

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NEW MEXICO CATTLE GROWERS'
ASSOCIATION
2231 Rio Grande Blvd. NW
Albuquerque, NM 87104

Plaintiff,

v.

UNITED STATES FISH AND WILDLIFE
SERVICE
1849 C Street, N.W.
Washington, DC 20240

UNITED STATES DEPARTMENT OF THE
INTERIOR
1849 C Street, N.W.
Washington, DC 20240

DEBRA HAALAND, in her official capacity as
Secretary of the Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

MARTHA WILLIAMS, in her official capacity as
Principal Deputy Director and Acting Director of
the United States Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

Defendants.

Civil Action Case No. 1:21-cv-3263

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff New Mexico Cattle Growers' Association's (Cattle Growers) membership is comprised of the hard-working individuals and families who earn their livelihoods raising cattle. Cattle Growers' membership includes the McKeen family, who for generations have raised cattle on the rugged terrain of western New Mexico. Ranching families like the McKeens must contend with drought, wildfire, and the many other realities of raising cattle in the harsh conditions of the arid west. They must also contend with burdensome federal regulations such as those imposed by the Defendants (collectively the "Service"), under the Endangered Species Act (ESA).

2. ESA regulations impose significant burdens on ordinary land use. They increase the costs of federal permitting, reduce the market value of affected lands, and expose landowners to potentially ruinous civil and even criminal penalties. It is therefore crucially important that federal decisionmakers are guided by sound data-driven science and objective, publicly disclosed standards. Yet, in many instances the Service is guided by no such standards when making key decisions that impact landowners. For example, when determining whether a population constitutes a "subspecies" (making it eligible for listing under the ESA), the Service relies upon ad-hoc determinations, without resort to any definition or standard for identifying "subspecies." This leaves ranching families like the McKeens—who have had their property values and livelihoods harmed by the endangered subspecies listing of the southwestern willow flycatcher—with little choice other than to comply with arbitrary and unsupported regulations.

3. In 2015—on behalf of affected members like the McKeen family—Cattle Growers, along with other groups, petitioned the Service to remove the southwestern willow flycatcher from the federal list of threatened and endangered species. *See* Petition of the Center for Environmental Science, Accuracy, and Reliability et al. to Remove the "Southwestern" Willow Flycatcher From

the List of Endangered Species Under the Endangered Species Act Due to Significant New Data that Demonstrates Original Data Error, Fed. Doc. No. FWS-R2-ES-2016-0039-0002, at 9 (Aug. 19, 2015) (the “Petition”). The grounds for the Petition were that, among other things, the best scientific and commercial data prove the flycatcher is not a distinct subspecies and is therefore ineligible for listing under the ESA.

4. The Service denied the Petition, determining in relevant part that the southwestern willow flycatcher is a subspecies. *See* 82 Fed. Reg. 61,725 (Dec. 29, 2017) (the “Final Rule”). That denial was illegal. In denying the Petition the Service violated the fundamental administrative law principle of reasoned decision-making. It set forth no definition of “subspecies;” provided no governing criteria for determining whether any given population or group of populations qualifies as a subspecies; and ignored crucial scientific evidence bearing on the flycatcher’s subspecies designation.

5. Therefore, the Final Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the Endangered Species Act, 16 U.S.C. §§ 1531–1544, and the Administrative Procedure Act, 5 U.S.C. §§ 701–706. The Final Rule should be vacated, and the matter remanded to the Service.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); 16 U.S.C. § 1540(c) and (g) (actions arising under the ESA); 5 U.S.C. § 702 (providing for judicial review of agency action under the APA); 5 U.S.C. § 706 (authorizing courts to set aside unlawful agency action).

7. On April 13, 2020, more than 60 days before the filing of this complaint, Cattle Growers provided the Secretary of the Interior and the Director of the United States Fish and Wildlife Service with written notice of the violations that are the subject of this lawsuit, in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as Exhibit 1 and is incorporated herein by reference. Neither the Secretary nor the Director have responded to this notice or taken any action to withdraw the Final Rule at issue here or otherwise remedy the violations of law identified therein.

8. Cattle Growers seeks relief under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

9. Cattle Growers asserts that the Service's denial of the Petition constitutes unlawful, arbitrary and capricious agency action. An actual, justiciable controversy now exists between Cattle Growers and the Service.

10. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

11. Cattle Growers has exhausted all available administrative remedies.

12. Cattle Growers is injured by the denial of the Petition. Invalidity of the Final Rule denying the Petition will redress those injuries.

13. Venue in the District of the District of Columbia is proper under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e), because Defendants are agencies and officers of the United States, Defendants reside in the District of the District of Columbia, and a substantial part of the events or omissions giving rise to the claim occurred in the District of the District of Columbia.

DESCRIPTION OF PARTIES AND STANDING ALLEGATIONS

Plaintiff

14. *New Mexico Cattle Growers' Association* is a nonprofit organization that represents roughly 1,400 ranchers and landowners throughout 32 New Mexico counties and 19 states. Since 1914, its primary purpose has been to serve as an advocate for New Mexico ranchers and landowners and to protect ranching from a variety of threats, including overreaching environmental regulation.

15. Leadership and committee positions are open to all Cattle Growers members. Although Cattle Growers represents the interests of all New Mexico ranchers, an annual fee is required for membership.

16. Many of Cattle Growers' members have been, and continue to be, burdened by onerous environmental regulations. These include regulations imposed under the ESA, such as the flycatcher's endangered listing. Cattle Growers therefore devotes substantial resources to ensuring that ESA regulations are consistently and transparently imposed.

17. Acting on behalf of its membership, Cattle Growers—through its elected leadership and various committees—acts as an advocate on ESA issues, publishes information on related issues for members, performs research pertaining to ESA regulation, submits comments to government agencies addressing concerns about how regulations under the ESA affect members, and engages in litigation when members are threatened by illegal government action taken under the ESA. For example, Cattle Growers has been involved in prior litigation over the flycatcher's critical habitat, *see N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277, 1285 (10th Cir. 2001), and remains actively involved in current debates regarding the gray wolf.

18. The Service's illegal denial of the Petition to delist the southwestern willow flycatcher under the ESA frustrates Cattle Growers' objectives and forces Cattle Growers to expend additional resources advocating for and educating its affected members. As the representative of New Mexico ranchers, Cattle Growers, through this lawsuit, seeks to protect its members' interests germane to its purpose.

19. Cattle Growers' members would have standing to challenge the Final Rule in their own right but their participation is not required for this lawsuit. Cattle Growers' annual dues-paying membership includes New Mexico rancher and landowner Mr. Hugh McKeen, whose property overlaps with the flycatcher's critical habitat, and whose livelihood, property values, and property rights are threatened by the flycatcher's listing. On behalf of affected members like Hugh McKeen, Cattle Growers joined the Petition.

20. Mr. McKeen owns a 700-acre private cattle ranch in Catron County, New Mexico. Mr. McKeen also holds permitted grazing rights on the adjacent 11,467-acre Cedar Breaks Allotment within the Gila National Forest, and adjudicated water rights from existing wells and ditches diverted from the San Francisco River. Mr. McKeen's ranch and grazing allotment overlap substantially with designated critical habitat for the flycatcher within the San Francisco Management Unit. *See* 78 Fed. Reg. 344, 378, 529 (Jan. 3, 2013).

21. The listing and designation impose significant regulatory burdens on the use of Mr. McKeen's ranch property and adjoining grazing allotment. The direct effect of these regulatory burdens has been a substantial diminution in the appraised value of Mr. McKeen's ranch.

22. The listing and critical habitat designation also subject Mr. McKeen to the risk of citizen suits and agency enforcement actions under the ESA, further adding to his operational costs.

23. The designation has also led to additional reductions in the market value of Mr. McKeen's property, due to public perceptions of the burdens imposed by endangered species regulations.

24. These economic injuries are traceable to the designation of critical habitat for the flycatcher and thus to the Final Rule denying the Petition to delist the flycatcher. Setting aside that illegal denial will redress these injuries by requiring the Service to properly consider the information contained in the Petition and revisit the propriety of the flycatcher's listing.

Defendants

25. The *United States Fish and Wildlife Service* is an agency of the Department of the Interior. The Service has been delegated responsibility by the Secretary of the Interior for the day-to-day administration of the ESA with respect to most terrestrial and freshwater plant and animal species. This includes listing species and designating critical habitat. The Service's Final Rule denying the Petition to delist the southwestern willow flycatcher is the subject of this action.

26. The *United States Department of the Interior* is an agency of the United States that administers and implements the ESA with respect to most terrestrial and freshwater plant and animal species. This includes listing species and designating critical habitat. The Department's Final Rule denying the Petition to delist the southwestern willow flycatcher is the subject of this action.

27. *Debra Haaland* is the Secretary of the United States Department of the Interior. In that capacity Secretary Haaland is responsible for the administration of the ESA with respect to most terrestrial and freshwater plant and animal species. She is sued in her official capacity.

28. *Martha Williams* is the Principal Deputy Director and Acting Director of the United States Fish and Wildlife Service. In that capacity, Acting Director Williams oversees the Fish and Wildlife Service’s administration of the ESA. She is sued in her official capacity.

LEGAL BACKGROUND

The Endangered Species Act

Listing of Threatened or Endangered Species

29. To receive protection under the Endangered Species Act, a “species” must be determined to be “endangered” or “threatened,” based on certain factors. *See* 16 U.S.C. § 1533(a). A “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

30. The ESA does not define the term “subspecies.” *See id.* § 1532.

31. A species or subspecies is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species or subspecies is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

32. To be listed under the ESA, a bird must be either a threatened or endangered species, subspecies, or distinct population segment.

33. The ESA forbids the unpermitted “take” of any endangered species of fish or wildlife. *See id.* § 1538(a)(1)(B). The term “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). The term “harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding,

feeding or sheltering.” 50 C.F.R. § 17.3. The ESA imposes harsh civil and criminal penalties for violation of its take prohibition. 16 U.S.C. § 1540(a)–(b).

