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Via Certified / Signature Required Priority Mail

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Public Comments Processing
Attn.: Docket No. FWS-R2-ES-2010-0085
Division of Policy and Directives Management
U.S. Fish & Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Re: Submission of Information in Response to Solicitation by the Fish & Wildlife Service Relative to the Proposed Rule to list the Chiricahua leopard frog (*Lithobates chiricahuensis*) under the ESA as Threatened with Critical Habitat

These comments and the information provided herein and in attachment, submitted on behalf of the Southern Arizona Cattlemen's Protective Association (SACPA), respond to the Fish & Wildlife Service's solicitation of information about its Proposed Rule to list the Chiricahua leopard frog as threatened and to designate critical habitat for it under the Endangered Species Act (ESA) (76 FR 50, 14126 et seq.).

SACPA is an organization representing some 70 families ranching in Pinal, Pima, and Santa Cruz Counties, Arizona. The organization was founded in 1955 in response to cattle rustling, specifically to offer rewards for information leading to the conviction of persons vandalizing any member's property or stealing, killing or maiming livestock. While SACPA continues to offer such rewards today, and law enforcement remains its primary mission, the organization has broadened its scope to address other industry-related issues of concern to its members, such as those involving endangered species and sustainable range management, animal welfare, and rancher safety.

In this Proposed Rule for the Chiricahua leopard frog, "livestock grazing" is wrongly identified by the FWS as a threat to the existence of Chiricahua leopard frogs. (76 FR 50 at 14129, 14131, 14136). Should that erroneous decision stand, undue economic harm to SACPA members, many of whom are the very small entities and families the FWS claims it is specifically interested in hearing from in response to this Proposed Rule (at p. 14127), would result because of further, unnecessary restriction of their livestock ranching businesses.

While SACPA disagrees with the FWS's claim in this Proposed Rule that livestock grazing poses a generic threat to the existence of Chiricahua leopard frogs, SACPA does agree with the FWS's assertion in this Proposed Rule that the best scientific information available must inform any decision of possible threat posed to Chiricahua leopard frogs by the grazing of livestock. (76 FR 50, 14132).

Indeed, the ESA also mandates use of this approach by requiring that only scientific evidence drawn solely from the best scientific and commercial information available be used by the Service to determine whether livestock grazing poses a threat to Chiricahua leopard frogs. Moreover, because this is a Proposed Rule and not a 90-Day finding, a preponderance of the scientific evidence drawn solely from the best scientific and commercial information is required, at the least, to support the FWS's decision in that regard under the ESA. *Moden v. United States Fish and Wildlife Service*, 281 F. Supp. 2d 1193 (D.Ct. Ore. 2003).

This means that the Service must show by at least a preponderance of the best scientific evidence available (i.e., that scientific evidence which is both relevant and reliable) that livestock grazing poses a threat to the existence of the Chiricahua leopard frog. This evidentiary requirement of the ESA is critically important where, as here, the very future of livestock ranching, which has been occurring in occupied Chiricahua leopard habitat in Arizona since at least the 1680s, in occupied habitat in Sonora since the 1530s, and which continues to nurture the historic and traditional agrarian cultures and customs common to these areas today, hangs in the balance.

Here, the FWS claims that the Southwest Endangered Species Act Team published considerations in 2008 for making affects determinations and recommendations for reducing and avoiding adverse affects to Chiricahua leopard frogs (76 FR 50 at p. 14129). Treatment of livestock grazing is included within that document, but neither that document nor its actual findings are included with this Proposed Rule. Nonetheless, the FWS reached the conclusion from that document in this Proposed Rule that "livestock grazing" poses a per se threat to Chiricahua leopard frogs.

