No. 17-2211

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NEW MEXICO FARM & LIVESTOCK BUREAU;
NEW MEXICO CATTLE GROWERS' ASSOCIATION;
and NEW MEXICO FEDERAL LANDS COUNCIL,

Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY, and
DEFENDERS OF WILDLIFE,

Intervenor-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
Honorable Kenneth Gonzalez, District Judge
Case No. 2:15-cv-00428-KG-CG

APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants New Mexico Farm & Livestock Bureau, New Mexico Cattle Growers' Association, and New Mexico Federal Lands Council hereby state they have no parent corporations and no publicly held corporation holds 10% or more of their stock.

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STATEMENT OF RELATED CASES

This case has no prior or related appeals.

GLOSSARY OF TERMS

ESA: **Endangered Species Act**

Ranchers: **Appellants**

Service: **Appellees**

JURISDICTIONAL STATEMENT

On March 5, 2014, the U.S. Fish and Wildlife Service issued a final rule designating critical habitat for the jaguar in Arizona and New Mexico. *See* App. 0452, *et seq*., 79 Fed. Reg. 12,572, *et seq*. (Mar. 5, 2014).[1] The District Court had jurisdiction to review that designation pursuant to the Administrative Procedure Act, under which "[a]gency action made reviewable by statute [is] subject to judicial review." 5 U.S.C. § 704; App. 0694. The District Court also had jurisdiction under the Endangered Species Act's citizen suit provisions found in 16 U.S.C. § 1540(c) and (g), which authorize any person to enforce mandatory provisions of the Act. App. 0697. The trial court held that the Appellants have standing, because specific members of the New Mexico Farm & Livestock Bureau, New Mexico Cattle Growers' Association, and New Mexico Federal Lands Council will face specific injuries as a result of the Endangered Species Act (ESA) critical habitat designation at issue in this appeal. *See* App. at 0695-97.

[1] Citations to the Appellants' Appendix will be to the specific page number in the appendix, without reference to the volume. When citing to record documents from the Federal Register, citations include a parallel cite to the published document.

The District Court issued its opinion and order disposing of all parties' claims on October 25, 2017. Appellants timely filed their Notice of Appeal on December 11, 2017. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The Fish and Wildlife Service violated the Endangered Species Act and APA by designating unoccupied, "marginal" areas as critical habitat for the jaguar because the designated units are not essential to jaguar conservation.
2. The Fish and Wildlife Service violated the Endangered Species Act and APA by designating Unit 6 as critical habitat when the Service's own criteria establish that Unit 6 is not habitat for jaguar in the first place.
3. The Fish and Wildlife Service violated the Endangered Species Act and APA by designating critical habitat for the jaguar before identifying the point when jaguars will no longer be threatened or endangered.

STATEMENT OF THE CASE

I. Introduction

This case addresses whether the Department of the Interior, Secretary of the Interior, the U.S. Fish and Wildlife Service and its Director (collectively Service) violated the ESA in designating two units, comprising thousands of acres of arid land in New Mexico, as "critical habitat" for the jaguar—a species that prefers and is primarily found in wet, tropical habitat in Central and South America and which the District Court found did not occupy the critical habitat units challenged in this suit. App. 0692, 0699. The Service's own analysis shows that the challenged units are "marginal" to jaguar conservation, and that one does not even meet the Service's criteria as "habitat," App. 0453-54, 79 Fed. Reg. at 12,573-74, yet the District Court ruled that they meet the ESA's requirement that unoccupied critical habitat be "essential" to species conservation. App. 0700-01.

The ESA authorizes the Secretary of the Interior (from whom the authority is delegated to the Director of the Service) to designate critical habitat for threatened or endangered species so long as the habitat contains all of the physical or biological features essential to the species'

conservation and requires special management considerations. 16 U.S.C. § 1532(5)(A)(i); 16 U.S.C. § 1533(a)(3)(A). The Service may only designate land as "critical habitat" if it is habitat in the first place. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018). And the Secretary may only designate areas unoccupied at the time of listing as critical habitat if the habitat is also "essential to the conservation of the species." *See* 16 U.S.C. § 1532(5)(A)(i).

In this case, the Service violated the ESA when it designated critical habitat for the jaguar in New Mexico in 2014. The Service designated six units of habitat in all. Portions of Unit 5, and all of Unit 6, are in Hidalgo County in the Southwest corner of the State of New Mexico. App. 0452, 79 Fed. Reg. 12,572. The Service decided that jaguar occupied New Mexico at the time of listing in the 1970s, even though the evidence showed there were no jaguar in the entire United States between 1937 and 1996. App. 0699; *see also* App. 0059, 0089, 59 Fed. Reg. 35,674, 35,676 (July 13, 1994). The rule alternatively found that the "marginal" habitat in New Mexico is "essential" to the conservation of the jaguar, such that it could be designated as unoccupied habitat. App. 0699-700; App. 0453, 79 Fed. Reg. at 12,573. The United States offers only

"marginal" habitat for the jaguar that according to government experts will be, at most, home to only a handful of non-breeding jaguar. App. 0468, 0486, 79 Fed. Reg. at 12,588, 12,606. Nevertheless, the Service designated the area as "critical habitat," contrary to its own findings. Portions of Unit 5, and Unit 6 of the designation are in the Southwest portion of the State of New Mexico. App. 0452, 79 Fed. Reg. at 12,572.

Because of the critical habitat designation, members of New Mexico Farm & Livestock Bureau, New Mexico Cattle Growers' Association, and New Mexico Federal Lands Council will face the additional regulatory burden of consultation under the Endangered Species Act when they seek federal permits for activities in the areas designated critical habitat. *See* App. 0695-97; *see also* App. 0474-475, 79 Fed Reg. at 12,594-595.[2] The designation of critical habitat also creates new regulatory hurdles for

[2] Under Section 7(a)(2) of the ESA (16 U.S.C. § 1536(a)(2)), the permitting agency must consult with the Service 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 . . . which is . . . critical," which will add expense and time to the permitting process and may result in permit denials. *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115 (D.D.C. 2004).

forest-fire management strategies, such as prescribed burns, leaving members of these organizations at heightened risk in a dry, fire-prone region. *See* App. 0474, 79 Fed. Reg. at 12,594.

The New Mexico Farm & Livestock Bureau, New Mexico Cattle Growers' Association, and New Mexico Federal Lands Council (Ranchers) filed this challenge to the designation in 2015, arguing that it violates the requirements for critical habitat in the Endangered Species Act, and the Administrative Procedure Act. In October 2017, the U.S. District Court for the District of New Mexico held that jaguar did not "occupy" Units 5 and 6 New Mexico at the time of listing, and therefore the New Mexico portion of Unit 5, and Unit 6, could not be designated as occupied critical habitat. App. 0699. But the court upheld the designation based on the alternative basis that as unoccupied habitat the New Mexico units are essential for jaguar conservation. App. 0701-702. The court deferred to the Service's decision that New Mexico is essential, and that the designation otherwise satisfied the requirements of the Endangered Species Act. *Id*. The District Court failed to address the Ranchers' claim that Unit 6 cannot be designated because it is not habitat in the first

place since it is too small an area according to the Service's criteria. *See* App. 0703.

The Ranchers appeal the portions of the decision that uphold the rule.

II. Factual and Legal Background

A. The Service Lists the Jaguar as Endangered and Determines That the U.S. Contains No Critical Habitat for the Species Until Sued by Center for Biological Diversity

The Service listed the jaguar as an endangered species under the former Endangered Species Conservation Act of 1969, a precursor to the Endangered Species Act. *See* App. 0081, 37 Fed. Reg. 6,476 (Mar. 30, 1972). In 1972, the Service listed the jaguar "as endangered from the U.S. and Mexico border southward to include Central and South America." App. 0088, 59 Fed. Reg. 35,674, 35,675 (Proposed Endangered Status for the Jaguar, July 13, 1994). In 1980, the Service stated that as a result of an "oversight," it had failed to properly list the jaguar to ensure protection in the U.S. App. 0082, 44 Fed. Reg. 43,705 (July 25, 1979, U.S. Populations of Seven Endangered Species); App. 0083, 45 Fed. Reg. 49,844 (July 25, 1980, Proposed Endangered Status for U.S. Populations of Five Species).