34. The ESA provides for citizen enforcement of the Act. 16 U.S.C. § 1540(g).

Critical Habitat Designation

35. Generally, concurrent with a species’ listing the Service must designate “critical habitat.” 16 U.S.C. § 1533(a)(3).

36. Such habitat comprises those occupied areas containing the physical or biological features essential to the species’ conservation, or any unoccupied area that is itself “essential for the conservation of the species.” *See id.* § 1532(5).

37. Critical habitat designations negatively affect property owners by increasing the burdens of federal permitting, reducing the value of designated property, and increasing potential take liability.

Consultation

38. Whenever an agency proposes to issue a permit, fund, or carry out an activity that may “jeopardize” a listed species’ “continued existence” or will “result in the destruction or adverse modification of [its critical] habitat,” the agency must “consult” with the Service over those effects and identify modifications or mitigation measures to ensure that the activity will not jeopardize the species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2).

39. This consultation requirement applies to activities on both private and public land.

40. In practice, the result of consultation under the ESA is almost always the imposition of additional restrictions on the federally funded or permitted activity.

Petitions to list or delist a species

41. The APA authorizes interested parties to petition for the enactment or repeal of any administrative rule. 5 U.S.C. § 553(e).

42. The ESA requires the Service, to the maximum extent practicable, within 90 days of the receipt of such a petition seeking the listing or delisting of a species, to determine whether the petitioned action may be warranted. *See* 16 U.S.C. § 1533(b)(3)(A). Within one year of the petition's receipt, the Service must make a final determination as to whether the petitioned action is warranted. *Id.* § 1533(b)(3)(B). If the Service so determines, it must then proceed with rulemaking. *See id.* § 1533(b)(5).

43. The Service has a nondiscretionary duty to list and delist species in accordance with Section 4 of the Act. *Id.* §§ 1533; 1540(g)(1)(C).

Administrative Procedure Act

44. The Administrative Procedure Act provides that “[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.

45. Pursuant to the APA, a court must set aside agency action that fails to meet statutory, procedural, or constitutional requirements; or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)–(D).

FACTUAL ALLEGATIONS

The Service's Listing of the Flycatcher as a “Subspecies”

46. In 1995, the Service listed the southwestern willow flycatcher as an endangered subspecies. 60 Fed. Reg. 10,694 (Feb. 27, 1995). The Service most recently designated 1,227

stream miles and 208,973 acres of revised critical habitat for the flycatcher in 2013. 78 Fed. Reg. 344 (Jan. 3, 2013).

47. The flycatcher is a small, neotropical migrant bird that, during its breeding season of May to September, can be found in riparian habitats of the southwestern United States. 82 Fed. Reg. 61,725, 61,727 (Dec. 29, 2017). These include parts of California, Nevada, Utah, Colorado, Arizona, New Mexico, and Texas. *Id.* The bird has a “grayish-green back and wings, whitish throat, light grey-olive breast, and pale yellowish belly.” 60 Fed. Reg. at 10,694.

48. The Service considers the southwestern willow flycatcher (*Empidonax traillii extimus*) to be a subspecies of the widely distributed willow flycatcher (*Empidonax traillii*). *Empidonax traillii* is a common species with a range that spans the North American continent. *Empidonax traillii* is not threatened or endangered and meets none of the criteria for listing as either threatened or endangered under the ESA.

49. The Service’s original subspecies designation for the flycatcher was based on “subtle differences in color and morphology.” 60 Fed. Reg. at 10,696.

50. More recently, the Service has relied on morphological (coloration) data derived from “core” areas within the putative subspecies, *see* E.H. Paxton et al., *Geographic Variation in the Plumage Coloration of Willow Flycatchers Empidonax Traillii*, 41. J. Avian Biology 128 (2010) (Paxton et al. (2010)), on vocalization data similarly collected in areas that did not correspond to areas of geographic division, J.A. Sedgwick, *Geographic Variation in the Song of Willow Flycatchers: Differentiation Between Empidonax traillii adastus and E. t. extimus*, 118 The Auk 366 (2001) (Sedgwick 2001), and on patterns of genetic differentiation among putative flycatcher subspecies that nevertheless lack clear and distinctive geographic boundary lines, E.H. Paxton et al., *Using Molecular Genetic Markers to Resolve a Subspecies Boundary: The Northern*

Boundary of the Southwestern Willow Flycatcher in the Four-corner States, U.S. Geological Survey Open-File Report 2008-1117 (2008) (Paxton et al. (2008)).

The Absence of any Regulatory Definition of “Subspecies”

51. The Service has never promulgated a rule defining the term “subspecies.”

52. Most recently, on November 10, 2021, the Service denied a 2017 petition requesting that the Service promulgate a regulatory definition of the term “subspecies.” In denying that petition the Service maintained its commitment to leaving that term undefined.

53. The Service has promulgated other rules for defining important ESA terms. For example, in 1996, the Service defined “distinct population segment” and stated that “it is important that the term ‘distinct population segment’ be interpreted in a clear and consistent fashion” because “[a]vailable scientific information provides little specific enlightenment in interpreting the phrase.” 61 Fed. Reg. 4722, 4722 (Feb. 7, 1996).

54. Like the term “distinct population segment,” there is little scientific information available to interpret the term “subspecies,” even among taxonomists. *See Holly Doremus, Listing Decisions Under the Endangered Species Act: Why Better Science Isn’t Always Better Policy*, 75 Wash. U. L.Q. 1029, 1100–01 (1997).

**Zink (2015) and Shortcomings in the Service’s
Subspecies Determination for the Southwestern Willow Flycatcher**

55. Shortcomings in the current subspecies designation of the southwestern willow flycatcher were demonstrated in a 2015 study which reanalyzed many of the sources relied upon by the Service. *See Robert M. Zink, Genetics, Morphology, and Ecological Niche Modelling Do Not Support the Subspecies Status of the Endangered Southwestern Willow Flycatcher (Empidonax trailli extimus)*, 117 The Condor 76 (2015) (Zink 2015).

56. Zink (2015) reanalyzed the molecular-genetic data from Paxton et al. (2008) and the morphological (coloration) data from Paxton et al. (2010). The study also refuted the vocalization data in Sedgwick (2001) and examined the ecological distinctiveness of the flycatcher through niche modelling techniques.

57. Zink (2015) demonstrated that there exists no statistically valid morphological, genetic, vocal, or ecological basis for designating the flycatcher as a separate subspecies.

58. Zink (2015) further highlighted the error in the Service's reliance on confirmatory studies, such as Sedgwick (2001), Paxton et al. (2008), and Paxton et al. (2010), which validate rather than test existing putative flycatcher subspecies. Zink (2015), *supra*, at 79. In particular, Zink (2015) demonstrated that these studies have not shown whether distinctions among existing flycatcher subspecies are any more significant than differences among randomly divided flycatcher populations. After studying this question, Zink (2015) concluded that, when viewed species wide, there is no significant genetic or morphological variation in flycatchers that corresponds to existing subspecies divisions (or any other geographically based division). *Id.* at 80–82.

Cattle Growers' Petition to Delist the Flycatcher

The Petition

59. In August 2015, a coalition of interested groups, including Cattle Growers, submitted a delisting petition for the southwestern willow flycatcher for—among other things—taxonomic error. *See* Petition, *supra*, at 10.

60. The Petition relied in part on Zink (2015) and demonstrated that morphological, genetic, vocal, and ecological data do not support the subspecies designation for the flycatcher.

61. Initially, the Service made a positive determination, finding that the Petition presented substantial information indicating that delisting of the flycatcher may be warranted because the bird did not constitute a subspecies. *See* 81 Fed. Reg. 14,058, 14,070 (Mar. 16, 2016).

Zink (2017)

62. Following submission of the Petition, another critical study was published. *See* Robert M. Zink, *Current Topics in Avian Conservation Genetics With Special Reference to the Southwestern Willow Flycatcher*, 9 *The Open Ornithology J.* 60 (2016) (Zink 2017).¹

63. Zink (2017) expanded on the analysis of Zink (2015) and contained three key pieces of additional genetic information demonstrating the erroneous nature of the Service's flycatcher subspecies designation. Most notably, Zink (2017) revealed critically misleading elements of Theimer et al. (2016), a preferred genetic study of the Service. Zink (2017), *supra* at 64–66.

Denial of the Petition

64. In December 2017, the Service denied the Petition, and determined that the southwestern willow flycatcher is a distinct subspecies and should remain on the federal list of threatened and endangered species. *See* 82 Fed. Reg. 61,725 (Dec. 29, 2017).

65. Addressing whether the flycatcher is a subspecies, the Service cited to several conflicting definitions of “subspecies,” conceded that “[v]arious definitions or descriptions of subspecies exist,” and noted that “[c]ontroversy over the utility and definition of subspecies has a long history.” U.S. Fish & Wildlife Serv., 12 Month Finding on a Petition to Delist the

¹ As noted in Cattle Growers' 60-day Notice of Intent to Sue, although Zink's letter was published in the 2016 volume of *The Open Ornithology Journal*, it was made available to the Service in final form on January 5, 2017. U.S. Fish & Wildlife Serv., 12 Month Finding on a Petition to Delist the Southwestern Willow Flycatcher Under the Endangered Species Act and 5-Year Review, Fed. Doc. No. FWS-R2-ES-2016-0039-0024, at 7 (Dec. 28, 2017). As such, the Finding & Status Review refers to this letter as “Zink's 2017 letter.” *Id.* In order to avoid confusion, this Complaint will continue to refer to this letter as Zink (2017), despite its 2016 publication date.

Southwestern Willow Flycatcher Under the Endangered Species Act and 5-Year Review, Fed. Doc. No. FWS-R2-ES-2016-0039-0024, at 9 (Dec. 28, 2017) [hereafter “Finding & Status Review”].

66. In denying the Petition, the only standard for subspecies determinations announced by the Service was that “[t]he differences between subspecies are usually less distinct than the differences between species.” *Id.*

67. Although the Service identified certain “differences” between the “southwestern” willow flycatcher and other willow flycatcher populations, the Service provided no rule for gauging the significance of those purported “differences.” *Id.* at 10–24.

