IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO FARM & LIVESTOCK BUREAU; NEW MEXICO CATTLE GROWERS' ASSOCIATION; and NEW MEXICO FEDERAL LANDS COUNCIL, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE; and DANIEL M. ASHE, in his official capacity as Director of the United States Fish and Wildlife Service, Defendants, CENTER FOR BIOLOGICAL DIVERSITY and DEFENDERS OF WILDLIFE, Defendant - Intervenors.	Case No. 2:15-cv-00428-KG-CG **PLAINTIFFS' REPLY BRIEF**

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INTRODUCTION

The Department of the Interior, Secretary of the Interior Sally Jewell, the U.S. Fish and Wildlife Service, and its Director, Daniel Ashe (collectively "Government"), exceeded their authority when they designated thousands of acres in New Mexico as critical habitat for the jaguar. This designation injures members of the New Mexico Farm & Livestock Bureau, New Mexico Cattle Growers' Association, and New Mexico Federal Lands Council (Plaintiffs).

The Government's designation of Units 5 and 6 in New Mexico as "critical habitat" violated the Endangered Species Act (Act) requirements that "critical habitat" be "occupied" and contain physical and biological features "essential to the conservation of the species" or unoccupied but "essential to the conservation" of the jaguar. The designation also fails, because the Government did not determine what is "essential to the conservation" of the jaguar. Per the Act's text, that entails determining what is essential to reaching the jaguar's recovery point. The Government argues this would somehow violate an *implicit* part of the Act, while ignoring the Act's *explicit* text. Fed. Defs.' Resp. at 13-14.

The Government attempts to avoid responsibility for violating the limits of the Act by arguing that the Court must defer to the designation. Fed. Defs.' Resp. at 17-8, 21. But the Tenth Circuit has held that in critical habitat cases like this, the Government is not entitled to *Chevron* deference. *New Mexico Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001) ("[A]ppellants . . . argue that *Chevron* deference is not applicable in this case. We agree."). This rule, however, would fail under even *Chevron* deference, because it is neither a fair interpretation of the Act, nor supported with substantial evidence.

Units 5 and 6 were not "occupied" at the time of listing, nor are they "essential to the conservation" of jaguar as required by the Act. The defendants offer no evidence that even one

jaguar resided in New Mexico in 1972, let alone visited even once. Indeed, even if the "time of listing" were in 1997, the Rule would fare no better. Arguments that the jaguar is evasive or survey efforts inadequate at the time of listing do not substitute for the requirement that the Government offer actual evidence that jaguars "occupied" the area in 1972. Similarly, Congress used the term "essential" to limit the kinds of land eligible for critical habitat designation. Even if jaguars on the edge of the population have some value to the species, that does not make potential habitat at the far end of their range "essential." Habitat that is of "marginal" or "secondary" importance is not "essential" to the conservation of jaguar. Accordingly, the designation should be revised to exclude all New Mexico portions.

ARGUMENT

I

THE PLAINTIFFS ESTABLISHED ASSOCIATIONAL STANDING

The Plaintiffs established their standing as associations, representing injured members. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The Government impliedly concedes that Plaintiffs satisfy the latter two requirements, alleging only that Plaintiffs failed to provide "evidence of any *individual member's* injury in fact." Fed. Defs.' Resp. at 10 (emphasis added).

The Government also concedes that the declarations of Cowan and Smith "testify about injuries sustained by the organizations' members." Fed. Defs.' Resp. at 10. The problem, according to the Government, is that the declarations did not identify at least one specific member by name

with any of those injuries, as was required in *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). *See* Fed. Defs.' Resp. at 10. *Summers* is distinguishable, because the declarants are personally familiar with members of the Plaintiffs' organizations in Hidalgo County and they know specific members who live or work in and around areas designated critical habitat and who are personally affected by the designation. In *Summers*, the alleged injuries were speculative—built on "'some day' intentions" to maybe eventually visit an area affected by the challenged regulation. 555 U.S. at 494-96. In contrast, the Plaintiffs here swore from their own knowledge about current, objective, and verifiable facts that do not hinge on subjective plans.

