New Mexico Farm and Livestock Bureau v. U.S. Dept. of Interior—FWS designation of critical habitat for endangered jaguar species invalidated

The Endangered Species Act provides for designation of "occupied" and "unoccupied" critical habitat in 16 U.S.C. § 1533(5)(A). "Occupied" critical habitat is "the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." *Id.* § 1533(5)(A)(i). "Unoccupied" critical habitat is "specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1533(5)(A)(ii). In 2014, the United States Fish and Wildlife Service designated two units of land as "occupied" critical habitat and, alternatively, as "unoccupied" critical habitat for a jaguar species (*Panthera onca*). *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Jaguar*, 79 Fed. Reg. 12,572 (Mar. 5, 2014). Several groups sought judicial review, where the district court found FWS's designation unlawful as to the units' status as "occupied" critical habitat but valid as to their "unoccupied" critical habitat status. *New Mexico Farm and Livestock Bureau v. U.S. Dept. of Interior*, No. 2:15-cv-00428-KG-CG (D.N.M. Oct. 25, 2017). The Tenth Circuit reversed on appeal, holding the designation invalid under both subparts of § 1533(5)(A). *New Mexico Farm and Livestock Bureau v. U.S. Dept. of Interior*, No. 17-2211, 2020 WL 1265668 (10th Cir. Mar. 17, 2020).

The panel first addressed when the jaguar species was listed in accordance with 16 U.S.C. § 1533 because "[t]he ESA expressly requires the agency to consider occupancy at the time a species 'is listed.'" FWS had concluded that the listing occurred in 1972 under the Endangered Species Conservation Act, which ESA repealed but whose determinations as to "threatened with extinction" status were "deemed an endangered species within the meaning of [ESA]" until "republished to conform with the classification for endangered species or threatened species." *Id.* § 1533(c)(3). FWS promulgated a consolidated list of endangered species in 1975 that included the jaguar species together with its ESCA listing date. The panel concurred with the agency on this point. However, it further reasoned that "Congress intended to ensure that even if the range of a species expands, the Service designates critical habitat under § 1532(5)(A)(i) only for areas occupied at the *initial* time of listing. For areas unoccupied at the time of listing into which a species has expanded, the Service designates critical habitat under the more stringent criteria in § 1532(5)(A)(ii)."

Turning to the critical habitat determinations, the panel first addressed FWS's "occupied" determination under § 1533(5)(A)(i) as speculative under the administrative record. It deferred to the FWS finding that the critical period for resolving whether the species occupied the two land units was between 1962 and 1982 in view of the average ten-year jaguar life span but held the "occupied" finding to be "speculative and not based on substantial evidence":

> Though we are mindful that the agency need only base its determinations on the "best scientific data available," ... not the best scientific data possible, our review of the Final Critical Habitat Designation reveals that the Service did not make a factual finding that Units 5 and 6 were occupied by jaguars in 1972. Rather, the agency expressed uncertainty about that question and ultimately found only that jaguars may have occupied the units at that time. [¶] Moreover, there is no evidence in the record that any

> jaguars were present in Units 5 and 6 between 1962 and 1982. In fact, there is no evidence that jaguars were present in Units 5 and 6 at any time before 1995.

The panel next rejected FWS's alternative "unoccupied" critical habitat determination under § 1533(5)(A)(ii). Relying on 50 C.F.R. § 424.12(e) (2013) and the final rulemaking accompanying it, the panel held that "before the Service designates an area as unoccupied critical habitat, it must find designation of occupied critical habitat 'inadequate to ensure the conservation of the species.'" It also cited a prior Tenth Circuit decision for this principle. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 470 (5th Cir. 2016), *vacated on other grounds*, 139 S. Ct. 590 (2018). It then looked to 2016 rulemaking, which recodified the regulation as 50 C.F.R. § 424.12(b)(2), and a 2019 amendment as "support[ing] our conclusion that § 424.12(e) (2013) required a sequential, 'step-wise' approach, under which the Service must find designation of occupied areas inadequate as a prerequisite to designating unoccupied areas." Although the plaintiff groups had "contest[ed] the Service's compliance with the statute" and not § 424.12(e) (2013), the panel exercised its discretion to entertain the issue because "when we consider an agency action made pursuant to a statute and an implementing regulation, we cannot ignore the regulatory context when determining whether that action was arbitrary and capricious." It again found the administrative record inadequate to sustain the agency's critical habitat determination:

> The Service did not find that the designation of areas occupied by jaguars in 1972 would be inadequate to ensure the conservation of the species. Nor did it make findings about whether any individual unit designated as unoccupied was essential for the conservation of the species. Rather, it addressed all the units together, finding that to the extent they were not occupied, they were essential for the conservation of the species.

Last, the panel rejected two additional arguments by the plaintiff groups—the second of which warrants noting. They "contend[ed] that because the ESA limits 'conservation' to those methods and procedures necessary to bring a species 'to the point at which the measures provided pursuant to this chapter are no longer necessary,' § 1532(3), the Service was required to identify this 'point' when it designated the jaguar's critical habitat." The panel observed that "the ESA's detailed provisions regarding designation of critical habitat include no such requirement" and added that § 1533(f)(1)(B)(ii), which deals with recovery plans, "the ESA requires the Service to identify 'objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list.' ... This requirement is entirely separate from the requirements for the designation of critical habitat." The panel remanded for proceedings consistent with its decision.

One panel member concurred but added a brief observation: "The administrative record raises concerns about whether the Service defined *essential* to mean merely convenient or helpful. But I am confident that it will be more careful after remand."

Decision link: https://www.ca10.uscourts.gov/opinions/17/17-2211.pdf