68. In its Final Rule denying the Petition, the Service assessed several studies. One study which played a critical role in the Service’s final decision to maintain the flycatcher’s listing was Theimer et al. (2016). *See* Finding & Status Review at 17–21, 23–24 (citing Tad C. Theimer et al., *Available Data Support Protection of the Southwestern Willow Flycatcher Under the Endangered Species Act*, 118 *The Condor* 289, 296 (2016)).

69. Of the other available studies, the Service gave significant attention to Zink (2015) but refused to engage Zink (2017). *See* Finding & Status Review at 7.

70. Zink (2017) provides three key pieces of additional data that directly contradicted the Service’s position and highlighted critically misleading aspects of the Service’s preferred study, Theimer et al. (2016).

71. Documents produced from the Service’s response to a FOIA request reveal that one of the Service’s own avian experts recommended, to no effect, that the Finding & Status Review engage with Zink (2017). *See* Email from Gjon Hazard, Fish & Wildlife Biologist, U.S. Fish & Wildlife Serv., to Angela Picco et al. (May 9, 2017, 5:04 PM PDT) (“There is one topic I would

like to elaborate on . . . [Z]ink’s rebuttal (Zink 2016, *The Open Ornithology Journal* 9(1):60–69) to the Theimer et al. (2016) critique of Zink (2015) is not presented in the document. . . . It seems to me that the Service should acknowledge and include this document in our evaluation, given that it is available and that Zink (2015) and Theimer et al. (2016) play such a central role to the petition and our response.”).

72. However, when provided with the contradictory information presented in Zink (2017), the Service refused to provide it the necessary attention. *See* Finding & Status Review at 7.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

73. Cattle Growers incorporates herein by reference the allegations set forth in the preceding paragraphs.

74. Individual members of Cattle Growers have been injured by the Final Rule denying the Petition. By denying the Petition, the Service leaves intact the flycatcher’s listing and critical habitat designation. If an injunction does not issue against the Service’s Final Rule, these Cattle Growers members will be irreparably harmed. Harms attributable to the flycatcher’s listing and subsequent critical habitat designation include, but are not limited to, devaluation of their property and the continued imposition of significant regulatory burdens on their property. A delisting of the flycatcher would result in the immediate rescission of the critical habitat designation, which would remedy the economic and other land-use-related injuries suffered by Cattle Growers’ flycatcher-habitat-affected members.

75. Cattle Growers has no plain, speedy, and adequate remedy at law for these injuries. Damages in this case are not available.

76. Cattle Growers’ claims for relief are ripe.

77. If not enjoined by this Court, the Service's decision to deny the Petition without reference to any cognizable subspecies standard, in violation of fundamental administrative law principles, will be left unremedied, in derogation of Cattle Growers' rights and interests.

78. If not enjoined by this Court, the Service's decision to deny the Petition without considering relevant evidence, in violation of fundamental administrative law principles, will be left unremedied, in derogation of Cattle Growers' rights and interests.

79. An actual and substantial controversy exists between Cattle Growers and the Service over the latter's duty to comply with the ESA and the APA in ruling on Cattle Growers' Petition.

80. This case is currently justiciable because the Service's failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Cattle Growers' members. Because the listing of the flycatcher has devalued the property of Cattle Growers' members and continues to impose substantial regulatory burdens upon them, Cattle Growers has a keen interest in knowing whether the denial of its Petition to delist the flycatcher is legal.

81. Therefore, declaratory and injunctive relief is appropriate to resolve this controversy.

FIRST CLAIM FOR RELIEF
Failure to Articulate "Subspecies" Standard
(ESA, 16 U.S.C. §§ 1533(b)(3)(B), 1540(g)(1)(C))

82. Cattle Growers incorporates herein by reference the allegations set forth in the preceding paragraphs.

83. An agency's articulation of a standard to guide its decision-making is essential to reasoned administrative decision-making. This rule derives from the requirement that an agency

identify a rational connection between the facts found and the decision made. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

84. The Endangered Species Act authorizes the Service to list “subspecies.” *See* 16 U.S.C. § 1532(16). However, the statute does not define the term, and the term does not have a commonly accepted meaning among taxonomists. Thus, for the Service to determine whether to list or to delist a “subspecies,” it must itself decide upon a standard or definition for the term.

85. The Service has not adopted a generally applicable definition of “subspecies.”

86. In denying the Petition, the Service accepted certain studies and rejected others. *See* Finding & Status Review at 9–24.

87. In doing so, it set forth what it considers to be relevant types of data and methods for making a taxonomic determination. However, merely identifying and discussing pertinent data and methodology do not define what is to be established by that data and methodology.

88. The Service did not articulate any standard or definition for what constitutes an avian subspecies. Necessarily, then, the Service could not and did not explain why the morphological, genetic, or other data before it support the conclusion that the southwestern willow flycatcher is a subspecies.

89. This failure to explain renders the Service’s decision arbitrary and capricious for three reasons:

- a. First, a certain degree of statistically significant difference can be detected between nearly any randomly divided population of a particular species. Hence, without a standard to qualify the taxonomic significance of such distinctions, the Service illegally reserves to itself the unfettered discretion to designate any population as a subspecies, on a case-by-case and standardless basis. *See Trafalgar Cap. Assocs.*,

Inc. v. Cuomo, 159 F.3d 21, 34 n.11 (1st Cir. 1998) (an “ad-hoc standardless determination . . . is likely to be arbitrary and capricious”); Rob Roy Ramey II, *On The Origin of Specious Species*, in *Institutions and Incentives in Regulatory Science* 77, 83 (Jason Scott Johnston ed., 2012) (“If species concepts and definitions can be selected post hoc to fit any set of observations, then just about any group of organisms could potentially qualify (or not qualify) as a species depending on the investigator’s whim or regulatory agency’s bias.”).

- b. Second, the Service’s failure to articulate a clear, publicly available and scientifically defensible standard for when it is appropriate to list a subspecies allows it to “move the goalpost,” as it will always be able to alter the level of significance necessary to prove or disprove subspecies status. *Cf. Qwest Corp. v. FCC*, 689 F.3d 1214, 1228 (10th Cir. 2012) (“[A]n agency’s shifting of the policy goalpost . . . may lead us to conclude that the agency has acted arbitrarily or capriciously.”). This arrangement prevents the public from developing the necessary data to support a delisting petition. *Cf. Kunkel v. Comm’r*, 821 F.3d 908, 910 (7th Cir. 2016) (“[Y]ou can’t beat something with nothing.”). As such, in reaching its decision, the Service provided the public with no criterion to measure the soundness of its action or to alert them to the relevant taxonomic standards. The result is that the regulated public remains in the dark as to what constitutes a “subspecies,” and the Service’s decision-making process is hidden from public scrutiny.
- c. Third, by reaching a conclusion without setting forth an adequate explanation for how the conclusion was reached, the Service made a listing decision without

observing the principle of reasoned agency decision-making. *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (“[T]he agency must explain why it decided to act as it did. The agency’s statement must be one of ‘reasoning’; it must not be just a ‘conclusion’; it must ‘articulate a satisfactory explanation’ for its action.”) (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)). All agencies—including the Service—must satisfactorily explain their actions. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

90. Compounding this arbitrariness, whatever de facto standard that the Service may have employed to diagnose the subspecies, the result was a taxonomic judgment that functioned only at the population, rather than the individual, level. In its Finding & Status Review, the Service admitted that its designation acknowledges an “intergradation” zone between the purported “southwestern” subspecies (*E. t. extimus*) and the purported “Great Basin” subspecies (*E. t. adastus*). Finding & Status Review at 17; *see also* 60 Fed. Reg. at 10,710–10,711. Within that zone, there is no way to identify individual birds as belonging to one or the other “subspecies.” Upholding the flycatcher’s subspecies status despite this intergradation zone is particularly problematic given that the Act’s prohibitions operate on the individual, not the population, level. *Cf.* Michael A. Patten & Philip Unitt, *Diagnosability Versus Mean Differences of Sage Sparrow Subspecies*, 119 *The Auk* 26, 28 (2002) (“A valid subspecies should be diagnosably different from all other populations, not merely exhibit mean differences. Otherwise, individuals cannot be identified, predictability is lost, and the category is deprived of its most useful applications.”). Indeed, given the substantial civil and criminal penalties attendant upon violations of the ESA’s prohibition on take, due process compels the Service to employ a subspecies definition that allows for diagnosability at the individual level.

91. Therefore, the Service’s denial of Cattle Growers’ delisting Petition was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the ESA, 16 U.S.C. §§ 1533(b)(3)(B), 1540(g)(1)(C).

SECOND CLAIM FOR RELIEF
Failure to Articulate “Subspecies” Standard
(In the Alternative to the First Claim for Relief)
(APA, 5 U.S.C. § 706(2)(A))

92. Cattle Growers incorporates herein by reference the allegations set forth in the preceding paragraphs.

93. The APA provides for review of final agency action when there is no other adequate judicial remedy. 5 U.S.C. § 704. To the extent that the First Claim for Relief is not cognizable as an ESA citizen suit action, the same is fully re-alleged under the APA.

94. The Service’s failure to articulate a standard or definition for “subspecies,” and failure to explain why the data before the agency supported the designation of the flycatcher as a subspecies, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

THIRD CLAIM FOR RELIEF
Failure to Consider Relevant Evidence and to use the Best Available Data
(ESA, 16 U.S.C. §§ 1533(b)(1)(A), (b)(3)(B), 1540(g)(1)(C))

95. Cattle Growers incorporates herein by reference the allegations set forth in the preceding paragraphs.

96. An agency’s consideration of all relevant evidence to guide its decision-making is essential to reasoned administrative decision-making. *See Butte County v. Hogen*, 613 F.3d at 194.

97. Further, listing decisions under the Endangered Species Act must be made “solely on the basis of the best scientific and commercial data available” 16 U.S.C. § 1533(b)(1)(A).

