

WildEarth Guardians – Western Watersheds Project – Caldera Action

October 19, 2022

Via Email and Certified Mail, Return Receipt Requested

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**RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act
Related to Ongoing Trespass Livestock in the Valles Caldera National Preserve.**

Dear Secretary Haaland, Director Williams, Director Sams, Chief Moore, Acting Regional Director Hammond, Superintendent Jorge Silva-Bañuelos, and Acting Forest Supervisor Duran:

In accordance with the sixty-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians, Western Watersheds Project, and Caldera Action (hereafter “Noticing Parties”) intend to bring a civil action against the National Park Service, U.S. Forest Service, and U.S. Fish and Wildlife Service and the officers and supervisors to whom this letter is directed (collectively, “Federal Agencies” or “Agencies”) for violating Section 7 of the ESA, 16 U.S.C. § 1536, by failing to consult or failing to reinstitute consultation necessary due to the long-term and ongoing presence of livestock on the Valles Caldera National Preserve. The Agencies also violated Section 7 of the

ESA by failing to ensure that those actions are not likely to jeopardize the continued existence of species protected by the ESA, or result in the destruction or adverse modification of critical habitat designated under the ESA. *See* 16 U.S.C. § 1536(a)(2). The Agencies also violated Section 9 of the ESA by authorizing activities that have resulted in the take of ESA-listed species or designated critical habitat. *Id.* § 1538(a). The Federal Agencies are causing jeopardy, adverse modification of critical habitat, and illegal take by continuing to allow livestock to enter and remain within the VCNP on a recurring basis since at least 2017. The Noticing Parties intend to sue the Federal Agencies after the 60-day period has run unless the violations described in this notice are remedied.



The Noticing Parties strongly urge and request the Federal Agencies to engage in discussions with the Noticing Parties about alternatives for remedying the violations of the ESA described in this notice letter before the 60-day notice period has run. We are available to discuss these matters at your earliest convenience.

The names and addresses of the Noticing Parties giving this Notice of Intent to Sue are:

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I. Legal Background: The Endangered Species Act

Enacted in 1973, the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA provides a means to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). To “conserve” means “to use and 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.” *Id.* § 1532(3).

To receive the full protections of the ESA, a species must first be listed by the Secretary of the Interior as “endangered” or “threatened” pursuant to ESA Section 4. *Id.* § 1533. The ESA defines “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). It defines “threatened” species as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

Congress recognized the importance of timely habitat protections to the conservation and recovery of endangered species when it found that:

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

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

Thus, concurrent with listing a species, the ESA requires the designation of critical habitat. 16 U.S.C. §§ 1533(a)(3)(A)(i); 1533(b)(6)(C). Critical habitat means “the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) *essential* to the conservation of the species and (II) which may require special management considerations or protection;” and unoccupied areas “*essential* for the conservation of the species.” *Id.* § 1532(5) (emphasis added). “[T]he purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

Section 7 of the ESA imposes a substantive obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for such species. 16 U.S.C. § 1536(a)(2). “Jeopardize the continued existence of” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.¹ “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” *Id.* The ESA also prohibits “take” of a species—which means to, *inter alia*, harass, harm, wound, kill, trap, capture, or collect a listed species, or to attempt to engage in any such conduct. 16 U.S.C. §§ 1538(a)(1), 1532(19). Harm includes significant habitat modification or degradation. 50 C.F.R. § 17.3.

To fulfill the substantive mandates of section 7 of the ESA, federal action agencies must consult with an expert agency—here, the U.S. Fish and Wildlife Service (“FWS”)—before undertaking any action that “may affect” affect listed species or their habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). The ESA’s consultation requirement applies “to all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. § 402.03. Agency action requiring consultation is broadly defined by regulation to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and include “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

If species listed as threatened or endangered under the ESA may be present in the area of agency action, the action agency must prepare a Biological Assessment (“BA”) to determine

¹ All citations are to the ESA regulations in effect as of October, 2022, 50 C.F.R. Part 400. In August 2019, the Fish and Wildlife Service issued final regulations amending its procedures for interagency consultation under the Endangered Species Act. 84 Fed. Reg. 44,976 (Aug. 27, 2019). Although those regulatory amendments are currently the subject of ongoing litigation, *see California v. Bernhardt*, No. 19-cv-6013 (N.D. Cal.), *Center for Biological Diversity v. Bernhardt*, No. 19-cv-5206 (N.D. Cal.), and *Animal Legal Defense Fund v. Bernhardt*, No. 19-cv-6812 (N.D. Cal.), the violations described in this Notice of Intent arise directly under the well-defined statutory terms of the Endangered Species Act, and would constitute violations of the Act under either the 1986 or 2019 implementing regulations.

whether a listed species may be affected by the proposed action. *See* 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species, the agency must engage in “formal consultation” with the Services. 50 C.F.R. § 402.14; *see also Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 99, 1018 (9th Cir. 2009) (“any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.” (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986))).

The threshold for a “may affect” determination is very low, and ensures “actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are not likely to do so—require at least some consultation under the ESA.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012). *See also WildEarth Guardians v. U.S. Fish and Wildlife Service*, 784 F.3d 677, 700 (10th Cir. 2015). According to the Services’ Consultation handbook, the “may affect” threshold is met if “a proposed action may pose *any* effects on listed species or designated critical habitat.” U.S. Fish and Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at xvi (1998) (emphasis in original). The regulations implementing the ESA require an examination of both the direct effects of the action as well as the indirect effects of the action, which are defined as “those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.” 50 C.F.R. § 402.02. Therefore, an agency must consult in every situation except when a proposed action will have “no effect” on a listed species or critical habitat.

If the action agency concludes in a BA that the activity is not likely to adversely affect the listed species or adversely modify its critical habitat, and FWS concurs with that conclusion in a Letter of Concurrence, then the consultation is complete. 50 C.F.R. §§ 402.12, 402.14(b). If, however, the action agency determines that the activity is likely to adversely affect the listed species or its critical habitat, then FWS must complete formal consultation.

To complete formal consultation, FWS must provide the action agency with a “biological opinion” (“BiOp”) explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. In carrying out the consultation process, “each agency shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The BiOp must include, *inter alia*, “a detailed discussion of the effects of the action on listed species or critical habitat.” 50 C.F.R. § 402.14(h)(1)(iii). The BiOp can either find the action is (1) not likely to jeopardize a species or result in adverse modification of critical habitat; (2) likely to cause jeopardy or adverse modification but such jeopardy or adverse modification can be avoided by implementing certain reasonable and prudent alternatives to the proposed action as designed; or (3) likely to cause jeopardy or adverse modification that is unavoidable and thus the action cannot proceed. 50 C.F.R. § 402.14(h)(1)(iv).

If the biological opinion concludes that the proposed action (or implementation of any reasonable and prudent alternatives) is *not* likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat, but may result in the incidental take of the species, FWS must provide with the biological opinion an “incidental take statement.” 16 U.S.C. §§ 1532(19), 1536(b)(4)(A); 50 C.F.R. § 402.14(i). *See also*

WildEarth Guardians v. U.S. Fish and Wildlife Service, 784 F.3d 677, 700 (10th Cir. 2015). The incidental take statement must specify the impact (amount or extent) of 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,” including but not limited to reporting requirements, 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). “[A] primary purpose of the [incidental take statement] and its measure of permissible take is to provide a trigger for reinitiating consultation under Section 7(a)(2) of the ESA.” *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 913 (9th Cir. 2012).

An agency’s ESA Section 7 duties do not end with the issuance of a BiOp. *WildEarth Guardians v. United States Bureau of Reclamation*, No. 14-0666-RB-SCY, 2015 WL 13651243, at *4 (D. N.M. 2015); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1106 (10th Cir. 2010); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010). The action agency “cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary or capricious.” *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); *see also Grand Canyon Trust v. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1037 (D. Az. 2009).

Further, after the procedural requirements of consultation are complete, the agencies have a duty to ensure that the consultation remains valid. To this end, an agency must re-initiate consultation in certain circumstances. 50 C.F.R. § 402.16. The ESA’s implementing regulations require the agencies to re-initiate consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) 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;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

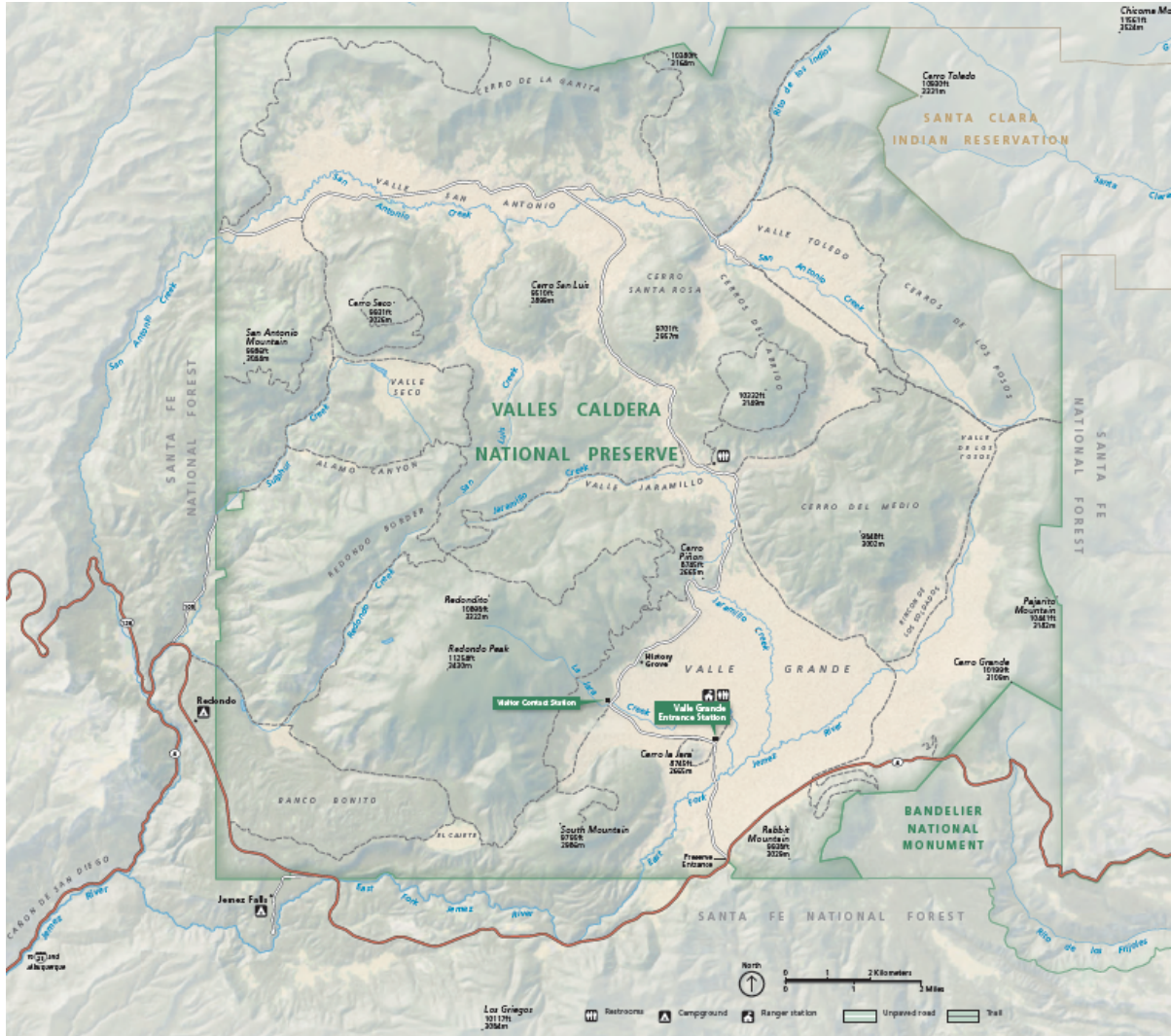
After consultation is initiated or reinitiated, ESA Section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures . . .” 16 U.S.C. § 1536(d). The 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50