The Service reached that erroneous conclusion largely because of the Team's (2008) reliance on Fleischner (1994), Belsky (1999), and its inordinate obsession with trampling to support that proposition. Neither Fleischner nor Belsky, however, are useful for that purpose. This is because Belsky et al. (1999) reviewed only various studies showing that uncontrolled livestock grazing degrades riparian ecosystems when, in fact, only controlled livestock grazing is practiced on lands subject to ESA jurisdiction. Thus, Belsky's conclusions are not relevant because the issue at hand involves the affects that *controlled* – not uncontrolled – livestock grazing might have on Chiricahua leopard frogs and their riparian habitats. Because Belsky's conclusions are not relevant to controlled livestock grazing, or the only form of livestock grazing that is actually practiced on lands subject to ESA jurisdiction, those conclusions fail to meet the test of scientific evidence. Accordingly, Belsky (1999) does not provide scientific evidence in support of the FWS's claim made in this Proposed Rule that "livestock grazing" poses a generic threat to Chiricahua leopard frog existence.

Fleischner (1994) is also cited by the Team (2008) as a source of scientific evidence supporting the threat posed to Chiricahua leopard frogs by livestock grazing. Again, review of Fleischner (1994) reveals that such is not the case.

While Fleischner (1994) did review a wide variety of grazing versus grazing exclusion studies, none of the more than 120 studies reviewed by Fleischner (1994) takes into account critical details that greatly influence experimental outcomes such as grazing intensity, timing and frequency. Moreover, Fleischner (1994) failed to consider any of the 35 long term controlled grazing studies identified as the foundations of range management by Van Poollen and Lacey (1979) (Holechek, 2005), while misrepresenting the actual state of scientific knowledge relative thereto as “rudimentary.” (Fleischner, 1994, at p. 630).

Further, nearly all the studies Fleischner did consider have serious flaws, including inadequate descriptions of grazing treatments and practices, weak study designs, and/or lack of pre-treatment data that prevent their replication. While there can be no argument with Fleischner (1994) that poorly controlled grazing can be destructive of rangeland ecosystems, Fleischner’s review is nonetheless grossly misleading because it overlooks more than 35 controlled grazing studies from North America and over 50 more studies from other parts of the world which show that livestock grazing managed by use of scientific principles is sustainable and generally results in rangeland improvement. (Holechek, 2005).

Fleischner’s (1994) review, like Belsky’s, is also misleading because it advocates a “one size fits all” approach to categorizing livestock grazing as a threat to various species while failing to recognize that severe, heavy, moderate, conservative, and light grazing intensities each have different and scientifically measurable impacts on rangeland ecosystems. As a result, Fleischner (1994), like Belsky et al. (1999), cannot and does not provide any scientific evidence supportive of the FWS’s claim that in this Proposed Rule that livestock grazing as practiced on lands to which ESA jurisdiction applies poses a threat to the existence of Chiricahua leopard frogs.

Similarly, the Team presents no relevant and reliable scientific evidence supportive of its obsession with the concern that livestock will threaten the existence of Chiricahua leopard frogs by trampling them to death. Instead, the Team offers nothing more than an unscientific opinion, based solely on speculation and surmise, that trampling by livestock poses a threat to the existence of Chiricahua leopard frogs. That approach not only fails to pass ESA muster (see *Bennett v. Spear*), but is also an approach that produces a conclusion contrary to that of actual experience and the evidentiary record, which clearly show that livestock grazing and Chiricahua leopard frogs have coexisted in Arizona for more than 300 years and that Chiricahua leopard frogs were formerly much more abundant in Arizona when there were many more cattle on the ground than there are today.

The fact of the matter is that there are no published scientific studies that have found controlled grazing to be a threat to any species, including Chiricahua leopard frogs (Holechek, 2005). On the other hand there are many studies showing the benefits of controlled grazing to both individual species and biological diversity. *Id.* (see citations, attached).

As shown herein and in attachment, scientific evidence of negative impacts to Chiricahua leopard frogs or their habitats caused by controlled livestock grazing – or the only form of livestock grazing that is practiced on lands to which ESA jurisdiction applies -- is actually nonexistent. As a result, the claim made by the FWS in this Proposed Rule, that livestock grazing at any and all levels poses a generic threat to Chiricahua leopard frogs and their habitat, is an assumption that can be viewed as nothing more than scientifically contradicted speculation offered in the absence of credible scientific review or support.