Nevertheless, Plaintiffs submit two additional declarations by their members, identifying injuries caused by the designation of critical habitat for the jaguar. It is appropriate for the Court to accept and consider these additional declarations. *See, e.g.*, *New Mexico Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 81 F. Supp. 2d 1141, 1149 (D.N.M. 1999), *rev'd on other grounds*, 248 F.3d 1277 (10th Cir. 2001) (trial court heard arguments regarding standing as well as exhibits that were raised in the reply brief; Tenth Circuit implicitly agreed with standing decision by reaching merits of the case). This Court has previously held that "it is within the Court's power to allow or require the Plaintiffs to supply, by amendment to the complaint **or by affidavits**, further particularized allegations of fact deemed supportive of Plaintiffs' standing." *Id*. (emphasis added). Moreover, Rule 15(d) permits supplementation of the record to establish standing at any time before final judgment. *See* Fed. R. Civ. P. 15(d) ("The court may permit supplementation even though the original pleading is defective in stating a claim or defense."); *Summers*, 555 U.S. at 500 (implying that it would be appropriate under Rule 15(d) for a trial court to accept declarations establishing standing, as long as the supplemental declarations are filed prior to judgment in the trial court); *see also id.* at 509 (Breyer, J., dissenting) (a judge has "liberal discretion to permit a plaintiff to amend

a complaint—even after one dispute . . . is settled. So why would they not permit the filing of affidavits—at least with the judge's permission?").

These additional declarations do not prejudice any party because they do not raise any new arguments. They provide the identity of specific members of the Plaintiffs' organizations and confirm that the declarations submitted with the Plaintiffs' Opening Brief were accurate. Meira Gault, a member of two of the Plaintiff organizations, is a trustee of a revocable trust that owns Midbar Ranch and property adjacent to land designated jaguar critical habitat. Decl. of Gault. The ranch's cattle also graze on critical habitat pursuant to a federal grazing permit and allotment. *Id*. Gault intends to apply for renewal of the permit. *Id*. Levi Klump, a member of all three Plaintiffs' organizations, owns a ranch and holds a federal grazing permit on federal land designated critical habitat. Decl. of Klump. He intends to apply for renewal. *Id*. The renewal of Klump and Gault's permits will be subject to consultation under the Act, which adds another layer of regulation that can complicate or delay renewal. Moreover, when they seek to make any improvements on the land, like a corral, stock pond, additional fences or other structures, those permits will now be subject to consultation. Gault has previously sought permission to build a corral, the entrance of which would be located on critical habitat, and hopes to build the corral in the near future. Any such permits for Gault or Klump could be denied, because the projects could alter jaguar habitat. *See* 79 Fed. Reg. 12,594, AR F000394. These members have a financial interest in making future improvements on land designated critical habitat, and these threats of injury are sufficient to confer standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (when the person is directly regulated "there is ordinarily little question that the action . . . has caused him injury"); *see also Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996); *Summers*, 555 U.S. at 498 (recreation interests or aesthetic interests are adequate to confer standing). This is also

consistent with the types of injuries described by the Plaintiffs in the Opening Brief and exhibits thereto. *See* Pls.' Opening Brief at 9-10; Decl. of Cowan; Decl. of Smith.

Likewise, Plaintiffs satisfy standing, because their members work in regulated areas and live and own property in areas adjacent to regulated areas that will now face greater risks of fire hazards, since the new rule will impact prescribed burns, particularly in the fire prone[1] Coronado National Forrest. *Cf. Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1259 (D.C. Cir. 1994) (associational standing where members live near regulated area and face "greater risks" of exposure to hazardous wastes as a result of regulation); Decl. of Gault; Decl. of Klump; 79 Fed. Reg. 12,594, AR F000394 (activities affected by the designation include fuels-management activities such as prescribed fire). Indeed, in 2015, a fire destroyed the fences on Midbar Ranch's allotment, forcing Gault to rebuild the fence at expense to the ranch. Decl. of Gault. Moreover, consistent with the declarations submitted with the Opening Brief, Gault and Klump use public roads and will suffer from any hurdles to infrastructure improvements, which benefit everyone who lives in the community. Decl. of Gault; Decl. of Klump. The final rule specifically says that consultation will probably negatively affect infrastructure improvements, including public roads in the area. 79 Fed. Reg. 12,594, AR F000394. The possible loss of these future improvements also confers standing. *See, e.g., New Mexico Cattle Growers' Ass'n,* 81 F. Supp. 2d at 1155, *rev'd on other grounds*, 248 F.3d 1277.

