No. 21-2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

U.S. FISH & WILDLIFE SERVICE, *et al.*,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY and WILDEARTH GUARDIANS,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of New Mexico
Case No. 1:18-cv-01138 (Hon. James O. Browning)

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STATEMENT OF RELATED CASES

There are no prior or related appeals within the meaning of 10th Cir. Rule 28.2(C)(1).

GLOSSARY

APA	Administrative Procedure Act
ESA	Endangered Species Act
OMB	Office of Management and Budget

INTRODUCTION

The Endangered Species Act ("ESA") instructs the Fish & Wildlife Service ("Service") to designate "critical habitat" for species listed under the Act. At issue in this appeal is the Service's designation of critical habitat for the endangered New Mexico meadow jumping mouse. The plaintiff ranchers' associations (the "Associations") take issue with the cost-benefit analysis the Service performed in deciding whether it should exercise its statutory discretion to exclude some areas that no party disputes meet the criteria for designation. The Associations' arguments are unavailing.

First, neither logic nor this Court's precedent support the Associations' view that the Service was required to attribute to the designation costs that would arise in the designation's absence. *Second*, the Service reasonably accounted for the potential impacts on asserted water rights, particularly in light of the Associations' failure to substantiate before the agency that any such rights exist. *Third*, the Service adequately justified its decision not to exclude two particular units of land from the designation—even assuming that the Associations have met their burden to demonstrate standing with regard to both units.

For these reasons, this Court should affirm judgment for the Service. To the extent this Court reaches the Associations' remaining arguments, it should reject both.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the claims pleaded by the Associations arise under federal statutes—namely, the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the ESA, 16 U.S.C. § 1531, *et seq.* Aplt. App. Vol. 1 at 15. As discussed *infra* (pp. 41-43), the Associations have demonstrated Article III standing with regard to only one of the two challenged units included in the designation.

The district court's judgment was final because it resolved all claims against all defendants. Aplt. App. Vol. 4 at 922-23. This Court accordingly has jurisdiction under 28 U.S.C. § 1291.

The district court entered judgment on October 13, 2020. Aplt. App. Vol. 1 at 12. The Associations filed a timely motion to alter judgment on November 6, 2020. *Id.* The district court issued an order granting in part and denying in part that motion on January 11, 2021. Aplt. App. Vol. 1 at 13. The Associations then filed a notice of appeal on March 1, 2021. *Id.* The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B) and 4(a)(4)(A).

STATEMENT OF THE ISSUES

1. Whether the Service complied with the ESA's directive to consider the economic impact of designating critical habitat.

2. Whether the Service adequately considered the designation's potential economic impact on any water rights that Association members may have.

3. Whether the Associations failed to demonstrate standing to challenge the Service's decision not to exclude *both* Units 3 and 4 from the designation, and whether the Service adequately explained its decision.

4. To the extent this Court accepts any of the Associations' challenges and reaches the issue of remedy, whether the district court's finding that any relief should be limited to a remand for further explanation was an abuse of discretion.

5. Whether this Court should deny the Associations' request to vacate a section of the district court's opinion, which has already been clarified by a subsequent order of that court.

STATEMENT OF THE CASE

I. The ESA's listing and critical habitat requirements

A. Criteria for and consequences of listing a species under the ESA

Congress enacted the ESA "to provide a program for the conservation of" endangered and threatened species, and "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Specifically, the ESA provides certain protections for species that the Service has formally determined satisfy the

statutory definition of "endangered" or "threatened."[1] An "endangered" species is one that is in danger of extinction throughout all or a significant portion of its range. *Id.* § 1532(6). A "threatened" species is one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. *Id.* § 1532(20). The decision to list a species as threatened or endangered is made "solely on the basis of the best scientific and commercial data available." *Id.* § 1533(b)(1)(A).

Certain of the ESA's protections attach to a species by the bare fact of being listed under the Act. Two are particularly relevant to this case.

First, Section 7 requires federal agencies to ensure that any action "authorized, funded, or carried out" by an agency "is not likely to jeopardize the continued existence" of any listed species. *Id.* § 1536(a)(2). To determine whether proposed action is likely to jeopardize a listed species, federal agencies must consult with the Service whenever the agency's planned activities "may affect" a listed species. 50 C.F.R. § 402.14(a). If, at the end of consultation, the Service determines that the action as proposed *is* likely to jeopardize a listed species, the

[1] Both the Service (as delegated power by the Secretary of the Interior) and the National Marine Fisheries Service (as delegated power by the Secretary of Commerce) have responsibility for administering the ESA, with the Service generally responsible for terrestrial and freshwater species like the jumping mouse. *See* 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(b).

Service must identify any "reasonable and prudent alternatives" that the agency may take to avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g), (h).

Second, Section 9 prohibits not just federal agencies but "any person" from taking any endangered species. 16 U.S.C. § 1538(a)(1).[2] "Taking" a listed species means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1532(19).

B. Criteria for and consequences of designating critical habitat

Whenever a species is listed, the ESA directs the Service to designate, "to the maximum extent prudent and determinable," specific areas as "critical habitat" for the species. *Id.* § 1533(a)(3)(A). The statute defines two types of areas that constitute critical habitat for a listed species: occupied and unoccupied. *Id.* § 1532(5)(A). For occupied habitat to be critical, it must contain physical or biological features that are "essential to the conservation of the species." *Id.* § 1532(5)(A)(i). For unoccupied habitat to be critical, the areas themselves must be "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

The statutory process for designating critical habitat begins with the Service identifying "any habitat" meeting the foregoing statutory definitions. *Id.* § 1533(a)(3)(A)(i). That threshold determination, like the decision to list a species,

[2] That prohibition may also be extended to threatened species. *Id.* § 1533(d); 50 C.F.R. § 17.31(a).

is made solely "on the basis of the best scientific data available." *Id.* § 1533(b)(2). After making that biological determination, however, the Service must then "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* Informed by that analysis, the Service "may"—but is not required to—"exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless exclusion will result in extinction of the species. *Id.*; *see generally Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370-72 (2018).

A critical habitat designation does not automatically restrict private activity on the land in question. Instead, the ESA attaches one legal consequence to the designation of critical habitat, which applies only to federal agencies: Section 7 requires agencies to ensure that their actions are not likely to "result in the destruction or adverse modification" of designated critical habitat. *Id.* § 1536(a)(2). At all times relevant to this appeal, the Service defined "adverse modification" of critical habitat to include "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (2016); *see* Aplt. App. Vol. 1 at 72, 82; 78 Fed. Reg. 53,058, 53,062-63 (Aug. 28, 2013).

In practice, taking steps to ensure that federal action does not jeopardize survival of a listed species—which an agency must do as a consequence of listing, regardless of whether critical habitat is designated—may sometimes itself ensure that the action does not adversely affect critical habitat. *See* Aplt. App. Vol. 1 at 82-83. Because of this potential overlap between the consequences of designating critical habitat and the consequences of listing the species in the first place, the Service has historically taken care when analyzing the effects of designation to consider only those effects that would not occur *but for* designation. *See* 78 Fed. Reg. at 53,062-63. For projects located in this circuit, however, the Service for several years considered itself bound by a decision of this Court disapproving of the Service's method of considering only the but-for (or "incremental") costs of designation because of the way that method interacted with a prior regulatory definition of "adverse modification" of critical habitat, which the Service stopped using in 2004 and has since amended. *See generally* pp. 29-33, *infra*; *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001); 78 Fed. Reg. at 53,062-63.

In 2013, however, following public notice and comment, the Service concluded that the incremental-cost method is "consistent with the Act," "is the most logical way of analyzing impacts," and is not foreclosed by *New Mexico Cattle Growers*. 78 Fed. Reg. at 53,062-63, 53,067. The Service promulgated a

new regulation providing that, in all jurisdictions, the Service will assess the costs of designating critical habitat by "compar[ing] the impacts with and without the designation." 50 C.F.R. § 424.19(b); *see also* 78 Fed. Reg. at 53,062 (clarifying that the regulation requires the Service to consider "the incremental impacts of the designation").

II. The challenged critical habitat designation decision

A. The endangered jumping mouse

The New Mexico meadow jumping mouse is a small mammal, approximately seven to nine inches in length, with a long tail that makes up more than half of that length. 79 Fed. Reg. 33,119, 33,120 (June 10, 2014); Aplt. App. Vol. 2 at 219. The jumping mouse hibernates eight to nine months of the year—longer than most mammals. 79 Fed. Reg. at 33,120. During the three to four months it is active in the summer, the jumping mouse "must breed, birth and raise young, and store up sufficient fat reserves to survive the next year's hibernation period." *Id.* Because the jumping mouse must meet so many needs in a compressed period, it "has exceptionally specialized habitat requirements." *Id.* at 33,120-21. Moreover, because of the jumping mouse's relatively short lifespan, low fecundity, and limited ability to travel long distances, populations are "highly vulnerable to extirpations" when that habitat "is lost and fragmented." *Id.* at 33,121.

The Service listed the jumping mouse as endangered in 2014. *Id.* at 33,119. As of that time, the jumping mouse was limited to a maximum of "29 small, isolated populations, all of which are incapable of withstanding adverse events"—and many of which were already "substantially compromised." *Id.* at 33,134; 81 Fed. Reg. 14,264, 14,274 (Mar. 16, 2016). A primary stressor on the species is ongoing habitat loss and degradation, driven in part by removal by grazing of vegetation on which the jumping mouse depends. 79 Fed. Reg. at 33,134.

B. The designation decision and underlying economic analysis

In 2016, following notice and two different periods for public comment, the Service issued a final rule designating 13,973 acres of critical habitat for the jumping mouse, consisting of eight riparian habitat "units" located along streams, ditches, and other channels in New Mexico, Colorado, and Arizona. 81 Fed. Reg. at 14,264; Aplt. App. Vol. 2 at 393 (map).

Included in this designation is "occupied" critical habitat, consisting of the 29 locations where jumping mice have been captured since 2005, plus a half-mile radius to capture the jumping mouse's typical range of travel. 81 Fed. Reg. at 14,272. Also included are two types of "unoccupied" critical habitat: currently unoccupied areas immediately adjacent to each tract of occupied critical habitat, plus two currently unoccupied tracts which are *not* adjacent to any occupied area.

Id.[3] At present, the adjacent unoccupied areas generally do not contain suitable habitat for the jumping mouse—which consists of "dense, herbaceous riparian vegetation with sufficient seasonally available or perennial flowing waters"—but, if restored, could provide areas into which existing populations may expand. *Id.* The non-adjacent unoccupied areas were selected because extending the jumping mouse population to the adjacent units alone would not be sufficient to build an overall population capable of withstanding the loss of local populations due to events like drought, flooding, or wildfire. *Id.*; *see also* 79 Fed. Reg. at 33,121-22.

No party disputes that all of the designated units meet the statutory definition of critical habitat. *See* 16 U.S.C. § 1532(5). Instead, the focus of this appeal is the Service's economic analysis and its subsequent decision not to exclude certain parcels that meet the statutory criteria from the designation.

1. The Service's framework for considering economic effects

The Service began its economic analysis by identifying in detail "the differences between actions required to avoid jeopardy," which would occur regardless of designation and thus would not be included in an analysis of the incremental cost of designation, and "actions that may be required to avoid adverse modification" of critical habitat. Aplt. App. Vol. 1 at 72. The Service explained

[3] The Service characterizes critical habitat units consisting of both occupied and adjacent unoccupied land as "partially occupied." *Id.*

that even under baseline conditions (*i.e.*, absent any designation of critical habitat), Section 7 of the ESA would still obligate federal agencies to ensure their actions are not likely to jeopardize the jumping mouse's survival. Aplt. App. Vol. 1 at 73. That obligation would itself require federal agencies to avoid actions that would "completely remove or significantly alter the amount or height of dense herbaceous vegetation" from areas already occupied by the jumping mouse. Aplt. App. Vol. 1 at 78.

The reason is that "the jumping mouse is such an extreme habitat specialist," dependent on "rich abundant food sources" during summer to "accumulate sufficient fat reserves" to survive hibernation. Aplt. App. Vol. 1 at 78, 82. Actions that would diminish those necessary habitat features would imperil the associated populations, which are already too few to safeguard the species' ability to survive loss of individual local populations. *See* Aplt. App. Vol. 1 at 79; *see also* 79 Fed. Reg. at 33,134-35. To avoid jeopardy, agencies likely would need to tailor such actions, including by reducing the size of the project, implementing seasonal restrictions, relocating the project, and/or offsetting habitat loss by protecting suitable habitat elsewhere in the species' range—the same actions that would be needed to avoid adverse modification of the habitat. Aplt. App. Vol. 1 at 79-80, 85-86. The Service accordingly "d[id] not anticipate measurable incremental effects" from designating occupied areas as critical habitat. Aplt. App. Vol. 1 at 83.

Not so for designating *un*occupied areas, which, as discussed above, contain no existing populations and largely lack the features necessary to support jumping mouse populations at present. Aplt. App. Vol. 1 at 83-84; *see also* 81 Fed. Reg. at 14,294-96. In such areas, certain federal actions could "affect the character of the physical habitat to such an extent that critical habitat may be adversely modified," without directly or indirectly affecting *existing* populations and thus jeopardizing survival. Aplt. App. Vol. 1 at 83-84.

2. The draft economic impacts screening report

The Service's incremental-effects framework formed the basis for a draft report prepared by a contractor, which estimated the economic impact of designating critical habitat and also determined whether that impact was likely to exceed $100 million in a single year—a threshold set by Executive Order 12,866 for determining whether a proposed regulation is economically significant. *See generally* Aplt. App. Vol. 1 at 122-43. The report concluded that designating critical habitat was not likely to exceed that threshold. Aplt. App. Vol. 1 at 123.

With regard to ESA Section 7's obligation to avoid adverse modification of critical habitat, the draft report concluded that the proposed designation would result in about $20 million in annual incremental costs. Aplt. App. Vol. 1 at 123. For occupied areas, the report considered the additional administrative burden of determining the likelihood that agency action would adversely modify designated

habitat, but did not anticipate a need for any substantive measures to avoid adverse modification, beyond what would independently be required to avoid jeopardy to the species. Aplt. App. Vol. 1 at 128. In partially or fully unoccupied units, however, incremental costs would include "both the administrative costs" to federal agencies of Section 7 consultation and "the costs of developing and implementing conservation measures needed to" ensure that federal actions do not adversely modify critical habitat. Aplt. App. Vol. 1 at 128-29.

The draft report predicted that the bulk of those costs—$15 million in total—would relate to agency action authorizing or regulating grazing on federal lands. Aplt. App. Vol. 1 at 129-32. The report explained that Units 3, 4, and 5 of the proposed critical habitat include lands in the Santa Fe, Lincoln, and Apache-Sitgreaves National Forests (called "allotments") on which private parties hold federal permits allowing them to graze livestock, subject to oversight by the Forest Service. *Id.* Because livestock grazing "can cause a rapid loss of herbaceous cover and eliminate dense riparian herbaceous vegetation" on which the jumping mouse relies, 81 Fed. Reg. at 14,275, the Forest Service's duty to avoid adverse modification of critical habitat may require the agency to reduce the amount of grazing it allows in those areas or to impose other restrictions, such as fencing off certain areas to cattle. Aplt. App. Vol. 1 at 129-32.

Of the expected incremental costs related to grazing on federal lands, the report predicted that a minor fraction—potentially $24,000—would be borne by private grazers. *See id.*; Aplt. App. Vol. 1 at 119-20; Aplt. App. Vol. 2 at 273. That $24,000 represents the value of grazing on the three allotments—located in Units 4 and 5 only—whose acreage contains at least five percent critical habitat. *Id.*[4] The remaining Section 7 grazing costs—including the administrative expense of consultation and of undertaking reasonable and prudent conservation measures like erecting fences—would be borne by the government. *Id.*

The draft report also recognized that the designation may have impacts on ranchers unrelated to Section 7 consultation. Aplt. App. Vol. 1 at 139-43. Specifically, it recognized that designation of critical habitat—whether occupied or unoccupied—may affect the market value of private holdings associated with the designated area because of negative "public perception" surrounding critical habitat, and calculated an upper bound for such effects. Aplt. App. Vol. 1 at 113-20, 140-41.

