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## Environmental Law - Putting a Price on Critical Habitat, New Mexico Cattle Growers Association v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001)

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## CASE NOTE

**ENVIRONMENTAL LAW – Putting a Price on Critical Habitat, *New Mexico Cattle Growers Association v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001).**

### INTRODUCTION

The southwestern willow flycatcher, a small bird that nests in riparian areas along riverbeds, was listed as endangered by the Fish and Wildlife Service (FWS) in 1995.<sup>1</sup> The Endangered Species Act (ESA) requires that designation of a species' critical habitat occur concurrently with the listing determination.<sup>2</sup> If FWS decides that critical habitat is not presently determinable, however, a one-year extension is available.<sup>3</sup> At the end of the one-year extension, FWS must publish a final critical habitat designation (CHD) based on the data that is currently available.<sup>4</sup> Critical habitat for the southwestern willow flycatcher was not designated within the statutory time period.<sup>5</sup> FWS cited the need to gather more information about the species as the reason for not completing the designation.<sup>6</sup> The designation was not completed until 1997, when FWS was ordered to do so by the federal District Court for the District of Arizona in *Southwest Center for Biological Diversity v. Babbitt*.<sup>7</sup> FWS then designated eighteen critical habitat units totaling 599 miles of stream and riverbeds.<sup>8</sup> New Mexico's agriculture industry brought suit alleging that FWS had inadequately performed the economic analysis that is required by the Endangered Species Act as part of the CHD process.<sup>9</sup>

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1. *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277, 1279 (10th Cir. 2001).

2. 16 U.S.C. § 1533(b)(6)(C) (2000).

3. *Id.* § 1533(b)(6)(C)(ii).

4. *Id.*

5. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1279.

6. *Id.*

7. *Id.* (citing *City of LaGrande v. Union Pacific Railroad*, No. CV96-115-ST, 1997 U.S. Dist. LEXIS 23935 (D. Ariz. July 18, 1997)).

8. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1280. Critical habitat was designated in Arizona, California, and New Mexico. *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141, 1147 (D.N.M. 1999). Selected areas were designated as critical habitat because "they contain the remaining known flycatcher nesting sites, and/or formerly supported nesting flycatchers, and/or have the potential to support nesting flycatchers." *Id.* at 1148.

9. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1277, 1280. The CHD process is codified in 16 U.S.C. § 1533(b)(2) (2000). Plaintiffs were New Mexico Cattle Growers Association, New Mexico Public Lands Council, New Mexico Wool Growers, Inc., New Mexico Farm & Livestock Bureau, New Mexico Wheat Growers Association, Production Credit

FWS has adopted an incremental or "baseline" approach to the analysis.<sup>10</sup> According to FWS, economic impacts on the area included in, and surrounding, the CHD that are attributable to the listing of the species must not be considered so that economics are not inserted into the listing process.<sup>11</sup> This creates the "baseline," and FWS only considers economic impacts that rise above the baseline.<sup>12</sup> FWS uses a "but for" method of analysis.<sup>13</sup> If an impact would not occur "but for" the CHD, the impact is attributed to listing and is not considered an impact of the CHD.<sup>14</sup> FWS then attributed all economic impacts to the listing of the species, not to the CHD, and concluded that there were no economic impacts on the area included in, or surrounding, the CHD because they did not rise above the baseline created by the listing of the species.<sup>15</sup>

The issue before the United States Court of Appeals for the Tenth Circuit in *New Mexico Cattle Growers Ass'n* was whether the "baseline approach" was a valid interpretation of the ESA's requirement that FWS conduct an economic analysis before issuing a CHD.<sup>16</sup> The court held that the language of the ESA clearly required consideration of economic impacts, and under FWS's baseline method the consideration of economic impacts, the ESA was rendered meaningless.<sup>17</sup> Therefore, FWS's interpretation of the

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Association of New Mexico, Coalition of Arizona New Mexico Counties for Stable Economic Growth, and Hidalgo County Cattle Growers Association. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1277. In *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141 (D. N.M. 1999), the District Court of New Mexico explained that "[i]n its June 1997 economic analysis, FWS purportedly measured economic effects based on changes in national income, and regional jobs and household income, and found that the critical habitat designation would have no incremental effect beyond that caused by listing." *Id.* at 1148.

10. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1280. FWS takes the position that "the ESA at Section 4(b) requires them 'to evaluate the economic impacts of the critical habitat designation only to the extent those impacts are *in addition to* any impacts attributable to the listing of the species itself.'" *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1165 (D.N.M. 2000)(citing 64 Fed. Reg. 36,277-36,278 (July 6, 1999)).

11. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1280. It is not clear, however, how FWS determines the impacts attributable to listing. In *Middle Rio Grande Conservancy Dist. v. Babbitt*, the District Court of New Mexico addressed this issue and found that "FWS has made no real attempt to examine or apportion impact, economic or otherwise. At no point did FWS endeavor to quantify impacts specifically credited to the listing in order to distinguish remaining and expected impacts not so readily assigned." 206 F. Supp. 2d at 1183.

12. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1280.

13. *Id.* at 1283.

14. *Id.*

15. *Id.* at 1280.

16. *Id.* 1283. In *New Mexico Cattle Growers Ass'n*, the Tenth Circuit panel explained that "[t]he primary statutory rationale for this position comes from 16 U.S.C. § 1533(b)(1)(A), which states that listing determinations be made 'solely on the basis of the best scientific and commercial data available.'" *Id.* at 1280.

17. *Id.* at 1285.

ESA was invalid because it did not comply with the statute's requirement of consideration of economic impacts.<sup>18</sup>

This note will discuss why the Tenth Circuit correctly required FWS to provide a meaningful economic analysis, but incorrectly invalidated the baseline approach. In analyzing why the current implementation of the baseline approach does not comply with the requirements of the ESA, this note will examine the requirements, structure, and intent of the ESA, and illustrate that FWS is incorrectly implementing the statute through its regulatory interpretations. Additionally, the ESA requirement that FWS perform an economic analysis will be discussed, as will the reasons why the baseline approach is needed to make the analysis meaningful. Finally, this note will explain FWS's policy position with respect to CHDs, how the policy is implemented through regulations, and how it contributes to the ineffectiveness of the baseline approach.

#### BACKGROUND

##### *The Endangered Species Act*

The Endangered Species Act has been amended several times since its enactment in 1973.<sup>19</sup> In 1992, its authorization expired and it has not been reauthorized.<sup>20</sup> Instead, the ESA is refunded through annual appropriations.<sup>21</sup> The ESA is the most stringent, and perhaps most powerful, of environmental laws.<sup>22</sup> It is set apart from other environmental laws by its use of unequivocal terms, by its absolute reliance on science in many important aspects of mandated decision-making, and by the geographic scale of its implementation.<sup>23</sup> It concerns every state in the nation; in Wyoming alone,

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18. *Id.*

19. Jason M. Patlis, *Paying Tribute to Joseph Heller with the Endangered Species Act: When Critical Habitat Isn't*, 20 STAN. ENVTL. L.J. 133, 136-37 (2001). ESA amendments relating to critical habitat occurred in 1978, 1982, and 1988. *Id.*

20. *Id.* at 136.

21. *Id.* at 136 n.8. This process is not very efficient and political battles end up being waged in the appropriations committee instead of the committees of jurisdiction. *Id.*

22. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Supreme Court explained that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost" and that it "admits of no exception" *Id.* at 184, 173.

23. Steven P. Quarles & Thomas R. Lundquist, *The Pronounced Presence and Insistent Issues of the ESA*, 16 NAT. RESOURCES & ENV'T 59, 59-60 (2001). The ESA, unlike other environmental laws, does not contain any "escape hatch" or "weasel words" such as "to the extent feasible," "insofar as practicable," "best available technology," or "in the public interest." *Id.* at 59. The ESA prohibits consideration of other factors in Section 4 listing decisions and Section 7 consultation requirements. *Id.* at 60. Before the ESA, regulators usually addressed issues on a site-specific basis. *Id.* Since the passage of the ESA, species have been listed and critical habitats designated over regions encompassing millions of acres and multiple states. *Id.*

fourteen animals and four plants are currently listed as threatened or endangered.<sup>24</sup>

The purpose of the ESA is to prevent the extinction of species by preserving and protecting the habitat upon which they depend.<sup>25</sup> Under the ESA, the Secretary of the Interior is required to determine which species are endangered or threatened.<sup>26</sup> The Secretary is required to make this decision “solely on the basis of the best scientific and commercial data available to him . . . .”<sup>27</sup> The Secretary is also required to designate critical habitat “to the maximum extent prudent or determinable.”<sup>28</sup> The ESA defines critical habitat as:

(i) the specific areas within the geographic area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species, and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.<sup>29</sup>

