horses and cows into the lower East Fork of the Black River. Further to the East, Corduroy Creek has been severely damaged by likely owned cows and non-native elk.

## **LEGAL STATUTORY AND REGULATORY FRAMEWORK**

### **Endangered Species Act**

Section 4 of the ESA directs the Secretary of the Interior to designate species that are threatened or endangered with extinction, and to designate “critical habitat” for such species. 16 U.S.C. § 1533(a). Section 4 also requires the Secretary to develop and implement recovery plans for the conservation and survival of threatened and endangered species, unless the Secretary finds that such a plan will not promote the conservation of the species. 16 U.S.C. § 1533(f).

Section 7 of the ESA requires each federal agency, in consultation with FWS, to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). For each proposed action, the action agency must request from FWS whether any listed or proposed species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* If the agency determines that its proposed action may affect any listed species or critical habitat, the agency must engage in “formal consultation” with FWS. 50 C.F.R. § 402.14.

To complete formal consultation, FWS must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. The biological opinion “is required to address both the ‘no jeopardy’ and ‘no adverse modification’ prongs of Section 7.” *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006), *citing* 50 C.F.R. § 402.14(g)(4). If FWS concludes in the biological opinion that the proposed action will jeopardize the continued existence of a listed species, or will result in the destruction or adverse modification of critical habitat, FWS must outline “reasonable and prudent alternatives” to the proposed action that FWS believes would not jeopardize listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A).

If the biological opinion concludes that the proposed action is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). In order to monitor the impacts of incidental take, the agency must report the impact of its action on the listed species to FWS. 50 C.F.R. § 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the agency must reinstate consultation immediately. 50 C.F.R. § 402.14(i)(4); *see also* 50 C.F.R. § 402.16.

The ESA requires the action agency and FWS to reinstate formal consultation where discretionary federal involvement or control over the action has been retained or is authorized by law and: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if 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; (3) if the 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; or (4) if a new species is listed or critical habitat designated that may be affected

by the action. 50 C.F.R. § 402.16.

In addition to the obligation to avoid jeopardizing species under section 7(a)(2), Section 7(a)(1) of the ESA also imposes an obligation on all federal agencies, in consultation with the FWS, to "carry[] out programs for the conservation" of listed species. 16 U.S.C. § 1536(a)(1). This provision imposes an "affirmative duty on each federal agency to conserve each of the species listed." *Sierra Club v. Glickman*, 156 F.3d 606,616 (5th Cir. 1998); *accord Pyramid Lake Paiute Tribe of Indians v. Dep't of the Navy*, 898 F.2d 1410, 1416-17 (9th Cir. 1990) (noting that federal agencies have "affirmative obligations to conserve under [S]ection 7(a)(1)"). "Conserve" is defined by the Act to mean *recovery*, *i.e.*, the "use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1536(a)(1).

Section 9 of the ESA and its implementing regulations prohibit the unauthorized "take" of any endangered or threatened species of fish or wildlife. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. "Take" is defined broadly under the ESA to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. 16 U.S.C. § 1532(19).

### **The Wild Horses and Burros Act**

#### **THERE IS NO LEGAL IMPEDIMENT PREVENTING THE REMOVAL OF STRAY HORSES THAT ARE DESTROYING NMMJM CRITICAL HABITAT**

The Forest Service must obey Public Law 92-195, the Wild Horses and Burros Act, 16 U.S.C. Sections 1332-40; however, the law not only does not preclude removal, it requires removal where "excess animals...must be removed...in order to preserve and maintain a thriving natural ecological balance [16 U.S.C. 1332]...[and] ... in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species. [16 U.S.C. 1333]"

Several definitions are applicable to the situation on the Apache-Sitgreaves National Forest with respect to stray horses destroying Critical Habitat:

"16 U.S. Code § 1332. Definitions: ...

"wild free-roaming horses and burros" means all unbranded and unclaimed horses and burros on public lands of the United States ...

"excess animals" means "wild free-roaming horses or burros... which must be removed from an area in order to preserve and maintain a thriving natural ecological balance..."

