



January 4, 2023

Gila National Forest
Attn: Planning Program
3005 E. Camino del Bosque
Silver City, NM 88061

Submitted via email to comments-southwestern-gila@usda.gov

Re: Gila Wilderness Feral Cattle Removal

Dear Gila National Forest Supervisor Howes and Wilderness District Ranger Provencio,

We appreciate the opportunity to submit scoping comments to the Gila National Forest (GNF) on the agency's proposal to reinitiate efforts to remove feral cattle from the Gila Wilderness. New Mexico Wilderness Alliance (New Mexico Wild) is a statewide non-profit 501(c)(3) organization dedicated to the protection, restoration, and continued enjoyment of New Mexico's wilderness, wildlife, and water. Along with conservation partners, New Mexico Wild has been working with and encouraging the GNF to find a solution to the problem posed by feral, unowned, unbranded cattle inside the Gila Wilderness since 2014. We commend the GNF for initiating this project and wholeheartedly endorse the agency's proposed action to remove all feral cattle from the Gila Wilderness.

In early 2022, the agency experienced remarkable success, working in partnership with Wildlife Services and a separate contractor to remove a total of 135 feral cattle. The agency estimates that there are between 50 and 150 feral cows remaining in the Gila Wilderness—likely an underestimate—and the number continues to grow as the cattle breed and reproduce. There is a clear need for action, and we applaud the GNF's efforts within the past year. We also acknowledge that there have been many unsuccessful attempts to round up this ever-growing herd over the last 40 years. It will take a concerted effort to solve this problem once and for all. We hope and expect that the GNF's efforts to eradicate unbranded, unowned, feral cattle will be completed by the time the Gila Wilderness celebrates its 100th Anniversary in June of 2024.

A. The GNF Has a Responsibility under Federal Law to Remove the Feral Cattle to Protect Public Resources.

As the GNF acknowledges in the scoping letter, feral cattle are overgrazing riparian areas, trampling stream banks, and causing erosion. Multiple federal statutes dictate that the



agency must remove the cattle to prevent ongoing habitat destruction and water quality degradation.

First, feral cattle erode streambanks and defecate in and near water, causing water quality degradation and pollution. These activities may cause spring and stream water to exceed the water quality standards set by New Mexico law, thereby violating the Clean Water Act (CWA).¹ Second, allowing feral cattle to persist in sensitive riparian areas is inconsistent with the riparian standards and guidelines set forth in the 1986 Forest Plan,² and thereby violates the National Forest Management Act (NFMA).³ It is critical to restore and protect hydrological integrity and soil health in the Gila Wilderness for compliance with federal and state law, and more importantly, for the wildlife, plants, and downstream communities that depend on a healthy ecosystem.

Third, allowing feral cattle to graze illegally in the Gila Wilderness violates the Wilderness Act of 1964.⁴ Although the Wilderness Act allows livestock grazing to continue in areas where grazing was established prior to the effective date of the Act,⁵ these cattle do not have an owner, are not on a grazing allotment, and are not subject to reasonable regulations designed to protect resources and mitigate impacts. The feral cattle are grazing illegally in sensitive ecosystems, and their presence damages the wilderness character of the land in violation of the Wilderness Act. In addition, the feral cattle exhibit unpredictable behavior and have been known to charge recreationalists in the Wilderness, including hunters, boaters, and hikers, posing an unnecessary threat to public safety.

Fourth, the GNF must remove the feral cattle to ensure compliance with the Endangered Species Act (ESA).⁶ The GNF is home to many federally listed threatened and endangered species, including the narrow-headed garter snake, northern Mexican garter snake, Chiricahua leopard frog, Chiricahua chub, Gila chub, Gila trout, loach minnow, spike dace, southwestern willow flycatcher, western yellow-billed cuckoo, Mexican spotted owl, New Mexico meadow jumping mouse, and Mexican gray wolf.⁷ The GNF also encompasses designated critical habitat for the Mexican spotted owl, Chiricahua leopard

¹ 33 U.S.C. § 1323(a).

² Gila National Forest Plan, Amendment 10, Riparian Standards and Guidelines (Sept. 2005), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5376730.pdf.

³ National Forest Management Act (NFMA), 16 U.S.C. § 1900 et seq.; see *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002) (explaining that “all management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with [NFMA]”).

⁴ 16 U.S.C. § 1131 et seq.

⁵ 16 U.S.C. § 1133(d)(4).

⁶ Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq.