[1] In 2013 alone, 425 wildfires on National Forest lands in New Mexico burned 183,345 acres in the state. Plaintiffs request that the Court take judicial notice under Federal Rule of Evidence 201(b)(2) and (c)(2) of this data from the National Interagency Fire Center in the National Report of Wildland Fires and Acres Burned by State, at p. 67, https://www.predictiveservices.nifc.gov/intelligence/2013_Statssumm/fires_acres13.pdf.

II

THE CRITICAL HABITAT DESIGNATION IS NOT ENTITLED TO DEFERENCE

A. *Chevron* Deference Is Not Applicable Under Tenth Circuit Precedent

The defendants argue that the Court must apply *Chevron* deference to the critical habitat designation and underlying assumptions used in the designation, including the meaning of words like "occupied" and "essential." *See* Fed. Defs.' Resp. at 17-8, 24 (relying on cases from outside the Tenth Circuit). The Government is wrong. The Tenth Circuit has already held *Chevron* deference does not apply to critical habitat designations, where the plaintiffs challenge the definition of terms used in the rule that have not been separately defined through notice and comment rulemaking. *See New Mexico Cattle Growers' Ass'n*, 248 F.3d at 1281.

In *New Mexico Cattle Growers' Association*, the Association challenged the critical habitat designation for the Southwestern willow flycatcher on the grounds that the Service had failed to properly take account of the critical habitat's economic impacts by using the "baseline" approach in its economic analysis. 248 F.3d 1277, 1279-80. The district court applied *Chevron* deference to the critical habitat designation, including the government's use of the "baseline" approach. *Id.* at 1281. The Tenth Circuit disagreed, and the government properly conceded that *Chevron* did not apply. *Id*. While *Chevron* may apply when an agency interprets a federal statute, it did not apply to the "baseline" approach component of the decision, because "the statutory interpretation resulting in the baseline approach ha[d] never undergone the formal rulemaking process." *Id*. Because the Fish and Wildlife Service had not used formal rulemaking to define the appropriate considerations in an economic analysis for a critical habitat designation, the court held that the baseline approach "remains an informal interpretation not entitled to deference." *Id*. The court ultimately set aside the

critical habitat designation because it found the baseline approach unpersuasive and inconsistent with congressional intent. *New Mexico Cattle Growers' Ass'n*, 248 F.3d at 1285.

Likewise, in this case the Government's "interpretation" of "occupied," "essential," and "conservation" in the habitat designation is not entitled to deference. The Government did not rely on a formally adopted definition of "occupied" or "essential" and instead has applied these terms differently for different species.[2] *See Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 120 (D.D.C. 2004) ("The Service does not have a regulation that imposes a single definition of 'occupied' for all species; rather, the Service has retained flexibility and defines the term differently depending on a given species's characteristics."). It stretches the idea of definition past the breaking point to say that a term "means" something entirely different each time it is used. Nor can the government point to any purported definition of any of these terms in the text of the designation in this case. Defendants argue that the designation "defines" "occupied," for example, to mean "a valid sighting or other evidence within ten years." But that is merely a statement of the data on which the Government relies. This is circular reasoning, not a definition.

Even worse, Congress *did* define "conservation," but here the Government ignored the definition when designating jaguar critical habitat. 16 U.S.C. § 1532(3) ("conservation" is the use of methods and procedures necessary to bring protected "species to *the point* at which" protections under the Act are no longer needed). These terms—occupied, essential, and conservation—are integral to the critical habitat designation, and they are the focus of this challenge. Accordingly, like

[2] Although the Government has now defined "conservation" and "occupied" in a new rule, *see* 81 Fed. Reg. 7439 (Feb. 11, 2016), that definition was adopted after, and not used in, the final jaguar habitat designation. The new rule refutes the Government's position here, by providing that an area may not be defined as occupied if it is visited "solely by vagrant individuals." *Id*.

in *New Mexico Cattle Growers' Ass'n*, the Government's interpretation of these terms is not entitled to *Chevron* deference.

B. *Chevron* Deference Would Not Salvage the Designation

Deference applies only to a "reasonable interpretation made by the administrator of an agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001). Courts must reject agency interpretations that construe a statute contrary to clear Congressional intent. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984). Similarly, "[a]n agency may not ignore factors Congress explicitly required be taken into account." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007).