II. Factual Background

A. The Valles Caldera National Preserve.

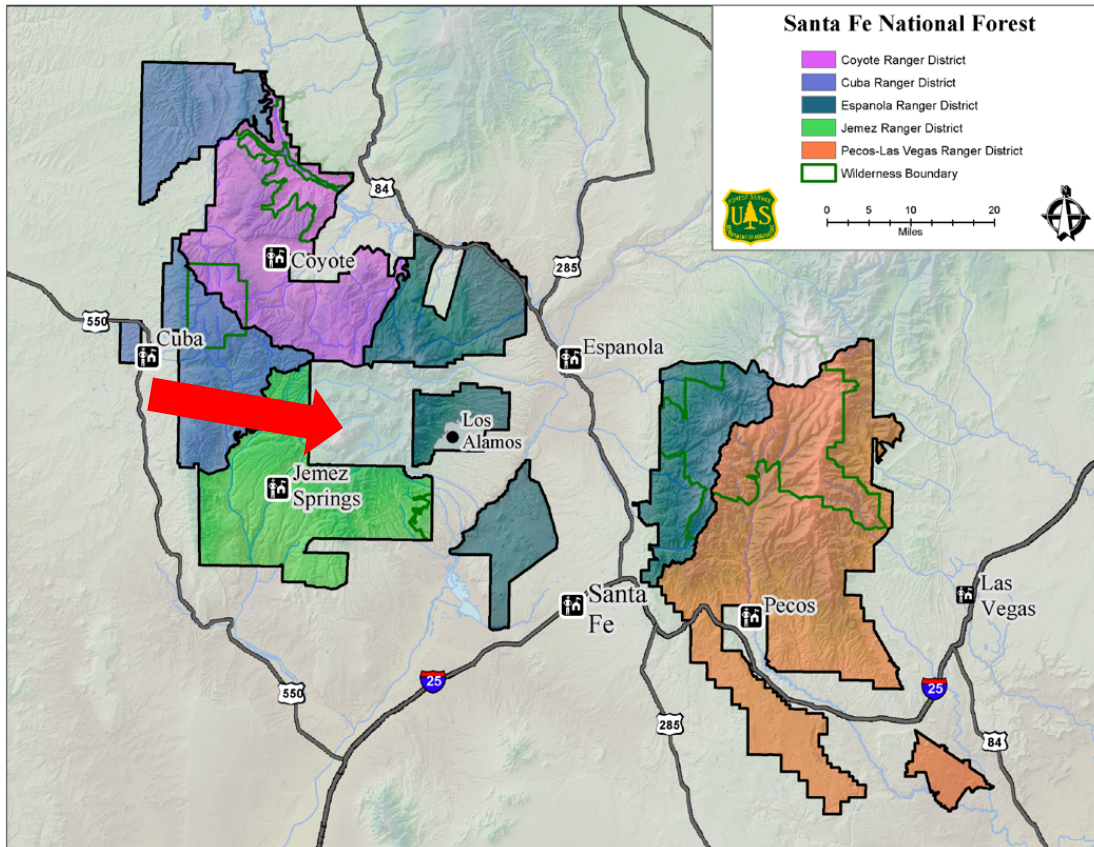
The Valles Caldera National Preserve (“VCNP”) was established in 2000 as a national experiment in decentralized public lands management and its protected areas provide for long-term economic and environmental sustainability and innovative approaches to place-based and science-based adaptive management. *See* 2018 National Park Service, Foundation Document, Valles Caldera National Preserve, page 3 (hereafter, “2018 Foundation Document”). Initially managed by the Valles Caldera Trust, the VCNP was designated as a unit of the national park system in 2014 as a “preserve,” and the National Park Service (“NPS”) assumed management of the VCNP on October 1, 2015.

“The preserve is an ecosystem in recovery.” 2018 Foundation Document at 4. It “is a place where one can directly experience pre-agricultural heritage and reflect on inconspicuous cultural landscapes.” *Id.* at 6. The VCNP, located in the center and at the top of the Jemez Mountains in north central New Mexico, encompasses 88,900 acres and is surrounded by Forest Service lands, the vast majority of which are subject to livestock grazing. The following map shows the VCNP with the Santa Fe National Forest almost completely encircling its boundaries:



See 2018 Foundation Document.

The next map shows the various Ranger Districts of the Santa Fe National Forest in relation to the VCNP (center square with no color, red arrow indicates location):



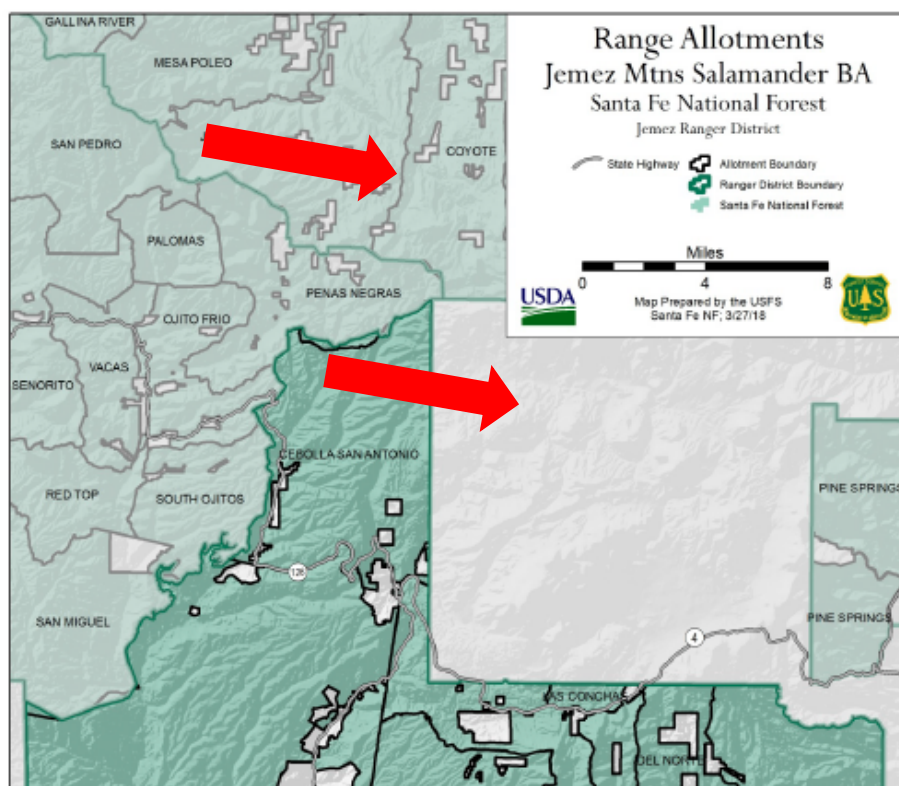
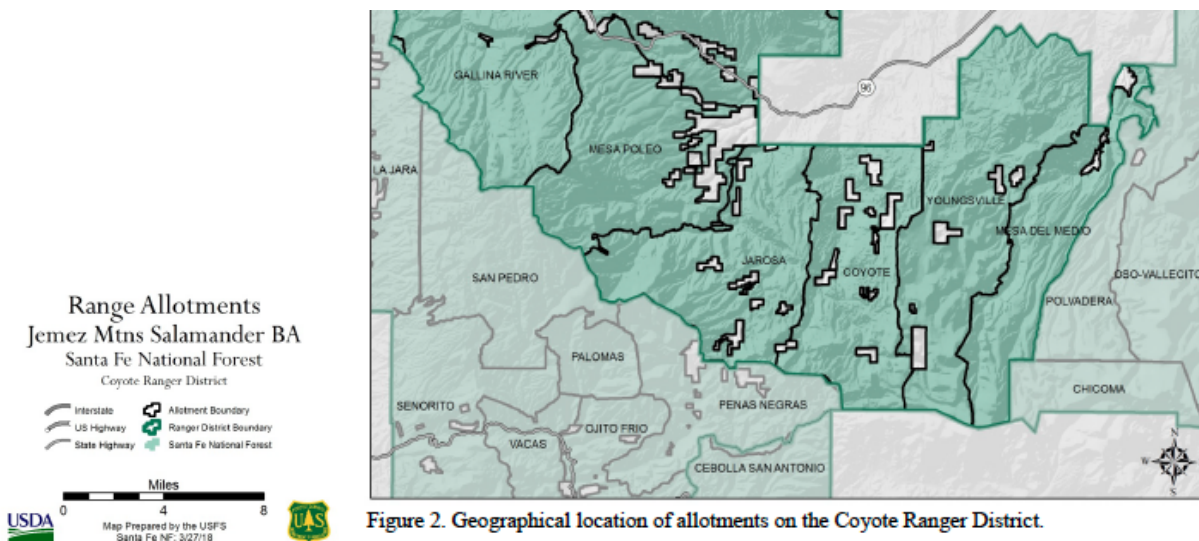
The VCNP is also bordered by the Pueblo of Santa Clara on the northeast corner. The VCNP landscape includes large grassland meadows (or *valles*, in Spanish) surrounded by forest-covered volcanic domes with elevations ranging from 8,000 to more than 11,000 feet. *Id.* at 3. The area supports a wide variety of wildlife and plants, including species protected under the ESA. *Id.* at 18. The area has a long history of overgrazing by domestic livestock and many wildlife species were extirpated from the area, though today the area is managed for ecological restoration and is considered an ecosystem in recovery. *Id.*, throughout. The purpose of the VCNP is to protect, preserve, and restore ecosystems and cultural landscapes within an outstanding example of a volcanic caldera for the purpose of education, scientific research, public enjoyment and use, and cultural continuity. P.L. 113-291, Dec. 19, 2014. 128 STAT. 3292, 113th Congress. Based on information and belief, there has been no grazing authorized on the VCNP in recent years.