As also shown herein and in attachment, neither the FWS nor the Southwest Endangered Species Act Team conducted anything close to a thorough review of the literature pertaining to controlled livestock grazing. Nor did either collect or attempt to collect any relevant or reliable hard scientific data relative to the testing of their shared speculation that livestock grazing at any and all levels poses a threat to Chiricahua leopard frogs. Instead, the FWS chose to presume – without benefit of credible research or analysis of any scientific data or scientific evidence – that controlled livestock grazing poses a generic threat to Chiricahua leopard frogs and their habitat throughout that species' range. As amply shown herein and in attachment, use of this purely speculative approach to threat analysis in this Proposed Rule violates the ESA because it lacks scientific credibility.

As also shown clearly and convincingly herein, the best scientific evidence available reveals that livestock grazing at light to moderate levels has not been shown to pose a threat to Chiricahua leopard frogs. While the Fish & Wildlife Service seems to recognize this fact by signaling out “poor” livestock management as a specific threat to Chiricahua leopard frogs (76 FR 60, at 14131), that is not the qualified position it took relative to livestock grazing as a threat to Chiricahua leopard frogs in the remainder of this Proposed Rule (76 FR 60, at 14129, 14131, 14136). Moreover, the Service's use of the term “poor,” as a descriptor of the kind of livestock management that may pose a threat to Chiricahua leopard frogs is not a term of scientific art defined by the Society for Range Management. Nor does the Fish & Wildlife Service offer any definition of the kind of livestock management it might subjectively view as “poor,” and therefore, as a threat to Chiricahua leopard frogs.

At the least, therefore, the Fish & Wildlife Service must come up with a scientifically defensible definition of what “poor livestock management” means for purpose of finding on this Proposed Rule, or, in the alternative, adopt a term of description that is a term of scientific art which is defined and accepted by the science of range management. We urge the Fish & Wildlife Service to adopt the latter approach and to properly find, based on clear and convincing scientific evidence drawn solely from the best scientific and commercial information available, that light to moderate levels of livestock grazing do not pose a threat to the existence of the Chiricahua leopard frogs. We also remind the Service that should it not do so, it will certainly be called upon to vigorously defend its effects decision relative to controlled livestock grazing, as well as its analysis of the immediate and cumulative effects that this decision will have on our important local industry, in upcoming Economic Analysis.

Identification of controlled livestock grazing as a generic threat to Chiricahua leopard frogs is not the only issue, however, that SACPA is concerned with in this Proposed Rule. Many other sections of this Proposed Rule also present claims which are of concern to SACPA.

For example, the treatment of the proposed Rosemont copper mine in this Proposed Rule (76 FR 50, at 14129) is inappropriate, biased and misleading. The FWS's treatment of the proposed Rosemont copper mine is inappropriate because no Proposed Rule to list any species should single out a specific entity for negative criticism based on the biased use of false innuendo. Nonetheless, this is precisely the approach taken in this Proposed Rule relative to Rosemont by the FWS.

According the FWS (70 FR 50, at 14129): "A copper mine (the Rosemont Mine) has been proposed in the northeastern portion of the Santa Rita Mountains, Pima County, Arizona (recovery unit 2), the footprint of which includes several sites recently occupied by Chiricahua leopard frogs." This statement is inappropriate and misleading because it falsely infers, by the use of the word "footprint," that mining activities conducted by Rosemont will threaten or destroy "several" sites recently occupied by Chiricahua leopard frogs on its holdings.

Such is decidedly not the case. In point of fact, only two Chiricahua leopard frogs (in one tank) were found within the footprint of the Rosemont Mine in 2008. Moreover, no Chiricahua leopard frogs, and no ranids whatsoever, were noted within the proposed Rosemont Project footprint or the Rosemont holdings during extensive 2009 survey efforts (Westland, 2009, at p. 12). Similarly, surveys conducted in 2006 revealed no Chiricahua leopard frog or other ranid presence within the Rosemont holdings (Westland, 2009, at p. 19).