The Government here argues that under *Chevron* deference the Court may not consider the plain meaning of the statute, dictionary definitions of terms, or Congressional history, to determine that the jaguar designation unreasonably applies the Act. Fed. Defs.' Resp. at 21, 27. Yet in *Chevron*, the Supreme Court looked to legislative history and interpreted the meaning of the statute at issue as the first step in construing legislative intent. *See Chevron*, 467 U.S. at 859-63 (looking first at statutory language then legislative history). Courts regularly look at dictionary meanings and legislative history as the first step in applying *Chevron* deference. *See, e.g., Whitman*, 531 U.S. at 465-6 (looking to dictionary definition when determining congressional intent in a *Chevron* case). When courts do apply *Chevron* deference, they do not simply defer to any definition the Government chooses.

As Plaintiffs explained in their Opening Brief, the legislative history of the Endangered Species Act demonstrates that Congress intended "critical habitat" to have "an extremely narrow definition." Pls.' Opening Brief at 17-19 (quoting House Agreement to Conference Report on

S. 2899 (Oct. 14, 1978)). Accordingly, even applying *Chevron*, the designation fails because it violates the plain meaning of the Act, as explained in the Opening Brief and below.

III

THE RULE FAILS BECAUSE THE GOVERNMENT FAILED TO DETERMINE "THE POINT" AT WHICH THE JAGUAR WOULD BE RECOVERED

The Endangered Species Act allows the Government to designate public and private land as critical habitat for an endangered species, but only when the lands satisfy those requirements laid out by Congress. Whether occupied or unoccupied, the Act requires that the Government determine the point at which the protections of the Act will no longer be required. Pls.' Opening Brief at 19-20. To designate areas occupied by a species at the time of listing, the Government may only designate those areas with "those physical or biological features (I) *essential to the conservation of the species*" and that may require special management or protection. 16 U.S.C. § 1532(5)(A) (emphasis added). Likewise, to designate land that is not occupied by a species at the time of listing, the Government must determine "that such areas are *essential for the conservation* of the species." Congress requires that when making any critical habitat designation, the Government must determine (at a lesser degree for occupied habitat) what is "essential to the conservation of the species." *See id.* (emphasis added). Congress defined "conservation" as the use of all methods and procedures "necessary to bring any endangered species or threatened species to *the point* at which the [the protections of the Act] are no longer necessary." 16 U.S.C. § 1532(3) (emphasis added). Thus, to determine whether habitat is essential to conservation of the species, the Government must also make at least some basic determination of the point at which the species will be recovered. Pls.' Opening Brief at 19-20.

The defendants argue this requirement conflicts with the provisions governing the recovery planning process. *See* Fed. Defs.' Resp. at 14; Def.-Intervenors' Resp. at 20-1. Recovery plans require a description of site-specific management actions, objective and measurable criteria to determine when a species should be removed from the protected list, and estimates of the time and cost necessary to recover the species. 16 U.S.C. § 1533(f)(1)(B). The defendants claim it would violate Congress's intent to perform all of these tasks prior to designating critical habitat. *See* Fed. Defs.' Resp. at 15; Def.-Intervenors' Resp. at 21. But Plaintiffs make no such proposal. Determining the point of recovery is only *one* element of a significantly more demanding recovery plan. 16 U.S.C. 1533(f)(1)(B)(i), (iii) (requiring the determination of necessary site-specific management actions, time and cost estimates). Moreover, Plaintiffs do not argue the Government needs to make a *detailed* finding—like the kind in a recovery plan— about all of the objective and measurable criteria that must be met before downlisting or delisting a species. But at minimum, the Government must make some meaningful finding about the recovery point to determine what is essential to conserving the species to the point that it no longer warrants federal protection.

It makes sense that Congress would include a requirement that Government consider the point of recovery when determining critical habitat. To recover jaguar, for example, would presumably require far more land if we need 100,000 jaguars versus 100 to reach a stable population which is no longer in danger of extinction. It also matters where that population would exist, especially when, as with the jaguar, the primary population and habitat is in South and Central America, and the record demonstrates the designated habitat in New Mexico to be marginal and secondary. *See* Pls.' Opening Brief at 15; 79 Fed. Reg. 12,573-74, AR F000373-4.

The Government claims that this argument has been rejected by the courts, but it has only been rejected by the Ninth Circuit, and a divided panel in the Fifth Circuit. *See Markle Interests,*

LLC v. U.S. Fish and Wildlife Serv., 827 F.3d 452 (5th Cir. 2016) (petition for rehearing en banc pending); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010). Neither of these decisions addressed Plaintiffs' argument here, that determining the point of recovery for habitat designation does not require the full blown recovery planning process to be completed first. The Tenth Circuit has not spoken on the matter at all.