Although the Service recognized in 1980 that it was "unlikely that a jaguar will wander into the United States in the near future" and "even more unlikely that a population could become established in the American southwest," it proposed to "offer Federal protection" in the "unlikely" event that should happen. App. 0084, 45 Fed. Reg. at 49,845. Indeed, a jaguar had not been seen in New Mexico since 1937 at the latest. *Id*. ("Jaguars have not been reported from the wild in New Mexico since 1904"); App. 0089, 59 Fed. Reg. at 35,676 (last reported jaguar sighting in New Mexico was in 1937).

On July 22, 1997, the U.S. Fish and Wildlife Service published a final listing rule that formally recognized endangered status for the jaguar in the United States, and finding that 1972 should be considered the year that the jaguar was listed as endangered for purposes of the Endangered Species Act. App. 0093, 62 Fed. Reg. at 39,147 (July 22, 1997). That listing also determined that the greatest threat to the jaguar in the United States was from hunting. App. 0101, 62 Fed. Reg. at 39,155. As a result, the Service decided that it was "not prudent" to designate habitat for the species, because posting critical habitat maps would increase the risk of illegal hunting of the jaguar. *Id*.

The Center for Biological Diversity sued, and the Service agreed to re-evaluate the determination. App. 0105, 75 Fed. Reg. 1742 (Jan. 13, 2010). In July 2006, the Service determined that a critical habitat designation would not increase risks to the jaguar. *Id.* But the Service found that no areas in the United States meet the definition of critical habitat and as a result the designation of critical habitat would not benefit the species. *Id.* The Service did not consider designating land outside the United States, because under implementing regulations to the Endangered Species Act, critical habitat cannot be designated in foreign countries. App. 0106, 75 Fed. Reg. 1743 (citing 50 C.F.R. § 424.12(h)) (2014).

The Center for Biological Diversity sued again. As a result of a settlement agreement in that case, the Service ultimately issued a new determination that the designation of critical habitat would be prudent, *id.*, and designated critical habitat in the U.S. App. 0452, 79 Fed. Reg 12,572.

B. The Service Designates Portions of the American Southwest, Which It Found To be of Marginal Importance at Best to Jaguar Conservation, as "Critical Habitat"

The ESA defines "critical habitat" as

> (i) the specific areas within the geographical area occupied by the species . . . 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; and
>
> (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). "That is no baseline definition of habitat—it identifies only certain areas that are indispensable to the conservation of the endangered species. The definition allows the Secretary to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined." *Weyerhaeuser Co.*, 139 S. Ct. at 369. "Only the 'habitat' of the endangered species is eligible for designation as critical habitat." *Id*. at 368.

The Service designated six units of critical habitat for the jaguar in Arizona and New Mexico on March 5, 2014. *See* App. 0452, 79 Fed. Reg. 12,572. The Service uses March 30, 1972, as the date for determining whether the units were occupied at the time of listing. App. 0461, 79 Fed. Reg. at 12,581.

Two of these units—Units 5 (Peloncillo Unit) and 6 (San Luis Unit)—include portions of the southwest corner of Hidalgo County, New

Mexico. App. 0452, 79 Fed. Reg. 12,572. Grazing is one of the primary land uses in Units 5 and 6. App. 0474, 79 Fed. Reg. at 12,594.

Unit 5 stretches across 102,724 acres in Hidalgo County, New Mexico and Cochise County, Arizona, including portions of the Coronado National Forest and 13,138 acres of privately owned land. App. 0472, 79 Fed. Reg. at 12,592. One suspected jaguar track was photographed within this unit near the New Mexico-Arizona border in 1995, and a jaguar was sighted in this unit in 1996. *Id.*; *see also*, App. 0460, 79 Fed. Reg. at 12,580, Table 1 (entries for 1995 and 1996).

Unit 6 includes 7,714 acres of entirely private property in Hidalgo County, New Mexico. App. 0474, 79 Fed. Reg. at 12,594. One jaguar was photographed in this Unit in 2006. *Id.*; *see also* App. 0460, 79 Fed. Reg. at 12,580, Table 1 (entry for 2006). Based on the single sightings in each unit decades after the 1972 listing of the jaguar, the Service deemed both units occupied at the time of the listing. App. 0474, 79 Fed. Reg. at 12,594.

The final rule recognized that the Service may have incorrectly considered the units to be occupied in 1972, so in the alternative it also deemed both units "essential" to the conservation of the species in order

to designate them as unoccupied critical habitat. The Service recognized that the very southwest portion of New Mexico is on the outer periphery of "a small part of the Jaguar's range" which is of only "marginal" importance "when compared to other areas throughout the species' range." App. 0453-54, 79 Fed. Reg. at 12,573-574; *see also* App. 0084, 45 Fed. Reg. at 49,845 ("southwestern United States comprises only peripheral range"). Indeed, the Service and the experts upon which it relies consider the United States as offering only "secondary"—not primary or "core"— habitat for the jaguar. App. 0454, 79 Fed. Reg. at 12,574. Instead of the arid habitat of the Southwest United States, jaguars prefer tropical forests, which better support jaguar populations. App. 0453, 79 Fed. Reg. at 12,573. ("[M]ost robust jaguar populations have been associated with tropical climates in areas of low elevation with dense cover and year-round water sources. . . . jaguars usually avoid open country like grasslands or desert scrub, instead preferring the closed vegetative structure of nearly every tropical forest type.").

The critical habitat designation also conceded that Unit 6 did not contain all the physical and biological features necessary for conservation, because it is too small. App. 0407, 79 Fed. Reg. at 12,594.

Yet the rule assumed without any analysis that land south of the border would provide sufficient additional habitat to compensate for the shortcoming. *Id*.

The designation also did not provide any information, let alone reach any conclusions, about what population or overall habitat size would be necessary to bring the jaguar to the point where it no longer would require protection under the ESA. Nor did the designation provide any estimates or information about the adequacy of existing habitat or the size of the current jaguar population. *See generally* App. 0452, *et seq*., 79 Fed. Reg. 12,572, *et seq*.

C. The District Court Incorrectly Deferred to the Service's Impermissible Interpretation of the ESA

After the Ranchers' comments during the rulemaking process failed to persuade the Service that New Mexico does not contain habitat that qualifies as critical habitat, the Ranchers filed this challenge against the Service in the United States District Court for the District of New Mexico. Ranchers allege that the designation of critical habitat in New Mexico violated the requirements of the Administrative Procedure Act and Endangered Species Act. App. 0694. Center for Biological Diversity and Defenders of Wildlife intervened. App. 0008.

On October 25, 2017, the District Court rejected the Service's finding that jaguar occupied Units 5 and 6 in New Mexico at the time of listing in 1972.[3] App. 0698-99. The court noted that "between 1937 and 1996, there were no jaguar sightings anywhere within New Mexico." App. 0699. The District Court also noted, "Despite the deference owed to the Service on matters of scientific expertise, the reviewing court cannot simply accept the truism that a particular species is elusive by nature as a substitute for concrete evidence to conclude that the relevant habitat was occupied at the time of listing." *Id.* The Service has not challenged the District Court's holding that Units 5 and 6 were unoccupied at the time of listing and therefore can only be designated if they qualify as "essential" for conservation as unoccupied habitat.