16 U.S.C. 1333, "Powers and duties of Secretary," states, in Section (a):

"The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on public lands," and "[a]ll management activities shall be at the minimal feasible level and shall be carried out in consultation with the wildlife agency of the State wherein such lands are located in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species. Any adjustments in forage allocations on

any such lands shall take into consideration the needs of other wildlife species which inhabit such lands...”

Further, 16 USC 1333 (b) Inventory and determinations...overpopulation... states,

“... Where the Secretary determines on the basis...(iv) such additional information as becomes available to him from time to time...that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken, in the following order and priority, until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with over population...”

In addition, Forest Service regulations (36 CFR 222.20 Subpart B – Management of Wild Free-Roaming Horses and Burros... Authority and definitions” state,

“§ 222.20 Authority and definitions. ...

(b) *Definitions.* ... (13) *Wild free-roaming horses and burros* mean all unbranded and unclaimed horses and burros and their progeny that have used lands of the National Forest System on or after December 15, 1971, or do hereafter use these lands as all or part of their habitat, but does not include any horse or burro introduced onto the National Forest Service System on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership...”

§ 222.23 Removal of other horses and burros.

Horses and burros not within the definition in § 222.20(b)(13) which are introduced onto Wild Horse and Burro Territories or ranges after December 15, 1971, by accident, negligence, or willful disregard of private ownership, and which do not become intermingled with wild free-roaming horses or burros shall be considered as unauthorized livestock and treated in accordance with provisions in 36 CFR 261.7 and 262.10.”

36 CFR 261.7 states, “Livestock. ... The following are prohibited: ... (a) Placing or allowing unauthorized livestock to enter or be in the National Forest System ... (b) Not removing unauthorized livestock from the National Forest System ... under Forest Service control when requested by a forest officer ...”

36 CFR 262.10 states, “Impoundment and disposal of unauthorized livestock. ... (b) When a Forest officer determines that such livestock use is occurring, but does not have complete knowledge of the kind of livestock, or if the name of the owner is unknown, such livestock may be impounded any time 15 days after the date a notice of intent to impound livestock is first published in a local newspaper and posted at the county courthouse and in one or more local post offices. The notice will identify the area in which it will be effective.”

Arizona State Statutes are also applicable:

3-1401. Definition of stray animal

"Stray animal" as used in this article means livestock, bison or ratites whose owner is unknown or cannot be located, or any such animal whose owner is known but permits the animal to roam at large on the streets, alleys, roads, range or premises of another

without permission, except that this section does not apply to livestock where the principles of a federal permit, federal allotment or federal lease are in dispute.

3-1371. Seizure of livestock by a livestock officer

Livestock officers shall seize livestock, except unweaned animals running with their mothers, wherever found and when the livestock officer questions the livestock's ownership. The question of ownership may be raised in the following circumstances:

1. The livestock is not branded as required by this chapter.
2. The ownership of the livestock is questioned by another person.
3. The livestock has brands so mutilated, indistinct, burned or otherwise disfigured as to be difficult of ascertainment.
4. The livestock bears a brand which is not recorded.
5. The livestock is freshly branded and not found with its mother.
6. The livestock has a brand or mark which is not the recorded brand or mark of the owner.
7. The livestock is that which is known as "leppys," "orejanas," "sleepers," "dogies" or "mavericks."
8. Other circumstances raising questions as to the livestock's ownership.

3-1379. Notification required on seizure by government agencies

All federal, state and local governmental agencies shall notify the department within two hours of any seizure of any livestock or property in or on which livestock is present or when a person responsible for the care of any livestock is taken into custody and the person from the federal, state or local governmental agency knows that the person taken into custody is responsible for the care of any livestock.”

The chances are essentially zero that the horses on the Apache National Forest destroying New Mexico meadow jumping mouse Critical Habitat are horses that come from the Heber Wild Horse Territory on the Sitgreaves National Forest. The Heber Wild Horse Territory is approximately 70 miles from the nearest jumping mouse Critical Habitat. For a horse to move from the Heber Wild Horse Territory to jumping mouse Critical Habitat on the Apache National Forest, it would have to either (1) move across Forest Service lands and cross either State Route 260 and/or State Route 60 or (2) they would have to leave Forest Service land crossing onto White Mountain Apache Tribal land and then cross State Routes 60, 77 and/or 73 to get to Critical Habitat. State Routes in Arizona are managed by the Arizona Department of Transportation and are protected by fences and cattle guards.

