No. 21-2019

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NORTHERN NEW MEXICO STOCKMAN'S ASSOCIATION and OTERO COUNTY CATTLEMAN'S ASSOCIATION,

Plaintiffs-Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendant-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY and WILDEARTH GUARDIANS,

Intervenor Defendant-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
Honorable James O. Browning, District Judge
Case No. 1:18-cv-01138-JB-JFR

APPELLANTS' OPENING BRIEF
ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Northern New Mexico Stockman's Association and Otero County Cattleman's Association hereby state they have no parent corporations and no publicly held corporation holds 10% or more of their stock.

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STATEMENT OF RELATED CASES

This case has no prior or related appeals.

GLOSSARY OF TERMS

APA:	Administrative Procedure Act
AUM:	Animal Unit Months
ESA:	Endangered Species Act
Northern New Mexico Ranchers:	Northern New Mexico Stockman's Association
Otero Ranchers:	Otero County Cattleman's Association
Ranchers:	Appellants
Service:	Appellees

JURISDICTIONAL STATEMENT

On March 16, 2016, Appellee U.S. Fish and Wildlife Service (the Service) issued a final rule designating critical habitat for the New Mexico Meadow Jumping Mouse in Arizona, Colorado, and New Mexico. *See* 81 Fed. Reg. 14,264 (Mar. 16, 2016); 2-Appx.-0340.[1] The District Court had jurisdiction to review Appellants' claims against that designation under the Administrative Procedure Act (APA), 5 U.S.C. § 704, and the Endangered Species Act's (ESA) citizen suit provisions, 16 U.S.C. § 1540(c) and (g). The District Court held that the Appellants have standing, because specific members of the Northern New Mexico Stockman's Association and Otero County Cattleman's Association (Ranchers) are injured by the ESA critical habitat designation at issue here. 4-Appx.-809–16.

The District Court issued its opinion and order and entered judgment disposing of all parties' claims on October 13, 2020. 4-Appx.-0922–24. Appellants timely filed a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) on November 6, 2020. 4-

[1] Citations to Appellants' Appendix are formatted as [volume number]-Appx.-[page number(s)].

Appx.-0925. The District Court granted in part and denied in part the motion on January 11, 2021. 5-Appx.-0972–73. The Appellants filed their Notice of Appeal on March 1, 2021. 1-Appx.-0974–75. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(ii) and 4(a)(4)(A)(iv). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Section 4(b)(2) of the Endangered Species Act required the Fish and Wildlife Service to study all of the economic impacts of the critical habitat designation at issue here, even those impacts that might be attributable coextensively to other causes, such as the listing of the New Mexico meadow jumping mouse as endangered.

2. Whether the Fish and Wildlife Service violated the Endangered Species Act by excluding the impact to water rights from its pre-designation economic impact analysis.

3. Whether the Fish and Wildlife Service acted arbitrarily, capriciously, or abused its discretion by failing to adequately explain why it did not exclude Units 3 and 4 from the critical habitat designation.

4. Whether this Court should instruct the District Court to hold unlawful and set aside Units 3 and 4 of the critical habitat designation.

5. Whether this Court should vacate that portion of the District Court's opinion and order purporting to adjudicate the water rights and grazing rights of Appellants' members because those statements exceed the scope of the pleadings, the District Court's review under the Administrative Procedure Act, and the District Court's jurisdiction.

STATEMENT OF THE CASE

I

Introduction

The Ranchers are a part of a centuries-old tradition of raising livestock in New Mexico. *See generally*, 2-Appx.-0444–79. The Northern New Mexico Ranchers trace their families' ranching histories to the late 16th century. *See* 2-Appx.-0446 ¶ 5; 1-Appx.-0089. They are a part of the historic Hispanic Ranching Families of New Mexico. 2-Appx.-0446 ¶ 5. These men and women descend from generations of ranchers that date back to the original founding of the livestock industry in North America, beginning with the colonization of the area by Don Juan de Oñate in 1598. *Id.*; *see also* 1-Appx.-0089.

The Otero Ranchers have also been ranching in New Mexico for generations. *See* 1-Appx.-0144; 2-Appx.-0470 ¶ 6; 2-Appx.-0474 ¶ 6. Some

trace their ranching history to before the establishment of the Forest Service. *See* 2-Appx.-0470 ¶ 6. Today, the Ranchers continue the ranching tradition in what are now the Santa Fe and Lincoln National Forests. *See* 2-Appx.-0447 ¶ 13; 2-Appx.-0457 ¶ 8; 2-Appx.-0453 ¶ 12.

Livestock is a part of the Ranchers' heritage, culture, and livelihood. Not surprisingly, these men and women face a lot of hardships raising cattle in rural New Mexico. Now, the Service has unlawfully added to those hardships. The critical habitat designation at issue here increases the costs of ranching in the Santa Fe and Lincoln National Forests. 1-Appx.-0127. The Service, however, did not follow the proper procedures before designating that habitat.

The ESA requires the Service to assess the costs of a critical habitat designation before reaching a final decision. 16 U.S.C. § 1533(b)(2). The Act then requires the Service to balance the costs and benefits of a designation in order to determine whether the agency should exclude any areas from critical habitat. *Id.* Here, the Service ignored both requirements. The Service instead conducted an economic impact analysis that underestimated the costs of the designation and provided inadequate reasoning for its final decision. That decision was thus

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. This Court should reverse the judgment of the District Court and remand with instructions to hold unlawful and set aside Units 3 and 4 of the critical habitat designation.

II

Factual and Legal Background

A. The Endangered Species Act

Under Section 4 of the ESA, the Service (acting for the Secretary of the Interior) determines whether to list a species as "threatened" or "endangered" based on certain factors, including those relating to habitat, overutilization, disease or predation, and existing regulatory mechanisms. *See* 16 U.S.C. §§ 1532(20), 1533(a). Once a species is listed, the statute makes it an offense to "take" the species and imposes civil and criminal penalties for those who violate the "take" provision. 16 U.S.C. §§ 1533(d), 1540. "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect …." 16 U.S.C. § 1532(19).

Additionally, once the Service lists a species as threatened or endangered, Section 4 requires the agency to designate critical habitat for that species "to the maximum extent prudent and determinable." 16

U.S.C. § 1533(a)(3)(A). Critical habitat may be either "occupied" or "unoccupied" by the species. *See N.M. Farm & Livestock Bureau v. United States Dep't of Interior*, 952 F.3d 1216, 1221–22 (10th Cir. 2020).

Occupied critical habitat is defined as those "areas within the geographical area occupied by the species" at the time of the listing "on which are found those physical or biological features" "essential to the conservation of the species" and "which may require special management considerations or protection ...." 16 U.S.C. § 1532(5)(A)(i). Unoccupied critical habitat is defined as those areas "outside the geographical area occupied by the species" at the time of the listing which "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service may designate unoccupied critical habitat only if it determines that occupied critical habitat is "inadequate to ensure the conservation of the species." *N.M. Farm & Livestock Bureau*, 952 F.3d at 1228 (quotations omitted).

Section 4(b)(2) requires the Service to base all critical habitat designations on "the best scientific data available," and only after taking into consideration "the economic impact, ... and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C.

§ 1533(b)(2). To ensure that any decision to designate critical habitat is fully informed, the Service must perform an economic analysis of the effects of the designation before it is finalized. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1280 (10th Cir. 2001). After properly assessing the impacts of a proposed designation, the Service may exclude any area from the designation if the benefits of exclusion outweigh the benefits of inclusion, so long as the exclusion would not result in the species' extinction. 16 U.S.C. § 1533(b)(2).

In short, Section 4(b)(2) "describes a unified process for weighing the impact of designating an area as critical habitat." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 371 (2018) (citing 16 U.S.C. § 1533(b)(2)). "The first sentence of Section 4(b)(2) imposes a 'categorical requirement' that the Secretary 'tak[e] into consideration' economic and other impacts before such a designation." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 172 (1997)) (alterations in original). "The second sentence authorizes the Secretary to act on his consideration by providing that he may exclude an area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of designation." *Id.*

Once the Service designates critical habitat, public or private property within that habitat is burdened with ESA regulation. In particular, Section 7 of the ESA requires every federal agency to consult with the Service to ensure that any action it authorizes, funds, or carries out "is not likely to jeopardize the continued existence of any" listed species or "result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). The Service has promulgated regulations defining these terms. 81 Fed. Reg. 7214-01 (Feb. 11, 2016); 50 C.F.R. § 402.02.

