Northern N.M. Stockman's Ass'n v. USFWS—Tenth Circuit rejects challenge to critical habitat designation for New Mexico meadow jumping mouse

In 2016, the United States Fish and Wildlife Service designated under the Endangered Species Act approximately 14,000 acres of land, together with 169.3 miles of flowing streams, in eight units within Arizona, Colorado and New Mexico as critical habitat for the endangered New Mexico meadow jumping frog. 81 Fed. Reg. 14,264 (Mar. 16, 2016). The jumping frog has "'exceptionally specialized habitat requirements'" because it hibernates during much of the year, has a relatively short life span, and gives birth to one small litter annually. The species gathers its food and nesting materials from vegetation along perennial flowing waters.

ESA Section 4(b)(2) requires the Service, in designating critical habitat, to "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The Service published at the time of the designation an economic analysis prepared by a private contractor that "utilized a methodology known as the 'baseline approach' to determine which costs must be included in the economic analysis. Under the baseline approach, the Service only considers costs that are 'solely attributable to the designation of critical habitat' and ignores costs that would exist regardless of the habitat designation." The analysis estimated the designation's costs at $23 million. Most of these costs derived from ameliorating the impact of livestock grazing and identified the need for constructing cattle fences, reducing animal unit months, and the possible need to shift cattle rotation patterns or to develop alternative water sources.

The Northern New Mexico Stockman's Association and the Otero County Cattleman's Association sought judicial review of the critical habitat designation under the Administrative Procedure Act in 2018. The district court dismissed the petition in a lengthy decision. *N. N.M. Stockman's Ass'n v. U.S. Fish & Wildlife Serv.*, 454 F. Supp. 3d 850 (D.N.M. 2020). The Tenth Circuit affirmed. *N. N.M. Stockman's Ass'n v. U.S. Fish & Wildlife Serv.*, No. 21-2019, 2022 WL 1123013 (10th Cir. Apr. 15, 2022).

After determining that the organizations possessed Article III associational standing, the panel "conclude[d] (1) the Service's economic impact methodology satisfies the ESA and does not violate our precedent; (2) the Service adequately assessed the impact of critical habitat designation on the Ranchers' water rights; and (3) the Service did not abuse its discretion when it declined to exclude Units 3 and 4 from the final critical habitat." Only the first of these conclusions has general significance; the remaining two, as the panel's summary conclusions suggest, were controlled by the proper exercise of agency discretion as reflected in the administrative record.

The associations "contend[ed] Section 4(b)(2) of the ESA requires the Service to analyze all the costs associated with designation, even costs that can be attributed to other causes, such as the listing of a species as endangered" and cited as so holding *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). The panel acknowledged that "[t]he Ranchers' position is not without support"—at least when *N.M. Cattle Growers* was decided:

> As the Ranchers point out, we specifically concluded "the baseline approach to economic analysis is not in accord with the language or intent of the ESA." ... Standing

> on its own, this language might foreclose the Service's argument here that the baseline approach is an acceptable application of Section 4(b)(2) of the ESA. But a careful review of *N.M. Cattle Growers* shows that we arrived at this conclusion only because of an implementing regulation in effect at the time—but since replaced—that resulted in the baseline approach rendering Section 4(b)(2) "virtually meaningless."

As the panel further explained, "[w]hen we decided *N.M. Cattle Growers*, the Service took the position that critical habitat designations were 'unhelpful, duplicative, and unnecessary[]'" but that such position could "be traced to a regulation that gave actions likely to jeopardize a listed species the same meaning as actions likely to result in the adverse modification of an area designated as critical habitat." However, in response to decisions from the Fifth and Ninth Circuit's invalidating the "destruction or adverse modification" of habitat definition in 50 C.F.R. § 402.02 (*Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004), *amended*, 387 F.3d 968 (9th Cir. 2004)), the Service

> promulgated a new regulation that modified the regulatory meaning of "destruction or adverse modification" of habitat. ... Rather than encompassing only actions that affect the survival and recovery of a species, as the jeopardy standard already does, the amended definition of habitat modification covers actions that affect the conservation of a species, which makes the definition broader in scope and effectively addresses our criticism in *N.M. Cattle Growers*. ... [¶] Under the new definition, costs associated with adverse modification are not equivalent to jeopardy costs. An action that jeopardizes a species is one that affects the "survival and recovery" of a listed species "by reducing the reproduction, numbers, or distribution of that species," while an action that adversely modifies habitat is one that "diminishes the value of critical habitat for the conservation of a listed species."

The panel recognized, in response to the associations' contention that "the baseline approach still renders Section 4(b)(2) meaningless in occupied areas because the Service routinely attributes all costs in those areas to the presence of the listed species rather than the designation of the areas as critical habitat[,]" that "[i]t may be true that in situations where critical habitat consists only of occupied areas, there will be few incremental costs attributable to critical habitat designation." However, it added, "those are not the facts before us. ... If in some future case, a private party believes the Service improperly designated areas as occupied critical habitat or misattributed costs to listing, then the party can challenge that designation under the Administrative Procedure Act."

The associations also challenged the baseline approach as inconsistent with Section 4(b)(2) without regard to *N.M. Cattle Growers* "because the statute itself requires the Service to analyze all the costs of designating critical habitat, even costs that would exist regardless of the critical habitat designation, such as costs associated with the listing of a species." Deeming the relevant regulation, subsection (b) of 50 C.F.R. § 424.19 ("Impact analysis and exclusions from critical habitat"), to reflect an agency interpretation of Section 4(b)(2), the panel reviewed its validity under *Skidmore* standards—i.e., by examining "'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade'"—with further deference accorded the Secretary of the Interior's "'reasonable interpretation'" of ESA provisions given the latitude accorded by the statute to the Secretary for enforcement purposes and her attendant regulatory expertise. Here, the panel concluded that Section 4(b)(2) did not "prescribe the exact methodology that must be used" and

that "[u]nder the plain language of the provision, the only costs that must be considered by the Service are the costs related to the designation of critical habitat." Consequently, "[a] reasonable way to determine those costs is to 'compare the hypothetical world with the designation to the hypothetical world without the designation'—i.e., the baseline approach."

As to the remaining issues, the panel found that "[a]fter a close review of the administrative record, ... the Service adequately considered the impact of critical habitat designation on the Ranchers' water rights." It stressed not only that "the ESA does not require the Service to analyze *all* economic impacts—no matter how speculative—of designating critical habitat" and but also "the Ranchers' lack of evidence in the record showing that designation constitutes a taking of their property rights." No more persuasive was "[t]he Ranchers' final argument is that the Service abused its discretion when it decided not to exclude Units 3 and 4 from the critical habitat designation." The panel replied, in part, that "[t]he record shows that the agency considered the benefits of exclusion and weighed those against the benefits of inclusion. Even though the agency did not describe in detail how it ultimately weighed the competing benefits, we will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" Such a "'path'" existed by virtue of the Service's "qualitative assessment of the benefits" of not excluding Units 3 and 4, its "discretion in deciding whether to exclude an area[,] and [its] decision to elevate conservation concerns over other factors is in keeping with the overall purpose of the ESA." In sum, the administrative record reflected "that the Service determined the conservation benefits of inclusion were substantial while the benefits of exclusion were minimal."

Decision link: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110671606.pdf