The District Court ultimately upheld the critical habitat designation, deferring to the government's alternative basis for designating Units 5 and 6 as unoccupied land that is "essential" to the conservation of the species. App. 0700-701. The court deferred to the agency's assertion that Units 5 and 6 provide "important dispersal

[3] The District Court also held that the Ranchers' organizations established standing because they demonstrated a concrete injury to their members. App. 0696-697.

habitat" and "contributes to the jaguars' persistence by supporting range expansion and genetic exchange," *id.*, even though there was "little to no evidence" that populations in the United States now or in the future would ever breed. App. 0692, 0700.

The District Court also rejected the Ranchers' argument that the Service failed to identify the point at which jaguars will no longer require ESA protection, which is a threshold determination in designating critical habitat. App. 0702. The District Court held that such determination is not necessary until the later "development and implementation of a recovery plan." *Id.*

Ranchers also argued below that Unit 6 is not "habitat" in the first place, because it is too small under the Service's criteria. App. 0561-62, 0675-76. The designation of Unit 6 was thus arbitrary and capricious, because it lacks the physical and biological elements necessary for conservation (in this case, adequate size), and the designation failed to determine whether land in Mexico would compensate for the inadequacy of Unit 6. *Id.* But, the District Court did not address this argument.

Ranchers timely filed this appeal.

SUMMARY OF ARGUMENT

Designating land as critical habitat is an "extraordinary event" when the species did not inhabit the land at the time it first gained protection under the ESA. *Cape Hatteras*, 344 F. Supp. 2d at 125. The Service may only designate such unoccupied land if it is "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii); 50 C.F.R. § 24.12(e) (2014) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.").[4] And as with occupied critical habitat, the land must have the physical and biological features necessary for conservation of the species, and it must require special land management considerations. 16 U.S.C. § 1532(5)(A).

The Service exceeded the scope of the ESA and violated the APA by designating unoccupied land in New Mexico as "critical habitat." These units—Units 5 and 6—are not essential to the conservation of the jaguar. The Service recognizes that the land is only of "marginal" value to the

[4] The Service relied on the above quoted version of 50 C.F.R. § 424.12(e). The Service later amended 50 C.F.R. § 424.12(e) in 2016, but that version was not relied upon for the designation, and thus is not included here.

species and that it will not likely ever be home to anything more than a few transient visitors. The Service argues the designation is necessary to promote genetic diversity of the species, yet it also concedes that it will likely never be home to breeding jaguar. The closest breeding jaguar are 130 miles south of the U.S./Mexico border, and those members of the species are not even part of the population that occupy the jaguar's "primary" or "core" habitat in the jungles of Central and South America, which are the primary focus of jaguar conservation. App. 0454, 79 Fed. Reg. at 12,585 (closest breeding population is still in "poorer quality jaguar habitat"). The Service violates the plain terms of the ESA by arguing that marginal, secondary habitat qualifies as "essential," or indispensable habitat.

Moreover, the Service violated the ESA by designating Unit 6 because it lacks one of the physical and biological features essential to the conservation of the jaguar. Unit 6 is too small to support jaguar, but the Service designated it anyway, assuming that land south of the Unit in Mexico would provide the additional necessary habitat to qualify Unit 6. This decision failed to consider an important part of the problem, and thus was arbitrary and capricious.

Finally, the Service's designation is made without determining the point at which the jaguar will be recovered, as required by the ESA. The ESA defines unoccupied critical habitat as being "essential" to the "conservation" of the species. And the ESA defines "conservation" as bringing a species to "the point" where it no longer requires the protection of the ESA. In other words, unoccupied critical habitat must be essential to bringing a species to the point where it no longer requires the protection of the ESA. Without knowing what is necessary to achieve conservation, the Service has no way of knowing whether any area of unoccupied habitat is essential to conservation. Yet the rule never made any finding whatsoever about the point of recovery. That failure to set the goalposts undercuts the legitimacy of its critical habitat designation.

A court reviewing the decision of an agency must ensure the agency acted within its statutory authority and reached a decision rationally connected to the relevant facts. The Service failed to do that. Its designation exceeded the ESA and did not rationally connect the designation to the relevant facts.

STANDARD OF REVIEW

Under the APA, an aggrieved party may seek judicial review of a final agency action where authorized by statute and for which there is no other adequate remedy. 5 U.S.C. §§ 702, 704. A reviewing court must "set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* at § 706(2)(A)-(C). Review under this standard is narrow, but "searching and careful." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

> An agency rule is arbitrary and capricious
>
> > if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

"Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent

with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Likewise "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' . . . does not merit deference." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 321 (2014) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *Mexichem Fluor, Inc., v. EPA*, 866 F.3d 451, 461 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 322 (2018) ("However much we might sympathize or agree with [the agency]'s policy objectives, [the agency] may act only within the boundaries of its statutory authority."). *See also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting *Chevron* is illegitimate and is "no less than a judge-made doctrine for the abdication of the judicial duty.").

ARGUMENT

I

THE DESIGNATION WAS ARBITRARY AND CAPRICIOUS AND OUTSIDE THE ESA'S AUTHORITY BECAUSE THE UNOCCUPIED UNITS ARE NOT ESSENTIAL FOR JAGUAR CONSERVATION

A. Only Indispensable Habitat Can Be Designated Critical Habitat

The ESA narrowly defines critical habitat so that only land truly indispensable to recovering the species may suffer the regulatory label. The Service may only designate unoccupied habitat if it is "*essential* to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added); 50 C.F.R. § 424.12(e) (2014) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.").

Because the statute does not define "essential," the Court should use the word's plain meaning when interpreting the statute's definition of "critical habitat." *See NISH v. Rumsfeld*, 348 F.3d 1263, 1270 (10th Cir. 2003) ("Our first inquiry is whether the interpretation complies with the plain meaning of the statutory language."). Merriam-Webster

Dictionary defines "essential" in relevant part as "of the utmost importance: basic, indispensable, necessary." www.merriam-webster.com/dictionary/essential. Consistent with this idea, the Supreme Court recently held that *all* critical habitat—occupied and unoccupied—must be "indispensable." *Weyerhaeuser*, 139 S. Ct. at 369.

B. Units 5 and 6 Are "Secondary" and "Marginal," Not Indispensable to the Jaguar

The record for the jaguar critical habitat designation demonstrates that Units 5 and 6 are not indispensable to the species, as required by the statute. The designation explains that "the most robust jaguar populations have been associated with tropical climates in areas of low elevation with dense cover and year-round water sources." App. 0453-54, 79 Fed. Reg. at 12,573-574. It further explains that the New Mexico units are on the outer periphery of "a small portion of the Jaguar's range" which itself is only "secondary" habitat for the global population of jaguars, not "primary." *Id*. According to the Service's own analysis, "habitat in the United States can be considered marginal when compared to other areas throughout the species' range" and only "a few, possibly resident jaguars are able to use the more open, arid habitat found in the United States." App. 0453, 79 Fed. Reg. at 12,573.

The designation says that "populations at the edge of species' range play a role in maintaining . . . genetic diversity." App. 0454, 0504, 79 Fed. Reg. at 12,574, 12,624. Tellingly, the designation does not say that such populations play an indispensable or essential role to maintaining genetic diversity. The Service concedes that the few transient jaguar that occasionally visit the United States do not breed, nor will they ever need to for the species to be recovered. App. 0468, 79 Fed. Reg. at 12,588; App. 0486, 79 Fed. Reg. at 12,606 ("Recovery of the jaguar does not require that areas in the United States contain females, documented breeding, or a self-sustaining population."). The rule failed to explain how jaguar that are not breeding can play an important *conservation* role in promoting genetic diversity. Instead, the designation concedes that "activities that may adversely or beneficially affect jaguars in the United States are less likely to affect recovery than activities in core areas of their range." App. 0504, 79 Fed. Reg. at 12,624.

The agency anticipates that the entire U.S. range would only rarely support "some individuals during dispersal movements" and "perhaps in some cases with a few resident jaguars." App. 0466, 79 Fed. Reg. at

12,586.[5] Only one jaguar was identified in each unit since the species was listed more than 40 years ago. App. 0460, 79 Fed. Reg. at 12,580, Table 1.