B. Livestock Grazing on the Santa Fe National Forest.

The Forest Service authorizes livestock grazing on the Santa Fe National Forest, including but not limited to the Youngsville, Mesa del Medio, and Coyote allotments on the Coyote Ranger District and the Cebolla-San Antonio allotment on the Jemez Ranger District. According to a July 25, 2018 Biological Opinion (02ENNM00-2016-F-0367) (hereafter, “2018 Grazing BiOp”) assessing the effects to the Jemez Mountains salamander from ongoing implementation of term grazing permits for allotments within the Coyote, Cuba, Española, and Jemez Ranger Districts on the Santa Fe National Forest, the grazing management system for

Youngsville allotment allows for rest rotation, average use duration of 5.5 months per year, with an average number of 739 cows or calves and 30 bulls. *See* 2018 Grazing BiOp at 12, Table 3. The grazing management system for the Cebolla-San Antonio allotment allows for three-herd deferred rotation, average use duration of short to 4 months (depending on the pasture), with an average number of 30 to 168 head (depending on the pasture). *Id.* at 14, Table 3.

The following maps show the Youngsville, Mesa del Medio, Coyote, and Cebolla-San Antonio allotments in relation to the VCNP. Note that the red arrow identifies the location of the VCNP in relation to these allotments:



2018 Grazing BiOp at 8, 11.

The 2018 Grazing BiOp states that the Forest Service develops Allotment Management Plans (“AMPs”) for each allotment that details the information regarding numbers of livestock, season of use and length, stocking dates, and rotation schedules for the allotment. 2018 Grazing BiOp at 16. In addition, the Forest Service develops Annual Operating Instructions (“AOIs”) for each allotment prior to each grazing season that detail the number of livestock to be grazed, developments planned, projects planned, maintenance activities, and any other instructions necessary to carry out activities outlined in the AMP for that year. *Id.* The AOI for a particular allotment should include any inspections, data collections, analyses, studies, routing schedules or other activities to be carried out during the grazing year. *Id.* The AOI for a particular allotment should include range infrastructure such as repair and maintenance of existing range structures like fences, tanks, corrals, wells, etc. *Id.* FWS states that “[a]ny proposed new range improvements will have site specific analysis done to determine effects to listed species.” *Id.*

C. The Federal Agencies Have Been Aware of Livestock Entering and Remaining Within the Valles Caldera For At Least Five Years.

Trespass livestock entering into the VCNP from adjacent grazing allotments on the Santa Fe National Forest, and remaining within the VCNP, have been a well-known and well-documented issue since at least 2017.² Based on information and belief, the livestock entering into the VCNP primarily come from the Youngsville, Mesa del Medio, Coyote, and the Cebolla-San Antonio allotments. The NPS and the Forest Service have been discussing making changes to boundary fencing—especially in the northern part of the VCNP—since at least 2017 but have failed to actually take action to address the ongoing issue of livestock entering and remaining within the VCNP. The following is a summary of the information showing the NPS and Forest Service’s awareness of livestock within the VCNP as a problem that needs to be addressed:

2017

- May 2017, the Forest Service and NPS discuss the need to address boundary fence maintenance issues and the need to “button up” the boundary fence.³
- July 2017, Forest Service and NPS planned boundary fence work days.⁴

2018

- February 2018, internal Forest Service email indicates the VCNP purchased fencing materials for use on the northern boundary between Forest Service and NPS managed lands.⁵

² This information was obtained from documents obtained through a Freedom of Information Act request and the supporting documentation (including various emails to and from Forest Service and NPS staff) is included as Attachment A.

³ Attachment A at 71.

⁴ *Id.* at 12, 53.

⁵ *Id.* at 36.

- September 2018, Forest Service and NPS communicate via email regarding Forest Service grazing permittee concerns about retrieving their livestock from VCNP.⁶ VCNP Superintendent allows livestock to be driven off VCNP instead of trailered off. A rancher and president of the Northern New Mexico Stockman's Association sends an email to the Forest Service and state officials complaining about livestock being moved out of VCNP and providing "estimated costs incurred in the removal" of livestock from the VCNP of more than \$22,000.
- On information and belief, in 2018 the Regional Park Service notified the VCNP it is failing to meet its obligations to protect natural resources. The NPS initiated a trespass livestock roundup after visitor complaints.⁷ In October, 2018, Superintendent Silva-Banuelos publicly states that the NPS has no obligation to fence-out livestock.⁸
- October 2018, NPS and Forest Service plan to work cooperatively to address trespass livestock entering and remaining in the VCNP and fencing issues.⁹
- November 2018, Forest Service plans to meet with NPS about fencing and "producer relationships"¹⁰
- November 2018, Forest Service and NPS discuss plans for working collaboratively on fencing issues in the 2019 grazing season.¹¹ NPS Superintendent identifies possible solution to address grazing trespass from example where Bandelier National Monument successfully eliminated grazing, including cattle and horses that come within its boundaries.¹² Forest Service and NPS identify 44 miles of boundary fencing that is needed.¹³

2019

- February 2019, Forest Service staff from the Santa Fe National Forest discuss via email their plans to coordinate with the NPS to build boundary fencing and to address livestock entering the VCNP from adjacent grazing allotments.¹⁴

2020

- Summer 2020 through December 2020, trespass cattle are documented within the VCNP.
- November 2020, VCNP Superintendent Jorge Silva-Banuelos tells Western Watersheds Project that efforts to address trespass livestock coming into the VCNP are ongoing, but fencing is needed. Superintendent Silva-Banuelos also stated that because New Mexico is a "fence-out" (or open range) state and the NPS has no obligation to fence the livestock out.¹⁵

⁶ *Id.* at 29 - 31.

⁷ Attachment B, 2018 Public Lands Newsletter.

⁸ Attachment A at 34-35.

⁹ *Id.* at 26.

¹⁰ *Id.* at 14.

¹¹ *Id.* at 21.

¹² *Id.* at 22.

¹³ *Id.* at 50.

¹⁴ *Id.* at 1, 42.

¹⁵ Attachment C, November 2020 email from Jorge Silva-Banuelos to WWP.

- December 2020, Western Watersheds Project notifies the Forest Service regarding grave concerns about trespass livestock entering the VCNP from Forest Service-managed lands.¹⁶ A similar letter was sent to the USFS.¹⁷

2021

- January 2021, Caldera Action notifies the NPS Director of the ongoing problem of trespass livestock in the VCNP, including information about damage to streams from livestock.¹⁸
- February 2021, Forest Service's response to Western Watersheds Project's December letter indicates the NPS did not notify the Forest Service about trespass livestock entering the VCNP from adjacent Forest Service-managed lands used by Forest Service permittees in 2019 or 2020.¹⁹
- May 2021, trespass livestock are again documented within the VCNP, almost immediately after turn-out was authorized on adjacent Forest Service-managed grazing allotments.²⁰ During this time the NPS did not authorize livestock grazing on the VCNP due to resource concerns.
- September 2021, at least 160 trespass livestock are documented within the VCNP.
- October 2021, Caldera Action notifies Forest Service about ongoing trespass livestock problems, more than 120 cattle, within the VCNP.²¹ At the end of October, 2021 the livestock were removed from the VCNP via trucks.

2022

- March 2022, Caldera Action submits Freedom of Information Act request for records related to surveys for threatened and endangered species.
- May 2022, NPS states to Caldera Action that fences on the northern boundary of the VCNP were being cut by Forest Service permittees almost as soon as they were installed. Trespass livestock are again documented within the VCNP within a few days of turn-out on the Forest Service-managed grazing allotments.
- July 2022, Caldera Action notifies the NPS about the ongoing presence of trespass livestock within the VCNP.²²
- July 2022, NPS is notified about trespass livestock within the VCNP, including descriptions and photos.²³

¹⁶ Attachment D, December 2020 letter from WWP to NPS.

¹⁷ Attachment E, December 2020 letter from WWP to USFS.

¹⁸ Attachment F, January 2021 letter from Caldera Action to NPS.

¹⁹ Attachment G, February 2021 letter from USFS to WWP.

²⁰ Attachment H, May 2021 letter from Caldera Action to NPS.

²¹ Attachment I, October 2021 letter from Caldera Action to NPS.

²² Attachment J, Email from Tom Ribe, Executive Director of Caldera Action to NPS on July 6, 2022.

²³ Attachment K, August 2022 email to NPS regarding trespass livestock in VCNP with descriptions and photos.

- August 2022, Caldera Action meets with the NPS at the VCNP to discuss the ongoing, multi-year problem of livestock within the VCNP. Caldera Action notifies the NPS that there are at least 130 livestock within the VCNP.

D. ESA-Listed Species and Designated Critical Habitat Within the Valles Caldera.

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

1. Jemez Mountains Salamander and its Designated Critical Habitat

FWS listed the Jemez Mountains salamander (*Plethodon neomexicanus*) as endangered in 2013. 78 Fed. Reg. 55,600 (Sept. 10, 2013). The average lifespan is unknown. *Id.* at 55,601. The age at first breeding around 3-4 years for females and 3 years for males and breeding frequency is every 2-3 years with 7-8 eggs laid. FWS is currently compiling information for the five-year JMS status review and assessment since its listing. *See* 84 Fed. Reg. 144, at 36113-36116. USFWS Notice of Initiation of 5-Year Status Review of 36 Species in Arizona, New Mexico, Texas, Utah, and Mexico. July 26, 2019. USFWS 2019 hereinafter. Based on this new information, FWS intends to develop a recovery plan by 2022. *See* February 14, 2020 comment from M. Peyton, Wildlife Biologist, to NPS regarding draft NRCA study plan. The Jemez Mountains salamander life history characteristics and sensitivity to disturbance have made surveying and monitoring this species extremely difficult.