The Government argues that it "can reasonably determine what is 'essential for conservation' of a species without determining when the species would be recovered." Fed. Defs.' Resp. at 15. But Congress foreclosed that idea when it defined "conservation" as it did in the statute: "'conservation' mean[s] to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). Congress wrote a specific meaning for conservation that is closely related to the tools and purpose of the Act, yet the defendants effectively ask the Court to ignore Congress's definition and instead use a general dictionary meaning when reading the statute. Fed. Defs.' Resp. at 15. "An agency may not ignore factors Congress explicitly required be taken into account." *Earth Island Inst. v. Hogarth*, 494 F.3d at 765. This failure alone demands the designation be overturned; it is neither "well reasoned" nor persuasive, failing any standard of deference. *See New Mexico Cattle Growers Ass'n*, 248 F.3d at 1281; *Whitman*, 531 U.S. 457, 481 (2001) (deference applies only to a "reasonable interpretation").

IV

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT UNITS 5 AND 6 WERE "OCCUPIED" AT THE TIME OF LISTING

Continuing the theme of deference, the Government again suggests that this Court must simply accept its interpretation of "occupied" without considering the statute. The Government determined that Units 5 and 6 in New Mexico were occupied by jaguars at the time of listing even though there were no sightings of jaguars at anytime near 1972—the time of listing. 79 Fed. Reg. 12,590, AR F000390. Indeed there were no jaguar sightings in New Mexico in the fifty years between 1937 and 1986. *Id.*

The Government argues that evidence from anytime after 1962 suggests jaguars occupied New Mexico in 1972. Fed. Defs.' Resp. at 19. The Defendant-Intervenors imply that evidence of jaguar presence at anytime in history is evidence that jaguars occupied New Mexico at the time of listing. *See* Resp. at 4-5. Again, this is not evidence that they occupied the New Mexico units at the time of listing. Defendants argue as though jaguar populations are static, which is inconsistent with the designation's statement that "habitat is dynamic, and species may move from one area to another area over time." 79 Fed. Reg. 12,578, AR F000378. And, this argument goes against the very way that the government purported to determine when the habitat units were occupied: within ten years of a valid sighting or other reliable evidence of presence. 79 Fed. Reg. 12,581, AR F000381. The record is devoid of any such sightings or other evidence for the two units designated in New Mexico for ten years before or after 1972. *Id.*

Noting that jaguars are evasive, the Government argues the only reason jaguars were not sighted at the time of listing was "because no one was looking for them." Fed. Defs.' Resp. at 19. Yet the record demonstrates that multiple researchers were looking in the area. *See* 59 Fed. Reg.

35,676 (July 13, 1994, Proposed Endangered Status for the Jaguar), AR F000009 (citing jaguar research from 1975 and 1983 stating no jaguar sightings in New Mexico since early 20th Century); 45 Fed. Reg. 49,845 (July 25, 1980, Proposed Endangered Status for U.S. Populations of Five Species), AR 000004 ("unlikely that a jaguar will wander into the United States in the near future"). Nevertheless, the Government suggests that lack of survey efforts must be to blame for the lack of evidence. Fed. Defs.' Resp. at 19. But the evidence in the designation shows that extensive surveillance techniques often prove there is nothing to see. For 13 years, from 1997-2010, the Borderlands Jaguar Detection Project maintained 45-50 remote-camera stations across three Arizona counties, conducted track and scat (feces) surveys opportunistically, and followed up on potential sighting reports from other individuals. 79 Fed. Reg. 12,582, AR F000382. Yet despite this extensive effort, the project only detected two or possibly three adult male jaguars in Arizona. *Id.* This extensive detection project only found evidence of jaguar presence on one day in 2001, no days in 2002, and one day in 2003. 79 Fed. Reg. 12,580, AR F000380, Table 1. The group only identified regular visits in Arizona from a jaguar for three of those 13 years: 2004-2007. 79 Fed. Reg. 12,579-80, AR F000379-80, Table 1. In other words, the record demonstrates that the explanation for a lack of jaguar sightings during this time is that there were no jaguars occupying the area at the time of listing.