The Service claims that the area from the edge of the jaguar range (i.e., those in the U.S.) to the zones of the breeding populations will be helpful to the species by "occupy[ing] habitat that serves as a buffer." *Id.* Yet the closest breeding population is 130 miles south of the U.S.-Mexico border. App. 0468, 79 Fed. Reg. at 12,588. The ESA specifically provides that "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species" except in limited circumstances. 16 U.S.C. § 1532(5)(C).

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[5] Although the rule broadly relied on data "publicly available on the Internet," it notably fails to discuss estimates of the jaguar population south of the border, perhaps because they would reveal how truly trivial United States habitat is for the species as a whole. App. 0489, 79 Fed. Reg. at 12,609 ("We have relied on published articles, unpublished research, habitat modeling reports, digital data publicly available on the Internet, and the expert opinion of the Jaguar Recovery Team to designate critical habitat for the jaguar."). Scientific estimates showing tens of thousands of jaguar in Southern Mexico, Central and South America were widely available prior to the rulemaking. *See, e.g.*, IUCN Red List, https://www.iucnredlist.org/species/15953/123791436, which is popularly known for compiling scientific estimates of endangered and threatened species populations, including jaguar population estimates that predate the listing.

If areas of such "marginal" value to a listed species qualify as "essential" to that species' conservation, then "essential" has no meaningful limit. The Service's determination that Units 5 and 6 in New Mexico are essential to jaguar conservation violates the ESA and should be overturned.

C. Critical Habitat Must be Essential When It Is Designated, and Is Not Critical If It Might be in the Future

The Act defines the required characteristics of critical habitat in the present tense, using the word "are." 16 U.S.C. § 1532(5)(A)(i) ("on which are found those . . . features . . . essential to the conservation of the species"), 16 U.S.C. § 1532(5)(A)(ii) ("determination . . . that such areas are essential for the conservation of the species."). The present tense description of critical habitat must be presumed intentional. *See Scarborough v. United States*, 431 U.S. 563, 570 (1977) ("It is obvious that the tenses used through Title IV were chosen with care."); *Carr v. United States*, 560 U.S. 438, 449-50 (2010) (use of present tense in statutory definition of crime signified that actions before enactment of statute not covered); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) ("We think the plain text of this provision, because it is expressed in the present

tense, requires that instrumentality status be determined at the time suit is filed.").

The present tense requirements contrast with the use of conditional criteria seen elsewhere within the ESA itself. *See, e.g.*, 16 U.S.C. § 1533(f)(1)(A) ("species that are, or may be, in conflict with construction or other development projects"); *see also* 16 U.S.C. § 1361(1) ("certain species and population stocks of marine mammals are, or may be, in danger of extinction"). The use of "are" in Section 1532(5)(A), alongside the conditional "are, or may be" in the very next section, 16 U.S.C. § 1533(f)(1)(A), requires that the critical habitat definition be read to exclude areas that "may be" able to meet the criteria. *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 631 (2018) (citing *Rusello v. U.S.*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *compare* 16 U.S.C. § 1533(b)(2) ("Secretary may exclude any area from critical habitat . . . unless he determines . . . that failure to designate such area *will* result in the extinction of the species . . .") (emphasis added); 16

U.S.C. § 160j ("The Secretary is authorized to make provision for such roads within the park as are, or will be, necessary . . ."); 16 U.S.C. § 3192(b)(C) ("activities on the tract are or will be detrimental to the purposes of the unit").

Despite the plain requirement that critical habitat must presently be essential to the conservation of the species, the designation itself repeatedly uses conditional language, suggesting that Units 5 and 6 "may" be essential to the species. *See, e.g.*, App. 0454, 79 Fed. Reg. at 12,574 ("[I]ndividual [jaguars] dispersing into the United States are important . . . for possible range expansion. . . . Peripheral populations such as these are an important genetic resource in that they may be beneficial to the protection of evolutionary processes . . . . This may be particularly important considering the potential threats of global climate change."); App. 0469, 79 Fed. Reg. at 12,589 ("[S]tressors associated with climate change and current stressors may push species beyond their ability to survive . . . . [t]he impact of future drought, which may be long-term and severe . . . may affect Jaguar habitat").

D. Courts Must Give Effect to Unambiguous Intent of Congress as Expressed in the ESA

The District Court ultimately upheld the designation of unoccupied critical habitat, by deferring to the Service's determination that "critical habitat designation in the American southwest is critical for range connectivity to adjacent habitable land in Mexico." App. 0701-702, *New Mexico Farm & Livestock Bureau v. U.S. Dep't of Interior*, 2017 WL 4857444, at *5. But that deference undermines the intent of Congress.

Courts, as well as agencies, must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. *Id.* at 843 n.9. That is the case here.

Here, the Service claims that land serving at best as only "marginal," "secondary" habitat, where only stray, non-breeding jaguar will occasionally roam, is "essential" to jaguar conservation. The service

has failed to satisfy the plain definition of critical habitat, and thus the designation must fail.

Moreover, even if the ESA's critical habitat definition were ambiguous, the Service did not define "essential" through formal rulemaking. Thus the Service's use of the term in the designation "remains an informal interpretation not entitled to deference." *See New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001) ("Because the statutory interpretation resulting in the baseline approach has never undergone the formal rulemaking process, it remains an informal interpretation not entitled to deference.").

The Court in this case thus should review the Service's interpretation of the word "essential" in this jaguar critical habitat designation and hold that it is unpersuasive and "inconsistent with the intent and language of the ESA." *Id*. at 1285.

E. Legislative History Shows that the Designation of Units 5 and 6 Fail the Standards Intended by Congress

If there is any question about the meaning of "essential" under the ESA, the legislative history makes clear that Congress intended "critical habitat" to be more limited than proposed by the designation here. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 210 n.29 (1978) (legislative

history only germane where a statute is ambiguous). The ESA initially did not define "critical habitat." *See generally* Public Law 93-205, Endangered Species Act of 1973. The interpretative regulations at that time provided that the agency list critical habitat "solely on the basis of biological factors." H.R. Rep. No. 95-1625 (1978), in A Legislative History of the Endangered Species Act of 1973, as amended in 1976, 1977, 1978, 1979, and 1980, Congressional Research Service at 731-2 (Feb. 1982), http://www.eswr.com/lh/ (A Legislative History of the ESA). But the authority was broad: "the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured." *Id.* at 731-2 (emphasis added).

After *Tennessee Valley Authority* interpreted the ESA as broadly prioritizing the conservation of species above human interests, no matter the cost, Congress responded by amending the ESA to better protect human interests. *See* H.R. Rep. No. 95-1625, in A Legislative History of the ESA at 734, 737, 741. Congress was also troubled by expansive critical habitat designations. *See, e.g.*, H.R. Rep. No. 95-1625, in A Legislative History of the ESA at 742 ("The committee believes,

nonetheless, that the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species.").

The Senate and House made clear throughout that critical habitat should only include those lands truly necessary for the survival of the species, not expansive zones for potential dispersal like those proposed here. Looking to limit the reach of critical habitat, the Senate Committee On Environment and Public Works Report asked the U.S. Fish and Wildlife Service to examine and deliver a report addressing "ambiguity in its regulatory process for critical habitat designations" because it disagreed with the Service's practice of designating as critical habitat lands intended to "extend the range of an endangered species." Senate Report 95-874 (1978), in A Legislative History of the ESA at 947-48. Rather, the committee suggested that only "those areas which are truly critical to the continued existence of a species" should qualify as critical habitat. *Id.* The committee reasoned, that there was "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." *Id.*

The Senate subsequently amended the newly proposed definition of critical habitat on the Senate floor to adopt a definition that is similar to the current definition. *See* Senate Consideration and Passage of S. 2899, With Amendments on July 19, 1978, in A Legislative History of the ESA at 1108-09. Senator Garn proposed the adopted amendment saying the extent of critical habitat should usually be smaller than the "entire range of the endangered or threatened species." *Id.* at 1101, 1080-81.