Jemez Mountains Salamander Habitat

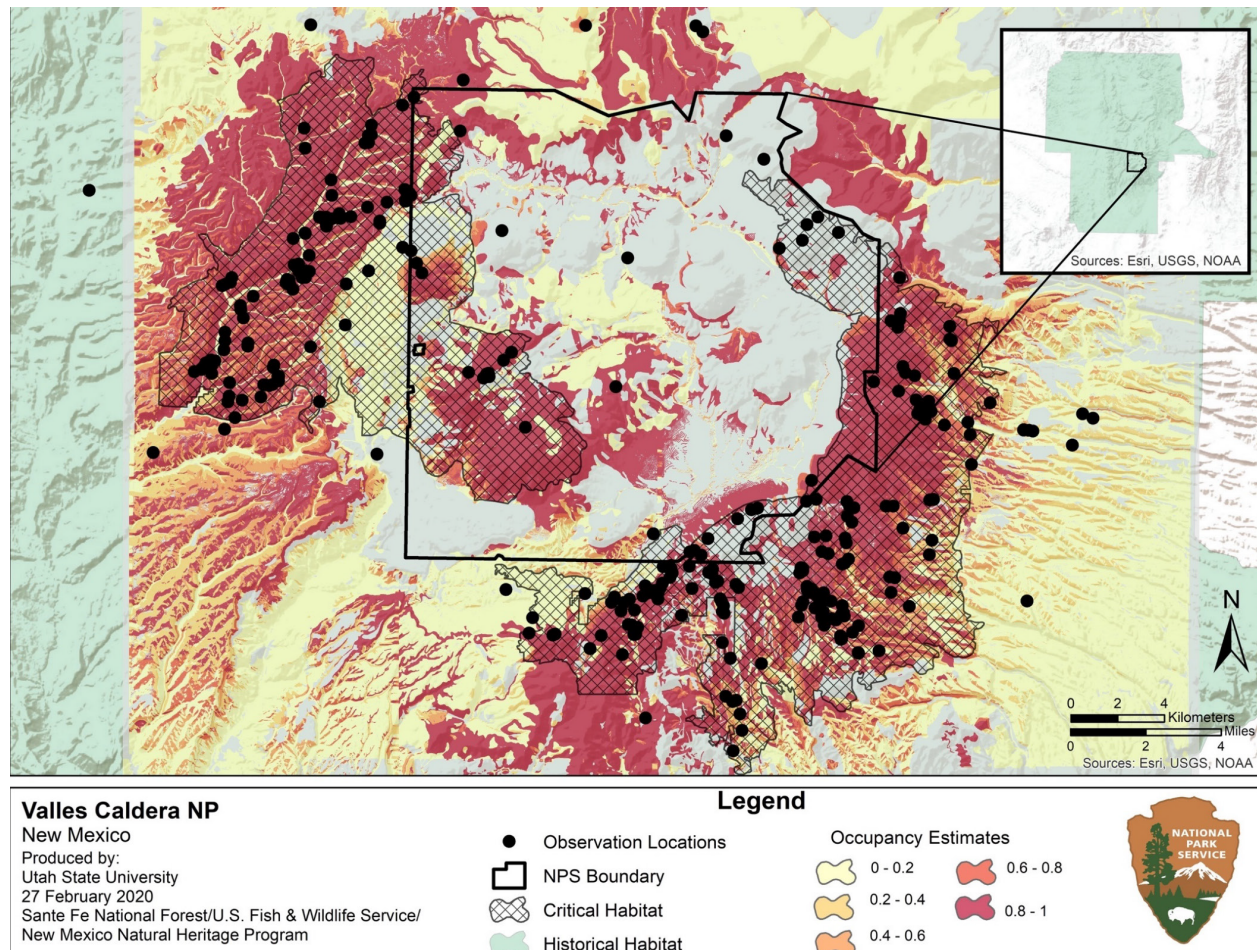
The salamander is strictly terrestrial and lives most of the year underground, making surveying for the salamander challenging. The salamander usually only surfaces after late summer rains saturate the soil and temperatures average 55 degrees Fahrenheit. The salamander lives primarily in mixed-conifer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

A high volume of large, downed trees (primarily Douglas-fir) provides refuge while salamanders are aboveground. The Jemez Mountains salamander is usually found between 2,200 to 2,900 meter in elevation (7,200 to 9,500 ft); however, they are sometimes found above and below this elevation range if conditions are favorable. Many aspects of the salamander's ecology, particularly with respect to reproduction, are poorly understood.

In addition to mixed-conifer, the salamander's habitat includes a shrub understory dominated by Rocky Mountain maple (*Acer glabrum* var. *glabrum*), New Mexico locust (*Robinia neomexicana*), oceanspray (*Holodiscus dumosus*), or shrubby oaks. The salamander habitat also should include bark, moss mats, rotted tree root channels, and/or rodent burrows or the presence of large invertebrates.

Jemez Mountains Salamander on the VCNP

The VCNP and the surrounding area, including the Jemez Mountains, provides habitat for the Jemez Mountain salamander. The VCNP website states the salamander has occupied the Jemez Mountains for at least 10,000 years and that the VCNP “is one of the largest fully protected areas throughout this species’ historical range, and the preserve contains 26% of the critical habitat identified for the species.”²⁴ The following map shows occupancy estimates for the salamander in and around the VCNP:



A recent Natural Resource Condition Assessment (NRCA) focused on seven resources in the VCNP, including the salamander. National Park Service 2022, Natural Resource Conditions at the Valles Caldera National Preserve. This assessment summarized what is known about the salamander in the preserve and surrounding area, and identified potential indicators of salamander condition for future study and monitoring. *Id.* at 94 et seq. The NRCA found that many areas where the salamanders were present historically are not unoccupied and where occupied there are fewer individuals. *Id.* Approximately 350 salamanders were recorded in and

²⁴ See NPS website for the VCNP and the salamander, available at https://www.nps.gov/articles/000/nrca_vall_2021_jemezmtsalamander.htm (last accessed Sept. 28, 2022).

around the VCNP in 1992, observations dropped dramatically, and in recent years only a handful of salamanders are observed annually. *Id.* at 98.

Threats to the Jemez Mountains Salamander

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

FWS did not identify livestock grazing as a primary threat, stating “[l]ivestock grazing generally does not occur within salamander habitat, because cattle concentrate outside forested areas where grass and water and more abundant” and “[w]e have no information that indicates livestock grazing is a direct or indirect threat to the salamander and its habitat.” *Id.* However, FWS admitted that “small-scale habitat modification, such as livestock trail establishment or trampling in occupied salamander habitat, is possible.” *Id.* FWS also stated that “[t]he [Forest Service] and Valles Caldera National Preserve manage livestock to maintain fine grassy fuels, and should not limit low-intensity fires in the future.” *Id.*

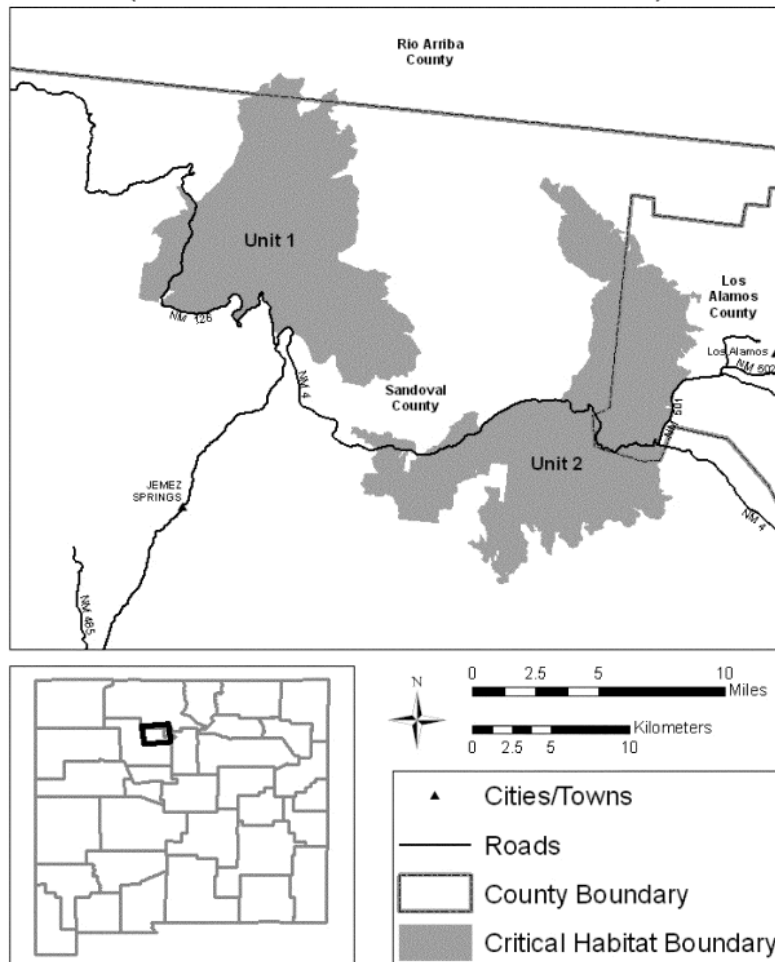
Cattle Within the VCNP May Impact Jemez Mountains Salamander

Cattle that enter and remain within the VCNP may impact Jemez Mountains salamander in numerous ways, including but not limited to directly trampling the salamanders; disease transfer; habitat modification due to livestock trail establishment or moving small logs, rocks, moss, bark, and other debris in areas where livestock grazing may occur; and soil compaction that could deter salamander movement underground and possibly above ground through the compaction and trampling of rodent burrows that can be used by salamanders. In addition, use of trucks or other vehicles to round up the cattle within the VCNP may result in further trampling of habitat or individual salamanders, as well as habitat fragmentation and displacement. See 78 Fed. Reg. at 55,617. Roads and trails may eliminate or reduce the quality or quantity of salamander habitat, reducing blocks of native vegetation to isolated fragments, and creating a matrix of native habitat islands that have been altered by varying degrees from their natural state. *Id.* Addressing these threats is critical given the limited information on the salamander, including basic life history knowledge, such as frequency of breeding and average life span.

Jemez Mountains Salamander Designated Critical Habitat

In November of 2013, FWS designated 90,716 acres of critical habitat for the Jemez Mountains salamander in Los Alamos, Rio Arriba, and Sandoval Counties. 78 Fed. Reg. 69,569 (Nov. 20, 2013). See the following map of designated critical habitat from the Federal Register notice:

Critical Habitat for *Plethodon neomexicanus* (Jemez Mountains salamander)



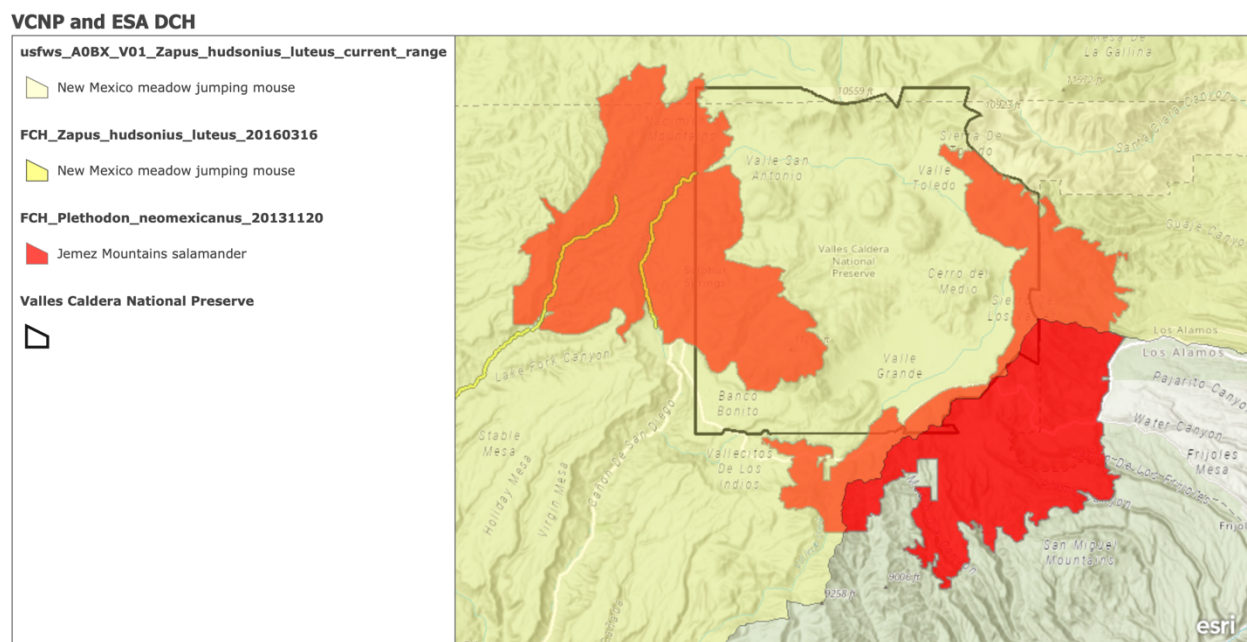
78 Fed. Reg. at 69,590.