Under Section 7, the Service must provide the consulting federal agency and the applicant (if any) with a biological opinion detailing how the project will affect a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If the Service determines that the project is likely to jeopardize the species' "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.* § 1536(a)(4), (b)(3)(A). If the Service determines that a project will not jeopardize the species' continued existence, or result in the destruction

or adverse modification of critical habitat of such species, the biological opinion must contain a written "incidental take statement" that sets forth measures to minimize the impact of the project on the species and the critical habitat. 16 U.S.C. § 1536(b)(4)(B) and (b)(4)(C)(i), (ii), and (iv).

B. Factual background

The New Mexico meadow jumping mouse is a small rodent found mainly in New Mexico. *See* 1-Appx.-0157. It dwells in wetland vegetation along streams and creeks. *Id.* In 2014, the Service listed the mouse as endangered under the ESA. *See* 1-Appx.-0159.

In 2016, the Service finalized the mouse's critical habitat designation. 2-Appx.-0339. In total, the Service designated an area of approximately 14,000 acres along 170 miles of flowing streams, ditches, and canals within Colfax, Mora, Otero, Sandoval, and Socorro Counties in New Mexico; Las Animas, Archuleta, and La Plata Counties in Colorado; and Apache and Greenlee Counties in Arizona. 2-Appx.-0375.

The critical habitat is divided into eight units, each further divided into subunits. 2-Appx.-0373–75. The Ranchers graze livestock in what are now Units 3 and 4 of the critical habitat. 1-Appx.-0132–33 (list of

allotments affected by designation); 2-Appx.-0447 ¶¶ 12–15; 2-Appx.-0453; 2-Appx.-0457; 2-Appx.-0466 ¶ 9; 2-Appx.-0462; 2-Appx.-0474; 2-Appx.-0470; 2-Appx.-0478 ¶ 7. The Service designated two subunits in these areas, 3C and 4B, as unoccupied critical habitat. 2-Appx.-0375. The Service designated the rest of Units 3 and 4 as "partially occupied" critical habitat, *id.,* although the ESA does not define "partially occupied" critical habitat. *See* 16 U.S.C. § 1532.

Prior to finalizing the designation, the Service produced an analysis of the economic impacts of the proposed designation. *See* 2-Appx.-0360. As part of its preparation for the economic analysis, the Service worked with Industrial Economics, Inc., a private contractor, to measure the economic impacts of the proposed critical habitat. *See* 1-Appx.-0071.

The analysis process began in 2013, when the Service issued an "Incremental Effects Memorandum" to Industrial Economics describing how the Service would like the contractor to measure the impacts of the proposed designation. 1-Appx.-0071. The memo described the anticipated impacts of the designation, including, among other things, the "protection of riparian areas through fencing" and a change in "the timing or duration of the action (e.g., dormant season grazing)." 1-Appx.-0086.

The Service's incremental effects memo noted that, under this Court's decision in *New Mexico Cattle Growers Association* "an economic analysis for critical habitat that is being designated within States that fall within the jurisdiction of the Tenth Circuit should include a coextensive cost evaluation." 1-Appx.-0072 (citing 248 F.3d 1277). A coextensive evaluation studies "all of the economic impacts of a critical habitat designation," even if some of those costs might also be attributable to other actions, like the listing of the species. *N.M. Cattle Growers*, 248 F.3d at 1285.

In February 2014, Industrial Economics issued a "Screening Memorandum" that purported to analyze the economic impacts of the proposed critical habitat designation as the Service instructed. 1-Appx.-0127. In conducting its analysis, however, Industrial Economics did not include a coextensive costs evaluation. *Id.* Instead it excluded what it called "baseline costs" in the analysis. *Id.* The memo defined baseline costs as "any existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users absent the designation of critical habitat," including "the economic impacts of listing the species under the Act." *Id.* Then, the memo only analyzed what it considered

"incremental costs," defined as those costs "over and above" "baseline costs." *Id.*

Despite excluding the coextensive costs of the designation, the screening memo still estimates that the designation will lead to about $20 million in regulatory costs. 2-Appx.-0384. Most of these costs come from anticipated grazing exclusion measures—such as fencing along streams and forced reduction in the number of cattle grazed—that the United States Forest Service and ranchers must undertake to continue raising cattle. 2-Appx.-0363; 1-Appx.-0143. Many of these grazing-related costs will be imposed on the Ranchers' members. According to the screening memo, the "incremental" costs to grazing activities are estimated at $1.4 million for subunit 3A, $1.9 million for subunit 3B, and $3.4 million for subunit 3C in the Santa Fe National Forest. 1-Appx.-0132. In the Lincoln National Forest, the estimated incremental costs to grazing activities are $670,000 for subunit 4B, $420,000 for subunit 4C, $530,000 for subunit 4D, and $730,000 for subunit 4E. *Id.*

C. Procedural history

On December 5, 2017, the Ranchers sent a letter notifying the Service of their intent to sue under the ESA, as required by 16 U.S.C.

§ 1540(g)(2). 1-Appx.-0036–43. Following the Service's response to the letter, the Ranchers filed a petition for review and complaint for declaratory and injunctive relief on December 6, 2018, alleging three claims against the critical habitat designation. 1-Appx.-0015–34. On August 7, the District Court granted Intervenor-Appellees WildEarth Guardians and Center for Biological Diversity's motion to intervene. 1-Appx.-0011.

After briefing and a hearing on the petition for review, the District Court entered an order and judgment denying the Ranchers' petition for review on October 13, 2020. 4-Appx.-0922–24. On November 6, 2020 the Ranchers timely filed a motion to alter or amend the judgment, requesting the District Court vacate those portions of its order and judgment that purport to adjudicate the Ranchers' members' water and grazing rights. 4-Appx.-0925. The District Court granted in part and denied in part the motion on January 11, 2021. 5-Appx.-0972–73. The Ranchers filed their Notice of Appeal on March 1, 2021.

SUMMARY OF ARGUMENT

This Court should reverse the judgment of the District Court and remand with instructions to hold unlawful and set aside Units 3 and 4 of

the critical habitat designation. In designating critical habitat for the mouse, the Service failed to properly follow Section 4(b)(2)'s "unified process for weighing the impact of designating an area as critical habitat." *Weyerhaeuser*, 139 S. Ct. at 371.

At the outset, the Service failed to follow the "categorical *requirement*" to take into consideration economic and other impacts before designating the critical habitat for the mouse. *Cf. Bennett*, 520 U.S. at 172 (emphasis in original). The Service's economic analysis underestimates the cost of designating critical habitat in two ways.

First, the Service failed to "conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *N.M. Cattle Growers*, 248 F.3d at 1285. By excluding coextensive costs from its analysis, the Service violated the requirements of the ESA and this Court's binding precedent. *Id.*

Second, the Service failed to analyze the designation's impacts to the Ranchers' water rights. The Service ignored these costs because of a mistaken assumption that ranchers cannot own water rights within the National Forest. *See* 2-Appx.-0352. But in New Mexico, stockwatering

rights are not owned by the Forest Service and those rights are instead "allocated under state law to individual stockwaterers." *United States v. New Mexico,* 438 U.S. 696, 716 (1978). And under New Mexico law, the right to beneficial use of water is a property interest distinct and severable from a right to use land. *See Walker v. United States*, 162 P.3d 882, 888 (N.M. 2007). The Service was therefore required to analyze the impacts to water rights before designating the critical habitat and, by failing to do so, violated the ESA.

Additionally, the Service abused its discretion and acted arbitrarily and capriciously in carrying out the second part of Section 4(b)(2)'s unified process. In issuing the final rule designating critical habitat, the Service failed to provide a reasoned basis for not excluding Units 3 and 4 of the designation and failed to follow its own stated policy to weigh the costs and benefits of designating critical habitat. *See* 2-Appx.-0383 (final rule designating habitat); 1-Appx.-0197 (Section 4(b)(2) policy). The Service's failure to provide a reasoned basis for its exclusion decision is an abuse of discretion. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Because the Service violated the ESA in designating critical habitat, this Court should reverse and instruct the District Court to hold unlawful and set aside Units 3 and 4 of the critical habitat. The APA states that a "reviewing court shall ... hold unlawful and set aside" unlawful agency action. 5 U.S.C. § 706(2)(A). To that end, this Court has recognized that vacatur of unlawful agency action is a common, and often appropriate relief. *High Country Conservation Advocs. v. United States Forest Serv.*, 951 F.3d 1217, 1228–29 (10th Cir. 2020). In this case, there is no reason to stray from the default rule of vacating unlawful agency action.

Finally, this Court should vacate those portions of the District Court's opinion and judgment that purport to adjudicate the Ranchers' grazing and water rights. In determining that the Service did not improperly exclude the impacts to water rights in its economic analysis, the District Court erroneously concluded in an alternative ruling that the Ranchers can *never* establish a taking of their water rights because those rights are speculative and because the members have lost their grazing permits. 4-Appx.-0866–71. That conclusion purported to answer a question outside the scope of the pleadings, outside the scope of a closed

record action under the APA, and outside the District Court's jurisdiction. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579 (10th Cir. 1994).