Finally, the draft report considered the incremental economic benefits of designating critical habitat. Aplt. App. Vol. 1 at 141-42. Because quantifying such

[4] Grazers on the 21 allotments containing less than five percent critical habitat are assumed to be able to shift their grazing to undesignated land on the allotment, thereby avoiding impacts to critical habitat without any need for the Forest Service to reduce the total amount of grazing. Aplt. App. Vol. 1 at 130.

benefits would require information that is not presently available, the report offered a qualitative description of the benefits, which include "incremental conservation efforts for the mouse, including reduced grazing, fencing, and surveys for areas not currently occupied by the species." Aplt. App. Vol. 1 at 141-42. Those incremental conservation measures could in turn produce associated benefits, including "[i]mproved water and soil quality," improved ecosystem health for other species found in the designated area, and public education benefits. *Id.* The Service elaborated on these potential incremental benefits in its environmental assessment document. *E.g.*, Aplt. App. Vol. 2 at 258-64, 266-70.

3. The Service's response to public comment

Drafts of both the screening report and environmental assessment were noticed in the Federal Register, and the public was given 30 days to comment. 79 Fed. Reg. 19,307 (Apr. 8, 2014); 81 Fed. Reg. at 14,265. In the notice, the Service specifically invited comment on whether it should consider excluding any areas proposed for designation. 79 Fed. Reg. at 19,308.

Despite that invitation, none of the Associations' members expressly argued that the Service should use its discretion to exclude in full the two units that are now the focus of the Associations' challenge. *See* Aplt. App. Vol. 1 at 144-46, 148-50, 151-53, 154-55; *see also* Fed. Aple. App. at 1-5, 9-10, 21-34, 37, 41. Nevertheless, the Service explained in its final designation that neither economic

impacts, nor national security impacts, nor "other relevant impacts" warranted exclusion of any unit. 81 Fed. Reg. at 14,307-08.[5] With regard to economic impacts in particular, the Service explained that the extensive analyses summarized above "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 14,307.

The Service's final designation also directly addressed public comments asserting without substantiation that the designation would extinguish private rights to water on federal land, allegedly held by grazing permittees. *See* Aplt. App. Vol. 1 at 58, 151-53. The Service maintained that determining in the first instance whether any permittees have a private water right "is beyond the scope of the environmental assessment and economic analysis." 81 Fed. Reg. at 14,275; *see also id.* at 14,281; Aplt. App. Vol. 2 at 226. The Service nevertheless supplemented its analysis to account for the economic impact of actions the federal government could take to avoid disrupting grazing permittees' access to water on federal lands—regardless of whether those permittees have a property right in that water. 81 Fed. Reg. at 14,287-88. Based on that supplemental analysis, the Service revised its expected incremental costs estimate to $23 million. *Id.*

[5] The Service did exclude certain units (not at issue here) composed of tribal land, in light of the special political and trust considerations attached to such lands. *Id.* at 14,308-12.

III. The Associations' challenge

In 2018, the Associations filed a petition for APA review of the critical habitat designation in the district court. Aplt. App. Vol. 1 at 15. The Associations, who represent individual ranchers in New Mexico, claimed that the Service erred by (1) considering the *incremental* economic effects of designating critical habitat, instead of performing a "coextensive" analysis including costs that would occur regardless of designation; (2) failing to adequately consider the economic impacts on asserted private water rights; and (3) declining to exclude Units 3 and 4 from the designation. Aplt. App. Vol. 1 at 27-33.

The Associations maintained that they had standing to raise their challenges because their members graze livestock on allotments that overlap in part with Units 3 and 4. With regard to Unit 4, the Associations provided detailed declarations explaining that fencing associated with the designation was impairing one member's access to water and that an appraiser had concluded that the designation had reduced the market value of two grazing permittees' properties. *See generally* Aplt. App. Vol. 3 at 592-601. The Associations' declarations regarding Unit 3 lacked comparable details. *See* Aplt. App. Vol. 2 at 445-49, 456-59, 461-63, 465-67.

The district court nevertheless held that the Associations had standing to raise all claims. Aplt. App. Vol. 4 at 809-16. On the merits, however, the court

rejected each claim. Aplt. App. Vol. 4 at 816-95. Because the court upheld the designation against all challenges, it had no occasion to grant any relief requested by the Associations. The court nevertheless noted that, if it *had* decided any claim in the Associations' favor, it would have remanded to the agency for further analysis without vacating the designation. Aplt. App. Vol. 4 at 896-914.

Following the district court's decision, the Associations filed a motion requesting that the court "alter or amend its opinion and order . . . or grant relief therefrom" to clarify the effect of certain passages discussing the water rights allegedly held by the Associations' members. Aplt. App. Vol. 4 at 930. In their reply, the Associations suggested specific language that would "efficiently address the Associations' concern, ensuring that the Associations' members will not be unfairly prejudiced by the Court's judgment," Aplt. App. Vol. 4 at 958, 964-65, which the court adopted in a separate order. Aplt. App. Vol. 5 at 972-73. This appeal followed.

SUMMARY OF ARGUMENT

The Service appropriately analyzed the economic impacts of designating critical habitat for the endangered jumping mouse and reasonably concluded that those impacts did not justify excluding from the designation certain habitat units that no party disputes meet the statutory criteria. The Associations' contrary arguments lack merit.

1. The Service appropriately complied with the ESA's directive to consider the economic impacts of designating critical habitat by analyzing those costs and benefits that would not occur *but for* the designation. The Service's long-standing, publicly vetted view that economic analysis of critical habitat designations should focus on incremental impacts is both a reasonable and persuasive reading of the ESA's directive, as multiple courts have recognized. This Court's decision in *New Mexico Cattle Growers* does not bar the Service's use of incremental analysis in this case.

2. The Service reasonably accounted for the potential economic impacts of the designation on private water rights claimed by some holders of federal grazing permits. The Service considered potential costs associated with impaired access to water by estimating the cost of building water development infrastructure to help offset any impact that designating critical habitat might otherwise have on permittees. The Service was not required to go further by exploring the hypothetical cost of taking private water rights, particularly where the Associations and their members failed to put material in the administrative record suggesting that any such taking is likely to occur. The Associations' contention that the Service's analysis was premised on a legal error about the nature of water rights misreads the record.

3. The Service's explanation for not excluding Units 3 and 4 from the designation was adequate. As a threshold matter, the Associations have met their burden to establish standing only with regard to Unit 4. Even assuming the Associations have standing to challenge the designation of both units, however, the Service's explanation suffices. Moreover, the Service's level of detail was appropriate in light of the fact that no member of the public requested that the Service use its discretion to exclude Units 3 or 4 in full, despite the Service's invitation to identify units that the Service should exclude. For that reason, this Court could also reject the Associations' argument as administratively forfeited.

4. Because the designation decision is lawful, there is no cause for this Court to address the Associations' request to vacate the designation with regard to Units 3 and 4. To the extent the Court does reach the question of remedy, it may either remand to the district court for further consideration, or uphold the district court's finding on the issue. The APA does not strip courts of their equitable discretion over whether to vacate unlawful agency action, and the Associations have not shown that the district court abused that discretion when it concluded that widely-used equitable factors would not support vacatur here.

5. Finally, there is no cause to vacate the portion of the district court's opinion concluding that the Associations' members have not demonstrated that they have water rights on federal lands. The district court already issued an order

clarifying that its decision does not address whether the Associations could prove a taking of water rights in an open-record case, using language that the Associations themselves suggested.

STANDARD OF REVIEW

This Court reviews a district court's resolution of APA claims *de novo*, using the same deferential standard toward the agency's decision as the district court. *Biodiversity Conserv. All. v. Jiron*, 762 F.3d 1036, 1059 (10th Cir. 2014); *Utah Env't Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006). An agency's decision will not be overturned "unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" *Bosworth*, 443 F.3d at 739 (quoting 5 U.S.C. § 706(2)(A)), and the challenger "bears the burden of persuasion" to show that agency action is arbitrary and capricious. *N.M. Health Connections v. HHS*, 946 F.3d 1138, 1162 (10th Cir. 2019).

A district court's decision whether to grant injunctive relief and whether to alter or amend judgment are both reviewed for abuse of discretion. *Ramos v. Banner Health*, 1 F.4th 769, 777 (10th Cir. 2021); *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019).

ARGUMENT

I. The Service complied with the ESA by considering the incremental economic impacts of designating critical habitat for the jumping mouse.

Section 4(b)(2) of the ESA directs the Service to "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). In a binding regulation promulgated after public notice and comment, the Service has interpreted that provision to require the Service to consider the *incremental* impact of designating critical habit: that is, the Service "will compare the impacts with and without the designation." 50 C.F.R. § 424.19(b). That approach is a reasonable and persuasive reading of the Act and is consistent with this Court's precedent.

A. The Service's view that the ESA contemplates an analysis of those economic impacts that would not occur but for designation is both reasonable and persuasive.

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Potts v. Ctr. for Excellence in Higher Educ., Inc.*, 908 F.3d 610, 613 (10th Cir. 2018). This Court has previously held that the ESA language at issue in this case "is plain in requiring some kind of consideration of economic impact." *New Mexico Cattle Growers*, 248 F.3d at 1285. But the statute is silent as to the details of that consideration—perhaps unsurprisingly, given that the appropriate methodology for conducting a statutorily required assessment of costs or other

impacts is the kind of gap that Congress frequently leaves for expert agencies to fill. *See, e.g.*, *Citizens' Cmte. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1027 (10th Cir. 2002) (citing *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985)). With regard to the precise question at issue in this case, the statutory text simply directs consideration of the "economic impact" of designating "any particular area." 16 U.S.C. § 1533(b)(2). It does not say whether costs that would arise regardless of the designation qualify among the relevant impacts—and as discussed below, the better reading is that they do not.

Where, as here, "Congress has not directly addressed the precise question at issue" with regard to a gap in a statute that a federal agency is charged with administering, "the court does not simply impose its own construction on the statute," but instead asks "whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). To be sure, not every agency interpretation of a statute is entitled to so-named *Chevron* deference. *Aposhian v. Barr*, 958 F.3d 969, 979-80 (10th Cir. 2020); *see generally United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001). But a "legislative rule . . . that 'is promulgated pursuant to a direct delegation of legislative power by Congress and . . . changes existing law, policy, or practice'" will receive deference, if reasonable. *Aposhian*, 958 F.3d at 979-80 (quoting *Rocky Mtn. Helicopters, Inc. v. FAA*, 971 F.2d 544, 546 (10th Cir. 1992)).

Agency interpretations not meeting those criteria "are entitled to respect under" *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), consistent with the interpretation's "power to persuade." *McGraw v. Barnhart*, 450 F.3d 493, 501 (10th Cir. 2006) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

As a matter of law, the Service's long-standing, publicly vetted interpretation of Section 4(b)(2) should receive *Chevron* deference. That interpretation has been subjected to the rigors of notice-and-comment rulemaking, which generally affords a "safe harbor of *Chevron* deference." *Sinclair Wyo. Refinery Co. v. United States*, 887 F.3d 986, 991 (10th Cir. 2017). The resulting regulation also displays many of the additional criteria this Court noted when extending *Chevron* deference to the regulation at issue in the recent *Aposhian* decision. *See* 958 F.3d at 980.[6] As a practical matter, however, the Service's interpretation should be upheld whether this Court applies the *Chevron* or *Skidmore* frameworks, because it is both reasonable *and* persuasive. Indeed, it is the "only logical way to implement the Act." 78 Fed. Reg. at 53,062.

[6] Specifically, the final rule was published in the Code of Federal Regulations. It marks a change in existing agency practice. *See* 78 Fed. Reg. at 53,062-63. Its accompanying final rule discusses the Service's authority to interpret the ESA and judicial deference. *Id.* at 53,069. And while the methodology for designating critical habitat does not directly regulate private parties, such designations do indirectly impact private parties, as the record in this case demonstrates. *E.g.*, Aplt. App. Vol. 1 at 113-20, 129-32; Aplt. App. Vol. 2 at 273-76.

The evident purpose of Section 4(b)(2)'s directive to consider the economic impact of designating critical habitat is to inform the Secretary's analysis of whether cost or other factors warrant excluding some areas from the ultimate designation. *See* 16 U.S.C. § 1533(b)(2); *New Mexico Cattle Growers*, 248 F.3d at 1284-85; *see also* 78 Fed. Reg. at 53,062. Study of the *incremental* costs of designation—rather than costs that would occur even in a world where no designation is made—is uniquely suited to informing that analysis.

As the Service has explained, "[t]o understand the difference that designation of an area as critical habitat makes and, therefore, the benefits of including an area in the designation or excluding an area from the designation, one must compare the hypothetical world with the designation to the hypothetical world without the designation." 78 Fed. Reg. at 53,062. That is precisely what incremental analysis does. By contrast, an analysis that attributes to the designation the cost of actions that are independently required by other parts of the statute—and that will therefore accrue even if no designation occurs—does not accurately inform the Service what the real-world ramifications of excluding or including a particular parcel would be. Indeed, in the words of this Court's sister circuit, "the very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010).

In addition to being consistent with statutory purpose, the Service's method is consistent with general best practices for conducting cost-benefit analyses. The Office of Management and Budget ("OMB"), for example, has long advised agencies that a key element of such analyses is identifying a baseline against which costs and benefits will be assessed. Circular A-4 (Sept. 17, 2003), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf. OMB advises that the baseline "normally will be a 'no action' baseline: what the world will be like if the proposed rule is not adopted." *Id.*; *see* 78 Fed. Reg. at 53,062 (noting consistency of Service's approach with OMB guidance).

For these reasons, the methodology that the Service used in this case has been approved by multiple courts, including district courts in this circuit. *See Ariz. Cattle Growers*, 606 F.3d at 1174; *Colorado by and through Colo. Dep't of Natural Res. v. U.S. Fish & Wildlife Serv.*, 362 F. Supp.3d 951, 988 (D. Colo. 2018); *Fisher v. Salazar*, 656 F. Supp.2d 1357, 1372-73 (N.D. Fla. 2009); *Cape Hatteras Access Pres. All. v. U.S. Dep't of the Interior*, 344 F. Supp.2d 108, 129-30 (D.D.C. 2004).

The Associations, however, maintain that considering incremental impacts improperly excludes some costs that the ESA requires be considered. Op. Br. 22-24. Not so.

As an initial matter, the Service agrees that a rational economic analysis may not simply ignore relevant economic impacts of designating critical habitat. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm. Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Associations err, however, in assuming that the ESA *must* be read to include costs that will arise regardless of a critical habitat designation among that designation's "impacts." Instead, for the reasons already stated, it is perfectly reasonable—and indeed persuasive given the statutory context—to treat as "impacts of" a particular designation only those real-world effects that would change based on whether the Service makes the designation. The Service's methodology accounts for all impacts of designating critical habitat, so understood.[7]

The Associations' argument to the contrary is premised on a misunderstanding of the relationship—or lack thereof—between the designation of critical habitat and the ESA's prohibition against taking listed species. Specifically, the Associations assert that designating critical habitat "increases the risk that one will violate the 'take' provision," and that the Service's method fails to account for the cost of those increased takes. Op. Br. 22. But nothing in the statutory or

[7] The Associations' resort to legislative history, *see* Op. Br. 19-21, does not compel a different conclusion: their citations show that Congress intended the Service to take into account the costs of designating critical habitat, but say nothing about the appropriate methodology.

regulatory definition of "take" hinges on whether the land where the offending action occurs has been designated as critical habitat.

To be sure, degradation of a species' habitat can cause take in certain circumstances—specifically, when that degradation "actually kills or injures wildlife." 50 C.F.R. § 17.3; *see generally Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-704 (1995). But that is true regardless of whether the habitat in question has any particular legal designation. And to the extent destruction of designated critical habitat may be more likely to result in death or injury to listed wildlife than destruction of other areas, the increased likelihood flows not from the legal designation but from the on-the-ground characteristics of the area that make it essential to the conservation of the species. *See* 16 U.S.C. § 1532(5)(A)(i)-(ii).

The Associations nevertheless contend that it may be easier for a prosecutor to prove that a take was "knowing"—and potentially subject to higher penalties—if the take occurs on designated critical habitat. Op. Br. 22-23. But the possibility that a designation decision could be used as one piece of evidence—among others—in deciding the appropriate penalty for a knowing violation of federal law does not show that designating critical habitat increases the incidence of take, nor that it is meaningfully responsible for the pecuniary consequences of such violations.