FWS's rule identified the physical or biological features essential to the conservation of the Jemez Mountains salamander in areas occupied at the time of listing, focusing on the features' primary constituent elements (those specific elements that provide for a species' life-history processes and are essential to the conservation of the species) (note, FWS now refers to these as physical and biological features). *Id.* at 69,580. FWS identified the salamander's primary constituent elements as: (1) moderate to high tree canopy cover (50 to 100 percent canopy closure that provides shade and mountains moisture), (2) elevations from 6,988 to 11,254 feet, (3) ground surface in forest areas with moderate to high volumes of large fallen trees and other woody debris, or structural features such as rocks, bark, and moss mats, and (4) underground habitat in forest or meadow areas containing interstitial spaces. *Id.* at 69,580 – 69,581.

FWS noted that the features essential to the conservation of the salamander may require special management considerations or protection to reduce certain threats, including but not limited to historical and current fire management practices, severe wildland fire, forest composition and structure conversions, post-fire rehabilitation, forest management, and habitat fragmentation from roads and trails. *Id.* at 69,581. FWS further noted that management activities that could ameliorate some of these threats include reducing fuels to minimize risk of wildfire, not implementing post-fire rehabilitation techniques that harm the salamander, removing unused roads or trails, and restoring habitat. *Id.*

Jemez Mountains Salamander Designated Critical Habitat Within the VCNP

Designated critical habitat for the Jemez Mountains salamander exists within the VCNP. *See, e.g.*, 78 Fed. Reg. at 69,570. The following map shows Jemez Mountains salamander designated critical habitat in and around the VCNP:



Cattle Within the VCNP May Adversely Modify or Destroy the Jemez Mountain Salamander's Critical Habitat

Cattle that enter and remain within the VCNP may impact Jemez Mountains salamander's designated critical habitat in numerous ways as described above, including habitat modification by trampling the area. Use of trucks or other vehicles to round up the cattle within the VCNP may result in further trampling of habitat as well as habitat fragmentation. Roads and trails may eliminate or reduce the quality or quantity of salamander habitat, reducing blocks of native vegetation to isolated fragments, and creating a matrix of native habitat islands that have been altered by varying degrees from their natural state. *See* 78 Fed. Reg. at 55,617. Accordingly, the Federal Agencies should have consulted under the ESA to evaluate how allowing cattle to enter and remain within the VCNP may affect the Jemez Mountains salamander and its designated critical habitat.

2. New Mexico Meadow Jumping Mouse

FWS issued a final rule on June 10, 2014 that listed the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*) (jumping mouse) as endangered under the ESA. 79 Fed. Reg. 33,119 (June 10, 2014). FWS determined the jumping mouse met the definition of endangered due to present or threatened destruction, modification, or curtailment of its habitat or range, the inadequacy of existing regulatory mechanisms, and other natural and manmade factors. *Id.*

New Mexico Meadow Jumping Mouse Habitat, Biology, and Status

FWS issued a Species Status Assessment on January 30, 2020 (hereafter, “2020 SSA”) that reviewed the jumping mouse’s life history, and detailed the threats to the species. The jumping mouse is a habitat specialist. 2020 SSA at 9. It nests in dry soils, but uses moist, streamside, dense riparian/wetland vegetation up to an elevation of about 8,000 feet. *Id.* at 19. The jumping mouse appears to only utilize two riparian community types: 1) persistent emergent herbaceous wetlands (i.e., beaked sedge and reed canarygrass alliances); and 2) scrub-shrub wetlands (i.e., riparian areas along perennial streams that are composed of willows and alders). *Id.* at 17. To achieve sufficient growth, vegetation must be associated with seasonally available or perennially flowing water. *See* 2020 SSA at ii. Accordingly, jumping mouse habitat must contain sufficient flowing waters and adjacent upland to support the vegetation characteristics necessary to support the species’ foraging, breeding, and hibernating behaviors. *Id.* Additionally, jumping mice are known to regularly use adjacent upland habitats for dispersal, day nesting, maternal nests, and hibernating.

The jumping mouse has a three-year lifespan. The jumping mouse hibernates for eight to nine months out of the year. During the growing season, the jumping mouse accumulates fat reserves by consuming seeds. Preparation for hibernation (weight gain, nest building) seems to be triggered by day length.²⁵ It enters hibernation in September or October, and emerges the following May or June.²⁶ Within this short active period, the jumping mouse must breed, give birth and raise young, and feed to store sufficient fat reserves to survive the next long hibernation period. Accordingly, if adequate resources are not available in a single season, jumping mice populations are greatly impacted and have lower reproductive success and over-winter survival rates.

Jumping mice produce only a single litter each year, consisting of no more than seven young. The jumping mouse has a long rearing period and it is unlikely that juveniles breed during the same year that they are born. It is likely that jumping mouse females have only two litters in their three-year lifespans. Because jumping mice have so few offspring each year, every litter is important to the survival and recovery of individuals, populations, and the species as a whole. If there are not sufficient resources to support females through the breeding and weaning

²⁵ Available at <https://ecos.fws.gov/ecp/species/7965> (last accessed Sept. 27, 2022).

²⁶ Livestock grazing is authorized on the nearby grazing allotments of the Santa Fe National Forest from March through September, overlapping entirely with the active period of the jumping mouse.

periods, populations are greatly stressed. The species is thus at a higher risk of extinction because it recovers more slowly from reductions in population size, and is subject to genetic and demographic stochasticity (i.e., random fluctuations in population size that occur because the birth and death of each individual is a discrete event).

The jumping mouse has limited dispersal capability, and exhibits extreme site fidelity during daily activities. Individual mice typically move less than 330 feet per day, and are unlikely to cross areas that do not contain suitable riparian habitat. Gaps of more than 656 feet between suitable habitat areas create significant barriers to movement and decrease the ability for jumping mice to colonize new habitats. Ensuring connectivity of suitable habitat along riparian corridors is important both to facilitating daily and seasonal movements, and to ensuring sufficient dispersal and gene flow to support viable and resilient populations of jumping mice. Correspondingly, due to the jumping mouse's life history (e.g., short active period, short life span, low fecundity, low dispersal ability) and specialized habitat requirements, populations have a high potential for extirpation—i.e., local extinction—when habitat is altered, fragmented, degraded, or eliminated.

Home ranges vary between 0.37 and 2.7 acres (0.15 and 1.1 hectares) and may overlap. *Id.* at 23. To support movements of individual jumping mice, sufficient habitat—i.e., habitat boasting the tall, dense riparian vegetation essential to the species' life history needs—must extend approximately 330 feet outward from the boundary between the active water channel and the floodplain. The riparian vegetation serves as an important food source for the jumping mouse, whose diet consists mainly of grass and forb seeds. Additionally, the tall, dense plants provide vital cover for nesting, movement, and predation avoidance.

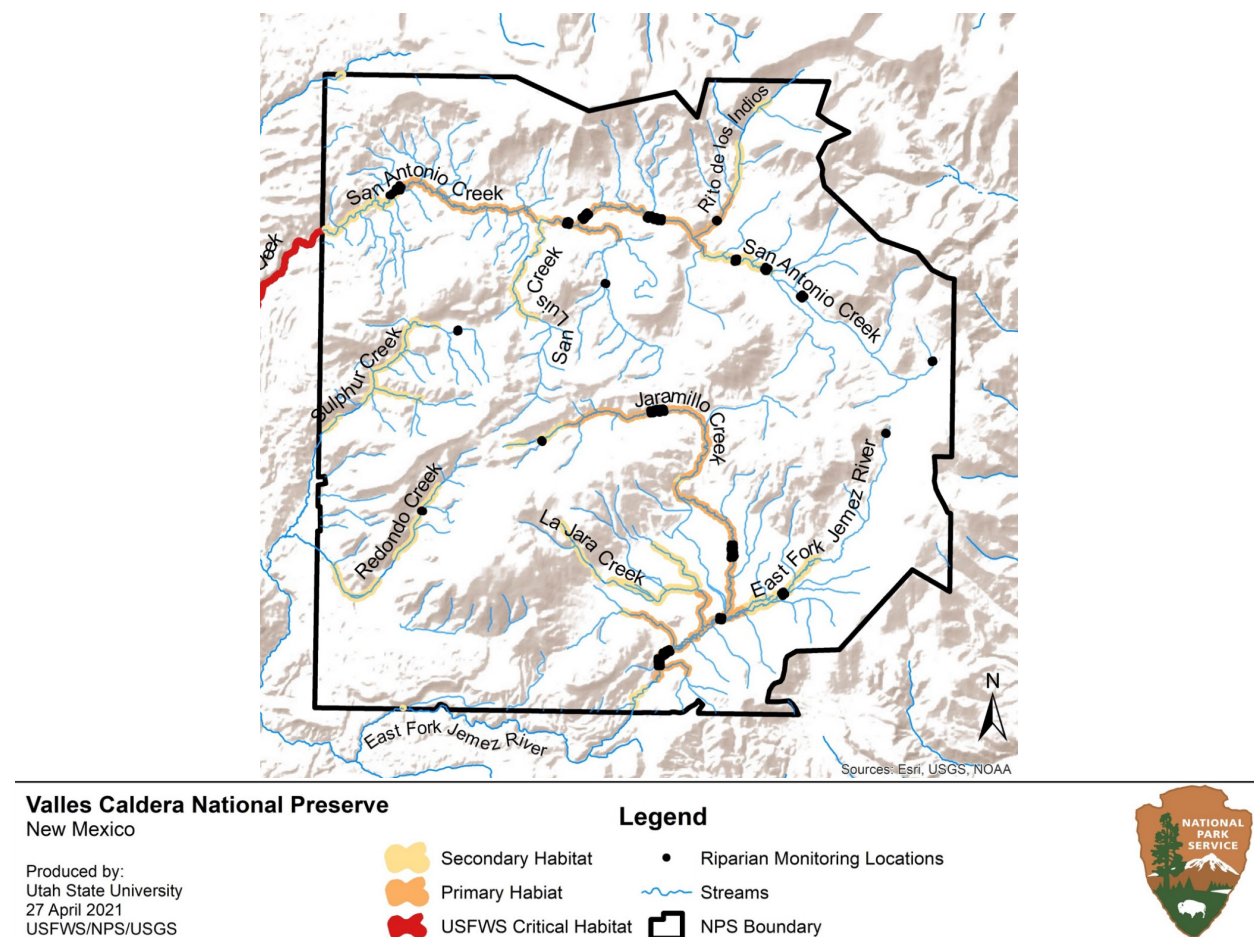
The jumping mouse is endemic to New Mexico, Arizona, and a small area of southern Colorado. 79 Fed. Reg. at 33,119. The jumping mouse's historical distribution likely included riparian and wetland areas along the Sangre de Cristo Mountains in Colorado and New Mexico, the San Juan Mountains in southern Colorado, the Jemez northern New Mexico, the Sacramento Mountains in southern New Mexico, the Rio Grande Valley from Española to Bosque del Apache National Wildlife Refuge in central New Mexico, and the White Mountains in eastern Arizona. *See* 2020 SSA at ii. However, extensive habitat loss and fragmentation due to grazing pressure, water management and use, drought, and wildfire have severely reduced its population and distribution. *Id.* at iii.