APA STANDARD OF REVIEW

Under the APA, an aggrieved party may seek judicial review of a final agency action. 5 U.S.C. §§ 702, 704. A reviewing court must "set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* at § 706(2)(A), (C).

"Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Likewise, an agency interpretation that is inconsistent "with the design and structure of the statute as a whole … does not merit deference" *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 321 (2014) (quotations and citation omitted).

ARGUMENT

I

The Service Violated Section 4(b)(2) By Not Including the Coextensive Costs of the Critical Habitat Designation

A. Decision and appellate standard of review

In its memorandum opinion and order, the District Court held that the Service did not violate Section 4(b)(2) by excluding the coextensive costs of the designation from its economic impact analysis. 4-Appx.-0816–58. This Court reviews the District Court's decision *de novo*. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1221.

B. Section 4(b)(2) requires the Service to analyze all of the costs of designating critical habitat

The first sentence of Section 4(b)(2) of the ESA requires the Service to consider the economic impacts of a critical habitat designation. 16 U.S.C. § 1533(b)(2). Here, the Service ignored its statutory duty to perform an economic impact analysis under Section 4(b)(2) by excluding the coextensive costs from the analysis. 1-Appx.-0127. The Service's approach to economic impact assessment does not comply with the language or intent of Section 4(b)(2). *N.M. Cattle Growers*, 248 F.3d at 1285. Therefore, the Service's designation was arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

Section 4(b)(2)'s economic analysis requirement traces its origins to the debate over *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*TVA*). In *TVA*, the Court concluded that, through the ESA, "Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174. Based on this interpretation, and the presence of the endangered snail darter, the Court enjoined the completion of an expensive, publicly-funded hydroelectric dam project that was over 80% complete. *Id.* at 166, 195; *id.* at 205 (Powell, J., dissenting).

The Court's decision in *TVA* caused a political uproar. Zygmunt J.B. Plater, *Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 Envtl. L. 1, 16 (2002). Congress immediately responded by amending the ESA in 1978. Among other changes, these 1978 amendments defined the critical habitat process, including the requirement that the Service consider economic impacts when designating habitat and they expressly granted the authority to exclude areas from a habitat designation. Pub. L. No. 95-

632, §§ 2, 11, 92 Stat. 3751, 3751, 3766 (1978), *codified as amended at* 16 U.S.C. §§ 1532(5), 1533(b)(2).

In 1982, Congress further amended the ESA. These amendments clarified the critical habitat designation process and the role that economic costs play in the listing and designation process. According to these amendments, the Service cannot take into account economic impacts during the listing process. Pub. L. No. 97-304, 96 Stat. 1411 (1982). Economic impacts are, however, to be considered in the "concurrent[]" designation of critical habitat. 16 U.S.C. § 1533(a)(3)(A)(i).

The House Report on the 1982 amendments provides further explanation about the amendments' purpose and effect. *See* H.R. Rep. No. 97-567, 1982 U.S.C.C.A.N. 2807. While the decision to list will be based on biological information, "the critical habitat designation, which is to accompany the species listing to the maximum extent prudent, also takes into account the economic impacts of listing such habitat as critical." H.R. Rep. No. 97-567, at 12, 1982 U.S.C.C.A.N. 2807, 2811–12. In other words, "the critical habitat designation, with its attendant economic analysis, offers some counter-point to the listing of species without due

consideration for the effects on land use and other development interests." *Id.*

Thus, one key objective of the 1978 and 1982 amendments was to "increase the flexibility in balancing species protection and conservation with development projects." H.R. Rep. No. 97-567, at 10, 1982 U.S.C.C.A.N. 2807, 2809. Specifically, Congress sought to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176–77.

This balancing between conservation and economic considerations comes through Section 4(b)(2)'s exclusion process. H.R. Rep. No. 97-567, at 12, 1982 U.S.C.C.A.N. 2807, 2812. The Service, however, cannot properly conduct that balancing unless it knows all the relevant costs. The Service's "baseline" approach excludes costs that the agency believes are not exclusively attributable to a critical habitat designation. *See New Mexico Cattle Growers*, 248 F.3d at 1280. A coextensive approach, on the other hand, results in "a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *Id.* at 1285. Because the

baseline approach excludes a designation's economic impacts, it "is not in accord with the language or intent of the ESA." *Id.* In other words, under Section 4(b)(2), the Service cannot ignore the costs of designating critical habitat because they may reflect the costs of listing. *See id.*

The coextensive approach not only conforms to the ESA's requirements, it makes sense in practice. Under the "baseline" approach, the Service believes it can easily separate the costs of listing from the costs of designation. *See N.M. Cattle Growers*, 248 F.3d at 1283. In the real world, the costs of listing cannot easily be separated from the costs of designating critical habitat. A critical habitat designation increases the risk that one will violate the "take" provision of the ESA. *See* Kimberly L. Mayhew, *United States v. Wang Lin Company: The Kangaroo Rat and Criminal Prosecution Under the Endangered Species Act*, 6 San Joaquin Agric. L. Rev. 193, 213 (1996). Under the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), for example, the government can prove a violation of that provision solely by demonstrating habitat modification. *Id.* at 691. A critical habitat designation also makes it easier for the Service to prove a "knowing" violation of the "take"

provision, which may increase the penalties for an offender. *See* 16 U.S.C. § 1540(a)(1).

The "baseline" approach, however, excludes from a designation's economic impact analysis *any* costs even slightly associated with the take provision. *See N.M. Cattle Growers*, 248 F.3d at 1283. Despite the increased risk of take liability that results from a critical habitat designation, the Service views the associated costs as wholly unattributable to the designation. To the Service they are merely "baseline" costs arising from the listing that have no relevance to assessing whether to exclude an area from critical habitat.

The coextensive approach reflects the language and intent of Section 4(b)(2). It takes into account "all of the economic impacts of a critical habitat designation …." *N.M. Cattle Growers*, 248 F.3d at 1285. Thus, it better aides the Service in deciding whether to exclude areas from a designation because it better assesses the actual costs to regulated parties. The baseline approach, on the other hand, severely underestimates, or completely ignores, these costs to regulated parties. By excluding the coextensive costs of the designation here, the Service

violated the ESA. This Court should reverse the judgment of the District Court.

C. This Court has held that Section 4(b)(2) requires the Service to analyze the coextensive costs of designating critical habitat, and the Service was bound by that decision at the time of designation

1. This Court has held that the baseline approach violates the language and intent of the ESA

In *New Mexico Cattle Growers*, this Court adopted a reasonable and straightforward interpretation of Section 4(b)(2) and held that the Service must analyze the coextensive costs of designating critical habitat. 248 F.3d at 1285. In that case, this Court considered whether the Service violated the ESA when it followed the "baseline" approach before designating critical habitat for the southwestern willow flycatcher. *Id.* at 1279–81. Applying the "baseline" approach, the Service determined that the designation would "result in no additional protection for the flycatcher nor have any additional economic effects beyond those that may have been caused by [the] listing and by other statutes ...." *Id.* at 1280. This Court rejected the Service's methodology, concluding that "the baseline approach to economic analysis is not in accord with the language or intent of the ESA." *Id.* at 1285. The harm from the Service's flawed

approach was exacerbated by the agency's regulations defining "jeopardizing the continued existence of listed species" as fully encompassing "destruction or adverse modification of critical habitat." *Id.* This equating of jeopardy (applied in the context of listing) with adverse modification (applied in the context of critical habitat designation) meant that the Service would rarely find any costs associated with any occupied critical habitat designation. *Id.*

Since *New Mexico Cattle Growers*, the Service has modified its definition of what constitutes "adverse modification of critical habitat" to differentiate it from the definition of jeopardizing a listed species' continued existence. 81 Fed. Reg. 7214-01 (Feb. 11, 2016); 50 C.F.R. § 402.02. The District Court concluded that this slight change of the adverse modification definition rendered *New Mexico Cattle Growers* nonbinding. 4-Appx.-0854–56. But this Court's holding that the baseline approach is contrary to the ESA was not based on the supposition that the method's employment would always result in zero-dollar economic assessments. This Court rejected the baseline approach principally because it cannot be reconciled with the ESA's text. *See N.M. Cattle Growers,* 248 F.3d at 1283–85.