At the same time, the House was considering its own amendments to the ESA. When the House considered its bill on the House floor, Representative Duncan of Oregon successfully proposed an amendment similar to the current definition of "critical habitat." House Consideration and Passage of H.R. 14104 (Oct. 14, 1978), With Amendments, in A Legislative History of the ESA at 879-81. Duncan explained that consultation "developed into the most significant part of the entire statute," in part because the ESA did not define critical habitat. *Id.* at 880. Under the proposed amendment, to designate critical habitat that was unoccupied at the time of listing, the Secretary would need to make "a determination . . . that such areas are essential for the conservation of the species." *Id.* at 881. He elaborated that to qualify as "essential" that

it is not enough for the Service to simply show that excluding it "would appreciably or significantly decrease the likelihood of conserving it." *Id.* This distinction, he thought, went "to the heart of the problem which every Member has felt in his district." *Id.*

The House and Senate ultimately conferred to reconcile their different ESA bills and to settle on one bill amending the ESA. The conference report does not mention the differences between the House and Senate versions and only states that it adopted a critical habitat definition contained in both versions. Conference Report No. 95-1804, in A Legislative History of the ESA at 1208. Representative Murphy explained that "the Senate and House bills were not really all that far apart" but that the House bill "was considerably more developmentally oriented than the Senate bill." He said, "the guts of the House bill" were retained in the conference report, including "An *extremely narrow* definition of critical habitat, virtually identical to the definition passed by the House." House Agreement to Conference Report on S. 2899, in A Legislative History of the ESA at 1220-1221 (emphasis added).

In sum, Congress overwhelmingly intended to strictly limit the breadth of the critical habitat designation such that it would not apply to

"marginal" habitat or "buffer" zones like those proposed by the Service here.

Hence, whether this Court examines the plain text requirement that unoccupied habitat be "essential" in the ordinary sense of that word, or the legislative history demonstrating that Congress did not intend expansion areas or buffers be designated, Units 5 and 6 fall outside the Service's statutory authority to designate.

II

THE RULE FAILS TO ESTABLISH THAT UNIT 6 CONTAINS THE NECESSARY PHYSICAL AND BIOLOGICAL FEATURES ESSENTIAL TO THE CONSERVATION OF THE SPECIES

A. The ESA Requires That Unoccupied Critical Habitat Contain the Physical and Biological Features Essential to the Species

Before the Service can designate land as "critical habitat," the land must first be habitat, *i.e.* it must also contain the physical and biological features necessary for the conservation of the species. 16 U.S.C. § 1532(5)(A); *Weyerhaeuser*, 139 S. Ct. at 368 (critical habitat must be habitat). The ESA's structure and text demonstrate that this is so. *See, e.g.*, *Dean v. United States*, 556 U.S. 568, 577 (2009) (clear meaning of statute determined from text and structure).

The ESA defines "critical habitat" in 16 U.S.C. § 1532(5)(A), which lists cumulative requirements for designation, the first two of which apply to occupied areas, and *all three* of which apply to unoccupied areas. It defines "critical habitat" as

> (i) the specific areas within the geographical area occupied by the species . . . 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; and
>
> (ii) specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). This section is a single definition of "critical habitat," not two separate definitions of occupied and unoccupied critical habitat. This structure requires that the definition be read as a whole, with subdivisions (i) and (ii) as *cumulative* rather than alternative requirements.

The connection of (i) and (ii) with "and" instead of "or" supports this reading. "Critical habitat" includes *both* occupied areas and unoccupied areas that meet the applicable criteria. If the criteria of (i) and (ii) were alternative instead of cumulative, they would not be joined with "and" but with "or." *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("or" is "almost always disjunctive.") (quoting *United States*

v. Woods, 571 U.S. 31, 45 (2013)). Therefore, the requirements of (i), that the area contain "features" that are (1) "essential to [species] conservation" and (2) "require special management," apply to *all* critical habitat designations. The Service must meet only these two criteria for an occupied area. 16 U.S.C. § 1532(5)(A)(i). If the area is unoccupied, the additional criterion—that the area be essential for species conservation—applies and limits the Service's discretion. 16 U.S.C. § 1532(5)(A)(ii).

This is also the most logical reading of the statute, because it would be anomalous under this provision if the Secretary could more easily designate geographic areas as critical habitat that lack the features essential to species conservations, but could only designate land occupied by the species at the time of listing if it contained those same features. *Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands."); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) ("The statute thus differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.").

Moreover, even if this provision were at all ambiguous, the legislative history also confirms the reading that (i) and (ii) are cumulative, not alternative, as described above at Section I(E) of this brief. Congress intended especially that the Service "be exceedingly circumspect in the designation of" unoccupied critical habitat. *See, e.g.*, H.R. Rep. No. 95-1625, in A Legislative History of the ESA at 742 ("[T]he Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species").

B. Designation of Unit 6 was Arbitrary and Capricious Because It Lacks the Necessary Physical and Biological Features Essential for Conservation

The Service identified the physical and biological features necessary for the jaguar, which it calls the Primary Constituent Elements (or PCEs). The jaguar needs all seven of the following elements: (1) extensive open spaces, of at least 38.6-square miles in the United States; (2) connectivity within Units in the United States and with Mexico; (3) adequate prey; (4) water sources within 12.4 miles of each other; (5) adequate cover; (6) rugged terrain; and (7) elevation of up to 2,000 meters. *See* App. 0454, 79 Fed. Reg. at 12,574. The Service maintains that all of these features are necessary for land to serve as

habitat for jaguars. App. 0467, 79 Fed. Reg. at 12,587. In fact, the Service concedes that by definition, to be habitat for the jaguar, the land must include all the PCEs. App. 0454, 79 Fed. Reg. at 12,574 ("[W]e are basing our definition of jaguar habitat in the United States on these [PCE] features."). But then the Service admits that Unit 6 does not contain the first of these features, because at 12.1 square miles it is not large enough. App. 0407, 79 Fed. Reg. at 12,594 (7,714 acres).

Nevertheless, the Secretary included this unoccupied area in the designation, by assuming that additional areas to the south of Unit 6, in Mexico, were suitable habitat, without any analysis of this assumption. *Id.* Without analyzing the habitat south of the border, it is impossible for the Service to support this claim. The Service "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

And since the court "may not supply a reasoned basis for the agency's action that the agency itself has not given," nor may it add to the factual record, this decision should be held arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Colorado Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) ("[T]he grounds upon which

the agency acted must be clearly disclosed in, and sustained by, the record."). *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (review is limited to the administrative record).

Because the rule fails to show that Unit 6 is large enough to support jaguar habitat, the agency's designation of Unit 6 is arbitrary and capricious.

III

THE SECRETARY FAILED TO MAKE THE CONSERVATION THRESHOLD DETERMINATION REQUIRED FOR ALL CRITICAL HABITAT

The designation of Units 5 and 6 is also arbitrary and capricious because it fails to make a threshold determination of the point of recovery necessary for designating critical habitat. The ESA defines unoccupied critical habitat as those areas "essential to the *conservation* of the species." 16 U.S.C. § 1532(5)(A) (emphasis added); *see Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1166 ("Critical habitat—including 'occupied critical habitat'—is defined in relation to areas necessary for the conservation of the species . . . ."). The Act defines "conservation" to mean the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at which the protections of the Act are

no longer required. 16 U.S.C. § 1532(3). Thus to determine what is "essential to the conservation of the species," the Service must first identify the point when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has at least roughly determined a viable population size and the minimum habitat necessary to sustain that population. But those threshold determinations are entirely missing from the final rule.