Today, the jumping mouse occurs within eight geographic management units that are defined by critical habitat units and the distribution of 77 current populations (18 in Colorado, 22 in New Mexico, and 37 in Arizona). 2020 SSA at ii. The distribution and number of jumping mouse populations have declined significantly rangewide with the majority of local extirpations occurring since the late 1980s and early 1990s. *Id.* at 81. In light of this, the FWS determined that the jumping mouse “likely does not currently have the number and distribution of resilient populations needed to provide the levels of redundancy and representation (genetic and ecological diversity) for the subspecies to demonstrate high viability.” *Id.* at iii. Indeed, the FWS found that the jumping mouse is “particularly vulnerable to extinction” “from both random and nonrandom catastrophic natural or human-caused events,” ultimately concluding that “that the subspecies' overall viability is low, given the ongoing and likely future losses of habitat in

conjunction with the small and isolated nature of currently-known populations,” because “the status of the subspecies has been reduced to the point where individual populations are vulnerable to extirpation.” *Id.* at 117-21.

New Mexico Meadow Jumping Mouse Within the VCNP

The VCNP includes secondary and primary habitat for the jumping mouse. In 2018 the NPS documented a male jumping mouse in Redondo Creek in 2018, but prior to that time no surveys for the jumping mouse inside the VCNP had been conducted. NPS 2022 at 73. The lack of authorized livestock grazing has allowed riparian vegetation to recover to levels conducive to jumping mouse recovery in many parts of the VCNP, but trespass grazing by cattle reverses this habitat recovery. The following map shows where the FWS identified potential primary and secondary habitat for the jumping mouse within the VCNP:



See Natural Resource Conditions at Valles Caldera National Preserve: Findings and Management Considerations for Selected Resources. NPS 2022 at p. 72.

Primary Threats to the New Mexico Meadow Jumping Mouse

The greatest threat affecting the jumping mouse is loss of suitable habitat. 79 Fed. Reg. at 33,122. The primary sources of current and future habitat losses include grazing pressure (which removes the needed vegetation) and water management and use (which causes vegetation loss from mowing and drying of soils), lack of water due to drought (exacerbated by climate change), and wildfires (also exacerbated by climate change). *Id.* Grazing that is incompatible with local ecological conditions, especially within riparian habitat, can result in overutilization of riparian and upland vegetation and water use and management that degrade riparian habitat and function. DRP at 7.

Livestock grazing and poor water management (e.g., water diversion) result in the loss of the riparian vegetation that the mice need to survive. Likewise, drought and wildfires alter the composition of the vegetative community. Livestock grazing poses a particularly significant and acute threat to the jumping mouse. Livestock concentrate in riparian areas due to their productivity and proximity to reliable water sources, and preferentially graze native riparian vegetation. Grazing eliminates or reduces the tall herbaceous vegetation and density that the jumping mouse relies upon for its biological functions and life history. Additionally, grazing can alter the composition and structure of the riparian habitats that are essential to the jumping mouse's survival. By preferentially grazing native riparian vegetation and thus decreasing competition, grazing can allow for the introduction and spread of invasive species, and can convert sites from riparian vegetation-dominated to upland plant species-dominated. Additionally, the concentration of livestock in riparian habitats results in extensive and deleterious trampling, soil compaction, and erosion of the streambed, which degrades the stream channel such that it can no longer support the riparian vegetation and wet soils required to maintain suitable habitat for the jumping mouse.

At the individual level, the removal of vegetation reduces the availability of food resources for jumping mice. If a jumping mouse fails to accumulate sufficient fat reserves during its short active season, it will not survive the long overwinter hibernation. Accordingly, as the FWS observed in its 2014 SSA, the jumping mouse is "extremely sensitive to habitat alterations." 2014 SSA at 89. Unfortunately, the timing of livestock grazing frequently coincides with the jumping mouse's short active season, which reduces the availability of food resources precisely at the time when the jumping mouse needs them to build the fat reserves required to breed, raise young, and enter the next hibernation period. By reducing the availability of food resources, which, in turn, affects overwinter survival, livestock grazing in suitable jumping mouse habitat results in reduced population sizes and, eventually, the extirpation of populations.

The reduction of suitable habitat due to grazing also places individual jumping mice at a greater risk of predation due to the loss of vegetative cover. Jumping mice depend on tall, dense riparian herbaceous vegetation, which is easily degraded when grazed to a condition where characteristics needed by jumping mouse are no longer available. Livestock grazing and trampling within jumping mouse habitat reduces the vertical height of riparian vegetation to a level below that which is required to maintain suitable habitat.

At the population level, grazing has repeatedly resulted in the permanent local extirpation of jumping mouse populations. Indeed, research has shown that the jumping mouse does not

persist in areas that are subject to heavy livestock grazing pressure. The fragmentation and isolation of jumping mouse populations that results from this lack of habitat connectivity makes it unlikely that extirpated populations will recolonize these areas in the future, since there are no nearby, connected source populations with robust numbers.

These threats can be reduced by implementing changes in grazing practices within riparian habitat that lead to recovery of the physical or biological features required by the New Mexico meadow jumping mouse. Protection and restoration of suitable riparian and upland habitat, particularly in areas vulnerable to the potential effects of climate change, are necessary to ensure the viability of the subspecies. DRP at 7. Modification or removal of livestock grazing is a key conservation step to recovery the jumping mouse. On March 14, 2022, WWP submitted comments regarding the Draft Recovery Plan for the jumping mouse to the FWS identifying livestock grazing, including livestock moving beyond authorized allotments, as a threat to the jumping mouse.

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

Cattle that enter and remain within the VCNP may impact jumping mouse in numerous ways, including but not limited to “alteration and destruction of New Mexico meadow jumping mouse habitat,” as shown by the best commercial and scientific data available. *See* 79 Fed. Reg. at 33,125 (“it is evidence that livestock grazing and recreational activities can negatively impact the required vegetation for mouse habitat”).

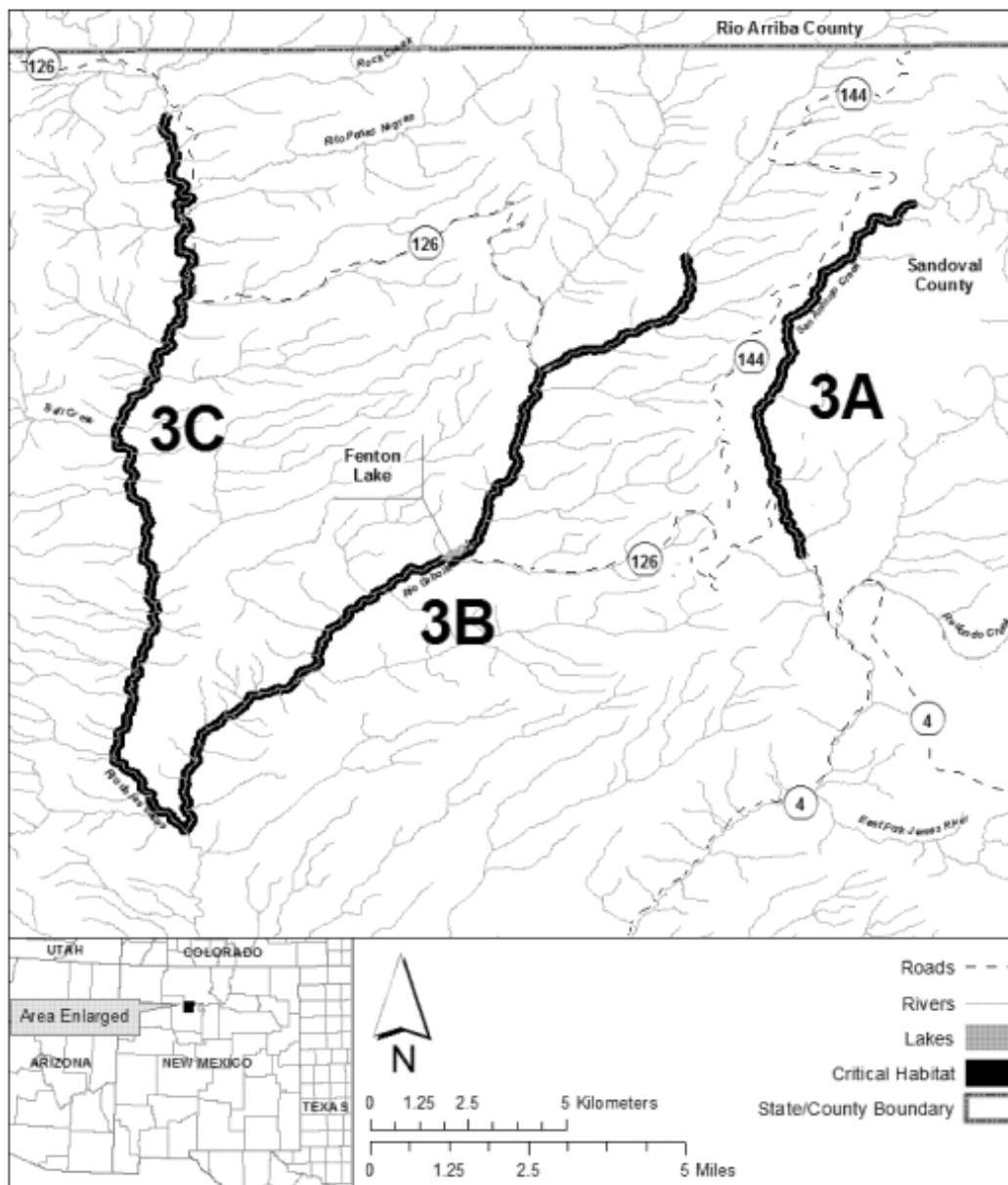
Importantly, FWS itself stated in its rule identifying the jumping mouse as endangered that “[i]f a Federal agency implements, authorizes, or funds water use or livestock grazing activities that may affect the New Mexico meadow jumping mouse, then they must enter into consultation with the Service.” 79 Fed. Reg. at 33,124. Further, FWS stated that such consultation “would analyze and determine to what degree the” jumping mouse is impacted by the livestock grazing activities. *Id.* It also stated that FWS “will work with Federal agencies during consultation under section 7 of the Act, to ensure that any actions they fund, authorize, or carry out would not jeopardize the continued existence of the New Mexico meadow jumping mouse” and that “these section 7 consultations will determine whether the management of a Federal livestock permit jeopardizes the continued existence of the New Mexico meadow jumping mouse.” That is precisely what must occur here for impacts to New Mexico meadow jumping mouse from cattle that enter and remain within the VCNP.