To be sure, this Court observed that the baseline method would "render[] any purported economic analysis done utilizing the baseline approach virtually meaningless," or "essentially without meaning." *Id*. at 1285. But the likelihood of such absurd results merely highlighted the methodological shortcoming of the baseline approach. This was not the essence of the problem, but a consequence of it. As the Court underscored, "Congress clearly intended that economic factors were to be considered in connection with [critical habitat designation]." *Id*. at 1284–85. The baseline approach fails to fully vindicate that intent because it excludes by design the consideration of at least one prime economic factor—coextensive costs.

Just because the Service will now find economic impacts of designation in some cases does not address this Court's concerns that the baseline approach threatens to render meaningless Section 4(b)(2)'s economic analysis requirement. *N.M. Cattle Growers*, 248 F.3d at 1285. The baseline approach still renders Section 4(b)(2) idle in many instances, most notably for occupied critical habitat in cases like this one. Indeed, the baseline approach appears to result in almost the exact same economic impact analysis for many designations. 86 Fed. Reg. 30,888,

30,898 (June 10, 2021) ("The probable incremental economic impacts of the … habitat designation are expected to be limited to additional administrative effort as well as minor costs of conservation efforts resulting from a small number of future section 7 consultations."); 86 Fed. Reg. 20,798, 20,873 (Apr. 21, 2021) (same language); 86 Fed. Reg. 12,563, 12,582 (Mar. 4, 2021) (same). If the species is present, then the Service attributes nearly all costs to the presence of the listed species, rather than to the critical habitat designation. *See id.*[2] This was true when *New Mexico Cattle Growers* was decided, and it remains true in many cases, including this one, today.

The baseline approach thus renders the economic impact requirement meaningless for many occupied critical habitat designations. *N.M. Cattle Growers,* 248 F.3d at 1285 ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous." (internal quotation and citation omitted)). But Section 4(b)(2) does not require an economic impact analysis only for

[2] This problem is made worse by the Service's loose standards for designating occupied critical habitat. *See N.M. Farm & Livestock Bureau,* 952 F.3d at 1227 (Service's occupied habitat determination was "purely speculative").

unoccupied critical habitat; it requires it for every designation. 16 U.S.C. § 1533(b)(2). The baseline approach undercuts that mandate and fails to give effect to Section 4(b)(2).

This case demonstrates how the baseline approach threatens to render Section 4(b)(2) meaningless for occupied critical habitat. As a result of the critical habitat designation, the Forest Service anticipates increased fencing on the allotments and a reduction in AUMs. *See* 1-Appx.-0129–30; 1-Appx.-0131; 1-Appx.-0134–35. The Forest Service expects to take these actions regardless of whether the critical habitat is occupied or unoccupied. 1-Appx.-0134–35. Under the baseline approach, however, these costs are excluded (*i.e.*, never considered) for those units that are occupied or "partially occupied" by the mouse. 1-Appx.-0131; 1-Appx.-0135.

The baseline approach severely underestimates the costs of the designation, preventing the Service from making an informed decision about what areas to exclude. If the Service examined the costs of fencing, and other coextensive costs, for the entire critical habitat, it would likely take a closer look at whether the "partially occupied" areas are, in fact, unoccupied. That would allow it to better determine whether the occupied

critical habitat is adequate to ensure the conservation of the species and what areas can be excluded. *See N.M. Farm & Livestock Bureau*, 952 F.3d at 1228. Section 4(b)(2) requires the Service to engage in this type of meaningful analysis. The Service's baseline approach unlawfully ignores that requirement.

2. The Service was bound by this Court's precedent to analyze the coextensive costs of designating critical habitat for the New Mexico meadow jumping mouse

Since *New Mexico Cattle Growers*, the Service has also formally adopted the baseline approach via regulation. 78 Fed. Reg. 53,058-01 (Aug. 28, 2013); 1-Appx.0094. The District Court stated that this new regulation was an additional reason for not applying *New Mexico Cattle Growers* in this case. 4-Appx.-0826. But an agency cannot apply a newly adopted regulation if it contradicts binding circuit precedent on the meaning of the statute. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148 (10th Cir. 2016). Unless and until this Court expressly overrules *New Mexico Cattle Growers,* the Service is bound by that decision to study the coextensive costs of designating critical habitat in areas within this Circuit. *See id.* at 1145–46. That includes the designation here.

This Court's precedent was binding on the Service's designation of habitat in New Mexico. *Cf. Gutierrez-Brizuela*, 834 F.3d at 1144. Indeed, in its incremental effects memorandum to Industrial Economics, the Service cited *New Mexico Cattle Growers* and instructed Industrial Economics to include a coextensive cost evaluation for the areas within this Court's jurisdiction. 1-Appx.-0072. At least at the beginning of the process, the Service appeared to "follow[] a practice of deferring to adverse circuit precedent so long as that precedent remained on the books, even when the agency may have disagreed with it." *Gutierrez-Brizuela*, 834 F.3d at 1147–48.

Yet, later, the Service and Industrial Economics ignored *New Mexico Cattle Growers* when they conducted the economic analysis. By the Service's own admission, the agency and its contractor excluded coextensive costs from its economic impact analysis. *See* 2-Appx.0360; 1-Appx.-0127. By applying the baseline approach, the Service ignored binding precedent, rendering its actions not in accordance with law.[3]

[3] The District Court applied *Skidmore* deference rather than *Chevron* deference to the agency's interpretation of Section 4(b)(2). 4-Appx.-0848. The level of deference is irrelevant because, even applying *Chevron*, the Service was bound by this Court's decision in *New Mexico Cattle Growers* at the time of the designation. *Cf. Gutierrez-Brizuela*, 834 F.3d at 1148.

By omitting coextensive costs from the analysis, the Service not only violated this Court's precedent, it also violated its own stated procedures. 1-Appx.-0072. The Service stated it would follow *New Mexico Cattle Growers*, then it did not. *Compare id.*, *with* 1-Appx.-0127. Agencies "are under an obligation to follow their own regulations, *procedures, and precedents*, or provide a rational explanation for their departure." *N.M. Farm & Livestock Bureau*, 952 F.3d at 1230–31 (emphasis added and quotations omitted). By departing from its procedures and precedents, the Service necessarily acted arbitrarily and capriciously. *See id.* at 1231.

By conducting a baseline economic analysis here, the Service violated Section 4(b)(2)'s requirement and this Court's holding that the Service must analyze all of the economic impacts of the designation. *N.M. Cattle Growers*, 248 F.3d at 1283. It also violated its own stated procedures. This Court should reverse the judgment of the District Court

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Furthermore, under *Chevron*, a court owes an "agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction," the court is "unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (internal quotations omitted). This Court, after examining the language and history of Section 4(b)(2), has correctly held that "the baseline approach to economic analysis is not in accord with the language or intent of the ESA." *N.M. Cattle Growers,* 248 F.3d at 1285.

and hold that the Service was required to analyze the coextensive impacts of the critical habitat designation.

II

Even if the Baseline Approach Were Appropriate Under Section 4(b)(2), the Service Still Improperly Excluded Impacts from Its Analysis

A. Decision and appellate standard of review

The District Court held that the Service did not abuse its discretion by failing to analyze the designation's impacts to water rights. 4-Appx.-0858–60. This Court reviews the District Court's decision *de novo*. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1221.

B. The Service failed to analyze the impacts to water rights because of an incorrect view of the law

Even under the "baseline approach," the Service failed to properly assess the costs of the designation under Section 4(b)(2). The ESA requires the Service to conduct an economic analysis so that it can balance conservation with productive use of land. H.R. Rep. No. 97-567, at 10, 1982 U.S.C.C.A.N. 2807, 2809. Even if the Service were correct that it could exclude the coextensive costs of a designation, the agency must still assess all the pertinent non-coextensive economic impacts. It failed to do so here.

One of the biggest impacts the Service ignored was the designation's impact to water rights. Prior to the designation, several ranchers commented that the designation, especially the anticipated fencing, would impact access to and use of their stockwater rights. *See* 2-Appx.-0352. The Service dismissed these comments, and failed to study the designation's impact on water rights, solely because it did not propose to build fencing "on private lands." *Id.* In other words, the Service did not study the impacts to water rights because it believed one can only own water rights on private land, and not within the National Forest. *See id.* That belief is wrong as a matter of law. *See New Mexico,* 438 U.S. at 716.