Without determining the point at which the jaguar will no longer be threatened or endangered, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area and whether any particular unoccupied area is essential. *See* 50 C.F.R. § 424.12(e) (2014) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). Without that foundational underpinning, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

The Service responded to this argument in the final rule suggesting that "designation of critical habitat is only one component of recovery for

a species" and a recovery plan would be the "the appropriate instrument to define recovery goals." App. 0488, 79 Fed. Reg. at 12,608.

But this fails to follow the ESA's requirements. The fact that basic information about the species, like its threatened or endangered status and the reasons for that status, happen to be addressed in a recovery plan does not mean that this information is something the Service can defer developing until after a species is listed and habitat is designated. This information is necessary for the Service to list a species in the first place. The later development of a recovery plan for the species builds on this earlier step.

Identically, an initial identification of the point of recovery is a step that the statute requires in determining what habitat to designate as critical. It is also implicit—if not explicit—in determining whether the species is endangered or threatened. The fact that the statute requires a recovery plan to address the point of recovery does not excuse the Service from determining what that point is when earlier steps in the ESA's sequence of conservation actions require it.

Rational decision-making requires the agency to provide some standard for determining "essential" habitat. How can the Service decide

what is "essential to conservation" if the Service has not made even a basic determination of what conservation would look like? It's like starting to build a house without deciding the size or shape of the house. One can't very well start building the walls before knowing how many rooms the house will have. Yet that is analogous to what the Service did here. The Service didn't just "entirely fail[ ] to consider an important aspect of the problem"; it entirely failed to consider a *foundational* one. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. For that reason, the rule should be found arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the final rule should be invalidated and remanded.

REQUEST FOR ORAL ARGUMENT

Appellants Ranchers request oral argument. This appeal will require the Court to consider the requirements of the ESA. Oral argument may assist the Court in deciding the proper interpretation of the ESA. Some of the legal issues raised by Appellants present new arguments not yet developed in the courts. For example, while *Weyerhaeuser*, 139 S. Ct. at 368, held that all critical habitat must be

habitat and "indispensable," the Supreme Court did not define habitat, and instead remanded the case to the Fifth Circuit for further development.

Oral argument will also assist the Court in resolving discrepancies about how the facts purportedly supporting the agency's Final Rule in this matter are not consistent with the final decisions made by the agency. The agency's designation is unsupported by the administrative record, as the agency has failed to articulate the facts that support its Final Rule.

Lastly, this appeal will require this Court to consider the proper deference owed to the agency's expansive interpretation of the Endangered Species Act. Oral argument may assist the Court in resolving these issues.

For these reasons, Ranchers respectfully submit that oral argument may assist the Court in deciding this case.

DATED: January 7, 2019.

Respectfully submitted,

/s/ Christina M. Martin

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(7)(b)(ii), because this brief contains 8,769 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief 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 this brief has been prepared in a proportionally spaced typeface using Word 2013 in 14 point, Century Schoolbook.

DATED: January 7, 2019.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

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. No. 2:15-cv-00428-KG-CG

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, INC. and DEFENDERS OF WILDLIFE, INC.,

Defendant - Intervenors.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiffs New Mexico Farm & Livestock Bureau, New Mexico Cattle Growers' Association, and New Mexico Federal Lands Council's (Plaintiffs) petition for judicial review of the United States Fish and Wildlife Service's (Service) final agency action designating critical habitat for the jaguar in portions of Arizona and New Mexico. *See* (Docs. 1, 69). Having reviewed the briefing and being fully advised, the Court denies Plaintiffs' petition for injunctive relief and affirms the Service's final agency action.

I. Procedural History

On March 5, 2014, the Service published its final agency rule designating approximately 764,207 acres of land in New Mexico and Arizona as critical habitat for the jaguar under the Endangered Species Act (ESA). 79 Fed. Red. 12,571. Plaintiffs initiated suit in this Court on May 20, 2015, by filing a petition seeking declaratory judgment and injunctive relief. (Doc. 1). On October 31, 2016, Plaintiffs filed their opening brief in support of their petition.[1] (Doc. 69). Defendants and Defendant-Intervenors each filed their own response on December 12 and December 19, 2016, respectively. (Docs. 70, 71). Plaintiffs filed their reply on January 13, 2017, and submitted a notice of completed briefing on February 3, 2017. (Docs. 73, 75).

II. Factual Background

The jaguar (*Panthera oncus*) is a large, territorial predatory cat with a camouflaged appearance of either pale yellow, tan, or reddish yellow with prominent dark rosettes or blotches. *See* R003476; 79 Fed. Reg. at 12,581. The core habitat, which most jaguar occupy, consists of the tropical rain forests of Central and South America. *See* Administrative Record (AR) F000373. However, at the northernmost portion of the jaguar's range, a small population has adapted to occupy more arid forest and open grass ecosystems. 79 Fed. Reg. at 12,573. This includes a breeding population of resident jaguars in Sonora, Mexico as well as individual jaguars in the southwestern United States. The ecosystems in the United States are considered suitable only as a secondary habitat, which has little to no evidence of reproduction but which may provide important dispersal habitat for the species. AR R003492-93.

[1] Plaintiff-Intervenors Arizona and New Mexico Coalition of Counties for Stable Economic Growth, Jim Chilton, Pima Natural Resource Conservation District, and Southern Arizona Cattlemen's Protective Association filed a notice of voluntary dismissal of their intervenor complaint on October 27, 2016. *See* (Doc. 66).

The Service listed the jaguar as endangered under the ESA in 1972.[2] 37 Fed. Reg. 6,476 (Mar. 30, 1972); AR F000001. The Service recognized in 1980 that it was "unlikely that a jaguar will wander into the United States in the near future" and "even more unlikely that a population could become established in the American southwest," due to the fact that a jaguar had not been seen in New Mexico since 1937. *See* 45 Fed. Reg. 49,845; 59 Fed. Reg. 35,674, 35,676 (July 13, 1994); AR F000004, AR F000009. However, between 1996 and 2006, two jaguars were sighted in portions of Hidalgo County, New Mexico. AR F000379-80; 79 Fed. Reg. at 12,594, 12,580-81.

On August 20, 2012, the Service solicited public comments on a proposed rule to designate approximately 838,232 acres of land as jaguar critical habitat in New Mexico and Arizona. 77 Fed. Reg. 50,214. The Service published its Final Rule on March 5, 2014, designating approximately 764,207 acres of land in New Mexico and Arizona as critical habitat for the jaguar. 79 Fed. Reg. 12,571. Of the six designated units, Units 5 and 6, the subjects of this lawsuit, cover areas within the state of New Mexico and part of Arizona.

Unit 5 stretches across 102,724 acres in Hidalgo County, New Mexico, and Cochise County, Arizona, including portions of the Coronado National Forest, and 13,138 acres of privately owned land. 79 Fed. Reg. at 12,592. One jaguar track was photographed within this Unit near the New Mexico-Arizona state border in 1995, and a jaguar was sighted in this Unit in 1996. *Id.*; 79 Fed. Reg. at 12,580, Table 1 (entries for 1995 and 1996). Unit 6 includes 7,714

[2] Intervenor-Defendants argue that, while the 1972 listing covered endangered populations in Mexico and Central/South America, jaguars were not listed as endangered within the United States until 1997. (Doc. 71) at 7. However, both Plaintiffs and Defendants agree with the Service's determination that the 1972 listing was intended to cover Jaguars across their entire range, including the portion extending into the United States. *See* (Doc. 69) at 13; (Doc. 70) at 11; 79 Fed. Reg. at 12,578-82. Accordingly, the Court will treat 1972 as the relevant date of listing.

acres of entirely private property in Hidalgo County, New Mexico. 79 Fed. Reg. at 12,594, AR F000394. One jaguar was photographed in this Unit in 2006. 79 Fed. Reg. at 12,580, Table 1 (entry for 2006), AR F000380.