CHD’s are to be designated “on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”<sup>30</sup> The ESA goes on to declare that “[t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless . . . the failure to designate such area as critical habitat will result in the extinction of the species . . . .”<sup>31</sup> This provision was not included in the original Act, but

24. 50 C.F.R. § 17.11-12 (2001). Wyoming’s species are the grizzly bear, threatened; whooping crane, endangered; whooping crane, experimental population, nonessential; Kendall Warm Springs dace, endangered; bald eagle, threatened; black-footed ferret, endangered; black-footed ferret, experimental population, nonessential; Canada lynx, threatened; Preble’s meadow jumping mouse, threatened; Pike minnow, endangered; razorback sucker, endangered; Wyoming toad, endangered; gray wolf, endangered; gray wolf, experimental population, nonessential; Colorado butterfly plant, threatened; blowout penstemon, endangered; Ute ladies’-tresses, threatened; and desert yellowhead, threatened. *Id.*

25. 16 U.S.C. § 1531(b) (2000).

26. *Id.* § 1533. The Secretary makes listing decisions through his own determinations or in response to citizen petitions. *Id.* §§ 1533(a)(1), (b)(3)(A).

27. *Id.* § 1533(b)(1)(A).

28. *Id.* § 1533(a)(3).

29. *Id.* § 1532(5)(A).

30. *Id.* § 1533(b)(2).

31. *Id.*

was added in 1978.<sup>32</sup> The legislative history makes clear that the purpose of adding this provision was to provide the Secretary of the Interior with discretion when balancing harm to the species against the benefits of a federal project when making a critical habitat designation.<sup>33</sup>

After a species has been listed, all federal agencies contemplating some type of action are required to consult with FWS to “insure that any action authorized, funded, or carried out by such agenc[ies] . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . .”<sup>34</sup> After critical habitat has been designated, federal agencies must consult with FWS to “insure that any action authorized, funded, or carried out by such agenc[ies] . . . is not likely to . . . result in the destruction or adverse modification of [designated critical] habitat . . . .”<sup>35</sup> An action is prohibited if it jeopardizes the existence of a species and results in the destruction of critical habitat.<sup>36</sup>

In order to implement the ESA, FWS has defined action that violates the jeopardy standard as action that can be reasonably expected “to reduce appreciably the likelihood of both the survival and recovery of a listed species . . . .”<sup>37</sup> Action that violates the adverse modification standard is action “that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”<sup>38</sup> It is FWS’s position that actions that satisfy the adverse modification standard nearly always jeopardize the exis-

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32. H.R. REP. NO. 95-1625, 17 (1978). The 1978 amendments were a Congressional response to *Tennessee Valley Authority v. Hill*, in which the Supreme Court had halted construction of the Tellico Dam because it would destroy the snail darter’s critical habitat. Patlis, *supra* note 19, at 151. The Dam was virtually complete at the time with over \$100 million spent on its construction. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172 (1978).

33. Patlis, *supra* note 19, at 152-53. The House Committee on Merchant Marine and Fisheries noted, “Critical habitat is determined solely on the basis of biological factors. The Secretary has no discretion to alter critical habitat designation of the basis of the effect that such designation may have on area (sic).” *Id.* at 153 n.78.

34. 16 U.S.C. § 1536(a)(2). Subsection (a)(2) requires that federal agencies and private parties seeking federal permits to consult with FWS or National Marine and Fisheries Service (NMFS) to insure that any action “is not likely to jeopardize the continued existence of any [listed species] or result in the destruction or adverse modification of habitat of such species . . . .” *Id.*

35. *Id.*

36. *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001). In 1978, the ESA underwent revisions of the consultation process. Patlis, *supra* note 19, at 151. The House Merchant Marine and Fisheries Committee approved a version of the bill which included a definition of “species or habitat degradation as either of: (A) the placing in jeopardy of the continued existence of any endangered species or threatened species . . . [or] (B) the destruction or adverse modification of any critical habitat.” *Id.* at 155 (internal quotations omitted). This provision was later eliminated by the House and Senate Conference Committee because it was viewed as an “unnecessary, and potentially harmful, technical provision.” *Id.* at 157 (citing H.R. REP. NO. 95-1804, at 18 (2001)).

37. 50 C.F.R. § 402.02 (2001).

38. *Id.*

tence of the species.<sup>39</sup> FWS maintains that CHDs are meaningless, and has historically only designated them when forced to do so by court order.<sup>40</sup> Overall, the courts are in agreement that FWS must designate critical habitat, regardless of its effectiveness.<sup>41</sup> However, that is where the similarity ends.