98. In affirming the flycatcher’s dubious subspecies classification, the Service failed to consider relevant and available scientific evidence.

99. The two main studies questioning the flycatcher’s subspecies designation are Zink (2015) and Zink (2017). Although Zink (2015) received significant attention from the Service, Zink (2017) received almost none. The Service characterized Zink (2017) as not presenting new data and therefore ignored it. *See* Finding & Status Review at 7.

100. However, contrary to the Service’s characterization, Zink (2017) contains key new data that directly contradicts both the Service’s position and important aspects of Theimer et al. (2016), a study that formed the backbone of the Service’s decision to deny the Petition. *See* Finding & Status Review at 17–21, 23–24.

- a. First, Zink (2017) supplies the phylogenetic analysis discussed but not included in Zink (2015). Zink (2017) *supra* at 63–64. That analysis shows that, by analyzing all publicly available mitochondrial DNA (mtDNA) data across the flycatcher species, “there is no support for *E. t. extimus*, or any other subspecies.” *Id.* at 64. Moreover, Zink (2017) points out the fundamental flaw in prior flycatcher genetic analyses—the failure to recognize that mtDNA haplotypes are inherited as a unit. Hence, analyzing only a subset of the haplotypes—as the Service’s preferred genetic studies did—is not adequate to detect subspecies structure: other subsets of the same genetic data may indicate conflicting patterns of variation. *Id.* at 63.
- b. Second, Zink (2017) supplies a discriminant analysis² of all six color characters for the flycatcher. *Id.* at 66. Theimer et al. (2016), a study relied on heavily by the

² William R. Klecka, *Discriminant Analysis* 7 (1980) (“Discriminant analysis is a statistical technique which allows the researcher to study the differences between two or more groups of objects with respect to several variables simultaneously.”).

Service, argues for subspecies designation based on just one such character. *See* Theimer et al. (2016), *supra* at 296. But Zink (2017) points out the focus on just one character is inadequate because it might lead to conflicting subspecies diagnoses based on conflicting patterns of variation. Zink (2017), *supra* at 65. Zink (2017) in fact demonstrates that, after taking into account all available color characters, no subspecies structure can be discerned. *Id.* at 65–66.

- c. Third, Zink (2017) reveals a critically misleading aspect of Theimer et al. (2016). The latter provides a figure of the mtDNA data, purporting to show the flycatcher’s gene tree for four haplotypes *but without an overlay of existing subspecies divisions*. Zink (2017), however, shows the haplotypes with that overlay, thereby revealing that “none of the main groups map onto subspecies.” *Id.* at 64.

101. Under the fundamental administrative law rule of “substantial evidence,” “an agency cannot ignore evidence contradicting its position,” and a “refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action.” *Butte County v. Hogen*, 613 F.3d at 194.

102. Denial of the Petition without considering the key information in Zink (2017) constitutes unreasoned decision-making and is arbitrary and capricious.

103. Additionally, by ignoring the key new evidence provided by Zink (2017), the Service failed in its duty to make its decision on the “basis of the best scientific and commercial data available” 16 U.S.C. § 1533(b)(1)(A). Indeed, the Service’s own avian expert characterized Zink (2017) as playing a “central role” in the Petition and the Service’s response. Email from Gjon Hazard, Fish & Wildlife Biologist, U.S. Fish & Wildlife Serv., to Angela Picco et al. (May 9, 2017, 5:04 PM PDT).

104. Therefore, the Service's denial of Cattle Growers' delisting Petition was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law, in violation of the ESA, 16 U.S.C. §§ 1533(b)(1)(A), (b)(3)(B), 1540(g)(1)(C).

FOURTH CLAIM FOR RELIEF
Failure to Consider Relevant Evidence
(In the Alternative to the Third Claim for Relief)
(APA, 5 U.S.C. § 706(2)(A))

105. Cattle Growers incorporates herein by reference the allegations set forth in the preceding paragraphs.

106. The APA provides for review of final agency action when there is no other adequate judicial remedy. 5 U.S.C. § 704. To the extent that the Third Claim for Relief is not cognizable as an ESA citizen suit action, the same is fully re-alleged under the APA.

107. The Service's failure to consider relevant evidence and the best available scientific data was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the following relief:

As to the First Claim for Relief:

1. Declare that the Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law, when they denied Plaintiff's Petition without identifying or articulating a definition of "subspecies," in violation of the ESA, 16 U.S.C. §§ 1533(b)(3)(B), 1540(g)(1)(C).

As to the Second Claim for Relief (stated in the alternative to the First Claim for Relief):

2. Declare that the Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law, when they denied Plaintiff's Petition without

identifying or articulating a definition of “subspecies,” in violation of the APA, 5 U.S.C. § 706(2)(A).

As to the Third Claim for Relief:

3. Declare that the Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law, when they denied Plaintiff’s Petition without consideration of relevant evidence or the best available scientific data, in violation of the ESA, 16 U.S.C. §§ 1533(b)(1)(A), (b)(3)(B), 1540(g)(1)(C).

As to the Fourth Claim for Relief (stated in the alternative to the Third Claim for Relief):

4. Declare that the Defendants acted arbitrarily, capriciously, abused their discretion, or otherwise failed to act in accordance with law, when they denied Plaintiff’s Petition without consideration of relevant evidence or the best available scientific data, in violation of the APA, 5 U.S.C. § 706(2)(A).

As to all Claims for Relief:

5. Set aside the Final Rule denying the Petition or enjoin its enforcement.

6. Remand the Final Rule for Defendant to (i) articulate a generally applicable definition of subspecies, and (ii) determine whether the flycatcher satisfies that definition, taking into account all relevant evidence.

7. Award Plaintiff reasonable attorney fees and costs, pursuant to 16 U.S.C. § 1540(g)(4), 28 U.S.C. § 2412, or any other appropriate authority; and

8. Award Plaintiff any other relief the Court deems just and proper under the circumstances of this case.

DATED: December 13, 2021.

Respectfully submitted,

/s/Damien M. Schiff

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** Pro hac vice pending*

Attorneys for Plaintiff New Mexico

Cattle Growers' Association

Exhibit 1



April 13, 2020

The Honorable David Bernhardt
Secretary
U.S. Department of Interior
1849 C Street NW
Washington, DC 20240

**VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED**

The Honorable Aurelia Skipwith
Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3331
Washington, DC 20240

**VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED**

Re: 60-Day Notice of Intent to Bring a Citizen Suit Pursuant to 16 U.S.C. § 1540(g)

Dear Secretary Bernhardt and Director Skipwith:

This letter provides notice of intent to commence civil litigation for violation of the Endangered Species Act, 16 U.S.C. §§ 1531-1544. This notice is submitted on behalf of Petitioner New Mexico Cattle Growers' Association (hereafter "the Cattle Growers").

Introduction

The Endangered Species Act authorizes the Secretary of the Interior, and by delegation the United States Fish and Wildlife Service (collectively "the Service"), to protect endangered and threatened populations of animals and plants.¹ The Act also provides a process whereby interested persons may petition the Service to add or remove these populations from the Act's lists of protected groups.² Under Section 4 of the Act, the Service is required to delist an already protected population when, for among other reasons, the best available data indicate that the population was originally listed in error.³

¹ See 16 U.S.C. § 1533(a).

² See *id.* § 1533(b)(3).

³ See *id.* § 1533(b)(3)(B)(ii); 50 C.F.R. § 424.11(e)(3).

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The Service has a nondiscretionary duty to list or delist species in accordance with Section 4 of the Act.⁴

In late 2017, the Service rejected a petition submitted by the Cattle Growers and other agricultural and industry groups to delist the Southwestern willow flycatcher on the ground of erroneous taxonomy.⁵ In doing so, the Service determined that the flycatcher is properly considered its own subspecies.⁶ The Service's denial of this petition was illegal for two reasons.

First, by affirming the flycatcher's dubious subspecies classification without articulating a definition or standard for what constitutes a flycatcher "subspecies," the Service violated the fundamental administrative law principle of reasoned decision-making.⁷ According to this basic tenet, an agency may not "shift[] . . . the policy goalpost[s]" in the course of ruling on a matter, much less decide an issue without articulating a standard or measure to explain the agency's decision.⁸ In rejecting the Cattle Growers' delisting petition, the Service admitted that there is no scientific consensus on the definition of "subspecies" generally, or as applied to birds in particular.⁹ The Service failed to provide a definition or standard for what constitutes a flycatcher "subspecies." It thus provided no criterion to measure the soundness of its own action or to alert the public to the relevant taxonomic standard. This standardless rejection of the Cattle Growers' delisting petition is necessarily arbitrary and capricious.

Second, in affirming the flycatcher's doubtful subspecies classification, the Service failed to consider relevant and available evidence. The two main studies questioning the

⁴ See 16 U.S.C. §§ 1533, 1540(g)(1)(C).

⁵ 82 Fed. Reg. 61,725 (Dec. 29, 2017).

⁶ See *id.* at 61,727.

⁷ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸ See *Qwest Corp. v. FCC*, 689 F.3d 1214, 1228 (10th Cir. 2012).

⁹ U.S. Fish & Wildlife Serv., 12 Month Finding on a Petition to Delist the Southwestern Willow Flycatcher Under the Endangered Species Act and 5-Year Review, Fed. Doc. No. FWS-R2-ES-2016-0039-0024, at 9 (Dec. 28, 2017) [hereafter "Finding & Status Review"] (discussing the conflicting definitions of subspecies and stating that the "[c]ontroversy over the utility and definition of subspecies has a long history").

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flycatcher's subspecies designation are Zink (2015)¹⁰ and Zink (2017).¹¹ Although Zink (2015) received significant attention from the Service, Zink (2017) received almost none. The Service characterized Zink (2017) as not presenting new data and therefore ignored it.¹² But contrary to the Service's characterization, Zink (2017) contains three key pieces of new information which the agency failed to address in its petition denial. Under the fundamental administrative law rule of "substantial evidence," "an agency cannot ignore evidence contradicting its position," and a "refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action."¹³ Rejection of the petition without considering this key information constitutes unreasoned decision-making, and is arbitrary and capricious.