In New Mexico, stockwatering rights are not owned by the Forest Service and those rights are instead "allocated under state law to individual stockwaterers." *New Mexico,* 438 U.S. at 716. And under New Mexico law, the right to beneficial use of water is a property interest distinct and severable from a right to use land. *See Walker*, 162 P.3d at 888. In other words, water rights are not necessarily tied to ownership of a given parcel. *See id.* Therefore, the Service's only stated reason for ignoring impacts on water rights—fencing of mouse-habitat streams will occur only in the National Forest—does not withstand scrutiny. The

Service is incorrect that ranchers cannot own water rights within the National Forest and this sole justification for refusing to analyze the designation's impact on water rights was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Cf. Byron v. Heckler*, 742 F.2d 1232, 1236 (10th Cir. 1984) ("This failure to apply the correct legal standard is, by itself, sufficient to command reversal in the case"); *Henrie v. U.S. Dep't of Health & Human Servs.*, 13 F.3d 359, 360 (10th Cir. 1993) (same).[4]

The Service did not provide any alternative reasoning for excluding the impacts to water rights from its economic impact analysis. *See* 2-Appx.-0352. Although the Service later stated more generally that it was unaware of instances when water rights would be "significantly

[4] Recently, the Court of Federal Claims held, ruling on a motion for reconsideration, that the Sacramento Grazing Association, a member of the Otero Ranchers, did not possess a right to beneficial use of stock water at the time of an alleged 1998 taking by the Forest Service. *Sacramento Grazing Ass'n, Inc. v. United States*, No. 04-786, 2021 WL 3124251, at *16 (Fed. Cl. July 26, 2021). But in reaching that holding, the court reaffirmed that stockwater rights are not appurtenant to land, and may even be transferred. *Id.* at 13. Indeed, the court noted that previous owners of the ranch had conveyed water rights through deeds and the Association's immediate predecessor could have transferred the rights to the Association if the transfer satisfied the statute of frauds. *Id.* at 13–15. Thus, the Forest Service's position that no one can own water rights in the National Forest was wrong as a matter of law.

impacted" by the designation, that observation was expressly tied to the agency's economic analyses and environmental assessment. 2-Appx.-0359. And those documents contain no discussion of the taking of water rights. *See* 1-Appx.-0129 (focusing on AUM reductions); 1-Appx.-0116–20 (same); 2-Appx.-0273; 2-Appx.-0321–22.

Moreover, the "significantly impacted" language is in the context of discussing water rights on private land. 2-Appx.-0359. In response to a comment about the designation's impact on water rights, the Service reiterated that the critical habitat designation "does not affect land ownership or establish a refuge, wilderness, reserve, preserve or other conservation area" and "does not allow the government or public to access State, tribal, local or private lands." 2-Appx.-0359. It once again dismissed the concerns of water rights owners because, "[i]f there is not a Federal nexus for activities taking place *on private or State lands*, then critical habitat designation does not restrict those actions …" *See id.* (emphasis added). This further demonstrates that the Service made its decision on the false premise that one cannot own water rights within a National Forest. The Service did not *find* any impacts to water rights

because it incorrectly believed it did not have to *look* for them. *See* 2-Appx.-0352.

The District Court excused the Service's actions and held that the Service did not need to analyze the impact on water rights because the Ranchers had not proved they had water rights prior to the designation. 4-Appx.-0864–66. The District Court further concluded that any water rights would not be tied to a particular location, but would only be a right to use a certain amount of water somewhere. 4-Appx.-0863–64. But the specifics of who owns what water rights are irrelevant here. The Service did not base its decision on uncertainty of ownership, but rather the belief that ranchers could not own water rights. *See* 2-Appx.-0352. The agency must be judged based on its stated reason. *See Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 435 (10th Cir. 2011) (an agency decision cannot be upheld based on reasoning not considered during the administrative process); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (court must judge the propriety of an agency action solely by the grounds invoked by the agency).

Even if the Service had justified its decision based on uncertainty of ownership, that uncertainty would not excuse the Service's obligation

to analyze the impacts to water rights. Indeed, the Service's inability to quantify *the benefits* of the designation did not preclude the Service from at least attempting a qualitative assessment. 1-Appx.-0142 (Screening Memo) ("[W]e are not able to quantify the primary species conservation benefit of the critical habitat designation. [¶] We therefore provide a qualitative summary ...."). There is no reason why a similar effort with respect to the designation's impact on water rights could not have been attempted. *See* 78 Fed. Reg. 53,058, 53,061 (Aug. 28, 2013) (for an impact to be considered, "the Service[] do[es] not ... require[] a showing of statistical probability or any specific numeric likelihood"); *cf. Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary."). The Service cannot *entirely* ignore impacts merely because they are supposedly uncertain or speculative. *See Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 565 (9th Cir. 2016) (upholding the Service's decision to address a designation's uncertain or speculative impacts qualitatively rather than quantitatively).

Finally, the District Court incorrectly held, in the alternative, that any error in calculating the impacts to water rights was harmless because any costs associated with the taking of a water right are subsumed in the agency's assessment of impacts to AUMs, private property values, and compensatory water developments. 4-Appx.-0866. Even if that were true, it would still not justify the Service's actions. Section 4(b)(2) has two purposes: to assess impact *and* to determine whether an exclusion would be appropriate. 78 Fed. Reg. at 53,060 ("An economic analysis is a tool that informs both the required impact analysis and the discretionary 4(b)(2) exclusion analysis."). That latter purpose can be accomplished not just by a dollars-and-cents comparison, but also by a qualitative assessment—a point borne out by the Service's "tribal relations" exclusions in this case. *See* 2-Appx.-0386; 2-Appx.-0388. Just as the Service may wish to support good relations with tribes by avoiding even the appearance of federal intrusion, so too the Service may wish to support good relations with ranchers by avoiding even the appearance of interfering with their water rights. But, by failing to attempt such a qualitative assessment of the designation's impact to water rights, the Service deprived itself of analysis potentially relevant to its exclusion

decision-making. *See* 1-Appx.-0197 (Section 4(b)(2) policy) (exclusion decision-making turns on "the nature of [the] impacts, not necessarily a particular threshold level"). That failure of process is prejudicial. *See Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1278 (D. Colo. 2012) ("[T]he harmless error doctrine is especially inappropriate where ... the rule in question involves complex matters, and procedural injuries to Plaintiff exist.") (footnote omitted).

Even assuming the Service's baseline approach is proper, the Service must still analyze all relevant impacts. But by excluding any analysis of the designation's impact on water rights, the Service failed to study an important impact based on an incorrect view of who can own water rights in New Mexico. The Service violated Section 4(b)(2) of the ESA and this Court should reverse the judgment of the District Court.

III

The Service Failed to Provide a Reasoned Explanation for Not Excluding Units 3 And 4

A. Decision below and standard of review

In its memorandum opinion and order, the District Court held that the Ranchers waived their claim challenging the Service's decision not to exclude units 3 and 4. 4-Appx.-0874–76. In the alternative, the District Court stated that the Service did not abuse its discretion in not excluding Units 3 and 4 from the designation. 4-Appx.-0878–95. This Court reviews the District Court's decision *de novo*. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1221.

B. The Ranchers properly raised this issue before the Service

Even assuming the economic analysis were accurate, the Service still abused its discretion in carrying out the second part of Section 4(b)(2)'s "unified process" for designating areas of critical habitat. *Weyerhaeuser*, 139 S. Ct. at 371. The Service declined to exclude Units 3 and 4 from the designation because it purportedly could not identify "any disproportionate costs that are likely to result from the designation." 2-Appx.-0383. In reaching this determination, the Service failed to explain

its reasoning. This lack of explanation renders the agency's final decision an abuse of discretion.

The District Court incorrectly held that the Ranchers administratively waived this claim. *See* 4-Appx.-0874–76. The District Court stated that the Ranchers were required to submit comments explicitly arguing that the benefits of exclusion outweigh the benefits of inclusion in relation to Units 3 and 4. *Id.* But issue exhaustion does not impose a "magic words" requirement. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002). Instead, to satisfy administrative exhaustion, one only need raise an issue "in sufficient detail to allow the agency to rectify the alleged violation …." *N.M. Farm & Livestock Bureau*, 952 F.3d at 1229 (quotations omitted).

Whether one sufficiently exhausted an issue will turn on the nature of the administrative proceeding. *See Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021). The "'desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.'" *Id.* (quoting *Sims v. Apfel*, 530 U.S. 103, 109 (2000)). Where, as here, "an

administrative proceeding is not adversarial … the reasons for a court to require issue exhaustion are much weaker." *Sims*, 530 U.S. at 110.