### *Early Cases*

The groundwork for the decision reached by the Tenth Circuit panel in *New Mexico Cattle Growers Ass'n* was laid in 1996 by *Catron County Board of Commissioners v. United States Fish and Wildlife Service*.<sup>42</sup> The issue before the court was whether ESA procedures displaced National Environmental Protection Act (NEPA) requirements.<sup>43</sup> FWS took the position that NEPA compliance was excused when another statute duplicated NEPA's requirements, and because NEPA and ESA procedures were similar, FWS was excused from conducting the analysis required by NEPA.<sup>44</sup> Additionally, FWS urged the court to adopt the Ninth Circuit's position in *Douglas County v. Babbitt*, which had held that because no actual impact flowed from a CHD, a NEPA analysis was unnecessary.<sup>45</sup> The Tenth Circuit panel disagreed with FWS's position and held that ESA procedures did not displace NEPA requirements, and that actual impact does flow from a CHD.<sup>46</sup> The court declared that "[m]erely because the Secretary says it does not make it so. The record in this case suggests that the impact will be im-

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39. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1284.

40. *Id.* at 1283. FWS policy states that critical habitat "generally provides little or no additional conservation benefits beyond those provided by the consultation provisions of section 7 and the prohibitions of section 9, while the cost of designation is generally high." 63 Fed. Reg. 25,505 (May 8, 1998).

41. In *Northern Spotted Owl v. Lujan*, the District Court held that "[t]he designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances." 758 F. Supp. 621, 626 (W.D. Wash. 1991). In *Natural Resources Def. Council v. United States Dept. of the Interior*, a Ninth Circuit panel held that FWS's reasons (the landowners might deliberately destroy the habitat and the designation would not 'appreciably benefit' the species) for not designating critical habitat were invalid, and that critical habitat must be designated. 113 F.3d 1121, 1125-27 (9th Cir. 1997). In *Conservation Council for Hawaii v. Babbitt*, the District Court for the District of Hawaii reached the same conclusion, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998); and in *Forest Guardians v. Babbitt*, the Tenth Circuit Court of Appeals panel agreed, stating, "[W]hen Congress by organic statute sanctions a specific deadline for agency action, neither the agency nor any court has any discretion." 174 F.3d 1178, 1190 (10th Cir. 1999).

42. 75 F.3d 1429 (10th Cir. 1996).

43. *See id.* at 1436-39. "NEPA does not require particular results but rather a particular process." *Id.* at 1437 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). "NEPA ensures that a federal agency makes informed, carefully calculated decisions when acting in such a way as to affect the environment and also enables dissemination of relevant information to external audiences potentially affected by the agency's decision." *Id.* (citing *Robertson*, 490 U.S. at 349).

44. *Id.* at 1437.

45. *Id.* at 1436.

46. *Id.*

mediate and the consequences could be disastrous."<sup>47</sup> *Catron County* established the significance of CHDs and indicated that the Tenth Circuit Court of Appeals would not view them as an ineffectual addition to the listing process, but rather as an additional measure of protection that would have substantial impacts.<sup>48</sup>

In *Middle Rio Grande Conservancy District v. Babbitt*, the United States District Court for the District of New Mexico was the first court to overturn a CHD on substantive grounds.<sup>49</sup> In 1999, the District Court for the District of New Mexico ordered FWS to designate critical habitat for the Rio Grande silvery minnow.<sup>50</sup> FWS complied by designating 163 miles of the Rio Grande main stem as critical habitat for the minnow.<sup>51</sup> This area contains nearly the entire present habitat of the minnow and was designated because FWS claimed that it contained the necessary elements the minnow needed to survive.<sup>52</sup> The Middle Rio Grande Conservancy District (hereinafter "Rio Grande District"), a political subdivision of the state of New Mexico, filed suit alleging that the CHD for the silvery minnow would negatively affect New Mexico economically, ecologically, aesthetically, culturally, and socially.<sup>53</sup> Rio Grande District claimed that FWS had failed to assess the environmental impact, neglected to consider alternatives, and ignored critically important data in making its determination that the CHD for the silvery minnow created no additional impacts that could not be attributed to the listing of the species.<sup>54</sup> FWS asserted that any action that would adversely modify the silvery minnow's habitat would also jeopardize the existence of the species.<sup>55</sup> FWS attributed all economic impacts to the listing of the species and declared that no impacts rose above this "baseline;" thus, an economic analysis was not necessary because there had not been any impact solely attributable to the CHD.<sup>56</sup>

Pursuant to Section 706 of the Administrative Procedure Act, the District Court reviewed the CHD for the silvery minnow and held that the

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47. *Id.*

48. *Id.* at 1436-38.