For these reasons, the Service's decision to analyze the costs and benefits that would not occur but for the designation faithfully executes Section 4(b)(2)'s directive to consider economic impacts.

B. The Service's method is consistent with circuit precedent.

This Court's precedent—specifically, *New Mexico Cattle Growers*—does not require a different mode of analysis. At issue in *New Mexico Cattle Growers* was the Service's designation of critical habitat for the southwestern willow flycatcher, a small riparian bird. 248 F.3d at 1279. In analyzing the economic impacts of that designation, the Service considered the incremental costs and benefits of designation against a baseline where no critical habitat was designated—as it did here. *Id.* at 1280. But in the flycatcher case, consistent with then-governing regulations, the Service treated the consequences of listing a species and designating critical habitat to be functionally identical as a matter of law, such that designation was deemed to have *no* economic impact whatsoever. *Id.* at 1280, 1283-84. The Service did so by according "virtually identical" legal definitions to Section 7's requirement to avoid adversely modifying critical habitat—which, as discussed, is the sole statutory consequence of designating critical habitat—and the independent requirement to avoid jeopardizing the survival of listed species. *Id.* at 1283-84. Specifically, the Service at that point in time maintained that "[a]ction violating the jeopardy standard is action reasonably

expected 'to reduce appreciably the likelihood *of both the survival and recovery of a species*,'" and that "[a]ction violating the adverse modification standard" is likewise "action 'that appreciably diminishes the value of critical habitat *for both the survival and recovery of a listed species*.'" *Id.* (emphasis added).

Because the Service's definitions of jeopardy and adverse modification were "identical, or if not identical one (adverse modification) is subsumed by the other (jeopardy)," studying the incremental effects of designating critical habitat necessarily yielded an empty set. *Id.* Indeed, the Service itself acknowledged in the flycatcher designation that "actions satisfying the standard for adverse modification are nearly always found to also jeopardize the species concerned," such that designating critical habitat had no practical effect. *Id.* at 1284.

This Court held that, in that regulatory context, looking only at incremental effects was inconsistent with statutory intent. *Id.* at 1284-85. In so doing, the Court was explicit that the problem it identified was not a problem inherent to the use of incremental analysis, but rather the product of the way that analytical approach interacted with the then-governing regulatory definitions codified at 50 C.F.R. § 402.02. In the Court's own words:

> *Because economic analysis done using the [Service]'s baseline model is rendered essentially without meaning by 50 C.F.R. § 402.02*, we conclude Congress intended that the [Service] 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.

Id. (emphasis added). The Court identified no other problem with the use of incremental analysis. *See id.*

Since *New Mexico Cattle Growers*, the Service has made significant changes to its regulatory approach for analyzing the economic impacts of critical habitat designations. Crucially, after several judicial decisions declaring the Service's former definition of adverse modification unlawful, *see Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1069-71 (9th Cir. 2004), *amended on other grounds*, 387 F.3d 968; *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 440-43 (5th Cir. 2001), the Service revised its interpretation to give that term meaning independent from the jeopardy definition. Under the amended regulations, "adverse modification" includes "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (2016). As the record in this case demonstrates, that standard encompasses actions that would not meet the regulatory standard for jeopardy—including actions that diminish the suitability of habitat in areas the relevant species is not yet found but could one day occupy, or actions that make it harder to develop suitable habitat in such areas. Aplt. App. Vol. 1 at 83-84; Aplt. App. Vol. 2 at 241.

In this changed regulatory context, considering the incremental economic impacts of critical habitat is no longer "virtually meaningless." *New Mexico Cattle*

Growers, 248 F.3d at 1285. To wit: the Service here identified $23 million in costs attributable to designation of critical habitat that would not accrue from listing the jumping mouse alone. 81 Fed. Reg. at 14,287-88. It also recognized costs that are unrelated to the regulatory standards for Section 7 consultations—specifically, potential impacts on the market value of private property and grazing allotments. Aplt. App. Vol. 1 at 113-20. Thus, as multiple courts have recognized, this Court's sole reason for disapproving of incremental analysis in *New Mexico Cattle Growers* is simply not applicable to the Service's new regulatory regime. *See Ariz. Cattle Growers*, 606 F.3d at 1173; *Colorado*, 362 F. Supp.3d at 988; *cf. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-86 (2005).

The Associations disagree, dismissing the change in the regulatory regime as "slight." Op. Br. 25. The Associations note particularly that in *some* factual settings, the universe of actions that constitute adverse modification and jeopardy still overlap. *Id.* 26-29. But such overlap reflects the reality that for some species—particularly "extreme habitat specialist[s]" like the jumping mouse whose current population is already precariously small—adversely modifying areas where the species lives *does* jeopardize the species' survival. *See* Aplt. App. Vol. at 78-83. The fatal flaw identified in *New Mexico Cattle Growers*, by contrast, was a legal definition of adverse modification that would necessarily render *any* study of the

incremental effects of designating critical habitat virtually null. 248 F.3d at 1285. The Associations' repeated assertions to the contrary are irreconcilable with that decision's text.

For these reasons, *New Mexico Cattle Growers* provides no basis for rejecting the Service's incremental economic analysis in this case.[8] The Service's choice of analytical method should therefore be upheld.

II. The Service appropriately considered economic impacts related to alleged private water rights.

The Associations next argue that, even accepting the incremental approach, the Service improperly excluded from consideration impacts on water rights that the Associations' members claim to hold. This challenge fails because the Service appropriately considered potential impacts related to access to water in light of the record before it.

A. The Service accounted for foreseeable impacts related to grazing permittees' access to water on federal land.

As discussed above, between preparation of the draft economic impact report and the final designation, the Service increased its projected incremental costs of the designation from approximately $20 million to $23 million. Aplt. App.

[8] The Service's "own stated procedures" do not say otherwise. *Contra* Op. Br. 31. The record document that the Associations cite as evidence that the Service deems *New Mexico Cattle Growers* controlling predates the Service's August 2013 final rule, which expressly concludes that the decision is no longer applicable. *See* Aplt. App. Vol. 1 at 72; 78 Fed. Reg. at 53,062-63.

Vol. 1 at 123; 81 Fed. Reg. at 14,287-88. That increased projection expressly includes the cost to the federal government of ensuring continued access to water on federal grazing allotments.

To elaborate, after the Service provided public notice of the draft economic report, it received comments from its sister agency, the Forest Service, Southwestern Region. Fed. Aple. Supp. App. at 38. Those comments noted that the draft report's projected costs "d[id] not seem to take into account that often times fencing off riparian areas also fences off the water necessary to distribute livestock to other grazeable acreage within that pasture." *Id.* In order for grazing to continue at the levels the draft report predicted, "there would likely need to be water developments"—that is, infrastructure that would facilitate grazing cattle's continued access to water—should the agency fence some areas along streams that are currently used by cattle to protect the jumping mouse's critical habitat. *Id.* Such developments could include building cattle lanes that allow access to water while fencing off portions of the streambank, as well as piping water into areas that are fully fenced off from natural sources.

The comments provided a range of costs for providing such developments on the three affected National Forests, "from as low as $20,000 to as high as $50,000-$100,000." *Id.* Specifically, in Apache-Sitgreaves National Forest, "there are a minimum of nine pastures with access to water within proposed critical

habitat," five of which "would no longer be suitable" if fenced, "unless there was a major water development investment at each site," at a total cost of "$400,000-$500,000 for the five pastures." Fed. Aple. Supp. App. at 39. In Lincoln National Forest, the development projects needed "to mitigate the loss of water access to livestock due to fencing" would be "approximately $100,000" over four sites. *Id.* The "need and costs for water developments" in Santa Fe National Forest were "expected to be similar." Fed. Aple. Supp. App. at 40.

In response to those comments, the Service amended the forecasted costs of designation. 81 Fed. Reg. at 14,287-88. Specifically, the Service "conservatively assumed" that the water developments identified above "would be required as a result of the proposed critical habitat designation." *Id.* at 14,287. Taking the high-end of the range above, the Service estimated that it would cost the federal government approximately $1.5 million to ensure that grazing permittees would continue to have comparable access to water after designation of critical habitat. *Id.*

B. The Service's decision not to specifically consider the hypothetical cost of taking water rights was reasonable.

The Associations have not presented—and thus have forfeited—any argument that the Service's estimate of the cost of providing continued access to water is arbitrary and capricious. They nevertheless argue that the Service's analysis was deficient because it did not specifically consider the costs that would

accrue *if*, despite such expenditures, designation of critical habitat were to effect a taking of alleged private water rights. But the Service stated, repeatedly, why it did not offer the analysis of private water rights that the Associations desire: "We did not conduct an analysis of privately owned water rights *because it is beyond the scope of the environmental assessment and economic analysis*." 81 Fed. Reg. at 14,275 (emphasis added); *see also id.* at 14,281; Aplt. App. Vol. 2 at 226. That decision was reasonable on the record before the agency.

Whether any individual holds a private right to water—and thus whether any taking of such rights is even theoretically possible—is a deeply fact-driven question under the relevant New Mexico state law, which relies on facts not within the agency's possession. Under the governing prior appropriation doctrine, "water rights are both established and exercised by beneficial use, which forms 'the basis, the measure, and the limit of the right to use of the water.'" *Walker v. United States*, 142 N.M. 45, 51 (2007); *see also Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1213 (10th Cir. 1999). For that reason, establishing the existence of a water right requires more than a simple assertion, or even a showing that the claimant presently uses water in a particular way. Instead, the claimant must, among any other requirements, demonstrate continuous beneficial use predating any competing claim to the water. *See id.*; *Sacramento Grazing Ass'n, Inc. v. United States*, No. 04-786, 2021 WL 3124251, at *13 (Fed. Cl. July 26, 2021). The

burden to so demonstrate is substantial; indeed, as the Associations acknowledge in their opening brief, the Court of Federal Claims recently found that one of the Associations' members, the Sacramento Grazing Association, had *not* proven a vested water right with regard to their grazing allotment in Lincoln National Forest. *Id.* at *14-16.

Moreover, even where a water right has been established, whether particular governmental action constitutes a taking of that right requiring just compensation under the Fifth Amendment is also fact-dependent. The inquiry is particularly complex because under New Mexico law, water rights are "not tied to a particular location or even a particular source." *Walker*, 142 N.M. at 53. Thus, government action restricting access to one location where an individual has exercised a vested water right may not rise to the level of a taking, so long as the individual may access the same amount of water in a different location. *See id.* at 53, 55.

The Associations did not put facts before the Service from which the Service could have concluded that the Associations' members have vested rights to use water on federal allotments, or that the designation decision was likely to result in a taking of any such rights. True, certain individuals asserted without elaboration in their comments that the proposed designation would cause the government to take their water rights. Aplt. App. Vol. 1 at 144, 151. But those letters offered bare conclusions with no supporting facts. One asserted, in full, that the Service

"proposed to claim our private water & grazing rights." Aplt. App. Vol. 1 at 144. Another stated that "[t]he biggest true economic impact . . . is the loss of the stock water rights," that the commenter asserted without citation or any further explanation were "confirmed by the 1866 Mining Act and protected by the many public land laws passed by Congress since then." Aplt. App. Vol. 1 at 151; *see also* Aplt. App. Vol 1 at 68 (letter from university asserting without elaboration that "[o]n private and federally managed lands . . . water rights are privately held rights."); Fed. Aple. Supp. App. at 7, 18. These letters do not substantiate the members' claims of a vested right, nor explain how the designation could possibly extinguish any such rights, especially if the federal government builds the infrastructure discussed above to safeguard grazing permittees' continued access to water.

For these reasons, the Service's decision to consider the foreseeable costs of facilitating continued access to water, rather than the speculative possibility that alleged water rights would be taken, was a reasonable way of accounting for impacts to permittees' access to water. The Associations' arguments to the contrary are unavailing.

Most critically, the Association's assertion that the Service did not study the impacts on private water rights "because it believed one can only own water rights on private land, and not within the National Forest" is not supported by the record.

Op. Br. 33. Nowhere in the record does the Service make such an assertion. To the contrary, and as previously stated, the Service repeatedly stated that it did not consider whether private water rights existed because the question was simply "beyond the scope" of its analysis. *E.g.*, 81 Fed. Reg. at 14,275; *id.* at 14,281; Aplt. App. Vol. 2 at 226.

The language on which the Associations rely does not show otherwise. It is true that, in response to a request that the Service not designate critical habitat "if it would compromise water rights," the Service stated that the designation was unlikely to impact activities on *private* land, without mentioning possible impacts to water rights on *federal* lands. *Id.* at 14,283. But the Service did not say that such impacts are legally impossible; it simply did not discuss that hypothetical. *See id.* Similarly, in response to a comment opining that fencing riparian areas "represents an unconstitutional taking of private property water rights," the Service stated that it has not proposed to erect any fencing "on private lands." 81 Fed. Reg. at 14,276. But again, the Service did not state fencing on federal lands could never result in the taking of private water rights. *See id.* In both instances, the decision to explicitly discuss actions impacting land known to be in private ownership, while leaving aside any discussion of hypothetical private water rights on federal land, is consistent with the Service's decision not to adjudicate whether any such rights exist.

The Associations' remaining argument is that, even accepting that the record provided no evidence that the designation would take private water rights on federal land, the Service could not "*entirely* ignore" speculative impacts and should instead have offered a qualitative description of the potential impacts to water rights, as it did for the difficult-to-quantify benefits of the designation. Op. Br. 37. But the Associations overlook that the Service did *not* "entirely ignore" the possible effects of its action on asserted water rights. Rather, as discussed, the Service accounted for any such effects by other means—specifically, by considering the cost of providing continued access to water on the allotments, which costs would presumably mitigate the already-speculative possibility that a taking might occur. The record before the Service did not require it to assume based on bare assertions that hypothetical takings would impose costs in excess of what the Service had already studied.

III. The Service's decision not to exclude Units 3 and 4 should be upheld.

Turning from the economic impact analysis itself to the exclusion decisions grounded in that analysis, the Associations argue that the Service has not justified its decision not to exclude Units 3 and 4 from designation. As a threshold matter, the Associations have not demonstrated standing to challenge the designation of Unit 3. Even assuming the Associations have standing as to both units, however,

the Service adequately explained its exercise of discretion, and the Associations have forfeited the argument that a more detailed discussion was required.

A. The Associations have standing to raise this claim with regard to Unit 4 only.

To assert a claim in federal court, the "irreducible constitutional minimum of standing" requires a plaintiff to demonstrate that he or she suffered an "injury in fact" that is "fairly . . . trace[able]" to the challenged conduct and that is "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Organizational plaintiffs like the Associations must demonstrate, among other requirements, that their members can satisfy those elements. *Utah Ass'n of Ctys. v. Bush*, 455 F.3d 1094, 1099 (10th Cir. 2006). The party invoking federal jurisdiction bears the burden of establishing all three elements, "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. When briefing a petition for review of agency action, a petitioner may not rely on mere allegations, but must provide actual evidence of injury. *Qwest Commc'ns Int'l v. FCC*, 240 F.3d 886, 892-93 (10th Cir. 2001).

The Service does not dispute that the Associations have met their burden with regard to Unit 4, in light of the detailed supplemental declarations regarding that unit that the Associations submitted with their reply brief below. *See generally* Aplt. App. Vol. 3 at 592-601. But they have *not* met that burden with regard to

Unit 3, because the declarations the Associations submitted regarding that unit—which have never been supplemented—fail to adduce specific facts demonstrating injury to any member.

The Associations' declarants aver that their allotments overlap with Unit 3 to an unspecified extent. Aplt. App. Vol. 2 at 447, 457, 462, 466. But the administrative record shows that *no* allotment in Unit 3 will contain five percent or more critical habitat following designation, and the Associations do not contend otherwise. Aplt. App. Vol. 1 at 129. The Associations have not explained how designation of such a small percentage of the relevant allotments would be likely to impact their members' grazing operations—especially in light of record analysis assuming that ranchers will be able to shift grazing outside the designated area "at minimal cost" in allotments that contain less than five percent critical habitat. Aplt. App. Vol. 1 at 130.