The Ranchers' comments were sufficient to exhaust their claim here, especially considering the non-adversarial nature of an administrative rulemaking. Both the Northern New Mexico Ranchers and the Otero Ranchers submitted letters to the Service, apprising the agency of the specific deficiencies in its exclusion decision-making, prior to filing suit. *See* 1-Appx.-0035–43. Moreover, the Northern New Mexico Stockman's comment letter submitted during the rulemaking process made a general objection to the mouse's critical habitat designation. 1-Appx.-0151–53. The letter highlighted the designation's harms to water rights, grazing leases, and base properties, noting as well that these same impacts would be felt by "other ranchers [because of] the designation." 1-Appx.-0151–52. Thus, whether the designation's costs are too excessive to justify the designation itself—the central issue in the Section 4(b)(2) exclusion process—was squarely raised during the rulemaking.[5]

[5] Other grazing permittees expressed similar concerns about designating rangeland in the Santa Fe and Lincoln National Forests. 1-Appx.-0155; 1-Appx.-0148–49.

The comments were sufficient to "allow the agency to rectify the alleged violation" if it wished to do so. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1229 (quotations omitted). This is not an instance where the Service failed to make a decision because it lacked evidence or input.[6] *Cf. N.M. Envtl. Impact Div. v. Thomas*, 789 F.2d 825, 835 (10th Cir. 1986) (applying issue exhaustion to "matters where the agency has not had an opportunity to make a factual record or apply its expertise"). Rather, the Ranchers' argument focuses on the legally defective rationale that the Service provided for an expressly stated decision.

The Service explicitly decided not to exclude Units 3 and 4 from the designation. *See* 2-Appx.-0383. The Ranchers contend that the Service abused its discretion in reaching that decision. Prior to the final rule, the Ranchers did not need to remind the Service that it must follow the precepts of reasoned decision-making and cannot abuse its discretion. *See Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007) (claims are not waived for failure to exhaust if "the problems

[6] Although, as demonstrated above, the Service would have been able to make a more informed decision had it properly studied the economic impacts of the designation.

underlying the claim are obvious or otherwise brought to the agency's attention") (internal quotation marks and citation omitted).

The District Court expressed concern that it would usurp the agency's function if it decided this claim. 4-Appx.-0875. But reviewing whether an agency provided sufficient justification for its decisions is a proper role of the judiciary. *See Weyerhaeuser*, 139 S. Ct. at 371. Courts "routinely assess ... whether to set aside an agency decision as an abuse of discretion under § 706(2)(A)." *Id.* (citing *Judulang v. Holder*, 565 U.S. 42, 53 (2011)). Like nearly every other agency decision, the Service's "'ultimate decision' to designate or exclude … is reviewable 'for abuse of discretion.'" *Id.* (quoting *Bennett*, 520 U.S. at 172). Administrative waiver does not preclude this Court from deciding whether the Service abused its discretion in not excluding Units 3 and 4 from the critical habitat designation.

C. The Service failed to provide a reasoned explanation for its decision not to exclude Units 3 and 4 from the designation

Reviewing an agency decision for abuse of discretion "involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Judulang*, 565 U.S. at 53 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). If an agency fails to

provide a reasoned explanation for its decision, then it has abused its discretion. *Id.*

Importantly, a court "should not attempt itself to make up for ... deficiencies" in an agency's reasoning. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. A court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (citing *Chenery Corp.*, 332 U.S. at 196). "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Chenery Corp.*, 332 U.S. at 196. In short, a court should not "guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 196–97.

Here, the Service's exclusion decision was fatally vague. *See Chenery Corp.*, 332 U.S. at 197. Although the Service purportedly examined the costs of designating critical habitat, it provided no explanation for what it would weigh those costs against. Instead, the agency merely concluded that, despite nearly $20 million in additional regulatory costs, 2-Appx.-0384, "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation."

2-Appx.-0383. The agency's failure to explain what it means by "disproportionate" is an abuse of discretion.

Prior to a recent 2020 regulation, the Service followed the same nebulous approach in all its critical habitat designations. Although not codified in regulation, the Service regularly employed the "disproportionate costs" standard in critical habitat designations. *See, e.g.*, 81 Fed. Reg. 59,046, 59,087 (Aug. 26, 2016) (various California amphibians); 81 Fed. Reg. 3866, 3883 (Jan. 22, 2016) (two Florida plants); 79 Fed. Reg. 54,635, 54,645 (Sept. 12, 2014) (Georgia rockcress). But instead of issuing a regulation describing the "disproportionate costs" standard, the Service made ad-hoc determinations as to when to exclude critical habitat. Such an "ad-hoc standardless determination ... is likely to be arbitrary and capricious under the Administrative Procedure Act." *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 n.11 (1st Cir. 1998).

The only hint in the final rule of *any* standard for assessing whether costs are "disproportionate" is the Service's repeated statement that the designation would not exceed $100 million in total costs. *See* 2-Appx.-0363; 2-Appx.-0384–85; 1-Appx.-0143 (screening memo assessing costs of

$100 million). This $100 million limit, however, does not provide a reasoned explanation for the Service's decision. The ESA requires the Service to weigh the costs of a designation against "the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2). Here, the Service made no effort to weigh the costs and benefits, and instead chose a cost threshold for exclusion. *See* 1-Appx.-0143.

The District Court determined that the $100 million limit was rational because that is the threshold for a "significant regulatory action" under Executive Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). 4-Appx.-0893. But an executive order that applies to any agency action does not provide justification for implementing a specific provision of the ESA. In passing Section 4(b)(2), Congress mandated an economic impact analysis of whether the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat …." 16 U.S.C. § 1533(b)(2). A cost threshold does not comply with that mandate. Moreover, the Service has never declared a policy that it will decline to exclude areas merely because the costs do not exceed $100 million. *Cf.* 78 Fed. Reg. at 53,063 (exclusion rules in effect for the mouse's designation).

In fact, the Service itself recognized that Section 4(b)(2) requires the weighing of the costs and benefits, and not just an examination of whether the impacts meet a specific threshold. 1-Appx.-0197. At the time of the designation, the Service stated that "it is the general practice of the Services to exclude an area when the benefits of exclusion outweigh the benefits of inclusion." 1-Appx.-0197. It followed that practice because "it is the nature of those impacts, not necessarily a particular threshold level, that is relevant to the Services' determination." *Id.* But here, the Service made no attempt to weigh those factors, instead relying on a threshold culled from a generally applicable executive order. Thus, the decision was arbitrary, capricious, or an abuse of discretion. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1230–31 (Agencies "are under an obligation to follow their own regulations, *procedures, and precedents*, or provide a rational explanation for their departure.").

The Service's practice since the designation further demonstrates the arbitrariness of its rationale in this case. Recognizing its lack of standards for 4(b)(2) exclusions, the Service last year adopted a rule "[t]o provide transparency about how the Secretary intends to exercise his discretion regarding exclusions under section 4(b)(2) …." 85 Fed. Reg.

55,398, 55,399 (Sept. 8, 2020) (proposed rule); 85 Fed. Reg. 82,376 (Dec. 18, 2020) (final rule). In adopting the new rule, the Service recognized that its previous policy was guided by an incorrect belief that "the Service's decision not to exclude a particular area under section 4(b)(2) of the Act was committed to agency discretion by law and therefore not subject to judicial review." 85 Fed. Reg. at 55,399. The belief that no court would ever examine its reasoning necessarily affected how the agency explained previous exclusion decisions.

As the Service now belatedly concedes, transparency is at the heart of reasoned agency decision-making. 85 Fed. Reg. at 55,399. If an agency's decision is to be transparent, it "must, of course, reveal the reasoning that underlies its conclusion [and] give the court the rationale underlying the importance of factual distinctions as well as the factual distinctions themselves." *See Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 532 (D.D.C. 2016) (quotations omitted). But here, the Service designated critical habitat without providing any standard for weighing the costs and benefits of the designation. That the Service has now made an effort towards transparency in future designations, 85 Fed. Reg. at 55,399, does not excuse the Service's lack of transparency here. Because the Service

failed to explain its reasoning for not excluding Units 3 and 4 from the designation, it abused its discretion in designating critical habitat. This Court should reverse the judgment of the District Court.

IV

This Court Should Instruct the District Court to Hold Unlawful and Set Aside Units 3 and 4 of the Critical Habitat Designation

A. Decision and standard of review

In its memorandum opinion and order, the District Court held that, even if it had ruled that the Service acted improperly in designating the critical habitat, it would still not have vacated the designation. 4-Appx.-0896–914. This Court reviews the District Court's decision *de novo*. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1221.

B. The APA requires courts to hold unlawful and set aside illegal agency action

This Court should remand and instruct the District Court to hold unlawful and set aside Units 3 and 4 of the designation. The District Court stated that even if it had held that the Service violated the ESA in designating the critical habitat, it would not have vacated the designation. 4-Appx.-0896–914. Stating that this Court has not articulated a standard for when to vacate agency action, the District

Court applied the test set out by the D.C. Circuit in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 148 (D.C. Cir. 1993). 4-Appx.-0901. The District Court's determination was incorrect because *Allied-Signal* is not the appropriate test for vacating agency action under the APA. Michael S. Freeman & Joel Minor, *Selected Issues on Standing, Injunctions, and Remedies in Oil and Gas Litigation*, 2017 No. 1 RMMLF-INST 9, at *27 (2017) (noting that this Court "has never adopted *Allied-Signal* and in a 1999 decision followed a plain language interpretation of APA § 706"). Even if it were the proper standard, the factors weigh in favor of vacating Units 3 and 4 here.