Recognizing the lack of evidence supporting the rule, the defendants unsuccessfully attempt to distinguish this designation from that in *Otay Mesa Prop., L.P. v. U.S. Dept. of Interior*, 646 F.3d 914 (D.C. Cir. 2011). In that case, the Government declared critical habitat for the San Diego fairy shrimp, using a single sighting of the shrimp in 2001 to support the finding that the property was occupied in 1997. *Id.* at 917. The agency further supported this conclusion by arguing that fairy shrimp eggs can lay dormant for many years, and thus if fairy shrimp were on the land in 2001, their

eggs likely were there many years before and after. *Id.* The Defendant-Intervenors inaccurately claim that the D.C. Circuit rejected the designation because the Government "offered no explanation why the property was occupied at the time of listing." Def.-Intervenors' Resp. at 13. Rather, as the Government concedes, the problem was that the evidence was "too thin." Fed. Defs.' Resp. at 22; *Otay Mesa*, 646 F.3d at 918. The Government in *Otay Mesa* argued that the "thin" evidence was adequate, because the Act only requires the Government to decide "on the basis of the best scientific data available." *Id.* But the Court rejected that argument, explaining "the absence of a requirement for the Service to collect more data on its own is not the same as an authorization to act without data to support its conclusions." *Id.* The Court should likewise reject the Government's "thin evidence" here.

The Government also strains the very meaning of the word "occupy" beyond any reasonable interpretation. By relying on single, isolated sightings of clearly transitory males, the government stretches the idea of "occupied" far beyond its plain meaning. *See* Pls.' Opening Brief at 11-14.

Defendant-Intervenors do not salvage the government's invalid "occupied" determination by arguing that 1997 is the date that should be used for listing. Defs.-Intervenors' Resp. at 8. The designation must stand or fall on the rationale provided by the government, which used 1972 for the listing date. 79 Fed. Reg. 12,581, AR F000381; *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir.1994) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself") (internal quote omitted).[3]

[3] Even if 1997 were used as the date of listing, the defendants failed to establish that the New Mexico units were ever "occupied." A single sighting of a transitory member of the species over the forty five years since it was listed cannot meet any reasonable definition of occupied, much less the interpretation of that term in *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir. 2010). *See also* Pls.' Opening Brief at 11-14.

The defendants argue that a permissible interpretation of "occupied" is "habitat where the species is likely to be found" and that the Court must defer to its decision. Fed. Defs.' Resp. at 21. But the Government's designation here neither meets that requirement, nor is it consistent with congressional intent. First, the Class 1 records, and the extensive surveillance methods used to detect jaguars in recent years demonstrate that one is actually unlikely to find a jaguar on any given day—let alone within any reasonable span of time—in Hidalgo County or in the entire United States. 79 Fed. Reg. 12,579-80, AR 000379-80, Table 1. The probability was so bad in 1972, the Government considered them a foreign species, listing them as occurring only in Central and South America. 79 Fed. Reg. 12,579-80, AR 00001. The Government cannot find any evidence of jaguar presence in New Mexico between 1937 and 1994. AR 000379-80, Table 1; 45 Fed. Reg. 49,844, AR 00004 (last sighting in 1937, and "unlikely that a jaguar will wander" into U.S.). However ambiguous one may say "occupied" is, the Government's definition violates congressional intent, as determined by "traditional tools of statutory interpretation." *New Mexico Cattle Growers' Ass'n*, 248 F.3d at 1281. "To reside in as an owner or tenant" or "to take up (a place or extent in space)" are reasonable dictionary definitions of the word "occupied." Pls.' Opening Brief at 11. Moreover, Congress sought to pass "[a]n extremely narrow definition of critical habitat." *Id.* at 19 (quoting House Agreement to Conference Report on S. 2899 in A Legislative History of the ESA at 1220-1). It did not seek a broad, generous interpretation of critical habitat. Transitory visits do not satisfy either an "extremely narrow" or a dictionary definition of "occupied." More glaringly, visits that occur decades after the listing of a species cannot qualify as "occupied at the time of listing." Accordingly, the Government's interpretation is unreasonable and unpersuasive and the critical habitat designation should be overturned.