The Associations' remaining assertions regarding Unit 3 similarly fail to substantiate an injury. Several declarants maintain that the erection of fences to protect critical habitat interferes with water rights. Aplt. App. Vol. 2 at 448, 458, 462, 466. But, in addition to failing to demonstrate that they have such rights (*see* pp. 36-38, *supra*), the declarants do not allege that fences have actually been (or imminently will be) erected on their allotments as a result of the designation—

merely that the government has posted fences at unspecified points in the past for unidentified reasons. *See id.*

Likewise, the declarants assert that designation of federal land subject to privately held grazing permits "lowers Rancher's property values." Aplt. App. Vol. 2 at 448, 458, 462, 467. But they do not present any specific evidence to show that their property value has dropped or is expected to. *See id.* True, the Service has acknowledged that costs to property owners "*may* result from public perception of how critical habitat regulations will be implemented," Aplt. App. Vol. 1 at 116, 119-20 (emphasis added), but standing "requires that the party seeking review be himself among the injured," *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). A finding that designation may generally impose costs on private landowners does not establish that these particular declarants have experienced a drop in property value—especially given that designation will impact only a small percentage of the relevant allotments. *Contra* Aplt. App. Vol. 4 at 811-12 (district court opinion).

For these reasons, the Associations' challenge to the Service's exclusion decision should be heard with regard to Unit 4 only.

B. The Service adequately explained its decision not to exclude either unit.

As the Supreme Court has recognized, the ESA "certainly confers discretion on the Secretary" over the ultimate decision whether to exclude areas meeting the statutory criteria from a critical habitat designation, even while courts are

empowered to review the Service's analysis supporting that decision. *Weyerhaeuser*, 139 S. Ct. at 371. Such review is limited, however, to determining whether the Service abused its statutorily conferred discretion. *See id.* at 371-72; *see also Bennett v. Spear*, 520 U.S. 154, 172 (1997). Likewise "narrow" is this Court's review of an agency's obligation to "give adequate reasons" for a decision: the Court will "determine only whether the [agency] examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made." *N.M. Health Connections*, 946 F.3d at 1162 (internal quotation marks omitted).

The Service satisfied that obligation here. It stated expressly that it was "not exercising [its] discretion to exclude any areas from this designation of critical habitat for the jumping mouse based on economic impacts" because its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." 81 Fed. Reg. at 14,307. The Service immediately followed that explanation with a reference to the extensive analysis of economic impacts found in the incremental-effects framework and draft report discussed above, providing a link to those materials. *Id.* The Service then briefly summarized the expected incremental costs (explaining that it expected those costs to be well under the $100 million threshold for economic significance set by Executive Order 12,866),

followed by the expected benefits (which it acknowledged were difficult to quantify). *Id.* at 14,307-08.

True, the Service did not list out each data point from the relevant reports that supported its conclusion in the exclusion discussion itself. But its reasons are readily discernable from the analyses the Service expressly referenced. *See, e.g.*, *Licon v. Ledezma*, 638 F.3d 1303, 1308 (10th Cir. 2011) ("We will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" (quoting *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007))); *see also* 5 U.S.C. § 706 ("the court shall review the whole record"). As discussed, those analyses show that the quantified incremental costs of designation would be just over $23 million in one year, of which all but a small fraction will be borne by the federal government. Aplt. App. Vol. 1 at 120, 123, 128-32; *see also* 81 Fed. Reg. at 14,287-88. The small fraction to be borne by private individuals mostly relate to grazing on federal allotments, but as the record demonstrates, *no* allotments overlapping Unit 3 will contain five or greater percent critical habitat. Aplt. App. Vol. 1 at 129. And only *one* unit overlapping Unit 4 will exceed that threshold—by less than one-third of one percent. *Id.*

On the other side of the balance, the analyses anticipate conservation gains for the endangered jumping mouse in excess of what would result from listing of the species alone. Aplt. App. Vol. 1 at 82-84, 141-42; *see also* Aplt. App. Vol. 2 at

258-64, 267-70. True, those benefits are primarily limited to imposing on federal agencies a duty not to adversely modify currently unoccupied designated habitat. *See* Aplt. App. Vol. 1 at 82-84. But the record shows that the jumping mouse is an "extreme habitat specialist" whose primary stressor is the lack of suitable or potentially suitable habitat. Aplt. App. Vol. 1 at 78-79, 82-83; *see also* 79 Fed. Reg. at 33,134-35. The Service also anticipates that designation may result in additional incremental benefits for other species and ecosystems. Aplt. App. Vol. 1 at 142; Aplt. App. Vol. 2 at 258-64, 267-70. On this record, it was not an abuse of discretion for the Service to conclude that the costs of designation are not disproportionate—especially given the ESA's overriding purpose to protect vulnerable species and their habitat. 16 U.S.C. § 1531.

The Associations nevertheless maintain that the Service's explanation is "fatally vague" because the Service did not explain what it weighed the costs of designation against. Op. Br. 45. The context described above makes clear, however, that the Service concluded that the costs of designation were not disproportionate *to its benefits*. *See* 81 Fed. Reg. at 14,307-08; *see also* Aplt. App. Vol. 1 at 71 (the Service "prepares an economic analysis" to "support its weighing of the benefits of excluding versus including an area").

Context likewise refutes the Associations' suggestion that the Service improperly used Executive Order 12,866's $100 million economic-significance

threshold as a hard test for determining whether the costs of the designation are disproportionate. *See* Op. Br. 46-47. Certainly, the Service noted that the expected costs of designation did not exceed that government-wide threshold. 81 Fed. Reg. at 14,307-08. But the Service did not articulate or apply any alleged "policy that it will decline to exclude areas merely because the costs do not exceed $100 million," Op. Br. 47; if it had, there would have been no need for the Service to invoke the benefits of the designation in explaining its exclusion decision, or indeed to study those benefits in the first place.

At bottom, the Associations fault the Service for deciding when costs are sufficiently disproportionate to justify exclusion on an ad-hoc basis, instead of defining by regulation a single standard that would apply across all designation decisions. *See* Op. Br. 46. But the Service may validly choose to implement the ESA on a case-by-case basis, determining on the facts of each matter that comes before it what the relevant threshold should be in the context of a particular species. *See In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*, 709 F.3d 1, 15 (D.C. Cir. 2013) (upholding the Service's practice of determining "what constitutes the 'foreseeable' future on a case-by-case basis in each listing decision"); *cf. Maier v. EPA*, 114 F.3d 1032, 1043 (10th Cir. 1997) (holding that the Clean Water Act allowed agency to impose relevant controls on a permit-by-permit basis rather than through generally applicable regulation). It

would be inappropriate for this Court to require that the Service follow an alternate approach that the relevant statutes themselves do not mandate. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524-25 (1978).

That the Service has, subsequent to the designation at issue here, enacted regulations more specifically describing the analytical principles the Service will apply when deciding whether to exclude units does not counsel otherwise. *See generally* 85 Fed. Reg. 82,376 (Dec. 18, 2020) (final rule); 85 Fed. Reg. 55,398 (Sept. 8, 2020) (proposed rule). The Service explained that it was adopting new standards "[t]o provide transparency about" decisions whether to exclude critical habitat from designation, in light of the Supreme Court's decision in *Weyerhaeuser* holding that such decisions are not entirely immune from judicial review. 85 Fed. Reg. at 55,399. But the fact that the Service wished to adopt a different approach does not mean that its prior approach was unlawful; to the contrary, the Service made clear that it was proposing "prospective standards only" and did not intend to call into question the sufficiency of any prior designation decision. *Id.*; 85 Fed. Reg. at 82,376.

For similar reasons, the fact that the Service believed when it issued the challenged decision that its choice whether to exclude parcels would be judicially unreviewable does not render that decision inherently suspect. *Contra* Op. Br. 49. Regardless of what degree of review it believed its decision might receive, the

Service provided a satisfactory explanation for that decision, which is rationally supported by the facts before it. *See N.M. Health Connections*, 946 F.3d at 1162. The Associations have not shown otherwise.

C. This Court could alternatively reject the Associations' arguments on the basis of administrative forfeiture.

For the foregoing reasons, the Service's decision not to exclude Units 3 and 4 was reasonable and reasonably explained, and can be upheld on that basis. The Service also notes, however, that this Court could alternatively resolve this issue by affirming the district court's conclusion that the Associations administratively forfeited their challenge. *See* Aplt. App. Vol. 4 at 874-78.

"[A]bsent exceptional circumstances, a reviewing court will not consider contentions which were not pressed upon the administrative agency" during the decision-making process. *Wilson v. Hodel*, 758 F.2d 1369, 1372-73 (10th Cir. 1985). Here, the Service identified the areas it was considering for exclusion and expressly asked the public to propose particular parcels that the Service should consider excluding. 79 Fed. Reg. at 19,308. Yet none of the Associations' members asked the Service to consider excluding Units 3 and 4 in full.

The Associations do not point to any place in the record where its members made such a request. Op. Br. 42-43. Instead, they argue that certain commenters sufficiently brought the possibility of excluding Units 3 and 4 to the Service's attention by expressing their view that designating critical habitat would harm

ranchers. *See id.* But accepting that a commenter is not obliged to recite "magic words" to avoid forfeiture, *id.* 41, there is a substantive difference between expressing opposition to designation generally and asking the Service to consider excluding particular units. The letters that the Associations cite do only the former. *See* Aplt. App. Vol. 1 at 148-49, 151-53, 154-55. And while other comments in the record do refer specifically to areas within Units 3 or 4, those comments challenge the scientific basis for those areas' designation and the Service's mode of economic analysis, rather than articulate a request that the Service use its discretion to exclude the areas. *See* Fed. Aple. Supp. App. at 1-5, 21-37, 41.

The Service interpreted only one comment in the record as a request to use its discretion to exclude any part of Units 3 or 4, and it provided a detailed answer for why that area in particular (Subunit 3C) should not be excluded in its answers to public comment. *See* 81 Fed. Reg. at 14,279-80. To the extent the Associations now seek a similarly fine-grained discussion of the remainder of Units 3 and 4—above and beyond the Service's adequate explanation for not excluding *any* unit on economic grounds, discussed above—they were obliged to request a determination regarding those specific parcels in their comments to the agency. *See US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1167 n.3 (10th Cir. 2012).

IV. The Associations are not entitled to an order vacating the designation of Units 3 and 4.

For the foregoing reasons, all of the Associations' challenges to the designation decision fail. Accordingly, this Court has no cause to consider what remedy would be appropriate if the Associations' challenges had merit. To the extent this Court does deem the question of remedy relevant, it can remand to the district court to choose a remedy in the first instance—or, because the district court has already indicated what remedy it would select, it can review that finding for abuse of discretion.[9] In either case, the Associations have not shown that they would be entitled to an order vacating designation of Units 3 and 4.

As many of this Court's sister circuits have recognized, while Section 706 of the APA states that a reviewing court "shall . . . set aside" unlawful agency action, 5 U.S.C. § 706, whether to grant a petitioner's request to vacate an agency rule is controlled by principles of equity. *E.g.*, *Natural Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289-91 (11th Cir. 2015); *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001); *Central Me. Power Co. v. Fed. Energy Regulatory Comm'n*, 252 F.3d 34, 48 (1st

[9] While this Court reviews the district court's decision whether the Service complied with the APA and ESA *de novo*, it reviews that court's denial of injunctive relief for abuse of discretion. *Ramos*, 1 F.4th at 777; *contra* Op. Br. 50.

Cir. 2001); *Central & Sw. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *Nat'l Wildlife Fed'n v. Espy,* 45 F.3d 1337, 1343 (9th Cir. 1995); *Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). That prevailing view is consistent with the statutory context in which Section 706 appears. *See* 5 U.S.C. § 702 ("[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground"); *see also id*. § 703 (referring to "actions for declaratory judgment," and thus demonstrating that remedies other than vacatur are available under the APA).

This Court has not held otherwise. To the contrary, it has described vacatur as "a common, and often appropriate form of injunctive relief"—not a mandatory one. *Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019). And in practice, it has sometimes reversed agency decisions and remanded directly to the agency without specifying that agency action should be vacated. *E.g.*, *Nat'l Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523, 1533-34 (10th Cir. 1993). Other times, it has left the decision of what relief to grant when agency action is deemed unlawful to the district court, without compelling vacatur. *See WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017).

Here, the district court correctly recognized that equitable relief like vacatur "does not follow from success on the merits as a matter of course," but instead is subject to a court's "equitable discretion." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *see* Aplt. App. Vol. 4 at 901-03. It channeled its discretion through the widely used *Allied-Signal* test, which considers "the 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. Under that test, "[v]acatur typically is inappropriate where it is 'conceivable' that the [agency] can, if given the opportunity, create a supportable rule." *Prometheus Radio Proj. v. FCC*, 824 F.3d 33, 52 (3d Cir. 2016); *see also Allied-Signal*, 988 F.2d at 151.

Applying the *Allied-Signal* factors, the district court concluded that vacatur was unwarranted. *See* Aplt. App. Vol. 4 at 903-14. While the Associations would evidently weigh the factors differently, they do not demonstrate that the district court's conclusion was an abuse of discretion. *See* Op. Br. 55-60.

With regard to the first factor, there can be no serious question that it is at least "conceivable" the Service could reach the same result on remand. *Allied-Signal*, 988 F.2d at 151. The Associations have never disputed that Units 3 and 4 satisfy the statutory definition of critical habitat; they only challenge how the Service supported its highly discretionary decision not to exclude those units.

Neither of the new regulations that the Associations now cite—which the Associations acknowledge the Service has announced plans to rescind—show that the Service's discretion on remand would be so constrained as to prevent the Service from designating Units 3 and 4 once again. *See* Op. Br. 57.

With regard to the second factor, the record amply supports the district court's conclusion that the benefits of keeping the designation decision in place outweigh the costs. *See* pp. 45-46, *supra*. In particular, the record shows—and the Associations have not disputed—that designation of Units 3 and 4 will yield incremental conservation benefits for a species whose current status is tenuous and whose risk of extinction is high. *See* Aplt. App. Vol. 1 at 84, 141-42; *see also* Aplt. App. Vol. 2 at 258-64, 267-70; 81 Fed. Reg. at 14,281-82. The district court was free to accord those impacts controlling weight, given that under the ESA "the balance has been struck in favor of affording endangered species the highest of priorities." *Tennessee Valley Authy. v. Hill*, 437 U.S. 153, 194 (1978).

For these reasons, there would be no reason for this Court to disturb the district court's conclusion that vacatur of the designation decision is unwarranted, even in the event that one or more of the Associations' challenges prevailed. Moreover, *any* relief in this case would be properly confined to the designation of Unit 4, given that the Associations have not demonstrated standing to challenge Unit 3. *See WildEarth Guardians*, 870 F.3d at 1240.

V. There is no cause to vacate the district court's alternate holding regarding water rights.

The Associations' final request is that this Court vacate a portion of the district court's decision concluding that the Associations' members have not demonstrated that the designation will result in a taking of private water rights. The Service agrees that it is unnecessary to conclusively adjudicate the existence of any private water rights in this APA action; the relevant question is instead whether the Associations' members introduced evidence of such rights into the record before the agency. *See* pp. 35-40, *supra*. The Service notes, however, that, in response to a post-judgment motion filed by the Associations on this issue, the district court clarified and limited its decision, making plain that the decision does *not* purport to decide whether the Associations' members could prove a taking of any water rights they may have in an open-record case. Aplt. App. Vol. 5 at 972-73. That clarifying language was proposed to the court by the Associations themselves. Aplt. App. Vol. 4 at 958, 964-65. On these facts, it is unclear how the district court abused its discretion in declining to further modify its opinion, nor what additional clarity striking the relevant section would afford.

CONCLUSION

For the foregoing reasons, this Court should affirm judgment for the Service.

Respectfully submitted,

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SEPTEMBER 15, 2021
90-8-6-08248

STATEMENT REGARDING ORAL ARGUMENT

Because this appeal involves questions of statutory interpretation and questions about the sufficiency of the Service's explanation for challenged agency action, the federal government believes that oral argument could aid this Court's resolution of the matter.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,976 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that all privacy redactions required under this Court's rules have been made.

I further certify that the filing was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Rachel Heron
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CERTIFICATE OF SERVICE

I hereby certify that this brief was filed with this Court's CM/ECF system on September 15, 2021, and all parties were served through that system.

s/ Rachel Heron
RACHEL HERON

No. 21-2019
ORAL ARGUMENT REQUESTED

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiff-Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Defendant-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY and WILDEARTH GUARDIANS,

Defendant-Intervenor 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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Intervenor Appellees Center for Biological Diversity and WildEarth Guardians state that they are non-profit organizations that do not have parent companies, subsidiaries, or affiliates that have issued shares of stock to the public in the United States or abroad.