III. Legal Standard: Review of a Final Administrative Decision

Plaintiffs seek review of the Service's final agency decision, asserting that the Service exceeded its authority in designating thousands of acres of arid land in New Mexico as critical habitat for the jaguar. Accordingly, Plaintiffs request declaratory judgment and injunctive relief against Defendants for violating the ESA, 16 U.S.C. § 1531, *et seq.*; 50 C.F.R. § 424.12(e)[3]; and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*.

A. Administrative Procedure Act

Under the APA, a reviewing district court must set aside an agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D). The Court possesses jurisdiction over an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. This review functions as an appeal and should be based on the administrative record before the agency at the time the agency made its decision. 5 U.S.C. § 706(2)(A); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579-80 (10th Cir. 1994). (determining that reviewing court may not rely on evidence outside the record under APA). An agency's decision is entitled to a "presumption of validity," and will be upheld if the agency considered the relevant factors and provided a reasoned basis for its decision. *Citizens' Comm.*

[3] This federal regulation details the authority and criteria used by the Secretary in designating critical habitat for an endangered species under the ESA.

to Save Our Canyons v. Krueger, 513 F.3d 1169, 1176 (10th Cir. 2008); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir. 1999).

B. The Endangered Species Act

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation" of such species. 16 U.S.C. § 1531(b); s*ee N.M. Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1282 (10th Cir. 2001) (same). The first step in protecting a species is for the Secretary of the Interior (Secretary), who has responsibility to list a species in need of protection as either "threatened" or "endangered." 16 U.S.C. § 1533(a). The ESA also requires the Secretary to designate critical habitat for all listed species, to the extent prudent and determinable, as a means of conserving the species. 16 U.S.C. § 1533(a)(3)(A). The designation must be based on "the best scientific data available" and may only be made after the Secretary considers and weighs the cost of all relevant impacts, including economic impacts. 16 U.S.C. 1533(b)(2); 50 C.F.R. § 424.12(a). Under this standard, the Secretary may designate both occupied and unoccupied territories as critical habitat, but the standard imposes "a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *see* 16 U.S.C. § 1532(5)(A).

IV. Standing

Before a federal court may declare legal rights and grant requested relief, the party invoking the court's authority must demonstrate all elements of Article III standing. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). Article III standing is established by showing an injury in fact which is fairly traceable to defendants with a likelihood that the requested relief will redress the alleged injury. *See Steel*

Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-03 (1998); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (explaining requirements for justiciable case and controversy). "[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). Standing may be established by affidavits demonstrating particularized injury to individual members of an organization. *See, e.g.*, *Riverkeeper v. Taylor Energy Co., LLC*, 113 F. Supp. 3d 870, 875 (E.D. La. 2015) (finding evidence of associational standing based on affidavits of individual organization members).

Here, each of the Plaintiff organizations assert standing on the basis that individual members have suffered or will suffer an injury in fact from the Service's final action declaring Units 5 and 6 as critical habitat for the jaguar. In support of this assertion, Plaintiffs have provided sworn declarations from Chad Smith, the CEO of New Mexico Farm & Livestock Bureau, and Caren Cowan, the Executive Director of Cattle Growers and an Authorized Representative of the New Mexico Federal Lands Council. (Doc. 69-2); (Doc. 69-3). These declarations state that members of each organization are property owners, cattle ranchers, and business operators within Units 5 and 6 who will be subject to costly and time consuming compliance procedures as a result of the regulatory action. (Doc. 69-2) at 2-3; (Doc. 69-3) at 2.

Further, Plaintiffs have provided specific declarations of individual members who claim personal injury in fact as a result of the Service's designation of Units 5 and 6 as critical habitat for the jaguar. 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 as jaguar

critical habitat. (Doc. 73-2). Levi Klump, a member of all three Plaintiff organizations, owns a ranch and holds a federal grazing permit on federal land designated as jaguar critical habitat. (Doc. 73-1). According to their declarations, the renewal of federal grazing permits will be subject to consultation under the ESA, as will any future planned improvements to their land, such as corrals, stock ponds, additional fencing or other structures. *Id*.

The threat of direct regulation constitutes sufficient harm to confer standing to challenge government action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (holding that standing to challenge government action depends upon whether plaintiff is himself object of regulation). Further, the ESA contains specific provisions allowing any party to challenge the manner in which the ESA is enforced, even if plaintiffs seek to limit the scope of the regulation. *See* 16 U.S.C. § 1540 (g); *Bennett v. Spear*, 520 U.S. 154, 166 (1997) (allowing ranch operators to bring ESA citizen-suit even though they sought to prevent regulation). Accordingly, the declarations describe with adequate specificity the injuries of individual members necessary to confer associate standing to Plaintiff organizations. The Court, thus, turns to the merits of Plaintiffs' petition.

V. Analysis: Designation of Critical Habitat

A. Whether Jaguars Occupied Units 5 and 6

The first step of the review is to determine whether the designated critical habitat was occupied by the species which the designation was meant to protect. 16 U.S.C. § 1532(5)(A). This inquiry focuses on whether the habitat was occupied at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i); 79 Fed. Reg. at 12,581. As an initial matter, the parties disagree as to the definition of the term "occupied" under the ESA. Plaintiffs contend that the mere presence of solitary, individual jaguars does not render an area occupied without evidence of a resident population. (Doc. 69) at 11, 22; (Doc. 73) at 19. By contrast, the Service asserts that the term

"occupied" varies on a case-by-case basis and, in this instance, is satisfied if the designated area is one where jaguar are likely to be present. (Doc. 70) at 23-24, 27. The term "occupied" as used in the ESA has been found to be ambiguous and not plainly defined thus granting deference to the Service's definition of the term. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119-20 (D.D.C. 2004) (applying *Chevron* deference to Service definition of "occupied" habitat). Further, Courts have upheld the Service's definition of "occupied" as an area where a species is likely to be found. *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1165, 1167 (holding that Service has "authority to designate as 'occupied' areas that [a species] uses with sufficient regularity that it is likely to be present during any reasonable span of time" but "may not determine that areas unused by [a species] are occupied merely because those areas are suitable for future occupancy"). Hence, a designated area may be considered "occupied" if individual members of the protected species are likely to be found there, whether or not the area holds a resident breeding population.

As noted above, the Service's listing of jaguars under the ESA occurred in 1972. The Service used the jaguar's ten-year average lifespan to conclude that the observance of a jaguar any time within a ten-year period of the designation would constitute evidence that the habitat was occupied at the time of listing. 79 Fed. Reg. at 12,581, AR 000381. However, the only evidence in the record of jaguar sightings in the relevant areas are: one historical sighting in Unit 5; one sighting in Unit 5 in 1996; and one sighting in Unit 6 in 2006. (AR R002258-60, 002263-64 (Robinson *et al*., 2006 report detailing historical jaguar observations in New Mexico); (AR F000380 and 79 Fed. Reg. at 12,594, 12,581, citing 1996 jaguar sighting in Peloncillo Mountains located in Unit 5); (AR F000379 and 79 Fed. Reg. at 12,594, 12,580, citing 2006 sighting in

"north end of San Luis Mountains" in Unit 6). None of these sightings occurred within a ten-year period before or after the 1972 jaguar listing date under the ESA. Despite this lack of direct evidence, the Service proffered that, given the lack of survey effort around the time of listing, as well as the difficulty in detecting jaguars generally, lack of detection in a particular area did not indicate that jaguars were necessarily absent from a particular area at the time of listing. 79 Fed. Reg. at 12,582. Nevertheless, the Service explicitly acknowledged its uncertainty regarding whether Units 5 and 6 were "occupied." *See* (Doc. 70) at 30. Indeed, the Service expressed skepticism at such occupation shortly after the listing, concluding that it was unlikely that a jaguar population would become established in the American southwest or even that individual transitory jaguars "will wander into the United States in the near future." 45 Fed. Reg. 49,845; AR 000004. This opinion was based on the fact that, between 1937 and 1996, there were no jaguar sightings anywhere within New Mexico. *See* 59 Fed. Reg. 35,674, 35,676 (July 13, 1994); AR F000009. Despite the deference owed to the Service on matters of scientific expertise, the reviewing court cannot simply accept the truism that a particular species is elusive by nature as a substitute for concrete evidence to conclude that the relevant habitat was occupied at the time of listing. *See, e.g*, *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1244 (9th Cir. 2001) (finding arbitrary and capricious Service's determination that area was occupied based on speculation rather than direct evidence of species' presence). Consequently, the Court must turn to the standard for determining whether an unoccupied area may nevertheless be designated a critical habitat.