Beginning in 2008, survey efforts were expanded beyond the Rosemont Holdings and ranids were noted along nine features that were surveyed. Chiricahua leopard frogs were confirmed at three stock ponds in the Rosemont holdings, two contiguous reaches of Box Canyon, and two stock ponds in the Greaterville area. An unconfirmed (to species) ranid frog was also noted at another site within the Rosemont holdings. The most productive sites for Chiricahua leopard frogs note in 2008 were the Greaterville and Granite Mountain tanks in the Greaterville area (not on Rosemont holdings), supporting at least 37 and 10 frogs, respectively (Westland, 2009, at p. 19).

Thus, despite the FWS's claim to the contrary in this Proposed Rule (76 FR 50, 14129), there is only one recently occupied site that is actually within the "footprint" of the mining activities proposed by Rosemont, and that site hasn't been occupied since 2008. Nonetheless, radical environmentalists have exploited the misinformation on Rosemont published by the FWS in this Proposed Rule to call for the inclusion of Rosemont's holdings as critical habitat for Chiricahua leopards based on the patently false claim that these frogs live where mining is proposed to occur. (see article, attached).

Similarly misleading and inappropriate is the FWS's further claim relative to Rosemont that "no analyses have been conducted yet to quantify how the frogs and their habitats may be affected [by the introduction of copper] in that region, which potentially includes the Bureau of Land Management's Las Cienegas National Conservation area; however, a draft environmental impact statement will likely be published in 2011." (76 FR 50, 14129). As the FWS well knows, but doesn't mention in this Proposed Rule, Rosemont is addressing the issue of introducing copper into the environment through its mining activities by employing cutting edge,

dry tailings technology. Moreover, as the FWS also well knew when it published this Proposed Rule, the draft EIS contains the very analyses it claims have not yet been conducted.

Accordingly, because the entire paragraph devoted in this Proposed Rule to Rosemont (at p. 14129) consists of misrepresentation and innuendo, that paragraph does not represent the best scientific information available and therefore has no value or place in any Proposed Rule to list the Chiricahua leopard frog as threatened with critical habitat.

Similarly, allowing critical habitat prudency determinations to be driven by radical environmental corporate litigants through lawsuits and court orders for which they are well compensated at public expense, as the FWS does once again here (76 FR 50, 14126), is neither reflective of sound scientific or public policy. Instead, that approach leads to excesses and inconsistencies, as exhibited by the proposal of critical habitat designation for the Chiricahua leopard frog in this Proposed Rule.

Here, the FWS is proposing to designate approximately 11,136 acres, 1,679 acres of which are private lands, as critical habitat for the Chiricahua leopard frog in Arizona and New Mexico (76 FR 50, 14139) despite the fact that ESA jurisdiction does not apply to entirely private actions on private lands. Moreover, the FWS is also proposing to designate many livestock ponds and tanks as critical habitat for the Chiricahua leopard frog where “special management” would be necessary. Such designations would extend 28 feet beyond the high water line, and would extend 328 feet upstream from each of these stock tanks (measured again at high water line). (76 FR 50, 14140).

In Arizona, the FWS is proposing the designation of SACPA members’ stock tanks as critical habitat for the Chiricahua leopard frog subject to “special management” (76 FR 50, 14136), despite the fact that the evidence indicates Chiricahua leopard frogs have made modest population gains since the time of listing (76 FR 50, 14131) under the special rule exempting operation and maintenance of livestock tanks on non-federal lands from Section 9 take provisions of the ESA (76 FR 50, 14126). These modest gains in population were realized under the 2002 final rule listing the then Chiricahua leopard frog, which unlike the currently Proposed Rule, specifically recognized the value of controlled livestock presence in supporting numerous populations of Chiricahua leopard frogs.