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U.S. FISH AND WILDLIFE SERVICE, NEW MEXICO ECOLOGICAL SERVICES FIELD OFFICE, NEW MEXICO MEADOW JUMPING MOUSE (*ZAPUS HUDSONIUS LUTEUS*) 5-YEAR REVIEW: SUMMARY AND EVALUATION (Jan. 30, 2020) 6

STATEMENT OF RELATED CASES

There are no prior or related appeals to this litigation involving the U.S. Fish and Wildlife Service's designation of critical habitat for the New Mexico meadow jumping mouse.

GLOSSARY OF TERMS

APA	Administrative Procedure Act
Conservation Groups	Defendant-Intervenor Appellees
EO 12866	Executive Order 12866
ESA or Act	Endangered Species Act
Mouse	New Mexico meadow jumping mouse
Ranchers	Appellants
Service	U.S. Fish and Wildlife Service
UMRA	Unfunded Mandates Reform Act

STATEMENT OF ISSUES

1. Whether the U.S. Fish and Wildlife Service ("Service") erred when it analyzed the economic impacts associated with designating critical habitat for the New Mexico meadow jumping mouse ("mouse") in accordance with section 4(b)(2) of the Endangered Species Act ("ESA" or "Act") and its implementing regulations, including the economic impacts associated with Appellants Northern New Mexico Stockman's Association and Otero County Cattleman's Association's (collectively the "Ranchers") access to water in their grazing allotments.

2. Whether the Service abused its discretion when it weighed the benefits of designating the critical habitat units used by the Ranchers against the economic impacts and decided not to exclude those units from the final critical habitat designation.

STATEMENT OF THE CASE

I. Introduction

When the Service designated critical habitat for the mouse in 2016, it had determined that there was a high probability that the mouse would be extinct within the decade. Int.-Aplee. Supp. App. Vol. 1 at 109. Since the 1980s, the mouse's numbers have declined significantly and it has lost approximately 70 populations. Int.-Aplee. Supp. App. Vol. 1 at 111. With only 29 isolated populations remaining—11 of which have been compromised historically and in

the last decade by grazing, water shortages, wildfire, and post-wildfire flooding—the mouse's situation has not improved. Int.-Aplee. Supp. App. Vol. 1 at 111.

In order to prevent extinction, the mouse requires several resilient populations across different drainages in eight separate and geographically distinct management areas. Int.-Aplee. Supp. App. Vol. 1 at 109. In order to protect the habitat these populations would need, and in accordance with the mandates of the ESA, the Service designated critical habitat for the mouse on March 16, 2016. Aplt. App. Vol. 2 at 339. Finding unregulated livestock grazing to be "incompatible with the persistence of jumping mouse populations," Int.-Aplee. Supp. App. Vol. 1 at 201, the Service designated under 14,000 acres of critical habitat alongside approximately 170 miles of flowing water as essential to the mouse's survival and recovery. Aplt. App. Vol. 2 at 340.

In response, the Ranchers ask this Court to set aside the Service's critical habitat designation. Lacking any ground on which to challenge the best available science demonstrating that the mouse is in danger of extinction in the near future due to habitat loss and that the land designated as critical habitat is essential to the mouse's survival and recovery, the Ranchers argue that the Service failed to take into consideration the economic impacts of the critical habitat designation and that the Service abused its discretion when it failed to exclude the Ranchers' members' grazing allotments from the designation. The Service, however, carefully

considered the designation's probable economic impacts and did not abuse its discretion when it decided not to exclude the areas used by the Ranchers from the designation. As a result, this Court should uphold the mouse's critical habitat designation.

II. Factual and Legal Background

A. The New Mexico Meadow Jumping Mouse

In 1985, the Service recognized that the mouse was likely in need of protection under the Act. Int.-Aplee. Supp. App. Vol. 1 at 13. However, it was not until after WildEarth Guardians petitioned to list the mouse as an endangered or threatened species in 2008—citing grazing as the primary threat—that the Service took any action to list the mouse as endangered. Int.-Aplee. Supp. App. Vol. 1 at 14–15. Five years later, when the Service proposed endangered status for the mouse, the agency found that the species suffered from historic and ongoing habitat loss and fragmentation primarily due to grazing pressure, water management and use, lack of water, and wildfire. Int.-Aplee. Supp. App. Vol. 1 at 101, 103–104. In 2014, the Service finally listed the mouse as endangered, affirmed its previous findings, and found that 11 of 29 remaining populations had been "substantially compromised since 2011 (due to water shortages, excessive grazing, or wildfire and postfire flooding)," and possibly extirpated. Aplt. App. Vol. 1 at 156, 158.

The mouse's precarious state is due to its unique needs. Aplt. App. Vol. 1 at 157–59. The mouse hibernates for up to nine months a year, leaving it only a narrow time frame each summer to mate, reproduce, and gain enough weight to survive its long hibernation. Aplt. App. Vol. 1 at 157. The mouse's short lifespan, coupled with its relatively low reproductive rate, limits its ability to replenish its population. *Id*. As a result, even a single bad year can be dire for a local population. *Id*.

Given its unique needs, the mouse has "exceptionally specialized habitat requirements[,]" including tall, dense vegetation and forbs found only in wetlands along perennial flowing water. Aplt. App. Vol. 1 at 157–58. This vegetation provides the mouse with sufficient nutrients to survive the winter and material to construct its nest in upland areas adjacent to the wetland outside of the floodplain in which the mouse raises its young and hibernates. Aplt. App. Vol. 1 at 158, Int.-Aplee. Supp. App. Vol. 1 at 110.

Historically found in riparian wetlands alongside streams in parts of southern Colorado, central New Mexico, and eastern Arizona, the mouse requires sufficient habitat to support healthy populations. Aplt. App. Vol. 1 at 157–58. This habitat needs to be connected to other habitat to allow for daily and seasonal movements. Aplt. App. Vol. 1 at 158. Without dispersed populations, the mouse is threatened by stochastic, i.e., random, events that may cause the extirpation of

local populations, such as drought, wildfire, and floods. Aplt. App. Vol. 1 at 158, 171.

The mouse is also "highly vulnerable to extirpations when habitat is lost and fragmented." Aplt. App. Vol. 1 at 158. Unfortunately, the mouse's habitat has been devastated, Aplt. App. Vol. 1 at 159, and "past and current habitat loss has resulted in the extirpation of historic populations, reduced the size of existing populations, and isolated existing small populations." Int.-Aplee. Supp. App. Vol. 1 at 112. The main threats to the mouse's habitat are from grazing, which eliminates or degrades the vegetation on which the mouse relies; water management and use; drought; and wildfire. Aplt. App. Vol. 1 at 159, Int.-Aplee. Supp. App. Vol. 1 at 112. The latter two threats are exacerbated by the effects of climate change. Aplt. App. Vol. 1 at 159. As a result of these threats, the "distribution and abundance of the [mouse] has declined significantly rangewide." Aplt. App. Vol. 1 at 158.

Of most relevance to this case, the mouse "has been and continues to be negatively affected by domestic livestock grazing[,]" the impacts of which include "trampling of streambanks, burrow collapse, loss of riparian cover, soil compaction, modification of riparian plant communities, lowering water tables, and the resulting microclimatic changes[.]"[1] Int.-Aplee. Supp. App. Vol. 1 at 195.

[1] The Service recently affirmed that "[l]ivestock grazing continues to be the major source of habitat destruction." U.S. FISH AND WILDLIFE SERVICE, NEW MEXICO

Grazing also results in "herbaceous removal, physical damages to plants, and changes in fluvial processes." Int.-Aplee. Supp. App. Vol. 1 at 195. The mouse is disproportionately impacted by grazing because "cattle tend to concentrate their activity in riparian habitat," and because "[g]razing particularly reduces the amount of food available to jumping mice in the late summer just prior to hibernation, which can limit the accumulation of sufficient fat reserves needed to survive." Int.-Aplee. Supp. App. Vol. 1 at 195–96. The difference between areas that are impacted by grazing and areas that are not is stark:

Int.-Aplee. Supp. App. Vol. 1 at 196 (above left; noting "headcutting outside of the Aqua Chiquita livestock enclosure" prior to the designation of critical habitat); Int.-Aplee. Supp. App. Vol. 1 at 197 (above right; comparing an area protected

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ECOLOGICAL SERVICES FIELD OFFICE, NEW MEXICO MEADOW JUMPING MOUSE (*ZAPUS HUDSONIUS LUTEUS*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 5 (Jan. 30, 2020), *available at* https://ecos.fws.gov/docs/tess/species_nonpublish/2936.pdf.

from grazing to an area with active grazing and no protection prior to the designation of critical habitat); *see also* Int.-Aplee. Supp. App. Vol. 1 at 200 (showing the loss of suitable habitat within three months due to livestock grazing prior to the designation of critical habitat). Ultimately, the mouse "does not persist in areas when its habitat is subjected to heavy livestock grazing pressure." Int.-Aplee. Supp. App. Vol. 1 at 197.

Consequently, "in order to ensure the subspecies' viability its habitat must be protected and restored particularly in areas less vulnerable to the potential effects of climate change." Int.-Aplee. Supp. App. Vol. 1 at 113. To protect and restore the mouse's essential habitat, to reverse this habitat's historic and cumulative destruction, and to fulfill the Act's mandates, the Service designated critical habitat for the mouse on March 16, 2016. Aplt. App. Vol. 2 at 339. In doing so, the Service sought to protect essential habitat to ensure both the survival and eventual recovery of the mouse. Aplt. App. Vol. 2 at 340, 373.

Given the mouse's imperiled state, it needs to recolonize lost habitat because "the areas occupied by the mouse since 2005 do not contain enough suitable, connected habitat to support resilient populations of jumping mouse," Aplt. App. Vol. 2 at 370. In order to protect its existing habitat and to recover lost habitat, the Service designated as critical habitat areas both occupied and unoccupied by the

mouse, as well as partially occupied areas.[2] Aplt. App. Vol. 2 at 370–72. Specifically, it found unoccupied areas necessary because "the survival and recovery of the subspecies [requires] expanding the size of currently occupied areas containing suitable habitat into currently unoccupied areas[,]" Aplt. App. Vol. 2 at 350, and because protecting currently unoccupied areas "allow[s] for the expansion of the existing populations and … the establishment of new populations." Aplt. App. Vol. 2 at 354; *see also* Aplt. App. Vol. 2 at 370–71 ("The inclusion of essential but unoccupied areas will not only protect these areas and provide habitat for population expansion from the 29 locations documented since 2005, but also provide sites for possible future reintroduction that will improve the subspecies' status through added population resiliency."). Ultimately, the Service designated approximately 14,000 acres of habitat divided into eight units as "essential to the conservation of the jumping mouse." Aplt. App. Vol. 2 at 340, 375–81. The Ranchers' members graze cattle on Units 3 and 4. Aplt. App. Vol. 1 at 17–18.

When the Service designated the mouse's critical habitat, it analyzed the potential economic impacts of the designation in accordance with section 4(b)(2) of the ESA and its implementing regulations. Aplt. App. Vol. 2 at 340. The Service

[2] "Partially occupied areas" consist of occupied areas and "unoccupied areas immediately adjacent" to them. Aplt. App. Vol. 2 at 348.

made this economic impact analysis available to the public and provided an opportunity for comment. Aplt. App. Vol. 2 at 340. After thoroughly reviewing the public's comments, Aplt. App. Vol. 2 at 360–66, the Service found that there would be no "disproportionate economic impacts resulting from the designation" and decided not to exclude Units 3 and 4 from the critical habitat designation. Aplt. App. Vol. 2 at 359, 383–84.

B. The Endangered Species Act and Its Implementing Regulations

The ESA requires the Service, "to the maximum extent prudent and determinable," to designate critical habitat for listed species. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C); 50 C.F.R. § 424.12(a). Critical habitat is defined as the "specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection[,]" 16 U.S.C. § 1532(5)(A)(i), as well as the "specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the [Service] that such areas are essential for the conservation of the species." *Id*. § 1532(5)(A)(ii).

"A critical-habitat designation does not directly limit the rights of private landowners. It instead places conditions on the Federal Government's authority to effect any physical changes to the designated area, whether through activities of its

own or by facilitating private development." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 365–66 (2018). The Service now recognizes that this "provides significant regulatory protections" such as "the requirement that Federal agencies consult with the Services under section 7(a)(2) of the Act to ensure that their actions are not likely to destroy or adversely modify critical habitat." Aplt. App. Vol. 2 at 95. "The designation of critical habitat ensures that the Federal Government considers the effects of its actions on habitat important to species' conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat." *Id.*

When promulgating a final critical habitat designation for a listed species, the Service must rely on the best scientific data available and take into consideration the economic impact, and any other relevant impact, of designating critical habitat. 16 U.S.C. § 1533(b)(2). In 2013, the Service codified its "incremental" approach to analyzing the economic impacts of critical designations. Aplt. App. Vol. 2 at 94–112. In doing so, the Service stated that it "will consider impacts at a scale that the [Service] determines to be appropriate, and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described." 50 C.F.R. § 424.19(b). The first part of this subsection "clarifies that the [Service] has the discretion to determine the scale at which impacts are considered … based on what would most meaningfully or sufficiently

inform the decision in a particular context." Aplt. App. Vol. 2 at 98. The second part "clarifies that impact analyses evaluate the incremental impacts of the designation." *Id.* "[T]he incremental impacts are those probable economic, national security, and other relevant impacts of the proposed critical habitat designation on ongoing or potential Federal actions that would not otherwise occur without the designation," or, stated another way, "the probable impacts on Federal actions for which the designation is the 'but for' cause." *Id.*

The Service found that this approach is "the only logical way to implement the Act[,]" because "[t]he only purpose of the impact analysis is to inform the Secretary's decision about whether to engage in the discretionary exclusion analysis under section 4(b)(2) of the Act. *Id.* Thus, "[t]o understand the difference that designation of an area as critical habitat makes and, therefore, the benefits of including an area in the designation or excluding an area from the designation, one must compare the hypothetical world with the designation to the hypothetical world without the designation." *Id.* The third part clarified that "there is no absolute requirement that impacts of any kind be expressed numerically." *Id.*

After considering the economic impacts of a critical habitat designation, the Service "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and

commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2) (emphasis added). "In identifying those benefits, … the Secretary may assign the weight given to any benefits relevant to the designation of critical habitat." 50 C.F.R. § 424.19(c).

III. Procedural Background

The Ranchers filed a petition for review and complaint for declaratory and injunctive relief on December 6, 2018, alleging that: (1) the Service's economic impact analysis violated the ESA and ran afoul of Tenth Circuit precedent, (2) the Service failed to adequately analyze the economic impact of the mouse's critical habitat designation to the Ranchers' members' alleged water rights; and (3) the Service abused its discretion in not excluding the Units 3 and 4, the two critical habitat units its members allegedly graze their cattle on, from the critical habitat designation. Aplt. App. Vol. 1 at 27–34. The District Court found that the Ranchers had standing to bring their claims but dismissed all of them. Aplt. App. Vol. 4 at 681–920.

SUMMARY OF ARGUMENT

Recognizing the existential threat habitat loss poses to the mouse, the Service designated habitat essential to the mouse's survival and recovery. Before doing so, it analyzed the economic impacts of the mouse's critical habitat

designation, including impacts on the Ranchers' access to water on the critical habitat units grazed by them. Weighing the significant ecological benefits for the mouse—essentially the species' continued survival and any hope of recovery—against those economic impacts, the Service exercised its considerable discretion and found that the benefits of inclusion outweighed the benefits of exclusion.

The Ranchers assert that the Service's economic impacts analysis failed to comply with the ESA because it did not consider costs beyond those caused by the critical habitat designation—such as costs associated with restrictions that would be put in place regardless of whether the Service designated critical habitat for the mouse because of the mouse's status as an endangered species under the Act. In essence, the Ranchers argue that the Service should analyze economic impacts that would occur even if critical habitat were never designated and use that analysis to determine whether to exclude an area from a critical habitat designation, even though it would not alleviate those economic impacts. They also argue that the Service failed to analyze the economic impacts the critical habitat designation would have on their putative water rights and failed to explain why it decided not to exclude the critical habitat units on which the Ranchers graze their cattle. They therefore ask this Court to eliminate critical habitat protections on those units.