New Mexico Meadow Jumping Mouse Designated Critical Habitat

In 2016 FWS designated 13,973 acres and 169.3 miles of flowing streams, ditches, and canals as critical habitat for the jumping mouse. 81 Fed. Reg. 14,264 (March 16, 2016). The critical habitat consists of eight units within Colfax, Mora, Otero, Sandoval, and Socorro Counties in New Mexico; Las Animas, Archuleta, and La Plata Counties in Colorado; and Greenlee and Apache Counties in Arizona. *Id.* The following map shows critical habitat Unit 3 for the Jemez Mountains:

(8) Unit 3—Jemez Mountains. Map follows:

Locations of Critical Habitat for the New Mexico Meadow Jumping Mouse Unit 3 - Jemez Mountains



See 81 Fed. Reg. at 14,320.

FWS identified primary constituent elements (“PCEs”)—i.e., specific elements of physical or biological features that provide for a species’ life history processes, and are essential

to the conservation of the species (FWS now refers to these as physical and biological features)—for the jumping mouse. *Id.* at 14,293. These elements that are essential for the conservation of the jumping mouse include: (1) riparian communities along rivers and streams that contain (a) persistent emergent herbaceous wetlands characterized by the presence of forbs and sedges, or (b) scrub-shrub riparian areas; (2) flowing water that provides saturated soils throughout the jumping mouse’s active season to support tall (i.e., average height of 24 inches) and dense herbaceous riparian vegetation; (3) sufficient areas of 5.6 to 15 miles along a stream, ditch, or canal that contains suitable or restorable habitat to support habitat connectivity; and (4) adjacent floodplain areas extending approximately 330 feet outward from the water channel. *Id.*

FWS also identified the following threats that may require special management considerations or protection: excessive grazing pressure, water use and management, highway reconstruction, commercial and residential development, severe wildlands fires, unregulated recreation, and the reduction in the distribution and abundance of beaver ponds. *Id.* FWS noted that management activities that could ameliorate these threats include but are not limited to: (1) maintaining occupied jumping mouse sites with active management to continue protecting these areas from livestock grazing; and (2) restoring and enhancing additional habitat through fencing of riparian areas, especially the Santa Fe National Forest. *Id.* at 14,293 – 14,294.

New Mexico Meadow Jumping Mouse Critical Habitat and the VCNP

Designated critical habitat for the jumping mouse is located just outside the VCNP to the west. FWS’s critical habitat subunits include the San Antonio Creek (two current populations), the Rio Cebolla (six current populations), and the Rio de las Vacas (one current population) (see image below). The FWS considers a 30-m (100-ft) buffer along a perennial stream of at least 9 km (5.6 mi) as required to support multiple, resilient jumping mouse populations. 2020 SSA. When the FWS designated critical habitat in 2016, the population along Redondo Creek within VCNP had not yet been discovered, although there is a historical record at this location from the 1970s.

Cattle Within the VCNP May Impact the New Mexico Meadow Jumping Mouse’s Critical Habitat

As noted above, FWS itself has found that the best commercial and scientific data available shows that livestock grazing can result in the alteration and destruction of jumping mouse habitat. Thus, the Federal Agencies must consult or re-initiate consultation under the ESA to assess the impacts from cattle that enter and remain within the VCNP on jumping mouse designated critical habitat.

3. Mexican Spotted Owl

Almost thirty years ago, FWS listed the Mexican spotted owl as a threatened species in need of protection under the ESA. 58 Fed. Reg. 14248 (Mar. 16, 1993). FWS identified (1) destruction and modification of habitat from timber management, and (2) the threat of these practices continuing as evidenced in existing national forest plans as the primary threats to the survival of Mexican spotted owl. *Id.* In 1993, FWS estimated that 1,037,000 acres of Mexican

spotted owl habitat had been converted from suitable to unsuitable habitat that was capable of becoming suitable sometime in the future. It attributed over seventy-five percent of the conversion to human activities, primarily timber harvest, and twenty-one percent to natural causes, primarily fire.

In 2004, FWS designated Mexican spotted owl critical habitat, including 8.6 million acres on Federal lands in Arizona, Colorado, New Mexico, and Utah. 69 Fed. Reg. 53182 (Aug. 31, 2004). Mexican spotted owl critical habitat only includes those areas within designated critical habitat boundaries that are defined as “protected habitats” (protected activity centers (“PACs”), steep slopes that have not had timber harvest in the last 20 years), and “recovery habitats” (unoccupied owl foraging, dispersal, and future nest and roost habitat).

Since the Mexican spotted owl was listed as a threatened species, populations of the species in New Mexico have not increased. FWS’s 2012 Recovery Plan lists 1,324 known owl sites in the United States. *See* U.S. Fish and Wildlife Service, 2012 Final Recovery Plan for the Mexican Spotted Owl (*Strix occidentalis lucida*), First Revision (hereafter, “2012 Recovery Plan”); 77 Fed. Reg. 74688 (Dec. 17, 2012). The majority of Mexican spotted owls in the United States are found on National Forest System lands.

Mexican Spotted Owl on the VCNP

When signing the VCNP’s enabling legislation into law, President Bill Clinton noted that it provides habitat to a broad range of species including Mexican spotted owl. *See* July 25, 2000, Statement on Signing the Valles Caldera Preservation Act, William J. Clinton. The VCNP’s foundation document states “[t]he preserve is included in the suitable habitat for the endangered New Mexico meadow jumping mouse and threatened Mexican spotted owl, but there have been no reported sightings.” 2018 Foundation Document at 25. However, Forest Service surveys expressly exclude the VCNP. *See, e.g.*, March 30, 2015, Rocky Mountain Bird Observatory, Site Occupancy by Mexican Spotted Owls (*Strix occidentalis lucida*) in the US Forest Service Southwestern Region, 2014, page 4. The following is a map of MSO, excluding the VCNP, showing abundant MSO sites adjacent and up to the border of the VCNP:

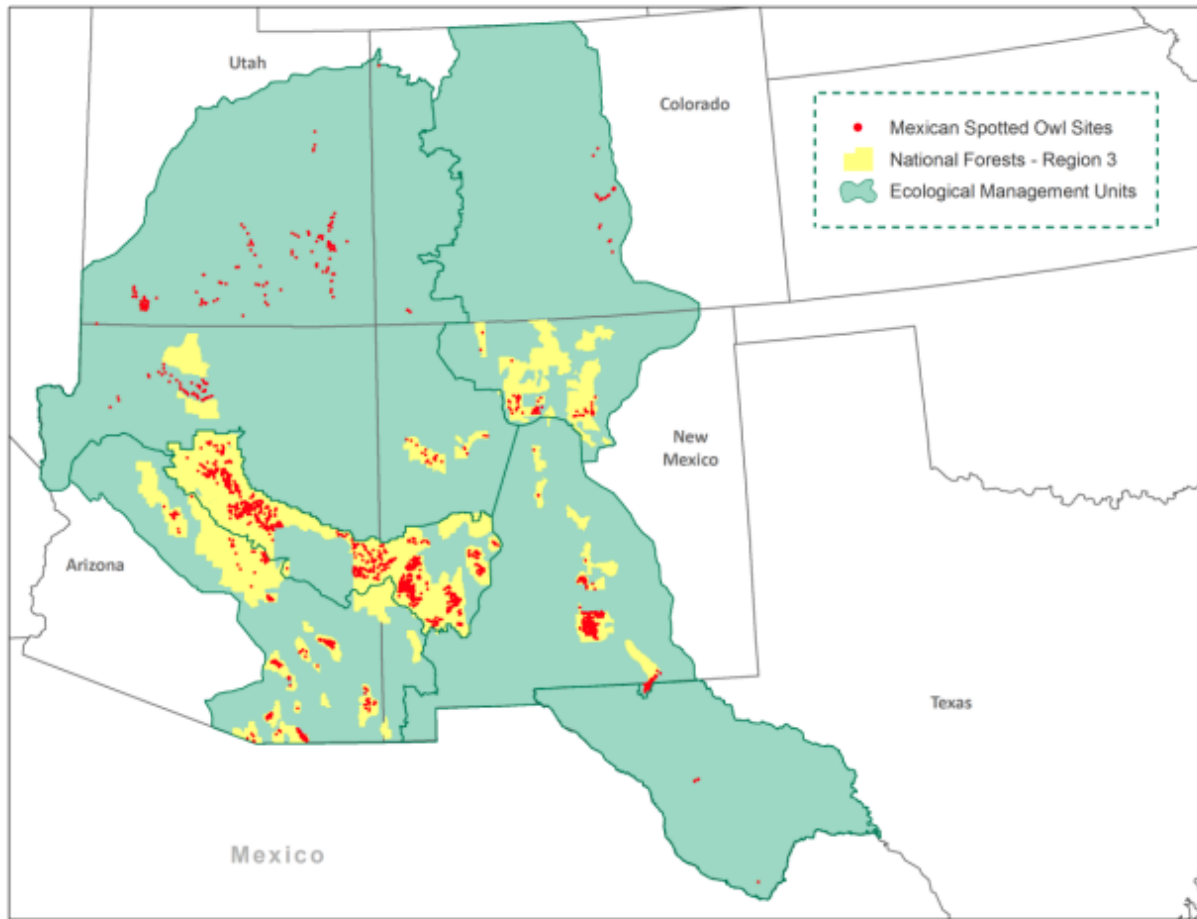


Figure 1. Range of the Mexican Spotted Owl in the United States and extent of US Forest Service lands (excluding National Grasslands) in the Southwestern Region. Mexican Spotted Owl sites are from the Recovery Plan, First Revision (2012).