Here, however, because of a taxonomic revision of the Chiricahua leopard frog, the FWS “reassessed” the status of threats to the “new” Chiricahua leopard frog (*Lithobates chiricahuensis*) in re-proposing this species as threatened in this Proposed Rule. (76 FR 50, 14126). That reassessment, as previously discussed at length, has turned Chiricahua leopard frog recovery on its head by erroneously identifying controlled livestock presence, or the very activity supporting the majority of extant Chiricahua leopard frog populations, as a threat to those same populations’ existence.

This sea change in recovery philosophy will have devastating economic impacts on SACPA members, the vast majority of which are small entities and families, in the form of regulatory takings of their water rights by severe restriction and possible prohibition of the use of those water rights for livestock watering beneficial use purpose. As a result, SACPA formally

requests that critical habitat designation for the Chiricahua leopard frog be excluded in at least proposed recovery unit 1 and in portions of recovery unit 2 in accordance with FWS policy relative thereto. (76 FR 50, 14127).

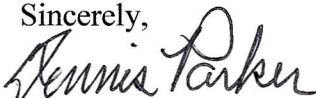
SACPA bases this request on the following facts. First, as previously stated, Chiricahua leopard frogs have made modest population gains in these proposed recovery units since 2002. Second, stock tanks supporting controlled livestock presence also support the majority of extant Chiricahua leopard frogs within these proposed recovery units where modest population gains have been realized. Third, the FWS has publicly recognized that chytridiomycosis and predation by nonnative species as consistently more important threats than habitat based factors to Chiricahua leopard frogs (76 FR 50, 14129). Fourth, some of the most robust populations of Chiricahua leopard frogs currently known occur in earthen livestock watering tanks (76 FR 50, 14134). Fifth, because “special management” of these same stock tanks will likely include severe restriction or prohibition of use of stock tanks by SACPA’s small entity and family members for the purpose they were created – to water livestock present on a controlled basis – a comprehensive regulatory takings of water rights analysis must also be performed and included in Economic Analysis.

In short, the FWS should properly exclude proposed recovery unit 1 and portions of recovery unit 2 from critical habitat designation because such designation would result in devastating and disproportionate economic impacts on SACPA members who are small entities and families, and because those economic impacts far outweigh any benefits to Chiricahua leopard frogs that might be attained by designating these areas as critical habitat nonetheless.

Finally, because this Proposed Rule represents a radical sea change in Chiricahua leopard frog recovery philosophy and approach, SACPA also urges the FWS to immediately invite coordination with local governmental entities in affected counties relative to any further development of this Proposed Rule. The purpose of doing so, mandated by NEPA (42 USC 4331(b)(5)), as the FWS knows but has failed to do, is to lay out the framework for coordination with local governmental entities early in the listing and critical habitat designation process. Thus, until the FWS engages in coordination with local entities of government over this Proposed Rule for the Chiricahua leopard frog, the FWS will remain in noncompliance with NEPA in both the proposal and development of this Proposed Rule.

Thank you for your consideration and attention to these comments.

Sincerely,



Dennis Parker,
Attorney at Law,

For the Southern Arizona Cattlemen’s Protective Association (SACPA)

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Conservation group wants site of proposed AZ copper mine set aside for threatened frog

THE ASSOCIATED PRESS

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TUCSON, Ariz. — A conservation group wants federal wildlife officials to increase the amount of land they plan to set aside to protect a threatened frog.

The U.S. Fish and Wildlife Service in March proposed setting aside more than 11,000 acres of critical habitat for the Chiricahua (cheer-uh-KAH'-wuh) leopard frog in central and southeastern Arizona and southwestern New Mexico.

The Center for Biological Diversity says the planned Rosemont mine southeast of Tucson, Ariz., where the frogs are known to live should be included.

The conservationists also say the agency is downplaying evidence that northern populations of the frog may be a different species.

Federal officials expect a final decision next year.

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