The Ranchers' arguments all fail. The Service adequately analyzed the economic costs resulting from the critical habitat designation, including potential

impacts to the Ranchers' ability to access water on their grazing allotments, in accordance with the Act and its implementing regulations. The Service also did not abuse it considerable discretion when it found that the benefits of including Units 3 and 4 in the designation outweighed any economic impacts. As a result, this Court should uphold the Service's designation of critical habitat for the mouse.

If this Court does find in favor of the Ranchers, it should keep the mouse's critical habitat designation in place during remand because any lapse in protections, however brief, may be catastrophic for the mouse. In the alternative, this Court should vacate only the aspects of the critical habitat designation that affect the Ranchers and should order the Service to revisit whether to designate or exclude those areas by a date certain.[3]

[3] The Conservation Groups take no position on the Ranchers' request to vacate portions of the District Court's Opinion and Order that purport to adjudicate the status of the Ranchers' purported grazing and water rights.

ARGUMENT

STANDARD OF REVIEW

The standard for judicial review of agency determinations under the ESA is governed by the "arbitrary [or] capricious" standard set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1998). Under this standard, this Court determines whether an agency's "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *see also Weyerhaeuser*, 139 S. Ct. at 371–72 (holding that a court's review of the Service's assessment of the costs and benefits of a critical habitat designation pursuant to section 4(b)(2) of the ESA is reviewable for "abuse of discretion"); *Colo. Wild. v. U.S. Forest Serv.*, 435 F.3d 1204, 1213–14 (10th Cir. 2006) ("It is not [the court's] duty … to substitute [its] judgment for that of the agency's on matters within its expertise.") (citation omitted). Hence, an agency's decision under the ESA is presumed to be valid in the first instance and should be upheld even if the Court might have decided the issue differently. *See Overton Park*, 401 U.S. at 415–16.

I. The Service Adequately Considered the Economic Impacts Associated with the Mouse's Critical Habitat Designation.

When designating critical habitat for the mouse, the Service correctly considered the economic impacts associated with the critical habitat designation—

that is, the "probable impacts … for which the designation is the 'but for' cause." Aplt. App. Vol. 1 at 98. In response, the Ranchers argue that the Service underestimated the economic impacts of the critical habitat designation by excluding "coextensive costs,"—i.e., costs attributable to something other than the critical habitat designation itself, Aplt. Opening Br. at 18—as well as costs associated with alleged stock water rights. *Id.* at 32–39.

The Ranchers' argument that the Service is *required* to consider coextensive costs when analyzing the economic impacts of the mouse's critical habitat designation must fail because it is contrary to the plain language of the Act. Additionally, the primary basis of the Ranchers' argument—this Court's opinion in *N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001)—cannot carry the weight they ask of it. That is because since the Tenth Circuit handed down its opinion, the regulations on which it was based have changed and the Service has since codified its incremental effects approach to analyzing the economic impacts of critical habitat designations. Finally, the Service adequately considered the probable economic costs associated with providing access to water for cattle.

A. The Ranchers' Coextensive Costs Approach to Analyzing the Economic Impacts of Critical Habitat Designations Violates the Plain Language of the Act.

The Ranchers' argument that section 4(b)(2) requires the Service to consider the coextensive costs of a critical habitat designation—i.e., costs that result from something other than the critical habitat designation—violates the plain language of the ESA, which orders the Service to analyze the costs "*of specifying any particular area as critical habitat*" so that it can determine whether the costs of designating an area as critical habitat outweigh the benefits. 16 U.S.C. § 1533(b)(2) (emphasis added). This Court has held that this language "is plain in requiring *some kind* of consideration of economic impact in the [critical habitat designation] phase." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285 (emphasis added). This Court has also held that certain approaches violate the plain language of the Act. *See id.* (rejecting an approach that rendered the Service's economic impact analysis "essentially without meaning"); *see also infra* I.B. This Court should additionally hold that the Ranchers' "coextensive approach" is contrary to the plain language of the Act.

The plain language of the Act is silent regarding how the Service should "consider[] the economic impact . . . of specifying any particular area as critical habitat," but it speaks clearly when directing the Service to consider *only* impacts associated with the critical habitat designation itself. 16 U.S.C. § 1533(b)(2).

Congress could have easily said that the Service was to "tak[e] into consideration the economic impact . . . [of listing the species, of any other concurrent environmental regulations, and of] specifying any particular area as critical habitat." The fact that Congress did not do so is strong evidence that it did not intend the Service to do so either. *See Ill. Pub. Telcoms. Ass'n v. FCC*, 752 F.3d 1018, 1023 (D.C. Cir. 2014) (Kavanaugh, J.) (holding that the D.C. Circuit would "not read into the statute a mandatory provision that Congress declined to supply"); *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions [in statutes] transcends judicial functions.") *see also Stark-Romero v. AMTRAK Co.*, 763 F. Supp. 2d 1231, 1273 (D.N.M. 2011) (noting that if Congress intended a specific result, it would have said so). While the Act is ambiguous as to the methodology the Service should use when considering a designation's economic impacts, the statute is unambiguous as to what impacts should be considered—the impacts "of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).[4]

[4] There is no legal basis for the Ranchers' claim that the designation of critical habitat "increases the risk that one will violate the 'take' provision of the ESA." Op. Br. at 22. The sources the Ranchers cite instead stand for the unremarkable finding that section 9's prohibition on "taking" a listed species extends to actions that modify habitat "that result[] *in actual injury or death to members* of an endangered or threatened species," *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697 (1995) (emphasis added)—not any action that modifies designated critical habitat.

B. The "Root of the Problem" in *N.M. Cattle Growers Ass'n* Has Been Cut.

At its core, the Ranchers' argument that the Service's incremental economic impacts analysis violates the Act stands or falls on whether the Tenth Circuit's analysis in *N.M. Cattle Growers Ass'n* still controls the outcome of this case. Aplt. Opening Br. at 18–28. It does not, however, because the Service has since amended the policies and regulations that were then at the "root of the problem."

In *N.M. Cattle Growers Ass'n*, appellants challenged the southwestern willow flycatcher's critical habitat designation, arguing (amongst other claims) that the Service's then so-called "baseline approach" to analyzing the economic impacts of the designation violated the ESA. 248 F.3d at 1280. The Service's baseline approach moved any economic impact attributable to the listing of a species "below the baseline and, when making the [critical habitat determination], [took] into account only those economic impacts rising above the baseline"—i.e., the additional economic impacts of designating an area as critical habitat. *Id.* Using the baseline approach, the Service determined that the flycatcher's critical habitat designation "resulted in no economic impact" because it would not "result in [any] additional protection for the flycatcher nor have any additional economic effects beyond those that may have been caused by listing and by other statutes." *Id.*

The reason the Service found that there would be no additional economic impacts, and the "root of the problem" as the Tenth Circuit saw it, was due to the

Service's then "long held policy position that [critical habitat designations were] unhelpful, duplicative, and unnecessary." *Id.* at 1283. This position, in turn, was due to the regulations implementing section 7 of the ESA at the time. Section 7 requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to *jeopardize* the continued existence of any endangered species or threatened species *or* result in the destruction or *adverse modification* of habitat of such species[.]" 16 U.S.C. § 1536(a)(2) (emphasis added). The Service's regulations at the time conflated the standards for "jeopardy" and "adverse modification" such that the jeopardy standard "fully encompass[ed] the adverse modification standard[,] render[ing] any purported economic analysis done utilizing the baseline approach virtually meaningless." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285; *Colorado v. U.S. Fish & Wildlife Serv.*, 362 F. Supp. 3d 951, 988 (D. Colo. 2018) ("The Tenth Circuit's primary reason for rejecting the baseline approach was that … 50 C.F.R. § 402.02[(2001)] rendered the approach 'meaningless.'"). As a result, the Service believed that designating critical habitat provided no more protection than listing, and the Service would therefore almost never find any additional economic costs associated with designation itself.

The Tenth Circuit found this approach "render[ed] any purported economic analysis … virtually meaningless." 248 F.3d at 1285. "[C]ompelled by the canons

of statutory interpretation to give some effect to the congressional directive that economic impacts be considered at the time of critical habitat designation[,]" the Tenth Circuit therefore rejected "the baseline approach." *Id.* Pursuant to the Tenth Circuit's guidance in *N.M. Cattle Growers Ass'n*, "between 2002 and 2007, the Services generally did not conduct an incremental analysis; instead, they conducted a broader analysis of impacts." Aplt. App. Vol. 1 at 98.

Much has changed since the issuance of *N.M. Cattle Growers Ass'n*. Critically, the regulations implementing section 7 of the Act that had "been the cause of much confusion," *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285, have been invalidated. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001) (holding that because of "the manifest inconsistency between 50 C.F.R. § 402.02 and Congress' 'unambiguously expressed intent' in the ESA, . . . the regulation's definition of the destruction/adverse modification standard [was] facially invalid"); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069–71 (9th Cir. 2004) (same). Following the opinions of this Court's sister circuits, the Service amended the regulatory definition of adverse modification through notice-and-comment rulemaking such that the adverse modification standard now encompasses more actions than the jeopardy standard. *See* 50 C.F.R. § 402.02 (2016) (as amended by Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016)).

Although the Ranchers attempt to downplay this amendment, characterizing it as a "slight change," Aplt. Opening Br. at 25, in truth it is critical. As the district court below observed, the Service's regulatory amendment "fundamentally altered how [the Service] conducts economic-impact analysis between the time *N.M. Cattle Growers Ass'n* was decided and now," Aplt. App. Vol. 4 at 849, because the updated definition allowed the Service to define and assess the incremental effect of critical habitat designation as distinct from the impact of listing. 81 Fed. Reg. at 7214–7217 (explaining the Service's updated approach to analyzing whether an action is likely to adversely modify designated critical habitat).

This regulatory change eliminates the predicate for the Tenth Circuit's analysis in *N.M. Cattle Growers Ass'n* because the Service's use of the incremental effect approach to economic analysis no longer renders its economic analysis "essentially without meaning." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285; *see also Colorado v. U.S. Fish & Wildlife Serv.*, 362 F. Supp. 3d at 988 ("The Tenth Circuit's primary reason for rejecting the baseline approach was that … 50 C.F.R. § 402.02[(2001)] rendered the approach 'meaningless.'"). Instead, the Service now recognizes that critical habitat helps federal agencies "focus their conservation programs and use their authorities to further the purposes of the Act[;]" "helps focus the efforts of other conservation partners[;]" and "provides early

conservation planning guidance to bridge the gap until the Service can complete more thorough recovery planning." Aplt. App. Vol. 1 at 95.

Additionally, critical habitat "provides a significant regulatory protection" by ensuring "that the Federal Government considers the effects of its actions on habitat important to species' conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat." *Id*. The Service has also noted that "[t]his benefit should be especially valuable when," in cases such as this one, "protection of unoccupied habitat is essential for the conservation of the species." *Id.*; *see also* Aplt. App. Vol. 2 at 372 (finding unoccupied areas essential to the mouse's recovery). As proof of concept that the Service's economic impact analysis is no longer meaningless, the Service in this case found that the mouse's critical habitat designation would result in $23 million of economic impact associated with grazing. Aplt. App. Vol. 2 at 363.

Indeed, since the issuance *Gifford Pinchot Task Force* invalidating the Service's section 7 regulations at issue in *N.M. Cattle Growers Ass'n*, no court outside of the Tenth Circuit has relied on the reasoning in *N.M. Cattle Growers Ass'n.* In light of these intervening changes, the Ninth Circuit explicitly rejected "the Tenth Circuit's approach in *New Mexico Cattle Growers Association* as relying on a faulty premise and h[e]ld that the FWS may employ the baseline approach in analyzing the critical habitat designation." *Ariz. Cattle Growers' Ass'n*

v. Salazar, 606 F.3d 1160, 1173 (9th Cir. 2009). Elaborating, the Ninth Circuit found the "co-extensive" approach less logical than the "baseline" approach, because "[t]he very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made." *Id.* Accordingly, because the "root of the problem" has been cut away, this Court's decision in this case is not dictated by *N.M. Cattle Growers Ass'n*.

C. The Service's Codified Incremental Effects Approach Is Based on a Permissible Construction of the ESA and Must be Given Deference.

The Service's amendment of section 7's implementing regulations eroded the foundation on which the Tenth Circuit built its analysis in *N.M. Cattle Growers Ass'n.* The Service's subsequent codification of the incremental effects approach to analyzing the economic impacts of designating critical habitat through notice-and-comment rulemaking following *N.M. Cattle Growers Ass'n*, however, is also fatal to Appellants' claims because "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus *leaves no room* for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (emphasis added). If not, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Chevron, U.S.A. v. NRDC, 467 U.S. 837, 844 (1984). Therefore—because (1) the Tenth Circuit in *N.M. Cattle Growers Ass'n* did not find that the ESA left "no room for agency discretion," (2) the statute is ambiguous as to how the agency should analyze the economic impacts of a critical habitat designation, and (3) the Service has formally promulgated a reasonable approach to conducting that analysis—the Service's incremental effects approach in this case must be upheld.

1. The Tenth Circuit in *N.M. Cattle Growers Ass'n* Did Not Find that the ESA Left "No Room for Agency Discretion."

As an initial matter, the Tenth Circuit in *N.M. Cattle Growers Ass'n* found *Chevron* deference inapplicable to the Service's baseline approach because it had not then "undergone a formal rulemaking process." 248 F.3d at 1281. As explained above, because the agency's economic impact analysis at that time was "rendered essentially without meaning" by the then-extant section 7 regulations, the Tenth Circuit held that "the baseline approach to economic analysis is not in accord with the language or intent of the ESA." *Id.* at 1285. Given the circumstances, the Tenth Circuit concluded that "Congress intended that the FWS 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." *Id.*

The Tenth Circuit never found that the coextensive economic impact analysis advanced by the Ranchers "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982.

Rather, the Tenth Circuit found that "[t]he statutory language is plain in requiring *some kind* of consideration of economic impact" when designating critical habitat. *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285 (emphasis added). In doing so, the Tenth Circuit left the Service room to codify a method of considering the economic impact of designating critical habitat as long as Congress had not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.

2. Congress Left it to the Service to Determine How to Analyze the Economic Impacts of Designating an Area as Critical Habitat.

The language of section 4(b)(2) of the Act is clear in requiring the Service to analyze the economic impacts of a critical habitat designation. 16 U.S.C. § 1533(b)(2). But "[t]he ESA is silent on the method the Service must use when assessing" those impacts. *Colorado v. U.S. Fish & Wildlife Serv.*, 362 F. Supp. 3d at 988. That silence affords the Service significant discretion in deciding how to conduct its economic impact analysis.

When statutory language is ambiguous, "a court can then resort to legislative history as an aid to interpretation." *N.M. Cattle Growers Ass'n*, 248 F.3d at 1282 (quoting *United States v. Simmonds*, 111 F.3d 737, 742 (10th Cir. 1997)). The legislative history explains that the ESA's economic impact provision—added as part of the ESA Amendments of 1978, Pub. Law No. 95-632, 92 Stat. 3751 (1978)—affords the Service great discretion when considering the economic

impacts of designation. *See* H.R. Rep. No. 95-1625, at 17 (1978) ("With the addition of this new paragraph, … [e]conomics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. The Secretary is not required to give economics or any other "relevant impact" predominant consideration in his specification of critical habitat … . The consideration and weight given to any particular impact is completely within the Secretary's discretion.").

The Ranchers argue that this same legislative history—requiring the Service to "take[] into account the economic impacts of listing such habitat as critical"—commands the Service to consider economic impacts beyond those associated with the designation of critical habitat. Aplt. Opening Br. at 19–21 (quoting H.R. Rep. No. 97-567, 1982 U.S.C.C.A.N. 2807). None of the legislative history they cite to, however, states that Congress intended the Service to consider the economic impacts associated with the listing of a species, or any other environmental regulations, when designating critical habitat.[5] Accordingly, Congress has not

[5] The Ranchers also cite *Bennett v. Spear* for the proposition that the purpose of the 1978 and 1982 amendments was to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." Op. Br. at 21 (citing *Bennett v. Spear*, 520 U.S. 154, 176–77 (1997)). The Supreme Court was referring, however, not to section 4(b)(2)'s economic impact analysis but section 7's "best available science" requirement. This, the Supreme Court found, was "intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations." *Id.* at 177. To the extent relevant,

spoken directly to how the Service is to analyze the economic impacts of a critical habitat designation, and this Court's inquiry cannot stop at *Chevron* step one.