Cattle Within the VCNP May Impact Mexican Spotted Owl

Effects on Mexican spotted owls from grazing by domestic livestock are complex, and multiple factors may determine specific influences. *See* 2012 Recovery Plan at 42. These factors include local and regional climatic patterns, biotic community associations and ecology, soil types and conditions, and the timing, intensity, and duration of vegetation removal associated with the presence of grazing animals. *Id.* Adding to the complexity are the interrelationships of grazing and other ecological processes such as changes in herbaceous plant composition, woody vegetation structure, soil stability, ecology, and fire regimes. *Id.* In general, effects from livestock grazing on Mexican spotted owl are either (1) short-term, requiring short recovery periods to restore suitable habitat characteristics; or (2) long-term alterations in plant-species composition and vegetation structure. *Id.* Livestock grazing, and the clearing of vegetation and human disturbance related to livestock grazing, may adversely impact Mexican spotted owls by disturbing or disrupting individual owls, disturbing habitat, and ultimately causing dispersal. *Id.* at 11.

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

1. Consultation for Effects of Livestock Grazing Within VCNP.

Based on information and belief, the NPS and FWS have never completed ESA consultation to assess the effects of allowing cattle from adjacent grazing allotments to enter and remain within the VCNP. Based on information and believe, the NPS and FWS have never completed ESA consultation to assess the effects of livestock grazing that is currently occurring within the VCNP and is likely to continue occurring in future years unless action is taken to prevent the cattle from entering the VCNP.

2. Consultation for Effects of Grazing Allotments Adjacent to VCNP.

The Forest Service and FWS have completed some section 7 ESA consultation related to livestock grazing on the Santa Fe National Forest, including but not limited to livestock grazing on the Youngsville, Mesa del Medio, Coyote, and Cebolla-San Antonio allotments.

For example, in 2016, FWS considered the effects of the Forest Service's proposed activities for (1) a proposed closure order on 228 acres and construction of a permanent pipe fence on the San Diego allotment, and (2) construction of one mile of fence off of NM State Highway 4, four miles of fence within the Road and Barley pastures, and two cattle guards on the Cebolla-San Antonio allotment. In a February 3, 2016 letter of concurrence (02ENNM00-2016-I-0252), FWS determined these activities would have insignificant and discountable effects to the jumping mouse and its (at the time proposed) critical habitat, Mexican spotted owl and its critical habitat, and the Jemez Mountains salamander and its critical habitat.

On October 20, 2017 the Forest Service issued a Biological Assessment ("BA") regarding potential effects of ongoing grazing to Jemez Mountains salamander and designated critical habitat. In response, FWS issued the 2018 Grazing BiOp that analyzed the effects to the endangered Jemez Mountains salamander and its designated critical habitat resulting from the implementation of ongoing term grazing permits on the Santa Fe National Forest. The scope of the proposed action analyzed in the 2018 Grazing BiOp was limited to the allotments within the Santa Fe National Forest. *See* 2018 Grazing BiOp at 6, 18 (describing the action area as "all grazed areas on the Jemez Mountains Ranger Districts of the Santa Fe National Forest").

The 2018 Grazing BiOp states that the Santa Fe National Forest has 51 grazing allotments and that the Forest Service made an effects determination for 33 of those allotments in its Biological Assessment ("BA") because those 33 allotments contain suitable habitat for the salamander. FWS concurred with the Forest Service's determination that livestock grazing was "not likely to adversely affect" the Jemez Mountains salamander within 13 of the 33 allotments. 2018 Grazing BiOp at 2. The Forest Service determined that livestock grazing may affect and is likely to adversely affect Jemez Mountains salamander on 19 of the 33 allotments, including the Youngsville and Cebolla San Antonio allotments. *Id.* The Forest Service also determined the livestock grazing may affect and is likely to adversely affect the salamander's critical habitat for 12 of the 33 allotments. *Id.* It made a "no effect" determination for the remaining 21 allotments

because those do not contain critical habitat. FWS’s 2018 Grazing BiOp states that livestock grazing typically occurs from May 1 through November 30, and in certain locations through a deferred rotation system of grazing wherein a specific number of livestock are allowed on certain pastures for a specific period of time only. 2018 Grazing BiOp at 6.

For the allotments adjacent to the VCNP (on the north and west), the BA and BiOp made the following determinations, including “May Affect, Likely to Adversely Affect” (MALAA):

Allotment	BA/BiOp determination	Critical Habitat Determination
Chicoma	MALAA	No Effect
Mesa del Medio	MALAA	No Effect
Youngsville	MALAA	No Effect
Coyote	MALAA	No Effect
Penas Negras	MALAA	MALAA
Cebolla San Antonio	MALAA	MALAA
San Diego	MALAA	MALAA
V Double Slash	MALAA	MALAA
Las Conchas	MALAA	MALAA
Del Norte	MALAA	MALAA
Alamo	MALAA	MALAA

FWS determined in the 2018 Grazing BiOp that the implementation of ongoing term grazing permits on the Jemez Mountains District of the Santa Fe National Forest, as proposed in the BA, is not likely jeopardize the continued existence of the Jemez Mountains salamander. 2018 Grazing BiOp at 32-33. FWS included an incidental take statement authorizing the incidental take of Jemez Mountains salamander that limited average use by cattle (1) up to light to moderate use (approximately 35% forage utilization) averaged across all allotments, or (2) up to moderate use (approximately 50% forage utilization) within any one allotment. 2018 Grazing BiOp at 34. Beyond these limits FWS stated reinitiation of consultation would be required. *Id.*

In addition, the 2018 Grazing BiOp refers to determinations that were previously made for threatened Mexican Spotted Owl and endangered New Mexico meadow jumping mouse, and cites the following documents: (1) 02ENNM00-2016-F-0300; (2) 02ENNM00-2016-F-0252; and (3) 02ENNM00-2016-I-0295.

Based on information and belief, none of the ESA consultations completed to date by the Forest Service and FWS to analyze the ongoing effects of livestock grazing on ESA-listed species and designated critical habitat (including, but not limited to the ESA documents described above), considered the effects from livestock grazing on the neighboring VCNP. The Forest Service is well aware of the ongoing problem—occurring repeatedly over at least the past five years—of livestock authorized under the Forest Service’s own AMPs and AOIs leaving the authorized allotments to enter and remain within the VCNP.

Because the identified action has been subsequently modified in a manner that causes an effect to listed species and critical habitat that was not considered in the earlier BiOps or BAs,

the Forest Service must reinitiate consultation. Also, the information outlined above showing the Forest Service has been aware of livestock entering and remaining within the VCNP is new information that reveals effects of the action that may affect listed species and critical habitat in a manner or to an extent that was not previously considered in earlier consultations. For this additional reason the Forest Service must reinitiate consultation.

III. ESA Violations

The Federal Agencies violated Section 7 of the ESA, 16 U.S.C. § 1536, by failing to initiate and complete consultation, or to reinitiate and complete consultation, on their decisions to allow livestock to enter and remain within the VCNP on a recurring basis since at least 2017. Section 7(a)(2) of the ESA requires that each federal agency consult with the Services to ensure that any action authorized, funded, or carried out by such 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. *See* 16 U.S.C. § 1536(a)(2).

Here, the livestock that enter and remain within the VCNP disturb and disrupt ESA-listed species; trample species' habitat; compact soil and alter residual vegetation; and otherwise disturb, fragment, and destroy habitat. Despite knowledge and repeated notice of the livestock and the harms caused by livestock to threatened and endangered species and designated critical habitat, the Federal Agencies have repeatedly failed to promptly remove livestock from the VCNP. Despite knowledge and repeated notice of the livestock and the harms caused by livestock to threatened and endangered species and designated critical habitat, the Federal Agencies have failed to maintain boundary fencing to prevent livestock from entering into and remaining within the VCNP. By allowing the cattle to enter and remain, despite demonstrated harm to the landscape, ecosystem, imperiled wildlife, and critical habitat, the Federal Agencies have authorized activities that may affect ESA-listed species that inhabit and use the VCNP, including but not limited to: endangered Jemez Mountain Salamander, endangered New Mexico Meadow Jumping Mouse, designated critical habitat for both species, as well as threatened Mexican spotted owl. The Federal Agencies' failure to initiate and complete consultation, or to reinitiate and complete consultation, on these actions violates the procedural consultation and conferral requirements of ESA section 7. It also violates the substantive requirements of that section by failing to ensure that the Forest Service's actions do not jeopardize any species protected by the ESA or adversely modify any critical habitat designated under the ESA. These violations are significant violations of the ESA.

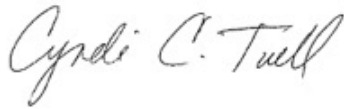
Additionally, the Federal Agencies violated Section 7(d) of the ESA by allowing livestock to enter and remain within the VCNP before completing adequate and lawful consultation. Such actions constitute an "irreversible and irretrievable commitment of resources" and warrant an injunction. *See* 16 U.S.C. §1536(d).

Based on information and belief, the Federal Agencies have also violated Section 9 of the ESA by authorizing activities that have resulted in the take of ESA-listed species or designated critical habitat. *Id.* § 1538(a). The Federal Agencies are causing jeopardy, adverse modification of critical habitat, and illegal take by continuing to allow livestock to enter and remain within the VCNP on a recurring basis since at least 2017.

At the conclusion of the 60-day notice period initiated by this letter, the Noticing Parties intend to file a lawsuit against the National Park Service, U.S. Forest Service, U.S. Fish and Wildlife Service, the individuals named above, and the individuals that administer components of that agency, under the citizen suit provisions of the Endangered Species Act, 16 U.S.C. § 1540. The Noticing Parties will seek declaratory and injunctive relief to prevent further ESA violations and such other relief as is permitted by law, including recovery of plaintiffs' costs, attorneys' fees, and expert witness fees.

Sincerely,

Western Watersheds Project



By: _____
Cyndi Tuell

WildEarth Guardians



By: _____
Marla Fox

Copies to:

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Congresswoman Teresa Leger Fernandez
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ATTACHMENTS

Attachment A: Documents obtained through a Freedom of Information Act request and the supporting documentation (including various emails to and from Forest Service and NPS staff).

Attachment B: Attachment B, 2018 Public Lands Newsletter.

Attachment C: November 2020 email from Jorge Silva-Banuelos to WWP.

Attachment D: December 2020 letter from WWP to NPS

Attachment E: December 2020 letter from WWP to USFS.

Attachment F: January 2021 letter from Caldera Action to NPS.

Attachment G: February 2021 letter from USFS to WWP.

Attachment H: May 2021 letter from Caldera Action to NPS.

Attachment I: October 2021 letter from Caldera Action to NPS

Attachment J: July 2022 Email from Tom Ribe, Executive Director of Caldera Action to NPS.

Attachment K: August 2022 email to NPS about trespass livestock within the VCNP, including descriptions and photos.