In reality, it does not matter if the horses now destroying jumping mouse Critical Habitat are coming from the Heber Wild Horse Territory. These horses are “excess animals” by federal definition where “excess animals” means “wild free-roaming horses or burros... which must be removed from an area in order to preserve and maintain a thriving natural ecological balance...” 16 U.S.C. § 1332.

And further, also pursuant to Federal law, “[t]he Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on public lands,” and “[a]ll management activities shall be at the minimal feasible level and shall be carried out in consultation with the wildlife agency of the State wherein such lands are

located in order to protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species.” [16 U.S.C. § 1333.]

### **SUMMARY AND VIOLATIONS OF THE ESA**

With their June 10, 2014, listing of the New Mexico meadow jumping mouse as endangered, FWS warned:

“Our assessment concluded that the New Mexico meadow jumping mouse has an overall low viability (probability of persistence) in the near term (between now and the next 10 years) and a decreasing viability in the longterm future (beyond 10 years). [page 33120] ...

In considering the area needed for maintaining resilient populations of adequate size with the ability to endure adverse events (such as floods or wildfire), we estimate that resilient populations of jumping mice need connected areas of suitable habitat in the range of at least about 27.5 to 73.2 hectares (ha) (68 to 181 acres (ac)), along 9 to 24 kilometers (km) (6 to 15 miles (mi)) of flowing streams, ditches, or canals. The minimum area needed is given as a range due to the uncertainty of an absolute minimum and because local conditions within drainages will vary. This distribution and amount of suitable habitat would allow for multiple subpopulations of New Mexico meadow jumping mice to exist along drainages and would provide for sources of recolonization if some areas were extirpated due to disturbances.

The suitable habitat patches must be relatively close together, no more than about 100 m (330 ft) apart, because the New Mexico meadow jumping mouse has limited movement and dispersal capacity for natural recolonization. Rangelwide, we determined that the New Mexico meadow jumping mouse needs at least two resilient populations (where at least two existed historically) within each of eight identified geographic management areas. This number and distribution of resilient populations is expected to provide the subspecies with the necessary redundancy and representation to provide for viability. [page 33121] ...

Nearly all of the current populations are isolated and widely separated, and all of the 29 populations located since 2005 have patches of suitable habitat that are too small to support resilient populations of New Mexico meadow jumping mouse. [page 33121] ...

Considering the subspecies’ biological status now and its likely status into the future, without active conservation (i.e., grazing management and water management) existing populations are vulnerable to extirpation (at least 11 have already undergone substantial impacts since 2011) and, therefore, the subspecies as a whole is currently at an elevated risk of extinction. None of the 29 populations known to exist since 2005 are of sufficient size to be resilient.

Assuming this rate of population loss continues similar to recent years, the number of populations could be severely curtailed in the near term, eliminating the level of redundancy needed to withstand catastrophic drought and wildfire, along with the additive impacts of multiple threats. In addition to past sources of habitat loss, ongoing grazing, water shortages, and high-impact wildfire (the latter two exacerbated by climate change) will continue to put all of the remaining locations at considerable risk of extirpation in the

near-term (between now and the next 10 years) and increasing over the long term. [page 33122]<sup>8</sup>

With this Notice, we present newly documented evidence that significant adverse modification and destruction of jumping mouse Critical Habitat is occurring on the Apache-Sitgreaves National Forest. Five of the 12 jumping mouse populations examined by the 2015 Biological Opinion have either been severely damaged, moderately damaged or are subjected to ongoing and increasing threats by uncontrolled grazing by stray horses, stray and/or likely owned cattle, and non-native elk. None of these damaging actions were anticipated by the 2015 Biological Opinion.