In both instances, the Service has failed in its nondiscretionary duty to list or delist a species in accordance with Section 4 of the Act.¹⁴ If the foregoing legal errors, more fully described below, are not corrected within the next 60 days, the Cattle Growers will seek recourse through the courts.

Parties

The Cattle Growers are a nonprofit organization that represents roughly 1,400 ranchers and landowners throughout 32 New Mexico counties and 19 states. Founded in 1914, the Cattle Growers are the voice of the New Mexico cattle industry. By serving as an advocate for New Mexico cattlemen and landowners in legislative, regulatory, and judicial matters,

¹⁰ Robert M. Zink, *Genetics, Morphology, and Ecological Niche Modeling Do Not Support the Subspecies Status of the Endangered Southwestern Willow Flycatcher (Empidonax traillii extimus)*, 117 THE CONDOR 76 (2015) (Zink (2015)).

¹¹ Robert M. Zink, *Current Topics in Avian Conservation Genetics With Special Reference to the Southwestern Willow Flycatcher*, 9 THE OPEN ORNITHOLOGY J. 60 (2016). Note, although this letter was published in the 2016 volume of The Open Ornithology Journal, it was made available to the Service in final form on January 5, 2017. Finding & Status Review, *supra* note 9, at 7. As such, the Finding & Status Review refers to this letter as "Zink's 2017 letter." *Id.* In order to avoid confusion, we will continue to refer to this letter as Zink (2017), despite its 2016 publication date.

¹² Finding & Status Review, *supra* note 9, at 7.

¹³ *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

¹⁴ See 16 U.S.C. §§ 1533, 1533(b)(3)(B), 1540(g)(1)(C).

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it seeks to protect ranching from a variety of threats, including overreaching environmental regulation. Many of the Cattle Growers' members have been, and continue to be, burdened by such onerous regulations. These include regulations under the Endangered Species Act, such as the flycatcher's endangered listing.

The Cattle Growers therefore devote substantial resources to ensuring that Endangered Species Act regulations are consistently and transparently imposed. The Cattle Growers lobby on Endangered Species Act issues, publish information on related issues for members, perform research pertaining to Endangered Species Act regulation, and submit comments to government agencies addressing concerns about how regulations under the Act affect members.

The Cattle Growers' membership includes New Mexico landowners who are threatened by regulatory restrictions stemming from the flycatcher's listing. This includes landowners whose properties are located within the flycatcher's critical habitat.¹⁵ On behalf of its affected members, the Cattle Growers joined a 2015 petition to delist the Southwestern willow flycatcher for several reasons, including faulty taxonomy.¹⁶

Background

Listed as endangered in 1995, the Southwestern willow flycatcher is a small, neotropical migrant bird, which during its breeding season of May to September, can be found in riparian habitats of the southwestern United States.¹⁷ These include parts of California, Nevada, Utah, Colorado, Arizona, New Mexico, and Texas.¹⁸ The bird has "a grayish-green

¹⁵ The Cattle Growers previously secured a victory for members who have experienced a threat to their livelihoods resulting from the flycatcher's listing when a court ordered a prior critical habitat designation be vacated. *See* N.M. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277 (10th Cir. 2001).

¹⁶ Petition of the Center for Environmental Science, Accuracy, and Reliability et al. to Remove the "Southwestern" Willow Flycatcher From the List of Endangered Species Under the Endangered Species Act Due to Significant New Data that Demonstrates Original Data Error, Fed. Doc. No. FWS-R2-ES-2016-0039-0002, at 9 (Aug. 19, 2015) [hereafter "Petition"].

¹⁷ 82 Fed. Reg. 61,725, 61,727 (Dec. 29, 2017); *see also* 60 Fed. Reg. 10,694 (Feb. 27, 1995).

¹⁸ 82 Fed. Reg. at 61,727.

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back and wings, whitish throat, light grey-olive breast, and pale yellowish belly.”¹⁹ The Service considers the Southwestern willow flycatcher (*Empidonax traillii extimus*) to be a subspecies of the widely distributed willow flycatcher (*Empidonax traillii*).²⁰ The Service’s original subspecies designation for the flycatcher was based on “subtle differences in color and morphology.”²¹ More recently, the Service has relied on morphological (coloration) data derived from “core” areas within the putative subspecies²² and on patterns of genetic differentiation among putative flycatcher subspecies that nevertheless lack clear and distinctive geographic boundary lines.²³

Taxonomic shortcomings in the current subspecies designation have been demonstrated by Zink (2015) and Zink (2017).

Zink (2015) reanalyzed the molecular-genetic data from Paxton et al. (2008) and the morphological (coloration) data from Paxton et al. (2010).²⁴ The study also analyzed vocalization data and examined the potential ecological distinctiveness of the flycatcher through niche modelling techniques.²⁵ In doing so, Zink (2015) demonstrated that there exists no statistically valid morphological, genetic, vocal, or ecological basis for designating the flycatcher a separate subspecies.²⁶ Zink (2015) further highlighted the error in the Service’s reliance on confirmatory studies that validate rather than test existing putative flycatcher subspecies by using data derived from “core” areas within

¹⁹ 60 Fed. Reg. at 10,694.

²⁰ *Id.*

²¹ *Id.* at 10,696.

²² See E.H. Paxton et al., *Geographic Variation in the Plumage Coloration of Willow Flycatchers Empidonax Traillii*, 41. J. AVIAN BIOLOGY 128 (2010) (Paxton et al. (2010)).

²³ E.H. Paxton et al., *Using Molecular Genetic Markers to Resolve a Subspecies Boundary: The Northern Boundary of the Southwestern Willow Flycatcher in the Four-corner States*, U.S. GEOLOGICAL SURVEY OPEN-FILE REPORT 2008-1117 (2008) (Paxton et al. (2008)).

²⁴ See Zink (2015), *supra* note 10.

²⁵ See *id.*

²⁶ *Id.*

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those populations, such as Paxton et al. (2008) and Paxton et al. (2010).²⁷ Zink (2015) demonstrated that these studies have not shown whether distinctions among existing flycatcher subspecies are any more significant than differences among randomly divided flycatcher populations. Zink (2015) studied this question and concluded that, when viewed species-wide, there is no significant genetic or morphological variation in flycatchers that corresponds to existing subspecies divisions (or any other geographically based division).²⁸

Zink (2017) expands on the analysis of Zink (2015) and contains three key pieces of additional information demonstrating the erroneous nature of the Service's current flycatcher subspecies designation. First, Zink (2017) supplies the phylogenetic analysis discussed but not included in Zink (2015).²⁹ That analysis shows that, by analyzing all publicly available mitochondrial DNA (mtDNA) data across the flycatcher species, "there is no support for *E. t. extimus*, or any other subspecies."³⁰ Moreover, Zink (2017) points out the fundamental flaw in prior flycatcher genetic analyses—the failure to recognize that mtDNA haplotypes are inherited as a unit. Hence, analyzing only a subset of the haplotypes—as the Service's preferred genetic studies did—is not adequate to detect subspecies structure: other subsets of the same genetic data may indicate conflicting patterns of variation.³¹ Second, Zink (2017) supplies a discriminant analysis³² of all six color characters for the flycatcher.³³ Theimer et al. (2016), a study relied on heavily by the Service, argues for subspecies designation based on just one such character.³⁴ But Zink (2017) points out the focus on just one character is inadequate because it might lead

²⁷ *Id.* at 79.

²⁸ *Id.* at 80-82.

²⁹ Zink (2017), *supra* note 11, at 63-64.

³⁰ *Id.* at 64.

³¹ *Id.* at 63.

³² WILLIAM R. KLECKA ET AL., DISCRIMINANT ANALYSIS 7 (1980) ("Discriminant analysis is a statistical technique which allows the researcher to study the differences between two or more groups of objects with respect to several variables simultaneously.").

³³ Zink (2017), *supra* note 11, at 66.

³⁴ See Tad C. Theimer et al., *Available Data Support Protection of the Southwestern Willow Flycatcher Under the Endangered Species Act*, 118 THE CONDOR 289, 296 (2016) (Theimer et al. (2016)).

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to conflicting subspecies diagnoses based on conflicting patterns of variation.³⁵ Zink (2017) in fact demonstrates that, after taking into account all available color characters, no subspecies structure can be discerned.³⁶ Third, Zink (2017) reveals a critically misleading aspect of Theimer et al. (2016). The latter provides a figure of the mtDNA data, purporting to show the flycatcher's gene tree for four haplotypes *but without an overlay of existing subspecies divisions*. Zink (2017), however, shows the haplotypes with that overlay, thereby revealing that "none of the main groups map onto subspecies."³⁷

In August 2015, relying in part on Zink (2015), the Cattle Growers and several other agricultural and industry organizations submitted a petition to delist the flycatcher for, among other reasons, taxonomic error.³⁸ This petition presented substantial morphological, genetic, vocal, and ecological data showing the flycatcher is not a distinct subspecies.³⁹

On March 16, 2016, the Service made a positive 90-day finding as to the petition.⁴⁰ However, in December 2017, the Service published a 12-Month Finding which also served as a 5-Year Status Review, denying the Cattle Growers' petition.⁴¹ Despite the fact the Service could not identify a standard for doing so, it felt competent to reject the Cattle Growers' morphological, genetic, vocal, and ecological data and analyses to conclude that the flycatcher is a distinct subspecies.⁴²

The Service's Finding contains numerous legal and scientific errors.

In its Finding & Status Review, the Service concluded that the flycatcher should continue to be recognized as its own subspecies, based on "differences" between it and other

³⁵ Zink (2017), *supra* note 11, at 65.

³⁶ *Id.* at 65-66.

³⁷ *Id.* at 64.

³⁸ *See* Petition, *supra* note 16.

³⁹ *See id.*

⁴⁰ *See* 81 Fed. Reg. 14,058, 14,070 (Mar. 16, 2016).

⁴¹ 82 Fed. Reg. 61,725 (Dec. 29, 2017).