3. The Incremental Effects Approach is a Reasonable and Permissible Interpretation of the Act that Warrants *Chevron* Deference.

Since the Tenth Circuit did not find that the ESA left "no room for agency discretion," *Brand X*, 545 U.S. at 982, and the statute is silent regarding the methodology the Service should use when conducting that analysis, the Service was free to promulgate a reasonable interpretation following *N.M. Cattle Growers*. Such an interpretation is due *Chevron* deference if "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227.

There can be no question that Congress delegated authority to the Service to issue regulations carrying the force of law and the Ranchers do not argue

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this reinforces the fact that when conducting an economic impact analysis—regardless of type—the Service must rely on the best scientific and commercial data available. *Id.* at 172. The Supreme Court never addressed how the Service should analyze that economic impact.

otherwise. There can also be no question that the Service promulgated the current regulations adopting the incremental impacts approach to analyzing the economic impacts of a critical habitat designation through the APA's rulemaking procedures following *N.M. Cattle Growers Ass'n* pursuant to the authority given to it by Congress to interpret the ESA. *See* Aplt. App. Vol. 1 at 94, 105, 112; *Colorado v. U.S. Fish & Wildlife Serv.*, 362 F. Supp. 3d at 988 (finding *N.M. Cattle Grower Ass'n* "outdated and inapplicable" because "the Service has promulgated, following formal rulemaking procedures, a new method for conducting an economic impact analysis—the 'incremental impacts' approach"); *see also Sinclair Wyo. Refin. Co. v. U.S. EPA*, 874 F.3d 1159, 1164 (10th Cir. 2017) (noting that agency interpretations "produced via informal notice-and-comment rulemaking" are entitled to *Chevron* deference).

In the current regulations, the Service set forth its approach to analyzing the economic impacts of a critical habitat designation and stated that it "will consider the probable economic … impacts of the designation upon proposed or ongoing activities[,] … and will compare the impacts with and without the designation." 50 C.F.R. § 424.19(b). In so doing, the Service will "determine the incremental impacts of designating critical habitat" by comparing "the protections provided by the critical habitat designation (the world with the particular designation) to the combined effects of all conservation-related protections for the species and its

habitat in the absence of the designation of critical habitat (the world without designation, i.e., the baseline condition including listing)." Aplt. App. Vol. 1 at 98. The Service found this approach to be "the only logical way to implement the Act," since it was the only meaningful way to inform a decision regarding whether to exclude an area from designation. Aplt. App. Vol. 1 at 98.[6] If the area would be excluded from designation, but the economic impacts would remain, the exclusion would be irrelevant. *Id.*; *see also Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1173.

When promulgating the current regulations, the Service explicitly addressed *N.M. Cattle Growers Ass'n* and found that the invalidation of the Service's prior section 7 regulations "eliminated the predicate for the Tenth Circuit's analysis." Aplt. App. Vol. 1 at 98–99. It also noted that ever since the Ninth Circuit's opinion in *Gifford Pinchot* invalidating the Service's then-extant section 7 regulations, the Service had been using an incremental economic impacts analysis in line with an opinion authored by the Solicitor of the Department of the Interior. *See, e.g.*, *id*. at 95 (citing M-37016, THE SECRETARY'S AUTHORITY TO EXCLUDE AREAS FROM A

[6] Ironically, the Ranchers accuse the Service of violating "its own stated procedures" when the Service followed its own duly promulgated regulations rather than a sentence summarizing the Tenth Circuit's opinion in *N.M. Cattle Growers Ass'n* and its impacts in a memorandum prepared for a contractor to produce an economic impacts analysis. Aplt. Opening Br. at 31. This memorandum, however, predated the Service's codification of the incremental effects approach. Regardless, a "memo [that] was not duly promulgated as a regulation … does not have the force and effect of law." *Garnes v. Colony Holding Corp.*, No. 88-1-N, 1988 U.S. Dist. LEXIS 11374, at *5 (E.D. Va. Oct. 5, 1988).

CRITICAL HABITAT DESIGNATION UNDER SECTION 4(B)(2) OF THE ENDANGERED SPECIES ACT (Oct. 3, 2008), *available at* https://www.fws.gov/endangered/esa-library/pdf/ 20081003 _SOL%20M-37016_4(b)(2).pdf).

Since the Service codified the incremental effects approach through formal notice-and-comment rulemaking, the Service's new regulation warrants *Chevron* deference. As the Supreme Court has noted, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead*, 533 U.S. at 230. "*Mead* thus created, in effect, a 'safe harbor of *Chevron* deference' for agency interpretations produced via formal agency action—formal rulemaking or adjudication—and those produced via informal notice-and-comment rulemaking." *Sinclair Wyo. Refin. Co.*, 874 F.3d at 1164 (quoting Charles H. Koch, Jr. & Richard Murphy, 3 Admin. L. & Prac. § 10:12 (Feb. 2017 update)); *see also Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57–58 (2011) (noting that, under the Supreme Court's precedent, the fact that the agency issued a rule "only after notice-and-comment procedures" was a "'significant' sign that [the] rule merits *Chevron* deference"); *Barnhart v. Walton*, 535 U.S. 212, 227 (2002) (Scalia, J., concurring) ("The [agency's] recently enacted regulations emerged from notice-and-comment

rulemaking and merit deference. No more need be said."). In sum, the Service's incremental effects approach to analyzing the economic impacts of critical habitat designations, including this one, is reasonable, was codified at 50 C.F.R. § 424.19(b) pursuant to the agency's delegated authority, and warrants *Chevron* deference.

Furthermore, the incremental effects approach fulfills the Tenth Circuit's holding that section 4(b)(2) of the ESA requires "*some kind of consideration* of economic impact[.]" *N.M. Cattle Growers Ass'n,* 248 F.3d at 1285 (emphasis added). As a direct example of how the current regulations no longer render the Service's economic impacts analysis "essentially without meaning," *id.*, the Service found the incremental economic costs associated with the mouse's critical habitat designation would cost approximately $23 million. *See* Aplt. App. Vol. 2 at 319, 322, 324, 358, 361, 363–64; Aplt. App. Vol. 4 at 847. That number and how the Service reached it indicate that the Service has satisfied its statutory obligation to consider the "economic factors … in connection with the [designation]," *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285, and that its codified approach towards doing so is reasonable.

4. The Service's Intervening Regulations Govern This Case

The Service's codification of the incremental effects approach through notice-and-comment rulemaking following *N.M. Cattle Growers Ass'n* is therefore

fatal to the Ranchers' claims because "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982 (emphasis added). If not, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron,* 467 U.S. at 844. The agency's subsequent interpretation controls even if it is not "the only one it could have adopted, or the one that this court would have reached had the question initially arisen in a judicial proceeding." *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1182 (10th Cir. 2005) (*quoting Salt Lake City v. W. Area Power Admin.*, 926 F.2d 974, 978 (10th Cir. 1991)). Because, as set forth above, the Service had the discretion to issue a reasonable interpretation of the Act setting forth how it was going to analyze the economic impacts associated with a critical habitat designation, and did so through notice-and-comment rulemaking, its interpretation controls.

Attempting to sidestep this conclusion and the Supreme Court's ruling in *Brand X*, the Ranchers assert that "until this Court expressly overrules *New Mexico Cattle Growers*, the Service is bound by that decision … within this Circuit." Aplt. Opening Br. at 29. But *Gutierrez-Brizuela v. Lynch*, the case on which the Ranchers rely, concerned an agency attempting to apply a new interpretation

"*retroactively*, applying its new rule to completed conduct that transpired at a time when the contrary judicial precedent appeared to control[.]" *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143 (10th Cir. 2016). In that case, citing "due process and equal protection concerns," the Tenth Circuit found that agency decisions should not "presumptively apply retroactively to conduct completed before they take legal effect." *Id.* at 1146–48.

Gutierrez-Brizuela is inapposite here, however, because the Service never sought to apply its regulations retroactively. Rather, the Service codified its incremental approach to the economic impacts analysis on August 28, 2013, Aplt. App. Vol. 1 at 98–99, well before the agency released the draft economic assessment for the mouse's critical habitat designation on April 8, 2014, Aplt. App. Vol. 2 at 328, 340. In such circumstances, in line with the Supreme Court's precedent in *Brand X*, the Tenth Circuit has been clear that "when a statute is ambiguous and an executive agency's interpretation is reasonable, the agency may indeed exercise delegated legislative authority to overrule a judicial precedent in favor of the agency's preferred interpretation." *Gutierrez-Brizuela*, 834 F.3d at 1143 (citing *Chevron*, 467 U.S. 837; *Brand X*, 545 U.S. 967). Such is the case here.

D. Even if Not Entitled to *Chevron* Deference, the Service's Incremental Effects Approach Warrants Significant Deference Based on Its Power to Persuade.

If, however, this Court finds *Chevron* does not apply, the Service's use of the incremental effects approach is still entitled to significant *Skidmore* deference because of the 'thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements[.]" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *Mead*, 533 U.S. at 228); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (holding that some deference to an agency's interpretation of a statute is due to extent it has the power to persuade). Under *Skidmore*, a court gives "respect" to an agency's interpretation of a statute considering "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 139–140).

The Service's incremental effects approach persuaded the Ninth Circuit, which found it, "if anything, more logical than the co-extensive approach." *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1173. This is because the purpose of the economic analysis is to determine the costs and benefits of including or excluding an area in the critical habitat designation. *Id.*; *see also* 16 U.S.C. § 1533(b)(2). Any analysis of the economic impacts of critical habitat designation is therefore "undercut by incorporating in that analysis costs that will exist regardless of the

decision made." *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1173. "To find the true cost of a designation, the world with the designation must be compared to the world without it." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 130 (D.D.C. 2004); *see also Colorado v. Fish & Wildlife*, 362 F. Supp. 3d at 988; *Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1371 (N.D. Fla. 2009); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1152–53 (N.D. Cal. 2006). Accordingly, the Service's use of the incremental effects approach—following the repeal and subsequent amendment of section 7's implementing regulations that were at the root of the problem in *N.M. Cattle Growers Ass'n*—is entitled to significant deference under *Skidmore* because it is well-reasoned, persuasive, and consistent with section 4(b)(2) of the Act.

E. The Service Adequately Considered the Economic Impact of the Mouse's Critical Habitat Designation.

The Ranchers next argue that the Service failed to analyze—either quantitatively or qualitatively—the economic impact of the critical habitat designation on their members' alleged water rights on national forest land. Aplt. Opening Br. at 32–40. Specifically, they allege the Service "ignored [] the designation's impact to water rights" because of a mistaken belief that "one can

only own water rights on private land, and not within the National Forest."[7] *Id.* at 33–34. The Ranchers further characterize the Service's mistaken belief as its "sole justification for refusing to analyze the designation's impacts of water rights[.]" *Id.* at 34. They derive this argument from the Service's response to a comment in the final critical habitat rule for the mouse about the fencing of riparian areas amounting to an unconstitutional taking of water rights, wherein the Service stated that it was not proposing any fencing on private lands. *Id.* (citing Aplt. App. Vol. 2 at 352).

But the record belies both the Ranchers' inference that the Service believed ranchers cannot hold water rights on National Forest Lands and the argument that the Service failed to consider the designation's impacts on water rights. As an initial matter, the Ranchers fail to point to where in the record the Service asserted that individuals could not hold water rights on National Forest Lands. All they point to is the Service's response to a comment where the agency states that it had not "fenced any areas for the protection of the jumping mouse or its habitat, nor [is the Service] proposing any fencing, on private lands." Aplt. App. Vol. 2 at 363.

[7] In the district court, the Ranchers argued that the Service failed to calculate the costs of "deprivation" of ranchers' water rights resulting from the designation, which allegedly constituted a Fifth Amendment taking. Aplt. App. Vol. 2 at 352. The Ranchers have not raised this taking argument on appeal, therefore it is waived. *Direct Commc'ns. Cedar Valley v. FCC*, 753 F.3d 1015, 1070, 1093 (10th Cir. 2014).

Little can be said about this response, except that it does not say that someone can only own water rights on private land.

Even if the record supported this inference of the Service's position on water rights ownership (which it does not), the Service did not "refuse to analyze" the designation's impacts on water rights. The record instead shows that the agency considered the costs to the Forest Service to avoid taking grazers' water rights when the Service performed "additional analysis regarding water developments[.]" Aplt. App. Vol. 2 at 363. In doing so, the Service "acknowledged that *if* fencing limits access to water, costs could be higher than what was estimated in" the Service's original analysis. *Id.* (emphasis added).

Additionally, although the Service disclosed that fencing portions of riparian areas may be necessary to protect critical habitat, the Service also contemplated other project modification measures that could protect critical habitat from the destructive impacts of grazing. Aplt. App. Vol. 1 at 85–86, 131. As a result, the Service "incorporated costs associated with the development of alternative water sources for cattle … ." Aplt. App. Vol. 2 at 363–64 (estimating "costs of $100,000 per pasture for water developments within five pastures in the Apache-Sitgreaves National Forest, four pastures in the Lincoln National Forest, and six pastures in Santa Fe National Forest, for a total of $1.5 million"). This analysis estimated the total costs associated with grazing to be $23 million—an increase of $8 million

from the proposed rule. Aplt. App. Vol. 2 at 363. Thus, given the information on economic impacts available to the Service at the time it designated critical habitat, its analysis of potential impacts to ranchers' access to water from fencing was sufficient.[8]

II. The Service's Determination Not to Exclude the Ranchers' Members' Grazing Allotments Was Within Its Discretion and Supported by the Record.

The Ranchers next assert that the Service failed to explain its decision not to exclude Units 3 and 4 from the mouse's critical habitat designation. Aplt. Opening Br. at 44–50. The Ranchers again ignore the Service's expertise, fail to address relevant factors, and fall short of showing that there has been a clear error of judgment. *Colo. Wild*, 435 F.3d at 1213 (It is not [the court's] duty … to substitute [its] judgment for that of the agency's on matters within its expertise."). Ultimately, the Service weighed the ecological benefits of including Units 3 and 4 against the relevant economic impacts and found that the benefits of inclusion outweighed the benefits of exclusion. In doing so, the Service did not abuse its discretion.

[8] Because the Service provided a quantitative assessment of the designation's impacts on ranchers' access to water, the Ranchers' argument that the Service should have "at least attempt[ed] a qualitative assessment" of these impacts is irrelevant. Aplt. Opening Br. at 37.

A. The Abuse of Discretion Standard Is a Narrow One.

Historically, courts found "no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation[,]" and thus the Service's "decision not to exclude [was] unreviewable." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 473–74 (5th Cir. 2016), *vacated by Weyerhaeuser*, 139 S. Ct. 361 (citing numerous cases holding the same). However, in *Weyerhaeuser* the Supreme Court found that the Service's "ultimate decision to designate or exclude, which [it] arriv[es] at after considering economic and other impacts, is reviewable for abuse of discretion." 139 S. Ct. at 371 (cleaned up). The Supreme Court recognized that "[t]he use of the word 'may' [in section 4(b)(2) of the Act] certainly confers discretion on the [Service]," but held that a court may review the Service's decision to include or exclude an area to assess "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quoting *Judulang v. Holder*, 565 U.S. 42, 53 (2011)).

The scope of a court's review is still "narrow," however, and "a court is not to substitute its judgment for that of the agency." *Judulang*, 565 U.S. at 52–53 (citations omitted). That is because "[a]gencies … have expertise and experience in administering their statutes that no court can properly ignore." *Id.* at 53.

B. The Service Provided a Reasoned Explanation for Its Decision Not to Exclude the Grazing Allotments Used by the Ranchers.

When arguing that the Service abused its discretion in not excluding the allotments used by the Ranchers from the critical habitat designation, the Ranchers ignore the primary relevant factor when designating critical habitat, which is whether the Service designated the habitat essential to the species' survival and recovery. Fundamentally, "[t]he [Act] clearly intends to do more than save endangered species and threatened species from jeopardy; it is intended to bring endangered and threatened species back from the brink of extinction to a point where statutory protections are no longer necessary." *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *Forest Guardians*, 174 F.3d at 1185 (noting that "critical habitat designations serve to protect species vulnerable to extinction"). "The designation of critical habitat … serves as the principle means for conserving an endangered species, by protecting not simply the species, but also the ecosystem upon which the species depends." *Middle Rio Grande Conservancy Dist.*, 206 F. Supp. 2d at 1169; *see also Gifford Pinchot Task Force*, 378 F.3d at 1070 ("[T]he purpose of establishing critical habitat is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery.").