The APA states that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law …" 5 U.S.C. § 706(2)(A). "Shall" is a command. *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). "Set aside" means vacate. *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To 'vacate,' … means 'to annul; to cancel …; to set aside."). Accordingly, the Supreme Court has used the term "set aside" many times to mean invalidating or vacating a regulation. *See, e.g.*, *FCC v. Midwest Video Corp.*, 440 U.S.

689, 708 n.18 (1979); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *see also* Mila Sohoni, *The Power to Vacate A Rule*, 88 Geo. Wash. L. Rev. 1121, 1138 (2020) (collecting cases).

The practice immediately preceding the APA's passage, along with its legislative history, confirm the plain meaning of "set aside." Prior to the adoption of the APA in 1946, Congress passed several statutes authorizing lawsuits to set aside orders adopted by certain agencies. *See* Urgent Deficiencies Act of 1913, 32 Stat. 208, 219 (1913); Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1093 (1934). The Supreme Court interpreted those statutes to authorize courts to vacate regulations and orders from those agencies. *See, e.g.*, *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 425 (1942). Thus, when Congress passed the APA, the practice of courts vacating unlawful agency action was well established. *See also United States v. Baltimore & O. R. Co.*, 293 U.S. 454, 458 (1935); *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 235 (1936); *see also* Sohoni, *The Power to Vacate A Rule*, 88 Geo. Wash. L. Rev at 1147–52 (explaining that in the years preceding passage of the APA, courts often set aside unlawful agency action).

With the passage of the APA, Congress intended to codify and unify existing administrative procedure and judicial review of that procedure. Pub. L. No. 79-404, 60 Stat. 237, 237 (1946) ("AN ACT To improve the administration of justice by prescribing fair administrative procedure."). In the words of Representative Francis Walter, the leading sponsor of the APA in the House, the APA contains "a comprehensive statement of the right, mechanics, and scope of judicial review" of agency actions. 92 Cong. Rec. 5654 (1946). This includes mandating when a court must vacate agency action. 5 U.S.C. § 706; *see also* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 Admin. L. Rev. 807, 855 (2018) (observing that the APA "specifically enumerates contexts in which judges must 'hold unlawful and set aside agency action ...'").

In sum, the APA establishes the scope of review of agency action and explicitly states what courts should do when an agency violates the law. The APA states "in the clearest possible terms" that a court "'shall'—not may—'hold unlawful and set aside'" illegal agency action. *Checkosky v. S.E.C.*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring) (quoting 5 U.S.C. § 706(2)(A)). "Setting aside means vacating; no other meaning is apparent." *Id.*

To that end, this Court has recognized that, "[u]nder the APA, courts shall hold unlawful and set aside agency action that is found to be arbitrary or capricious. Vacatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts.'" *High Country Conservation Advocs. v. United States Forest Serv.*, 951 F.3d 1217, 1228–29 (10th Cir. 2020) (quotations omitted). Although vacatur is not a form of injunctive relief, *see Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 165–66 (2010) (vacating agency action is a "less drastic remedy" than the "extraordinary relief of an injunction …."), vacatur of agency action is the default relief under the APA. *See High Country Conservation Advocs.*, 951 F.3d at 1228–29; 5 U.S.C. § 706(2)(A). It is also the default remedy for violations of the ESA. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9th Cir. 2005), *rev'd on other grounds*, *sub nom. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

This Court should apply that appropriate and default remedy here by instructing the District Court to vacate Units 3 and 4 of the critical habitat designation. Although vacatur of the entire agency action is the default textual rule under the APA, this Court has stated that a court may partially set aside a regulation if the invalid portion is severable.

See High Country Conservation Advocs., 951 F.3d at1228–29. Here, each unit of critical habitat is distinct, and the Ranchers are primarily concerned with the designations in Units 3 and 4. Therefore, this Court should instruct the District Court to vacate just those units.

C. Even under *Allied-Signal*, vacatur is the appropriate remedy here

Even if this Court chooses to adopt the *Allied-Signal* test, it should still instruct the District Court to vacate Units 3 and 4. Under *Allied-Signal*, "[t]he decision whether to vacate depends on '[t]he seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" 988 F.2d at 150–51 (citations omitted).

Here, the Service's failure to properly analyze economic impacts is a violation of the ESA's "'categorical requirement' that the Secretary 'tak[e] into consideration' economic and other impacts before such a designation." *Weyerhaeuser*, 139 S. Ct. at 371 (quoting *Bennett*, 520 U.S. at 172 (alterations in original)). This failure to properly analyze the economic impacts of the designation calls into doubt whether the Service's final decision was correct because, on remand, the Service will have to apply the proper standards for analyzing the impacts of the

critical habitat designation. That alone is sufficient justification for vacatur because even "the threat of disruptive consequences cannot save a rule when its fundamental flaws foreclose [the agency] from promulgating the same standards on remand." *North Carolina v. E.P.A.*, 531 F.3d 896, 929 (D.C. Cir.), *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008) (quotations omitted).

The Service's lack of explanation was also seriously deficient and justifies vacatur of Units 3 and 4. Although the deficiency was partly due to a lack of explanation and reasoned decision-making about the exclusion decision, the problem was more fundamental. At the time of its decision, the Service did not believe that its exclusion decision was judicially reviewable. 85 Fed. Reg. at 55,399. This led to a failure to articulate transparent standards for when exclusion would be appropriate. *See id.* When an agency's decision is devoid "of reasoning to support its conclusion," a court should vacate the decision. *Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1217 (D.C. Cir.), *supplemented*, 713 F.2d 795 (D.C. Cir. 1983); *see also Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 799 n.2 (D.C. Cir. 1983).

Furthermore, two new critical habitat regulations cast into "doubt whether the agency chose correctly" in this case. *Allied-Signal*, 988 F.2d at 150–51.[7] As stated above, the Service has recognized that it has not been transparent in how it decides when to exclude areas from critical habitat designations, and has adopted new standards for making that decision. 85 Fed. Reg. at 55,399. The Service has also adopted a regulation about whether and when to designate unoccupied critical habitat, recognizing that "Congress intended that the test be more demanding for designating unoccupied critical habitat than for occupied habitat." 84 Fed. Reg. 45,020-01, 45,022 (Aug. 27, 2019). On remand, the Service will have to apply these new standards, and the designation should not remain in place during the Service's review. *See Action on Smoking & Health*, 713 F.2d at 797–99 & n.2 (court should vacate regulation to avoid inviting post-hoc rationalizations); *see also N.M. Farm & Livestock Bureau v. U.S. Dep't of the Interior,* No. 2:15-cv-428

[7] The Service has announced its plans to initiate rulemaking to rescind these regulations, but has not yet started the rulemaking process. *See* Press Release, U.S. Fish and Wildlife Service and NOAA Fisheries to Propose Regulatory Revisions to Endangered Species Act (June 4, 2021), *available at* https://www.fws.gov/news/ShowNews.cfm?_ID=36925. Therefore, the regulations remain binding on the Service.

KG/CG, 2021 WL 275535, at *8 (D.N.M. Jan. 27, 2021) (unpublished) (vacating units of critical habitat because of Service's substantive errors in designating habitat).

As to the consequences of vacatur, the effects of leaving the designation in place weigh in favor of setting it aside. *But see North Carolina*, 531 F.3d at 929, *on reh'g in part*, 550 F.3d 1176 (quotations omitted) (consequences of vacatur are irrelevant if the agency will have to apply different standards on remand). Keeping the designation in place would greatly injure the Ranchers. Among other things, it directly affects the property values of the ranchers' private property. 3-Appx.-0592–97. The designation also subjects the ranchers to more burdensome Section 7 consultation. *Cf.* 16 U.S.C. § 1536(b)(3)(A). When grazing occurs in an area designated critical habitat, the Forest Service typically engages in Section 7 consultation when the agency issues annual operating instructions. *See Oregon Nat. Desert Ass'n v. Lohn*, 485 F. Supp. 2d 1190, 1192 (D. Or. 2007), *vacated*, No. CIV 06-946-KI, 2007 WL 2377011 (D. Or. June 11, 2007), and *vacated as moot*, 308 F. App'x 102 (9th Cir. 2009). And while the Section 7 consultation may not immediately affect ranchers' income, the increased time and uncertainty

associated with the Section 7 process affects ranchers' ability to plan for future grazing seasons and may result in restrictions on time and degree of use. *See also* 1-Appx.-0065 (NMSU Range Improvement Task Force comment on the effects of increased management requirements).