⁴² Finding & Status Review, *supra* note 9, at 23.

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flycatcher populations.⁴³ To justify its reaffirmation of the flycatcher's subspecies status, the Service cited various studies highlighting genetic, morphological, vocal, and ecological "differences" between it and other flycatcher subpopulations.⁴⁴ In particular the Service relied upon purportedly "compelling" evidence of "step-clines" in the flycatcher's genetic and morphological data.⁴⁵ However, the Service provided no rule for gauging the significance of those purported "differences." That failure is notable for two reasons. First, there is no common agreement among taxonomists as to how much difference is needed to justify a subspecies designation.⁴⁶ Second, whatever one's preferred standard for subspecies diagnosis, that standard must attempt to qualify or quantify the necessary degree of difference, because one will nearly always be able to find statistically significant differences between any two populations within one species.⁴⁷

Compounding the Service's errors was its reliance on studies that only test for significance among the existing putative flycatcher subspecies, such as Paxton et al.

⁴³ *Id.* at 15.

⁴⁴ *Id.* at 15-24.

⁴⁵ *Id.* at 23-24.

⁴⁶ Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1100-01 (1997) ("Although many biologists use the word subspecies, it carries no similar, generally recognized biological meaning."). In its 2017 Finding, the Service acknowledged this lack of consensus as to the definition of a subspecies. Finding & Status Review, *supra* note 9, at 9 (noting that "[c]ontroversy over the utility and definition of subspecies has a long history" and "[v]arious definitions or descriptions of subspecies exist"). Indeed, the only common thread the Service could identify between the definitions it cited was that "[t]he differences between subspecies are usually less distinct than the differences between species." *Id.*

⁴⁷ See J.V. Remsen, Jr., *Subspecies as a Meaningful Taxonomic Rank in Avian Classification*, 67 ORNITHOLOGICAL MONOGRAPHS 62, 64 (2010) ("Given large enough sample sizes, the means of any two populations likely differ significantly (>95%), even though actual overlap can be nearly complete, and so statistically significant differences in the means alone provide almost no information on how distinctive two populations are in terms of diagnosability, the key theme of the conceptual definitions of subspecies.").

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(2010).⁴⁸ These studies presume the propriety of the existing subspecies divisions by using data derived from supposed “core” areas within those subspecies.⁴⁹ Such confirmatory studies serve little purpose beyond validating the existing subspecies divisions. What the Service’s Finding and its preferred studies did not do was determine whether the cited differences among existing flycatcher subspecies are any more significant than the differences among randomly divided flycatcher populations. As discussed above, Zink (2015) and Zink (2017) studied this question and found that, when viewed species-wide, there is no significant genetic or morphological variation between flycatcher populations that corresponds to existing subspecies divisions (or any other geographically based division).⁵⁰

Further compounding these errors, whatever de facto standard that the Service may have employed to diagnose the subspecies, the result was a taxonomic judgment that functioned only at the population, rather than the individual, level. In its Finding, the Service admitted that its designation acknowledges an “intergradation zone” between the purported “southwestern” subspecies (*E. t. extimus*) and the purported “Great Basin” subspecies (*E. t. adastus*).⁵¹ Within that zone, there is no way to identify individual birds as belonging to one or the other “subspecies.”⁵² Upholding the flycatcher’s subspecies status despite this intergradation zone is particularly problematic given that the Endangered Species Act’s prohibitions operate on the individual, not population, level.⁵³

⁴⁸ See Finding & Status Review, *supra* note 9, at 20-21.

⁴⁹ See Zink (2015), *supra* note 10, at 79-81 (citing Paxton et al. (2010), *supra* note 22.)

⁵⁰ Zink (2015), *supra* note 10, at 80-84; Zink (2017), *supra* note 11, at 63-66.

⁵¹ See Finding & Status Review, *supra* note 9, at 17.

⁵² See Theimer et al. (2016), *supra* note 34, at 297 (“[A]ssigning individuals or populations that lie within the boundary to one or the other subspecies may often be difficult or impossible.”).

⁵³ Cf. Michael A. Patten & Philip Unitt, *Diagnosability Versus Mean Differences of Sage Sparrow Subspecies*, 119 THE AUK 26, 28 (2002) (“A valid subspecies should be diagnosably different from all other populations, not merely exhibit mean differences. Otherwise, individuals cannot be identified, predictability is lost, and the category is deprived of its most useful applications.”).

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The existence of this intergradation zone reveals an even more fundamental flaw in the Service's taxonomy decision-making. By focusing on step-clines,⁵⁴ the Service impliedly conceded that it is improper to divide a species along a smooth cline of geographic variation that contains zones of intergradation.⁵⁵ The Service's Finding cites Theimer et al. (2016) to contend that, based on a subset of mtDNA characters and one character of plumage coloration, step-clines do exist justifying the division between *E. t. extimus* and *E. t. adastus*.⁵⁶ But, by failing to analyze all of the data from a species-wide perspective, the Service biased the analysis in favor of diagnosing subspecies.⁵⁷ By analyzing only a subset of the pertinent genetic data, the Service and Theimer (2016) were incapable of verifying *concordant* variation. Confirming the presence of such variation is an essential component of any non-arbitrary subspecies definition.⁵⁸

Finally, of the two main studies questioning the flycatcher's subspecies designation, the Service gave significant attention to Zink (2015) but refused to engage Zink (2017).⁵⁹ However, as discussed above, and contrary to the Service's assertion that Zink (2017) does

⁵⁴ Finding & Status Review, *supra* note 9, at 23-24.

⁵⁵ See Finding & Status Review, *supra* note 9, at 20 (“[A] gradual transition in traits is less suggestive of subspecies than a more fractured separation”). See generally Remsen, *supra* note 47, at 65 (observing that “broad geographic patterns of smoothly clinal differences in coloration and, especially, morphometrics” do not support a subspecies designation); Patten & Unitt, *supra* note 53, at 27 (criticizing the naming of subspecies “along perfectly smooth clines” because it could result in “a near limitless number” of subspecies); Zink (2017), *supra* note 11, at 64 (“In any case of geographic variation, one will be able to find the center of a cline, but that is not the same as documenting the existence of a discrete taxon.”).

⁵⁶ Finding & Status Review, *supra* note 9, at 23-34; Theimer et al. (2016), *supra* note 34, at 291-92, 296.

⁵⁷ See Zink (2015), *supra* note 10, at 83 (“If only samples . . . were compared [from] (putative core areas), . . . there would likely be a statistically significant difference, whereas inclusion of intermediate samples reveals the biased nature of that inference.”).

⁵⁸ Remsen, *supra* note 47, at 65 (“[T]hree characters might show geographic variation, but each character could show three different patterns that would delimit subspecies boundaries in three conflicting ways.”).

⁵⁹ Finding & Status Review, *supra* note 9, at 7 (“We reviewed Zink’s 2017 letter in Open Ornithology Because there was no new information in this letter, it did not change our evaluation.”).

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not contain any new data, Zink (2017) contains three key pieces of relevant new data which the Service improperly failed to address in its Finding & Status Review.⁶⁰ The information in Zink (2017) was particularly relevant due to the Service's reliance on an alleged break in haplotype frequency,⁶¹ its reliance on an alleged break in plumage coloration,⁶² and its reliance on the supposedly "compelling" hybrid-zone analysis (HZAR) of Theimer et al. (2016), which purportedly confirmed "a marked discontinuity in quantitative genetic and morphological features."⁶³ Zink (2017), by using new analyses—specifically a phylogenetic analysis of all flycatcher mtDNA data and a discriminant analysis of all flycatcher color data—proved that any purported genetic and morphological distinctions are de minimis or no greater than the differences between many other putative subspecies.⁶⁴ That determination necessarily undermined the persuasiveness of the Service's hybrid-zone HZAR analysis, which employed the same limited subset of genetic data.⁶⁵ And by failing to use HZAR on the entire mtDNA data set, Theimer et al. (2016) could not establish that any genetic variation observed was concordant.

Violations of the Endangered Species Act

The Service's denial of the Cattle Growers' delisting petition violates fundamental principles of reasoned agency decision-making, is therefore arbitrary and capricious, and

⁶⁰ In fact, documents produced from the Service's response to a FOIA request reveal that one of the Service's own avian experts recommended, to no effect, that the Finding engage with Zink (2017). See E-mail from Gjon Hazard, Fish & Wildlife Biologist, U.S. Fish & Wildlife Serv., to Angela Picco et al. (May 9, 2017, 5:04 PM PDT) ("There is one topic I would like to elaborate on . . . [Z]ink's rebuttal (Zink 2016, *The Open Ornithology Journal* 9(1):60-69) to the Theimer et al. (2016) critique of Zink (2015) is not presented in the document It seems to me that the Service should acknowledge and include this document in our evaluation, given that it is available and that Zink (2015) and Theimer et al. (2016) play such a central role to the petition and our response.").

⁶¹ Finding & Status Review, *supra* note 9, at 18.

⁶² *Id.* at 21.

⁶³ *Id.* at 23-24 (citing Theimer et al. (2016), *supra* note 34, at 296-97).

⁶⁴ Zink (2017), *supra* note 11, at 65-66.

⁶⁵ See Finding & Status Review, *supra* note 9, at 23-24; Theimer et al. (2016), *supra* note 34, at 291-92, 296-97.

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thus the agency violated its nondiscretionary duty to list or delist species in accordance with Section 4 of the Act.⁶⁶

First, in its Finding, the Service failed to articulate any standard for what constitutes a “subspecies,” either generally or as applied to flycatcher populations. Although the Endangered Species Act authorizes the Service to list “subspecies,”⁶⁷ the Act itself does not define the term.⁶⁸ Further, the Service has never promulgated a regulation or policy fleshing out the term.⁶⁹ When making taxonomic decisions, existing regulations direct the Service to rely on “standard taxonomic distinctions” and to consult with its own experts and the outside scientific community.⁷⁰ However, that instruction is unhelpful

⁶⁶ See 16 U.S.C. §§ 1533, 1533(b)(3)(B), 1540(g)(1)(C).