B. Whether Unoccupied Units Are Essential to Conservation

As noted above, the ESA allows designation of a critical habitat even if the area is not occupied by the listed species if the land is considered "essential for the conservation of the

species." *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163. This critical habitat designation can apply to the protection of a species' population which occupies the area at present, even if the area was considered unoccupied at the time of listing. *See Otay Mesa Prop., L.P. v. United States Dep't of the Interior*, 144 F. Supp. 3d 35, 60 (D.D.C. 2015) (upholding critical habitat determination for stock pond which supports fairy shrimp reproduction). However, with limited exceptions, a critical habitat designation may not include the entire geographical area which can be occupied by the threatened or endangered species. 16 U.S.C. § 1532(5)(c).

Here, Defendants contend that, even in the event that the designated area was unoccupied at the time of listing, that area remains essential to the conservation of the jaguar and, thus, constitutes a critical habitat. (Doc. 70) at 30-34. Defendants concede that the biomes of the designated New Mexico Units are not a part of the jaguars' core habitat and are suitable only as secondary habitat, which has little to no evidence of reproduction but can provide important dispersal habitat for the jaguar. *Id*. at 31. However, Defendants contend that the preservation of secondary habitats as part of the conservation plan contributes to the jaguars' persistence by supporting range expansion and genetic exchange. *Id*. at 31-32. Specifically, Defendants claim that populations at the outer periphery of the jaguars' range possess genetic and demographic diversity which allow them to inhabit the distinct arid environments of its secondary habitat, a key component for adaptability which ensures the species' survival. *Id*. In essence, Defendants assert that the small populations capable of inhabiting the arid environments of northern Mexico and the American southwest are critical to the species survival precisely because they are adapted to exist outside the jaguars' core habitat. *Id*. at 33-34.

In support of its critical habitat designation, the Service relied on jaguar sightings in 1996 and 2006 to demonstrate that Units 5 and 6 are habitable and presently in use by the species. *See*

AR F000389; 79 Fed. Reg. at 12,594, 12,580-81. Further, the Service relied on the scientific opinion of a team of experts contained in the jaguar Recovery Outline to determine that protection of core habitat is insufficient to the conservation of the species and to explain why protection of the small populations located in the secondary habitat on the edge of the jaguars' range was essential to the adaptability (and thus conservation) of the species. *See* 79 Fed. Reg. at 12,573; AR F000373-74; AR R002484 (conserving jaguars requires "at least, saving populations of the species in all the significantly different ecological systems in which they occur. . . it is not sufficient to pursue jaguar conservation efforts only in tropical forests"). Indeed, federal Courts have previously upheld the determination of critical habitat based on a similar rationale. *See, e.g., Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1367 (N.D. Fla. 2009) (upholding designation of critical habitat for area which allows dispersal movements and maintains genetic diversity in isolated portions of species' range).

Plaintiffs contend that this critical habitat designation serves as an overly-extensive buffer. Plaintiffs further contend that the Service's ends could be achieved simply by preserving the breeding population 130 miles south of the United States-Mexico border, which has adapted to surviving in an arid ecosystem similar to the Units in the American southwest. (Doc. 69) at 21; *see also* (Doc. 71) at 6 (describing similar ecological conditions in Sonora, Mexico). While this breeding population arguably plays a larger part in the species' adaptability to secondary habitats, it is not the reviewing Court's role to reevaluate *de novo* the importance of the designated critical habitat. Rather, the Service's designation of Units 5 and 6 is based on analysis of relevant data and rationally connected to evidence demonstrating the importance of preserving populations in the secondary habitat at the edge of the jaguars' northern range. This Court concludes the decision is neither arbitrary nor capricious and defers to the Service's scientific

determination that critical habitat designation in the American southwest is critical for range connectivity to adjacent habitable land in Mexico. *See* AR R002441-82; AR R002430-40; (Doc. 70) at 39-40.

C. Whether the Service Failed to Make a Threshold Determination

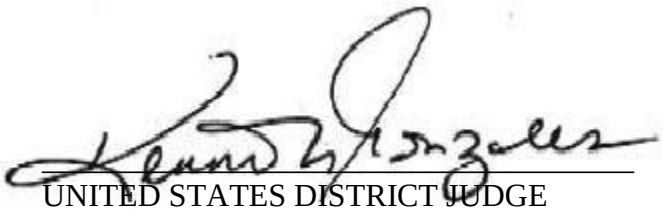
Alternatively, Plaintiffs argue that the Service's rationale for designating Units 5 and 6 as critical habitat is incomplete because it fails to identify the point at which jaguars will no longer be considered a threatened species in need of regulatory protections. (Doc. 69) at 25-27. Plaintiffs contend that, as a result of this failure, the Service's final rule is lacking a threshold determination necessary to designate critical habitat under the ESA. *Id*.

The ESA defines critical habitat as those areas "essential to the conservation of the species" and describes conservation as use of methods to bring a species to "the point" at which protections are no longer required. 16 U.S.C. §§ 1532(3), 1532(5)(A)(i)-(ii). Plaintiff misread the ESA. Indeed, the ESA does not impose a threshold requirement that the Service identify at the time of critical-habitat designation a specific viable population size and minimum habitat necessary to sustain that population. *See, e.g., Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F. 3d 452, 469 (5th Cir. 2016) ("The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation"). Rather, the statute instructs the Secretary to determine the point at which a species is conserved during the development and implementation of a recovery plan, an action separate from the critical habitat designation phase. *See* 16 U.S.C. § 1533(f)(1)(B)(ii). Because the statute does not require knowing when a species is conserved during the critical habitat designation phase, the final rule's exclusion of this analysis does not invalidate the designation of Units 5 and 6 as critical habitat for the jaguar.

VI. Conclusion

For the foregoing reasons, the Court finds that the Service's determination that the designated areas in Units 5 and 6 were essential to the conservation of the jaguar species was not arbitrary and capricious under the APA. Consequently, the Court affirms the Service's determination to designate Units 5 and 6 as critical habitat for the jaguar.

IT IS THEREFORE ORDERED that Plaintiffs' petition to overturn the final agency rule (Doc. 69) is **DENIED** and the Service's final decision is **AFFIRMED**.



UNITED STATES DISTRICT JUDGE

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. No. 2:15-cv-00428-KG-CG

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.

FINAL ORDER

Pursuant to the Memorandum Opinion and Order denying Plaintiffs' petition to overturn a final agency rule (Doc. 69), the Court enters this Final Order under FED. R. CIV. P. 58, affirming the decision of the United States Fish and Wildlife Service and dismissing this action with prejudice.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(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, Symantec, last updated January 7, 2019, and according to the program are free of viruses.

DATED: January 7, 2019.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Christina M. Martin
CHRISTINA M. MARTIN

Laken D. Padilla

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Tenth Circuit Court of Appeals

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Case Name: New Mexico Farm, et al v. United States Dept of Interior, et al
Case Number: 17-2211
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Docket Text:
[10616588] Appellant/Petitioner's brief filed by New Mexico Cattlegrowers' Association, New Mexico Farm and Livestock Bureau and New Mexico Federal Lands Council. 7 (Counseled) paper copies to be provided to the court. Served on 01/07/2019 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [17-2211] CMM

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