⁷ See generally Gila National Forest Draft Revised Forest Plan Draft EIS, Vol. I, at p. 177-182 & Table 23 (Dec. 2019), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd687232.pdf (describing federally listed species in the Gila).



frog, southwestern willow flycatcher, Gila chub, loach minnow, and spike dace; and critical habitat has been proposed within the GNF for the narrow-headed garter snake, northern Mexican garter snake, and yellow-billed cuckoo.⁸

The wild backcountry of the GNF is critical to the survival and recovery of these imperiled species. Illegal grazing by feral cattle necessitates renewed and ongoing consultation between the GNF the U.S. Fish and Wildlife Service under Section 7 of the ESA.⁹ Allowing the feral cattle to persist is likely to jeopardize the continued existence of species protected by the ESA, or to result in the destruction or adverse modification of critical habitat designated under the ESA, in violation of Section 7.¹⁰ The GNF's failure to take action to remove the cattle may also violate Section 9 of the ESA by allowing activities that result in the "take" of ESA-listed species or designated critical habitat.¹¹

The ESA dictates prompt action to address the adverse impacts of feral cattle on listed species and critical habitat, and removing the feral cattle is unlikely to affect the wild nature of endangered Mexican gray wolves or other predators. The U.S. Fish and Wildlife Service has previously determined that feral cattle removal will not affect wolves because there are no wolf packs located within the project area.¹² Past experience demonstrates that numerous scavengers will consume the carcasses prior to being found by the occasional disbursing wolf that may or may not pass through the area.¹³ Any incidental contact between wolves and carcasses is unlikely to change the behavior and nature of wolves, which are natural predators and not scavengers.¹⁴

B. The GNF's Authority to Remove the Feral Cattle from Federal Land Is Not Precluded by State Law.

The GNF has full authority to act independently to remove the invasive feral cattle population from the Gila Wilderness. In doing so, the GNF is not required to consult with any New Mexico State agency, including the New Mexico Livestock Board, which lacks management authority to remove the unbranded, feral cattle from federal land as

⁸ *Id.* at 169.

⁹ 16 U.S.C. § 1536.

¹⁰ 16 U.S.C. § 1536(a)(2).

¹¹ 16 U.S.C. § 1538(a); *see also* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.).

¹² *See* Federal Defendants' Preliminary Response in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, *N.M. Cattle Crowers Ass. v. Vilsack*, Case No. 2:22-cv-00086-GJF-GC, Doc. 9, at 11 (Feb. 9, 2022).

¹³ *Id.*

¹⁴ *Id.*



“estrays.” The GNF may, however, enter a voluntary partnership with an appropriate state agency or private entity to facilitate the treatment and disposition of the feral cattle.

The feral cattle are not subject to the provisions of the New Mexico Livestock Code, which governs the livestock industry in New Mexico,¹⁵ or the jurisdiction of the Livestock Board. The Livestock Code applies to “all domestic or domesticated animals that are used or raised on a farm or ranch . . . and exotic animals in captivity.”¹⁶ The Livestock Code established the New Mexico Livestock Board¹⁷ and granted the Board the power to exercise general regulatory supervision over the livestock industry.¹⁸ Among other things, the Livestock Code permits the Livestock Board to take possession of “stray” livestock, and to sell the animals and retain the proceeds if the lawful owner is not found.¹⁹

Under New Mexico law, unowned, unbranded feral cattle that are born and live in the wilderness on federal land do not meet the definition of “livestock” for purposes of the Livestock Code and, accordingly, are not subject to treatment as “estrays” by the Livestock Board. In 1994, Lieutenant Governor Casey Luna asked Attorney General Tom Udall to provide an opinion about whether the Livestock Board had jurisdiction over wild horses living on White Sands Missile Range.²⁰ The Attorney General concluded that wild horses did not fit within the definition of “livestock” or “estrays” for purposes of the Livestock Code and that the federal government had primary authority regarding their disposition. The Attorney General explained,

As long as the horses remain on White Sands Missile Range, the State of New Mexico and the United States government have overlapping jurisdiction regarding their treatment, movement and disposition. The United States, as landowner, may take whatever actions it deems appropriate with respect to the horses, subject to any conditions or restrictions imposed by the State through its laws as trustee or conservator of wild animals for the benefit of the people. . . . [T]he *situation lends itself to a cooperative federal-state effort* to determine the treatment and disposition of the animals. However, so long as the animals remain wild and remain on White Sands, and so long as neither the State Legislature nor

¹⁵ The Livestock Code, NMSA 1978, §§ 77-2-1 to -32; *see* § 77-2-1 (stating that the purposes of the Livestock Code are to “are to promote greater economy, service and efficiency in the administration of the laws relating to the livestock industry of New Mexico, to control disease, to prevent the theft or illegal movement of livestock and to oversee the New Mexico meat inspection program”).

¹⁶ NMSA 1978, § 77-2-1.1(A).

¹⁷ NMSA 1978, § 77-2-2.

¹⁸ NMSA 1978, § 77-2-7(A).

¹⁹ NMSA 1978, §§ 77-13-4 to -5.

²⁰ N.M. Att’y Gen., No. 94-06 (Aug. 25, 1994) (opinion regarding jurisdiction over wild horses on federal land).



Congress enacts legislation governing their treatment, the federal government, as landowner, has primary authority and responsibility to determine their fate.²¹

The New Mexico Court of Appeals has issued two recent opinions confirming the Attorney General’s conclusions that unowned, undomesticated animals are not “livestock” under the Livestock Code, and that the statutory provisions that govern the Livestock Board’s jurisdiction and treatment of “estrays” are not applicable to unowned, undomesticated animals.²²

The reasoning employed by the Court of Appeals and the Attorney General applies to the feral cattle in the GNF. The GNF has primary legal authority to take whatever actions the GNF deems appropriate with respect to the feral cattle on federal land, including removal through lethal or non-lethal means. If the GNF takes the feral cattle off federal land, the situation may lend itself to a voluntary, cooperative federal-state effort to determine the treatment and disposition of the animals, which may include a livestock auction conducted by the state or other solutions.