⁶⁷ 16 U.S.C. § 1532(16).

⁶⁸ See Anna L. George & Richard L. Mayden, *Species Concepts and the Endangered Species Act: How a Valid Biological Definition of Species Enhances the Legal Protection of Biodiversity*, 45 NAT. RESOURCES J. 369, 374 (2005) (observing that the Act’s “definition” for species “does not define a species at all” but “merely provides for protection of groups below the species level”).

⁶⁹ In 1979, the Service proposed regulations to, among other things, govern the taxonomy analysis for populations proposed for listing. See 44 Fed. Reg. 47,862, 47,863 (Aug. 15, 1979). Rather than define any of the Act’s taxonomic terms, the proposal merely directed the Service to rely on “standard” distinctions and the agency’s own expertise. In response to the proposal, several commenters requested that the Service set forth the rules by which these “standard” distinctions would be made. 45 Fed. Reg. 13,010, 13,012 (Feb. 27, 1980). The Service declined, stating without exception in the final rule’s preamble that, other than reliance on internal expertise and that of the scientific community, “no criteria . . . can be established for acceptance of taxonomic treatments.” *Id.* at 13,013. Since then, the Service has not promulgated definitions for “species” and “subspecies.” On November 10, 2017, counsel for the Cattle Growers submitted a rulemaking petition to encourage the Service to engage in rulemaking on the issue of taxonomic standards and define “species” and “subspecies.” See Petition of Pacific Legal Foundation et al., For Rulemaking Under the Administrative Procedure Act (Nov. 10, 2017), <https://pacificlegal.org/wp-content/uploads/2017/11/ESA-Taxonomy-Rulemaking-Petition.pdf>. This rulemaking petition was submitted on behalf of several of the Cattle Growers’ fellow petitioners in the flycatcher matter. Counsel received notification of receipt by letter dated February 23, 2018, but is yet to receive a substantive response from the Service.

⁷⁰ 50 C.F.R. § 424.11(a).

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because there is no universally accepted definition of “subspecies” among taxonomists, and there exist no “standard” distinctions.⁷¹

This lack of scientific consensus has been acknowledged by the Service,⁷² and the Service’s 2017 Finding again notes the absence of any authoritative subspecies definition.⁷³ In its Finding, the Service cited to several conflicting definitions of “subspecies.”⁷⁴ The only discernable common thread among them was that “[t]he differences between subspecies are usually less distinct than the differences between species.”⁷⁵ This is not an adequate standard for agency decision-making. The Service therefore rejected the delisting petition without providing any valid standard for what would need to be shown to disprove the flycatcher’s subspecies status. The result is that the regulated public remains in the dark, and the Service’s decision-making process is hidden from public scrutiny. By failing to articulate a clear, publicly available and scientifically defensible standard for when it is appropriate to list a subspecies, the Service has reserved to itself unfettered discretion as to listing decisions.

⁷¹ See Doremus, *supra* note 46, at 1100-01 (“Although many biologists use the word subspecies, it carries no similar, generally recognized biological meaning.”); George & Mayden, *supra* note 68, at 375 (“[T]here is no single accepted method for recognizing species.”). Exacerbating the regulation’s inadequacy is “the decline of taxonomy as a discipline in major universities.” Kevin Winker, *Subspecies Represent Geographically Partitioned Variation, a Gold Mine of Evolutionary Biology, and a Challenge for Conservation*, 67 THE AUK 6, 10 (2010).

⁷² See *12-Month Finding on a Petition to Delist the Coastal California Gnatcatcher*, 81 Fed. Reg. 59,952, 59,958 (Aug. 31, 2016) (“[T]here is no consensus in the literature for defining subspecies criteria for avian taxa.”) (citing George Sangster, *The Application of Species Criteria in Avian Taxonomy and Its Implications for the Debate Over Species Concepts*, 89 BIO. REV. 199, 212 (2014)).

⁷³ Finding & Status Review, *supra* note 9, at 9 (noting that “[c]ontroversy over the utility and definition of subspecies has a long history” and “[v]arious definitions or descriptions of subspecies exist”).

⁷⁴ *Id.*

⁷⁵ *Id.*

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Not only is this unfair,⁷⁶ it is illegal, violating basic principles of reasoned agency decision-making.⁷⁷ All agencies—including the Service—must satisfactorily explain their actions.⁷⁸ An agency cannot simply reach a conclusion without setting forth an adequate explanation for how that conclusion was reached.⁷⁹ Consequently, the Service may not inexplicably move the goalposts of its decision-making during the course of rule-making, much less fail altogether to set up the goalposts.⁸⁰

The Service in its petition denial accepted certain studies and rejected others.⁸¹ In doing so, the Service set forth what it considered to be the relevant types of data for making a taxonomic determination and even commented on the appropriate methodology for collecting and presenting that data.⁸² However, merely identifying and discussing pertinent data and appropriate methodology do not define what is to be established by that data and methodology—the existence or nonexistence of a subspecies. To be sure, in presenting the data, the Service identified “differences” between the “southwestern”

⁷⁶ Cf. *Pennsylvania v. Surface Transp. Bd.*, 290 F.3d 522, 535 (3d Cir. 2002) (“[A]gencies must apply consistent standards and principles to insure the fairness of the administrative process.”).

⁷⁷ See *Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 n.11 (1st Cir. 1998) (an “ad-hoc standardless determination . . . is likely to be arbitrary and capricious”). Cf. *Kunkel v. Comm’r*, 821 F.3d 908, 910 (7th Cir. 2016) (“[Y]ou can’t beat something with nothing.”).

⁷⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁷⁹ See, e.g., *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (“[T]he agency must explain why it decided to act as it did. The agency’s statement must be one of ‘reasoning’; it must not be just a ‘conclusion’; it must ‘articulate a satisfactory explanation’ for its action.”) (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)); *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 532 (D.D.C. 2016) (“As to transparency, the agency ‘must, of course, reveal the reasoning that underlies its conclusion’ . . . [and] ‘give the court the rationale underlying the importance of factual distinctions as well as the factual distinctions themselves.’”) (quoting respectively *Transcon. Gas. Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995), and *San Luis Obispo Mothers for Peace v. U.S. Nuclear Reg. Comm’n*, 789 F.2d 26, 48 (D.C. Cir. 1986)).

⁸⁰ See *Qwest Corp. v. FCC*, 689 F.3d 1214, 1228 (10th Cir. 2012) (citing various authorities).

⁸¹ See *Finding & Status Review*, *supra* note 9, at 15-24 (accepting studies such as Sedgwick (2001), Paxton et al. (2008), Paxton et al. (2010), and Theimer et al. (2016), and rejecting other studies such as Zink (2015)).

⁸² *Id.* at 22-23 (responding to petitioners’ methodology critique of the literature relied upon).

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subpopulation of the willow flycatcher and other subpopulations of the species.⁸³ However, the Service's Finding gives no explanation for why any of these differences—be they morphological, genetic, vocal, or ecological—are significant enough in themselves to make the flycatcher a distinct “subspecies.” The data do not explain themselves. The Service must therefore explain the subspecies criterion which those studies and data purportedly satisfy. The failure to do so effectively reserves to the Service the arbitrary power to list or delist the flycatcher according to whim and fancy, picking and choosing from those studies that support the agency's position and rejecting those that do not.⁸⁴

The Act forbids the Service from gaming the system. The agency must instead bind itself to reasonable, scientifically defensible, *and* publicly articulated standards for subspecies diagnosis.

Second, the Service failed to consider relevant evidence in arriving at its decision. This failure also violates the basic administrative law principle of reasoned decision-making and is arbitrary and capricious. As discussed above, the two main studies questioning the flycatcher's subspecies designation are Zink (2015) and Zink (2017). Although Zink (2015) received significant attention, the Service refused to engage with Zink (2017).⁸⁵ The Service incorrectly characterized Zink (2017) as not containing any new data.⁸⁶ However, as discussed above, and according to one of the Service's own avian experts, Zink (2017) contains key additional information.⁸⁷ Indeed, Zink (2017) provides three key pieces of additional data that directly contradict both the Service's position, and important aspects of Theimer et al. (2016), a study that formed the backbone of the Service's 2017 finding.⁸⁸

⁸³ *Id.* at 15-24.

⁸⁴ See Rob Roy Ramey II, *On The Origin of Specious Species*, in INSTITUTIONS AND INCENTIVES IN REGULATORY SCIENCE 77, 83 (Jason Scott Johnston ed., 2012) (“If species concepts and definitions can be selected post hoc to fit any set of observations, then just about any group of organisms could potentially qualify (or not qualify) as a species depending on the investigator's whim or regulatory agency's bias.”).

⁸⁵ Finding & Status Review, *supra* note 9, at 7.

⁸⁶ *Id.*

⁸⁷ See *supra* note 60 and surrounding text.

⁸⁸ See Finding & Status Review, *supra* note 9, at 17-21, 23-24.

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The Service's failure to address such consequential contradictory information in its Finding was improper. Under the Administrative Procedure Act's rule of "substantial evidence," "an agency cannot ignore evidence contradicting its position," and a "refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action."⁸⁹

Conclusion

The Service's denial of the delisting petition cannot be reconciled with the rules of Endangered Species Act decision-making. As set forth above, the Service's denial of the Cattle Growers' delisting petition (i) failed to articulate a standard to govern subspecies designation and (ii) failed to consider available and highly relevant evidence. By acting in this manner, the Service violated its nondiscretionary duty to list or delist species in accordance with Section 4 of the Act.

If the Service does not promptly remedy these legal errors, the Cattle Growers will commence a civil action to require their correction following expiration of the statutory 60-day notice period.

Respectfully submitted,



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DAMIEN M. SCHIFF
ANTHONY L. FRANÇOIS
*Counsel for New Mexico
Cattle Growers' Association*

⁸⁹ Butte County v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010).