The 2015 Biological Opinion relied on Forest Service commitments to protect the jumping mouse and its riparian habitat by monitoring, structures and fencing. The Forest Service has not kept these commitments.

Since the 2015 Biological Opinion, we understand that new populations have been discovered locally on the Apache-Sitgreaves National Forest and at some other locations region wide (Florida River, Jemez Mountains, Sugarite Canyon), that the population at Coyote Creek remains the same, and that populations at Bosque del Apache and the Sacramento Mountains are not doing well.

While these new findings also represent new information, they do not remedy FWS' listing concerns regarding (1) overall low viability, (2) isolated populations of insufficient resilient size, (3) lack of connectivity between populations, (4) lack of active conservation management (grazing and water), and (5) climate change.

FWS' 2015 Biological Opinion for the Apache-Sitgreaves National Forests violates the ESA and is arbitrary, capricious, an abuse of discretion, and not in accordance with law for a number of reasons, including but not limited to the following: (1) despite determining that the LMP is likely to adversely impact the jumping mouse, FWS failed to include an Incidental Take Statement for the jumping mouse; (2) in determining no jeopardy for the jumping mouse, FWS failed to properly consider relevant factors and the overall cumulative impacts of authorized and unauthorized livestock grazing, stray horses, elk, climate change, drought, flooding, and wildfires on the critically endangered jumping mouse population; (3) FWS failed to articulate a rational connection between the facts found and the choice made in making its no jeopardy determination for the jumping mouse; and (4) FWS failed to properly analyze and consider the impacts of the LMP on the recovery of the jumping mouse and its critical habitat.

The Forest Service has an independent, substantive duty under Section 7 of the ESA to ensure that its actions are not likely to jeopardize listed species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). Because the 2015 Biological Opinion violates the ESA and is unlawful, the Forest Service's reliance on the Biological Opinion to fulfill its Section 7 procedural and substantive obligations for the LMP is also arbitrary, capricious, and in violation of the ESA. *Center for Biological Diversity v. Salazar*, 804 F.Supp. 2d 987, 1010 (D. Az. 2011) (an action agency's reliance on a legally flawed biological opinion is arbitrary and capricious). Without a lawful and valid Biological Opinion, the Forest Service has failed to insure that continued implementation of the LMP is not likely to jeopardize the continued existence of jumping mouse, or result in the destruction or adverse modification of the its critical habitat, as required by the ESA. *Id.*; 16 U.S.C. § 1536(a)(2).

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<sup>8</sup> Determination of Endangered Status for the New Mexico Meadow Jumping Mouse Throughout Its Range, Final Rule, U.S. Fish and Wildlife Service, 79 FR 33119, June 10, 2014.

The anticipated amount and extent of incidental taking of jumping mouse in the 2015 Biological Opinion has been exceeded, new information has revealed effects of the action that are affecting the jumping mouse and its critical habitat in a manner and to an extent not previously considered in the 2015 Biological Opinion, and the action has been modified in a manner that causes effects on the jumping mouse and its habitat that was not considered in the 2015 Biological Opinion. FWS and the Forest Service are therefore in ongoing violation of the ESA for failing to reinstate formal consultation concerning the continued implementation of the LMP. 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.16.

The Forest Service is in violation of Section 7(a)(1) of the ESA, where “all” federal agencies “shall, in consultation with and with the assistance of the [FWS], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species,” as the Forest Service is jeopardizing the continued existence of the jumping mouse and allowing the continued destruction and adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(1).

The Forest Service is authorizing and allowing the destruction and adverse modification of Critical Habitat for the jumping mouse, and jeopardizing the continued existence of the jumping mouse, in violation of Section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

In sixty days, the Center for Biological Diversity and Maricopa Audubon Society will seek judicial relief if you have still not taken corrected action and reinstated formal consultation regarding the destructive Forest Service action and activities on the Apache-Sitgreaves National Forests that are jeopardizing the New Mexico meadow jumping mouse and destroying and adversely modifying designated habitat to a degree not considered in the 2015 Biological Opinion.

### CONTACT INFORMATION

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Sincerely,



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