On the other hand, vacating the designation would not lead to disruptive consequences for the government. "This is not a case in which the 'egg has been scrambled,' and it is too late to reverse course." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110–11 (D.C. Cir. 2014) (quoting *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002)). On remand, the Service will have the opportunity to properly analyze the economic impact of the designation and make an informed decision about what to designate.

Furthermore, vacating the designation will not have serious environmental consequences. Most of the designated units of critical habitat are either partially or entirely unoccupied, and thus any activity in those areas is unlikely to have any significant impact on the mouse's continued existence. 2-Appx.-0372; 2-Appx.-0375. In contrast, in any area where the mouse is present, Section 7 consultation, and its related protections, will be triggered if any action is likely to jeopardize the

mouse's continued existence. 16 U.S.C. § 1536(a)(4). Thus, even with vacatur, the means to protect the mouse will still be available. But in those areas where the mouse is not or is unlikely to be found, vacating the rule means that the Ranchers will not be subject to a costly and unnecessary designation.

This Court should instruct the District Court to hold unlawful and set aside Units 3 and 4 of the critical habitat designation.

V

This Court Should Vacate Those Portions of the District Court's Opinion and Order That Purport to Adjudicate the Status of the Ranchers' Grazing and Water Rights

A. Decision and standard of review

In an alternative holding in its memorandum opinion and order, the District Court stated that the critical habitat designation does not effect a taking of any of the Ranchers' members' water rights, that the Ranchers' members have merely speculative water rights, and that they have lost their grazing rights. 4-Appx.-186–71. In its order granting in part and denying in part the Ranchers' motion to alter or amend the judgment, the District Court held:

> The Court's ruling in this case is limited to the administrative record and the Court is not adjudicating the status of the

> Associations' members' grazing rights in another case on another record or whether, in an open-record action, the Associations' members could successfully assert a claim for just compensation for the taking of their water rights by the New Mexico Meadow Jumping Mouse's critical habitat designation.

5-Appx.-0972–73.

This Court's review of the Service's actions under the ESA is governed by the APA, and it reviews the District Court's decision *de novo*. *N.M. Farm & Livestock Bureau*, 952 F.3d at 1221. This Court reviews rulings on Rule 59(e) motions for an abuse of discretion. *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019).

B. The District Court's Order exceeds the scope of the complaint and its jurisdiction in this case

In determining that the Service did not improperly exclude the impacts to water rights in its economic analysis, Part III.D of the District Court's order goes beyond the administrative record and concludes in the alternative that the Ranchers' members can *never* establish a taking of their water rights because those rights are speculative and because the members have lost their grazing permits. 4-Appx.-0866–71. Attempting to correct this error, the Ranchers filed a motion to alter or amend the judgment so that the Ranchers would not be precluded from asserting

their rights in the future. The District Court granted in part and denied in part the motion. 5-Appx.-0972–73. But the District Court also stated in the hearing on the motion that its decision *does* adjudicate the status of the Ranchers' rights in this case. 5-Appx.-1101. This Court should vacate those portions of the District Court's order that purport to adjudicate the Ranchers' rights because that question was outside the scope of the complaint, outside the scope of a closed record action under the APA, and outside the District Court's jurisdiction.

The Ranchers did not plead a takings claim, which generally must be filed in the United States Court of Federal Claims. *E. Enterps. v. Apfel*, 524 U.S. 498, 520 (1998) (citing 28 U.S.C. § 1491).[8] Rather, the Ranchers advanced claims under the ESA, alleging, as stated above, that the Service's economic impact analysis for water rights was legally inadequate, and thus that the Service failed "[to] tak[e] into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). As noted above, such a challenge is resolved according to the standards of the APA. *N.M. Cattle Growers*

[8] District courts have concurrent jurisdiction to adjudicate takings claims seeking $10,000 or less in just compensation. *See* 28 U.S.C. § 1346(a)(2).

Ass'n, 248 F.3d at 1281 (citing 5 U.S.C. § 706(2)(A)–(D)). Accordingly, to show that the Service's analysis was faulty, the Ranchers did not need to plead and prove a stand-alone takings claim but only show that the Service's consideration of the designation's economic impacts was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

The Ranchers therefore did not need to adduce evidence to satisfy the elements of a takings claim, an effort that likely would have been precluded anyway because APA actions are reviewed under a closed record. *See Olenhouse,* 42 F.3d at 1579. Rather, the Ranchers sought to demonstrate that, regardless of whether any individual rancher's water right has in fact been taken by the mouse's habitat designation, the Service's analysis of the designation's impact on the water rights brought to the agency's attention by public comment was insufficient because it was based on an error of law. *Cf. McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017) (a decision based on an error of law is necessarily an abuse of discretion).

Additionally, at the conclusion of Part III.D, the District Court stated that "members of the Stockman's Associations have lost the license

to graze on this land." 4-Appx.-0871. Neither the Service nor the Intervenors ever alleged such a loss, and all the evidence submitted to the District Court is to the contrary. *See* 2-Appx.-0457 ¶ 5 (declarant's grazing association holds permits for grazing within the Santa Fe National Forest); 2-Appx.-0462 ¶ 5 (declarant grazes cattle on an allotment within the Santa Fe National Forest); 2-Appx.-0466 ¶ 9 (same); 2-Appx.-0470 ¶ 7 (declarant's grazing association grazes cattle on an allotment within the Lincoln National Forest); 2-Appx.-0474 ¶ 7 (same); 2-Appx.-0478 ¶ 7 (same). Not only was this conclusion unsupported by the record, it purported to answer a question not before the court. The status of the Ranchers' grazing rights was not before the District Court and the Ranchers could not have put it before the court in a closed-record APA action about a habitat designation. *Cf. Olenhouse,* 42 F.3d at 1579. All non-record evidence was submitted only for the purpose of proving standing. *Cf. New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 696 n.13 (10th Cir. 2009).

Whether this Court applies a *de novo* or an abuse of discretion standard of review, it should vacate those portions of the District Court's order that purport to adjudicate the status of the Ranchers' grazing and

water rights. A District Court abuses its discretion when it bases its decision on improper or irrelevant factors. *See Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1132 (10th Cir. 2010) (citing *Gen. Motors Corp. v. Harry Brown's, LLC,* 563 F.3d 312, 316 (8th Cir. 2009)). A District Court also abuses its discretion when it "fails to consider the applicable legal standard." *United States v. Hasan*, 609 F.3d 1121, 1127 (10th Cir. 2010) (citations omitted) (internal quotation marks omitted). Finally, a district court "necessarily abuses its discretion" when it "errs in deciding a legal issue …." *United States v. Margheim*, 770 F.3d 1312, 1317 (10th Cir. 2014) (quotations omitted); *see also Nelson,* 921 F.3d at 929 ("A court abuses its discretion when basing its decision on an erroneous legal conclusion.").

The District Court abused its discretion by purporting to adjudicate issues outside the scope of the action and its jurisdiction, thus committing reversible error. *See Olenhouse,* 42 F.3d at 1579 ("The Procedure Used by the District Court was Fundamentally Inconsistent with the Review Process Required under the APA"). This Court should vacate Part III.D of the District Court's order that purports to adjudicate the Ranchers'

grazing and water rights and hold that this action only challenged the Service's critical habitat designation for the mouse.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the District Court and remand with instructions to hold unlawful the final rule and set aside the critical habitat designation for Units 3 and 4. The Ranchers also request that this Court vacate those portions of the District Court's order that purport to adjudicate the Ranchers' grazing and water rights.

STATEMENT REGARDING ORAL ARGUMENT

Appellants Ranchers request oral argument. This appeal will require the Court to consider the requirements of the ESA, as well as several regulations implementing the ESA. Some of these regulations have been promulgated recently, and have not been interpreted by this Court or other courts. Oral argument may assist the Court in deciding the proper interpretation of the ESA, the Service's regulations, and the proper deference owed to the agency's expansive interpretation of the ESA. For these reasons, Ranchers respectfully submit that oral argument may assist the Court in deciding this case.

DATED: August 2, 2021.

Respectfully submitted,

s/ Jeffrey W. McCoy

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(7)(b)(ii), because this brief contains 12,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).

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DATED: August 2, 2021.

/s/ Jeffrey W. McCoy
JEFFREY W. McCOY

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I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

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DATED: August 2, 2021.

/s/ Jeffrey W. McCoy
JEFFREY W. McCOY

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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