V

THE RULE FAILS BECAUSE THE NEW MEXICO HABITAT DESIGNATIONS ARE NOT ESSENTIAL TO THE JAGUAR

The Government argues in the alternative that if the New Mexico units were unoccupied at the time of listing, they are instead essential to the conservation of the jaguar and therefore properly designated as critical habitat under the Act. The defendants primarily argue that "[p]rotecting the most genetically distinct populations of a species, such as those on the outer periphery of the species' range, is 'disproportionately important for protecting genetic diversity' of the species as a whole, and thus critical to conservation." Fed. Defs.' Resp. at 26 (quoting R001508); *see also* Def.-Intervenors' Resp. at 15 ("individual jaguars dispersing into the United States 'are important' to species as a whole") (citing AR F000374). But that only argues that certain jaguars are valuable, not that the species cannot be conserved without them. And, it does not qualify *habitat* at the outer fringe of their range as "essential."

The Government also mischaracterizes the Plaintiffs' argument. First, it wrongly suggests the Plaintiffs conceded that the habitat in Unit 5 and 6 is somehow distinct, providing a different type of habitat than the jaguars can use anywhere else. Fed. Defs.' Resp. at 26. Second, the Government suggests that Plaintiffs require that an area "cannot be essential if it is not occupied." *Id.* at 27. This is also not true. Plaintiffs instead argued that the administrative record demonstrates that the arid land in New Mexico is not the kind of habitat where jaguars thrive (i.e., wet forests and jungles). Pls.' Opening Brief at 15-16. The lack of jaguar visits only serves to bolster that conclusion. *See id.*

Oddly, the Defendant-Intervenors argue that the northern most part of the jaguar's range is critical, because it is important to "restor[e] connectivity between populations." Resp. at 16. The

northern-most fringe of the jaguar's range cannot connect populations—there are no populations beyond it with which to connect. Nor is there any population in the designated habitat. They also argue that because Units 5 and 6 *can* support jaguars, it qualifies as essential habitat. *Id*. at 17. Indeed, it goes so far as to say that almost any kind of habitat qualifies as "essential" except, for example, "land that objectively could *never* contribute to the conservation of a species." *Id*. at 18. This is an Orwellian rewriting of the statute, in which "essential" is twisted to mean "possibly useful, some day, maybe." There is no way to describe this as a reasonable reading of the Act's critical habitat provisions, which Congress clearly intended as narrow and to limit the government's discretion in designations. *See* Pls.' Opening Brief at 16-9.

As established in Plaintiffs' Opening Brief, the plain meaning of "essential" is "of the utmost importance: basic, indispensable, necessary." *Id*. at 15. Moreover, the Act demands not just that the habitat be essential, but that it be "essential to conservation"— i.e., to getting the species off of the endangered and threatened lists. Congress intended that "essential" and *not* "marginal" territory be used as critical habitat. *See* Pls.' Opening Brief at 17 ("There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species continued survival.") (quoting Senate Report 95-874 (1978)).

VI

UNIT 6 IS INADEQUATE AND PLAINTIFFS DID NOT WAIVE ARGUMENT

Generally, a party must first raise an issue with an agency before seeking judicial review. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148 (D.C. Cir. 2005). But this doctrine does not represent an "ironclad rule" and ordinarily is not a "jurisdictional prerequisite to judicial review." *Id.* Moreover, a party need not raise the issue if

another did. *See Appalachian Power Co. v. E.P.A.*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (allowing petitioners to cite to any comments in the relevant docket that raise the issue they did not raise personally); *Nat'l Wildlife Fed'n v. E.P.A.*, 286 F.3d 554, 562 (D.C. Cir. 2002), *supplemented sub nom. In re Kagan*, 351 F.3d 1157 (D.C. Cir. 2003) ("neither NWF *nor any other party* before the agency raised any of these contentions during the administrative phase of the rulemaking process") (emphasis added). While the Plaintiffs did not personally raise the size issue of Unit 6, other parties did so. *See* 79 Fed. Reg. 12,628 (comment 127 says "None of the critical habitat units contain all the PCEs essential to conservation of the jaguar"). There is no requirement that a party raise the precise legal grounds for their objection.

The Government may not now escape its deficiency in Unit 6 by supplementing the record. "[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record." *Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). Here, the rule fails to show that Unit 6 is large enough to support jaguar habitat.

CONCLUSION

For the foregoing reasons, the critical habitat designation should be revised to exclude Unit 6 and the portion of Unit 5 in New Mexico. The final rule should be invalidated and remanded with instructions to remove the portions in New Mexico.

DATED: January 13, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I electronically filed the foregoing with the clerk of the court for the United States District Court for the District of New Mexico through the Court's CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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