C. The Feral Cattle Must Be Removed to Protect the Wild and Scenic Values of the Gila River and its Tributaries.

As noted above, the population of feral cows in the Gila Wilderness has been and continues to degrade the riparian corridors along the mainstem of the Gila River and adjacent tributaries. Many of the river segments impacted by these unbranded and unowned cows are identified in the GNF’s draft Revised Land Management Plan (LMP) and draft Environmental Impact Statement (EIS) as eligible for designation as Wild and Scenic Rivers.²³

Congress enacted in the Wild and Scenic Rivers Act in 1968 to preserve rivers with outstanding natural, cultural, and recreational values in a free-flowing condition for the

²¹ N.M. Att’y Gen., No. 94-06, at 2-3 (emphasis added).

²² See *Wild Horse Observers Ass’n v. N.M. Livestock Bd.*, 2022-NMCA-061, ¶ 16, 519 P.3d 74 (explaining that the Board is prohibited from treating undomesticated wild animals, including wild horses, as stray livestock); *Wild Horse Observers Ass’n v. N.M. Livestock Bd.*, 2016-NMCA-001, ¶ 2, 363 P.3d 1222 (holding “that ‘livestock’ does not include undomesticated, unowned animals, including undomesticated and unowned horses; therefore, undomesticated, unowned horses may not be ‘stray’”).

²³ Gila National Forest Draft Revised Forest Plan at 233-37 (Dec. 2019), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd687231.pdf; Draft EIS, Vol. I, at p. 18 (Dec. 2019), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd687232.pdf (explaining that a 2019 eligibility study found 16 stream reaches totaling 225 miles as eligible Wild and Scenic Rivers).



enjoyment of current and future generations.²⁴ If the final LMP and EIS identify these river segments as eligible for Wild and Scenic classification, then the agency will have a mandate to maintain the river's free-flowing nature and Outstandingly Remarkable Values (ORVs).²⁵ As identified in the Draft EIS, the mainstem of the Gila River through the Gila Wilderness contains numerous ORVs, including scenery, geology, recreation, wildlife, and historical resources. At present, all these ORVs are being damaged and impacted by the erosion and pollution caused by unmitigated overgrazing by unauthorized cattle. Recreationists that utilize the mainstem of the Gila River for solitude and primitive forms of recreation, including fishing and non-motorized boating, often encounter the feral cattle population and have experienced incidents of aggressive behavior by these wild animals.

Furthermore, pending legislation introduced by New Mexico's two U.S. Senators, Martin Heinrich and Ben Ray Luján, would formally designate 450 miles of waterways in the Gila as Wild and Scenic – many of which overlap with areas presently affected by the feral cattle population in the Gila Wilderness.²⁶ The federal cattle must be removed to protect the wild and scenic values of the Gila River and its tributaries.

D. As Compared to Lethal Removal Efforts, Live Capture and Removal Has Proven Ineffective and Inhumane.

We strongly support the agency's proposed action to promptly remove feral cattle from the Gila Wilderness through an appropriate combination of lethal and non-lethal means, and to form partnerships with state and private entities that may be available to assist. We would like to emphasize, however, that the use of lethal removal, both on the ground and via helicopter, has proven to be relatively cost effective, humane, and results oriented; whereas on-the-ground roundups, which have been tried for decades, have had minimal success and have wasted the limited agency resources available to deal with the problem.

Because the feral cattle were born in the wild and never domesticated, they are extremely hard to catch and herd in the rugged terrain of the Gila Wilderness. Ground gathering and transport is difficult and hazardous for wranglers and their horses and dogs. Gather and transport is also hard on the feral cattle: previous roundup activities have resulted in a greater than 50% stress-induced mortality rate. We appreciate the agency's efforts to identify and utilize the most effective and humane methods to resolve the tremendous problems posed by the feral cattle's ongoing presence in the Gila Wilderness.

²⁴ 16 U.S.C. § 1271 et seq.

²⁵ Draft EIS, *supra*, at 158.

²⁶ M.H. Dutch Salmon Greater Gila Wild and Scenic River Act, S. 3129, 117th Cong. (2021), *available at* <https://www.congress.gov/bill/117th-congress/senate-bill/3129?q=%7B%22search%22%3A%5B%22Gila%22%2C%22Gila%22%5D%7D&s=1&r=2>.



CONCLUSION

We respectfully submit these scoping comments to you and urge the GNF to move forward with a Categorical Exclusion to ensure that the removal of feral cattle in America's first Wilderness is both expeditious and efficient, while at the same time protecting one of the most valuable public lands resources accessible in the Southwestern United States. Thank you for your consideration of our comments. Please include them in the official project record. We look forward to continuing to work with the GNF to protect the Gila Wilderness and the Gila River.

Sincerely,

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