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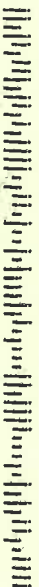


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Domestic Return Receipt

CIVIL COVER SHEET

JS-44 (Rev. 11/2020 DC)

I. (a) PLAINTIFFS NEW MEXICO CATTLE GROWERS' ASSOCIATION (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>88888</u> (EXCEPT IN U.S. PLAINTIFF CASES)	DEFENDANTS UNITED STATES FISH AND WILDLIFE SERVICE; et al. [See Attachment] COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>
(c) ATTORNEYS (FIRMNAME, ADDRESS, AND TELEPHONE NUMBER) SEE ATTACHMENT	ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)	III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY!																								
<div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <input type="radio"/> 1 U.S. Government Plaintiff </div> <div style="width: 48%;"> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 48%;"> <input checked="" type="radio"/> 2 U.S. Government Defendant </div> <div style="width: 48%;"> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III) </div> </div>	<table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/Malpractice <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input checked="" type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security</u> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
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<input type="radio"/> E. General Civil (Other)	<input type="radio"/> F. Pro Se General Civil
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<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent – Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 (DTSA)	<u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609 <u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application	<input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act (TCPA) <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)
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<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
☒ 1 Original Proceeding
 ☐ 2 Removed from State Court
 ☐ 3 Remanded from Appellate Court
 ☐ 4 Reinstated or Reopened
 ☐ 5 Transferred from another district (specify)
 ☐ 6 Multi-district Litigation
 ☐ 7 Appeal to District Judge from Mag. Judge
 ☐ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 ESA, 16 U.S.C. § 1531, et seq.; APA, 5 U.S.C. § 701, et seq.; Declaratory Judgment and Injunctive Relief

VII. REQUESTED IN COMPLAINT

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

JURY DEMAND:

Check YES only if demanded in complaint
 YES ☐ NO ☐

VIII. RELATED CASE(S) IF ANY

(See instruction)

YES ☐ NO ☒

If yes, please complete related case form

DATE: 12/13/2021

SIGNATURE OF ATTORNEY OF RECORD /s/Damien M. Schiff

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil coversheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

Attachment to Civil Cover Sheet

List of All Defendants:

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES
DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as
Secretary of the United States Department of the Interior; MARTHA WILLIAMS, in her
official capacity as Principal Deputy Director and Acting Director of the United States
Fish and Wildlife Service

Plaintiff's Attorneys:

Damien M. Schiff, D.D.C. No. CA00045
Charles T. Yates, Cal. Bar No. 327704*
Email: dschiff@pacificlegal.org
Email: cyates@pacificlegal.org
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

* *Pro hac vice pending*

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia



NEW MEXICO CATTLE GROWERS' ASSOCIATION

Plaintiff(s)

v.

UNITED STATES FISH AND WILDLIFE SERVICE;

et al.

[see attachment]

Defendant(s)

Civil Action No. 1:21-cv-3263

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Damien M. Schiff
Charles T. Yates
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-3263

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Attachment to Summons

List of All Defendants:

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director and Acting Director of the United States Fish and Wildlife Service

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia



NEW MEXICO CATTLE GROWERS' ASSOCIATION

Plaintiff(s)

v.

UNITED STATES FISH AND WILDLIFE SERVICE;

et al.

[see attachment]

Defendant(s)

Civil Action No. 1:21-cv-3263

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Damien M. Schiff
Charles T. Yates
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-3263

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Attachment to Summons

List of All Defendants:

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director and Acting Director of the United States Fish and Wildlife Service

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia



NEW MEXICO CATTLE GROWERS' ASSOCIATION

Plaintiff(s)

v.

UNITED STATES FISH AND WILDLIFE SERVICE;

et al.

[see attachment]

Defendant(s)

Civil Action No. 1:21-cv-3263

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Debra Haaland
Secretary
United States Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Damien M. Schiff
Charles T. Yates
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-3263

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Attachment to Summons

List of All Defendants:

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director and Acting Director of the United States Fish and Wildlife Service

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia



NEW MEXICO CATTLE GROWERS' ASSOCIATION

Plaintiff(s)

v.

UNITED STATES FISH AND WILDLIFE SERVICE;

et al.

[see attachment]

Defendant(s)

Civil Action No. 1:21-cv-3263

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Martha Williams
Principal Deputy Director and Acting Director
United States Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Damien M. Schiff
Charles T. Yates
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-3263

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Attachment to Summons

List of All Defendants:

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director and Acting Director of the United States Fish and Wildlife Service

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia



NEW MEXICO CATTLE GROWERS' ASSOCIATION

Plaintiff(s)

v.

UNITED STATES FISH AND WILDLIFE SERVICE;

et al.

[see attachment]

Defendant(s)

Civil Action No. 1:21-cv-3263

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Merrick Garland
 Attorney General
 U.S. Department of Justice
 950 Pennsylvania Ave., N.W.
 Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Damien M. Schiff
 Charles T. Yates
 Pacific Legal Foundation
 555 Capitol Mall, Suite 1290
 Sacramento, California 95814

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-3263

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Attachment to Summons

List of All Defendants:

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director and Acting Director of the United States Fish and Wildlife Service

UNITED STATES DISTRICT COURT

for the

District of Columbia



NEW MEXICO CATTLE GROWERS' ASSOCIATION

Plaintiff(s)

v.

UNITED STATES FISH AND WILDLIFE SERVICE;

et al.

[see attachment]

Defendant(s)

Civil Action No. 1:21-cv-3263

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Matthew M. Graves
U.S. Attorney's Office
555 4th Street, N.W.
Washington, DC 20001
Attn: Civil Process Clerk

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Damien M. Schiff
Charles T. Yates
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-3263

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* _____
 was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
 _____ on *(date)* _____; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
 _____, a person of suitable age and discretion who resides there,
 on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
 designated by law to accept service of process on behalf of *(name of organization)* _____
 _____ on *(date)* _____; or

☐ I returned the summons unexecuted because _____; or

☐ Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Attachment to Summons

List of All Defendants:

UNITED STATES FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior; MARTHA WILLIAMS, in her official capacity as Principal Deputy Director and Acting Director of the United States Fish and Wildlife Service

Kiren Mathews

From: DCD_ECFNotice@dcd.uscourts.gov
Sent: Monday, December 13, 2021 4:25 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:21-cv-03263 NEW MEXICO CATTLE GROWERS' ASSOCIATION v. UNITED STATES FISH AND WILDLIFE SERVICE et al Complaint

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered by Schiff, Damien on 12/13/2021 at 7:24 PM EDT and filed on 12/13/2021

Case Name: NEW MEXICO CATTLE GROWERS' ASSOCIATION v. UNITED STATES FISH AND WILDLIFE SERVICE et al
Case Number: [1:21-cv-03263](#)
Filer: NEW MEXICO CATTLE GROWERS' ASSOCIATION
Document Number: [1](#)

Docket Text:

COMPLAINT for Declaratory and Injunctive Relief against DEBRA HAALAND, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, MARTHA WILLIAMS (Filing fee \$ 402 receipt number ADCDC-8926003) filed by NEW MEXICO CATTLE GROWERS' ASSOCIATION. (Attachments: # (1) Exhibit 1 - 60-day Notice, # (2) Civil Cover Sheet, # (3) Summons to U.S. Fish and Wildlife, # (4) Summons to U.S. Department of the Interior, # (5) Summons to Debra Haaland, # (6) Summons to Martha Williams, # (7) Summons to Attorney General, # (8) Summons to District Attorney)(Schiff, Damien)

1:21-cv-03263 Notice has been electronically mailed to:

Damien M. Schiff dschiff@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org

1:21-cv-03263 Notice will be delivered by other means to::

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-0]
] [03a532f482b71bb30207786695f57e1845ecd87f947bf4742680be2aa22830ae76b
7b7fa7984a134cd474d100ee0791dab5db30293a5c9476a3ea00544e75c7b]]

Document description:Exhibit 1 - 60-day Notice

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-1]
] [9ac44fa126e250eb5c7950e255d2d0070646044fe411801d9d9f0d19fe9173dedd7
56d890727f818ea2229558918e31632cf7d7d3b309e7c992035c6d39f227b]]

Document description:Civil Cover Sheet

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-2]
] [4c27cc9705d876e44eec76a910541caa82762f28a35ff4e8982113b5fcac9ed9420
832f9fe5c45f90e2951daa553c22e83970a7d78fef25f07cca998f76417c9]]

Document description:Summons to U.S. Fish and Wildlife

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-3]
] [3d1253b648e19d8004af6040bf2d51796003d6f4ac5bc1483e1b311032823099ce1
a3d26edbd848cff53415114bc624668ede3767a87f429ef836d3dc1bfb7b0]]

Document description:Summons to U.S. Department of the Interior

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-4]
] [5bdf83ab30ba08463391d89d830dd60343fb8ec7a79913eb69d13d9ac83c5b37154
70952faa2e0be8642ad9ead6a87011895a9f8417c50da3585dbaa118d4088]]

Document description:Summons to Debra Haaland

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-5]
] [5c3d910b88053d90c88b36ae319f8883345d07be32a0bcf0563c78f7255a04c0609
4e3c6f319d73a3a5a56fe126273eb4fba771a5cc5ad85dc4e01337400c512]]

Document description:Summons to Martha Williams

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-6]
] [6ac4d5ee2ac29f9c8ee91650a218873c3dc0908952c3360f7dd41451063bc783b31
a1186abb9fa93da3d9bcfd8b88a40e5921da037458c8a3f83bf501637d672]]

Document description:Summons to Attorney General

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-7]
] [062af1441ab1b9117ebc5d514844abacb5d159521970023dd799849e5f40c466635
d20d8b3e124633e43bb9e65e3708b27c1215757b2b8f1be99f191ed576d96]]

Document description:Summons to District Attorney

Original filename:suppressed

Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=12/13/2021] [FileNumber=7485522-8
] [4afcaa85f582fc86422ab9394594653e79ec905269c5872a604b00a02216b86b104
742265a2743e991ec5aa059751a429fe79613c4d3cb84b2181beb98f2d7f1]]