The need to protect critical habitat is all the more manifest in this case because the "mouse has exceptionally specialized habitat requirements," Int.-Aplee. Supp. App. Vol. 1 at 110, and because "past and current habitat loss has resulted in the extirpation of historic populations [of the mouse], reduced the size of existing populations, and isolated existing small populations." Int.-Aplee. Supp. App. Vol. 1 at 112. Furthermore, "[o]ngoing and future habitat loss is expected to result in additional extirpations of more populations." Int.-Aplee. Supp. App. Vol. 1 at 112.

The Ranchers assert that the Service failed to explain how the benefits of protecting the mouse's habitat outweighed the costs of including Units 3 and 4 in the designation. But the Service actually addressed each critical habitat unit in turn and concluded that:

> [A]ll of these areas, whether they are within partially occupied or completely unoccupied units, are essential to the conservation of the jumping mouse because: (1) The areas occupied by the mouse since 2005 do not contain enough suitable, connected habitat to support resilient populations of jumping mouse; (2) the currently unoccupied segments within individual stream reaches or waterways need to be of sufficient size to allow for the expansion of populations and provide connectivity (active season movements and dispersal) between multiple populations as they become established; (3) additional areas need habitat protection to allow restoration of the necessary herbaceous vegetation for possible future reintroductions; and (4) multiple local populations along streams are important to maintaining genetic diversity within the populations and for providing sources for recolonization if local populations are extirpated.

Aplt. App. Vol. 2 at 376; *see also* Aplt. App. Vol. 2 at 375–81.

In doing so, the Service addressed the specific benefits of the critical habitat subunits in which the Ranchers' members graze, finding that the subunits required protection to address impacts from severe wildland fires, recreation, grazing, floods, the reduction and distribution of beaver ponds, development, and highway reconstruction, and that the units provided potential areas for recolonization by the mouse and connectivity between currently occupied areas. Aplt. App. Vol. 2 at 377–78 (addressing subunits 3A, 3B, 3C, 4B, 4C, and 4E where the Ranchers' members graze).

The Service also considered the economic costs specific to each critical habitat subunit. Aplt. App. Vol. 1 at 132–33. After weighing these benefits against the cost of designation, the Service still chose not to exclude any specific areas from the critical habitat designation. Aplt. App. Vol. 2 at 383–84. In doing so the agency considered the "relevant factors," did not make "a clear error in judgment," and exercised its "expertise and experience in administering" the Act, which "no court can properly ignore." *Judulang*, 565 U.S. at 53.

Instead of contending directly with the enumerated benefits the critical habitat designation provides for the mouse, the Ranchers instead contend that the Service picked an arbitrary standard when weighing the benefits of designation against its costs by considering whether the critical habitat designation would result in costs exceeding $100 million, arguing that this limit "does not provide a

reasoned explanation for the Service's decision" not to exclude Units 3 and 4. Aplt. Opening Br. at 47. This $100 million limit is derived from Executive Order ("EO") 12866, which requires the Service to "consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives," and the Unfunded Mandates Reform Act ("UMRA") which requires the Service to determine if the mouse's critical habitat designation would "produce a Federal mandate of $100 million or greater in any year." Aplt. App. Vol. 2 at 389–390. While the Service is required to consider the thresholds set forth in EO 12866 and the UMRA, the Service's decision whether to exclude an area from critical habitat is independent of these thresholds.

Instead, when deciding whether to exclude any area from the mouse's critical habitat designation, the Service weighed the benefits of inclusion and exclusion to determine if "the benefits of exclusion outweigh the benefits of inclusion[.]" Aplt. App. Vol. 2 at 383. Finding that the economic benefits did not outweigh the benefits of inclusion, the Service exercised its considerable discretion and decided not to exclude Units 3 and 4 from the critical habitat designation.

In the end, this Court must "uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (cleaned up). The Ranchers ignore the larger

administrative record supporting the Service's decision. Looking at the record as a whole, the Service considered the economic impacts associated with the critical habitat designation and the Ranchers fail to show that the Service "abused its discretion" when it exercised its discretion to not exclude Units 3 and 4 from the mouse's critical habitat designation.

III. Remand Without Vacatur Is the Proper Remedy if This Court Finds for the Ranchers.

If this Court rules in favor of the Ranchers, the Conservation Groups request the Court remand the designation back to the agency to address any potential errors, but that the designation be left in place during such a remand. Given that the mouse is "highly vulnerable to extirpations when habitat is lost and fragmented[,]" Aplt. App. Vol. 1 at 158, and that a single year of bad resources can doom a local population, Int.-Aplee. Supp. App. Vol. 1 at 110, the consequences for the mouse of losing critical habitat protections, even if only until the Service can issue a new critical habitat designation, could be dire.

If the Court decides vacatur is appropriate, the Conservation Groups request the Court limit vacatur to the critical habitat subunits used by the Ranchers or, if the Court vacates the critical habitat designation in its entirety, that the Court set a deadline for the Service to promulgate a new critical habitat designation for the mouse.

A. This Court Retains Its Traditional Equitable Powers to Leave the Mouse's Critical Habitat Regulation in Place During Remand.

"Ordinarily, when a regulation is not promulgated in compliance with the APA, the regulation is invalid. However, when equity demands, the regulation can be left in place while the agency follows the necessary procedures." *Coal. of Ariz./N.M. Ctys. v. Salazar*, No. 07-CV-00876 JEC/WPL, 2009 WL 8691098, at *3 (D.N.M. May 4, 2009) (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (internal citations omitted); *see also High Country Conservation Advoc. v. U.S. Forest Serv.*, 951 F.3d 1217, 1229 (10th Cir. 2020) (holding that the court's "traditional equitable powers to fashion appropriate relief … are retained under the APA"). Many courts have exercised their equitable discretion to fashion remedies for ESA violations that provide the most benefit to imperiled species in light of the ESA's conservation purpose. *See, e.g.*, *Ctr. for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1109 (D. Ariz. 2003) (ordering the designation of critical habitat for the Mexican spotted owl to remain in effect during remand); *WildeEarth Guardians v. U.S. Dep't of Interior*, 205 F. Supp. 3d 1176, 1190 (D. Mont. 2016) (retaining the Canada lynx's critical habitat designation during remand). "The decision whether to vacate depends on the 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." *Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (cleaned up).

B. The Disruptive Consequences of Even a Limited Lapse in Protections for the Mouse May be Dire, and Any Deficiencies in the Service's Economic Impacts Analysis May be Easily Remedied

If this Court finds for the Ranchers, it is crucial that the Court exercise its equitable discretion to leave the critical habitat designation in place during remand because the designation provides essential federal protections, without which the mouse will likely go extinct. On the other side of the scale, any deficiencies in the Service's economic impact analysis may easily be remedied on remand.

As noted above, the "mouse has exceptionally specialized habitat requirements," Int.-Aplee. Supp. App. Vol. 1 at 110, and "past and current habitat loss has resulted in the extirpation of historic populations [of the mouse], reduced the size of existing populations, and isolated existing small populations." Int.-Aplee. Supp. App. Vol. 1 at 112. Furthermore, "[o]ngoing and future habitat loss is expected to result in additional extirpations of more populations." Int.-Aplee. Supp. App. Vol. 1 at 112. To be clear, "[n]one of the 29 populations known to exist since 2005 are of sufficient size to be resilient[,]" and "without active conservation (i.e., grazing management and water management) existing populations are vulnerable to extirpation[,] with "at least 11 hav[ing] already undergone substantial impacts since 2011[.]" Int.-Aplee. Supp. App. Vol. 1 at 113. As such, the mouse is

"currently at a high risk of extinction[,]" and vacatur of its critical habitat designation will be devastating. Int.-Aplee. Supp. App. Vol. 1 at 113.

One of the primary threats to the mouse's continued existence is grazing. Int.-Aplee. Supp. App. Vol. 1 at 113. The impacts of grazing include "trampling of streambanks, burrow collapse, loss of riparian cover, soil compaction, modification of riparian plant communities, lowering water tables, and the resulting microclimatic changes[.]" Int.-Aplee. Supp. App. Vol. 1 at 195. Grazing also results in "herbaceous removal, physical damages to plants, and changes in fluvial processes." Int.-Aplee. Supp. App. Vol. 1 at 195. Both now and in the future, unmanaged livestock grazing likely precludes the development of the resources the mouse needs for survival and the "[t]he loss of suitable habitat in the past has eliminated jumping mouse populations and severely reduced the resiliency of the remaining populations." Int.-Aplee. Supp. App. Vol. 1 at 204.

Indeed, because of "the magnitude and imminence of grazing pressures on the jumping mouse and its habitat," the Service concluded that "livestock grazing is the most significant factor causing continuing impacts in five of the eight geographic management areas[.]" Int.-Aplee. Supp. App. Vol. 1 at 204; *see also* Aplt. App. Vol. 2 at 376–81 (noting grazing as a threat requiring management in every unit except Units 6 and 7). Specifically, the Service recognized grazing as a threat that requires management in four out of the six critical habitat subunits in

which Ranchers have grazing allotments. *See* Aplt. App. Vol. 2 at 377–78 (noting grazing as a threat in subunits 3A, 3B, 4C, and 4E).

Unfortunately, even a brief lapse in protection can be devastating to local mouse populations, with habitat being lost in as little as three months because of unmanaged grazing. Int.-Aplee. Supp. App. Vol. 1 at 200 (showing the loss of suitable habitat within three months due to livestock grazing prior to the designation of critical habitat); *see also* Int.-Aplee. Supp. App. Vol. 1 at 203 (noting that the "delay between the removal and completion of a fence in Arizona likely caused a jumping mouse population to become extirpated"). Ultimately, the mouse "does not persist in areas when its habitat is subjected to heavy livestock grazing pressure[,]" Int.-Aplee. Supp. App. Vol. 1 at 197, and grazing is predicted to continue to contribute to habitat loss for the remaining mouse populations. Int.-Aplee. Supp. App. Vol. 1 at 192.

If the critical habitat designation is vacated, the mouse's essential habitat will be deprived of essential protections in precisely those areas where grazing poses the gravest threat to the species. Critically, federal agencies will no longer be required to ensure "that any action authorized, funded, or carried out by such agency[,]" such as the issuance of a grazing permit, "is not likely to … result in the destruction or adverse modification of [critical] habitat[.]" 16 U.S.C. § 1536(a)(2). Given the mouse's unique habitat requirements and that habitat can be destroyed in

as little as three months, Int.-Aplee. Supp. App. Vol. 1 at 200, the consequences of the loss of such protections for even a limited time could be dire.

The fact that the mouse will retain protections due to its listed status in occupied areas is not a panacea, because unoccupied areas of critical habitat will no longer be protected. Unoccupied areas are essential to the mouse's survival and recovery because occupied areas, "do not contain enough suitable, connected habitat to support resilient populations of jumping mouse," and because unoccupied areas allow "for the expansion of populations and provide connectivity … between multiple populations as they become established," as well as "protection to allow restoration of the necessary herbaceous vegetation for possible future reintroductions" and areas "for recolonization if local populations are extirpated." Aplt. App. Vol. 2 at 376.[9] The potential disruptive consequences of vacating the mouse's critical habitat designation, even if a new designation is promulgated in short order, counsels in favor of maintaining the critical habitat designation during remand.

[9] The Ranchers assert that vacatur of the critical habitat designation will not harm the mouse because activities in unoccupied critical habitat are "unlikely to have any significant impact on the mouse's continued existence." Aplt. Opening Br. at 40. This focus on survival ignores the fact that "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival *but also essential for the species' recovery*." *Gifford Pinchot*, 378 F.3d at 1070 (emphasis added).

On the other side of the scale, any error in the Service's economic impacts analysis or determination not to exclude the Ranchers' subunits from the designation may be easily rectified. First, the Ranchers do not allege that the Service failed to consider the best available science when the agency designated critical habitat. As such, the Service will only need to—if this Court rules in favor of the Ranchers—reconsider its economic impacts analysis and whether to exclude any area from the critical habitat designation. *See* 16 U.S.C. § 1533(b)(2). Given that the statute requires the Service to finalize a critical habitat designation within a year of listing a species as endangered or threatened, *id.* § 1533(b)(6)(C)(ii), or issuing a proposed rule, *id.* § 1533(b)(6)(A)(ii), the Service should be able to rectify any error relatively quickly. If the Court rules that the Service erred by failing to adequately consider economic impacts associated with lost access to water rights, any delay may be further expedited if the Ranchers are willing to supply the Service with specific information relating to when and where they believe access to water has been restricted.

Without the protection provided by critical habitat, the mouse will be in grave danger of extinction within the decade. Int.-Aplee. Supp. App. Vol. 1 at 109. Given that many populations have been extirpated in the past few decades, any lapse in protection may be devastating to the mouse. Considering the species'

fragile status, equity counsels in favor of leaving the mouse's critical habitat designation in place during remand if the Court issues a remand.

C. Alternatively, Vacatur Should be Limited to the Units Used by the Ranchers and this Court Should Order the Service to Issue a New Critical Habitat Designation for Those Units by a Date Certain.

Alternatively, if this Court finds that the balance of equities tips in favor of vacatur despite the threat of the mouse's extinction, this Court could issue a limited vacatur specific to the critical habitat Units 3 and 4. *High Country Conservation Advoc.*, 951 F.3d at 1228–29 (cleaned up) (finding that a court may partially set aside a regulation "if the severed parts operate entirely independently of one another, and the circumstances indicate the agency would have adopted the regulation even without the faulty provision"). The Service independently justified why each critical habitat subunit met the definition of critical habitat and vacating Units 3 and 4 from the designation would not render the rest of the designation gibberish. Aplt. App. Vol. 2 at 375–81. Since the Service can justify the inclusion of each subunit on its own, but the Ranchers' claims only concern Units 3 and 4 of the mouse's overall designation, vacating just those two units would redress the Ranchers' injury while ensuring that the mouse retains essential protections elsewhere.

Finally, if the Court determines that vacatur of the entire designation is appropriate, the Conservation Groups request the Court order the Service to issue a

new critical habitat designation for the mouse "as soon as possible … consider[ing] what work is necessary to publish the final rule and how quickly that can be accomplished[, … but] without regard to the Secretary's other priorities under the ESA." *Forest Guardians*, 174 F.3d at 1193. "[I]n no case may the Service exceed the statutory time limits set forth in the ESA for the promulgating critical habitat designations: the FWS must issue a proposed critical habitat designation … no later than one year after the date of th[is] Court's Order in this matter, and a final rule no more than one year later." *N.M. Cattle Growers Ass'n v. Norton*, No. 02-0461 LH/RHS, 2003 U.S. Dist. LEXIS 18534, at *6 (D.N.M. Sep. 30, 2003).

CONCLUSION

For the foregoing reasons, the Center respectfully requests this Court uphold the Service's designation of critical habitat for the New Mexico meadow jumping mouse.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves important questions of statutory interpretation impacting the ESA's implementation. Defendant-Intervenor Appellees believe that oral argument could aid this Court's resolution of the matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,523 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word 2016, Times New Roman, 14-point font.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing document:

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

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Bitdefender Virus Scanner (last updated September 16, 2021), and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the Appellate Electronic Filing system on September 16, 2021.

/s/ *Ryan Adair Shannon*
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ADDENDUM

Endangered Species Act, Section 4(b)(2): 16 U.S.C. § 1533(b)(2)

The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

50 C.F.R. § 402.02 (as amended, 81 Fed. Reg. 7214 (Feb. 11, 2016))

Definition of "Adverse Modification" (2016)

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

Definition of "Jeopardize"

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. § 424.19 (as amended, 78 Fed. Reg. 53,058 (Aug. 28, 2013))

Impact analysis and exclusions from critical habitat

(a) At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. The draft economic analysis will be summarized in the Federal Register notice of the proposed designation of critical habitat.

(b) Prior to finalizing the designation of critical habitat, the Secretary will consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities. The Secretary will consider impacts at a scale that the Secretary determines to be appropriate, and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described.

(c) The Secretary has discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, in addition to the mandatory consideration of impacts conducted pursuant to paragraph (b) of this section, the Secretary may assign the weight given to any benefits relevant to the designation of critical habitat. The Secretary, however, will not exclude any particular area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.