49. Murray D. Feldman & Michael J. Brennan, *The Growing Importance of Critical Habitat for Species Conservation*, 16 NAT. RESOURCES & ENV'T 88, 91 (2001) (citing *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156 (D.N.M. 2000)). The Federal District Court for New Mexico overturned the CHD because FWS had failed to provide a sufficient factual basis supporting the areas chosen to be included in the CHD. *Middle Rio Grande.*, 206 F. Supp. 2d at 1193. Contrast this with *Catron County* where FWS had failed to meet the procedural requirement of performing a NEPA analysis. *Catron County Bd. of Comm'r v. United States Fish and Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996).

50. *Middle Rio Grande*, 206 F. Supp. 2d at 1161.

51. *Id.* at 1164.

52. *Id.*

53. *Id.* at 1161.

54. *Id.* at 1162.

55. *Id.* at 1165.

56. *Id.*



final rule designating critical habitat was arbitrary and capricious.<sup>57</sup> Judicial review of agency decision-making is limited to deciding whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choice made.”<sup>58</sup> Among the court’s reasons for finding the FWS action to be arbitrary and capricious are the following: (1) the determinations and assumptions made in the CHD were not supported on factual grounds; (2) FWS designated the entire present habitat of the silvery minnow without considering any alternative designations; (3) FWS did not identify or justify the baseline used in attributing all impact to the listing; (4) FWS failed to define with sufficient specificity what biological and physical features are essential to the species’ survival; and (5) the identification of the primary constituent elements of the silvery minnow’s survival were too vague and too broad to be used for any purpose intended by the ESA.<sup>59</sup> The court declared that FWS had vastly oversimplified the issues confronting the Rio Grande ecosystem, and had ignored its statutory duty to consider these issues when designating critical habitat.<sup>60</sup>

The final CHD required that the Rio Grande maintain a constant bank to bank flow.<sup>61</sup> The court focused on the fact that this would be next to impossible and could not be accomplished without immediate and long-term alterations in established water rights, which would result in substantial economic impact.<sup>62</sup> The court concluded, “[R]eaching a ‘no-impact’ conclu-

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57. *Id.* at 1194. The District of New Mexico court explained in *Middle Rio Grande v. Babbitt* that an agency decision cannot be set aside unless: (1) the agency acted outside the scope of its authority; (2) the agency failed to comply with prescribed procedures; or (3) the agency action was otherwise arbitrary, capricious or an abuse of discretion. *Id.* at 1176 (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994)). The court is not allowed to substitute its judgment for that of the agency, but must defer to the agency’s judgment when the decision at issue involves interpretation of federal statutes. *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001). This standard of review was set forth by the Supreme Court in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and is referred to as “*Chevron* deference.” *New Mexico Cattle Growers Assn.*, 248 F.3d at 1281.

58. *Middle Rio Grande*, 206 F. Supp. 2d at 1176 (citation omitted).

59. *Id.* at 1178-79.

60. *Id.* at 1179.

61. *Id.* at 1181. “[T]he terms of the final rule designation of the silvery minnow’s critical habitat brings with it a requirement that substantial amounts of water remain continuously present in the middle Rio Grande . . .” *Id.* The Tenth Circuit explained in *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220 (10<sup>th</sup> Cir. 2002), that very few minnows exist in the Cochiti and Isleta portions of the Rio Grande partly due to channelization, accompanying changes to the river’s speed and temperature, and diversion dams. *Id.* at 1224.

62. *Middle Rio Grande v. Babbitt*, 206 F. Supp. 2d at 1179. The court explained that “[r]ights to all of the river’s surface water are legally held for a variety of beneficial uses, those holding water rights utilize them to the full extent permitted, and no water is available to appropriate for other uses.” *Id.* The requirement of a constant bank-to-bank flow “must inevitably result in staggering complexities and unavoidable economic and other consequences.” *Id.* Rio Grande District holds senior water rights to 70 community acequias, which are historic ditch systems for the apportioning and distribution of water. *Id.* at 1161. These water rights support pasture, alfalfa, green chili, and vegetable crops valued by the

sion without identifying how much water could be required and where that water will come from appears to be the essence of arbitrary and capricious.”<sup>63</sup> The court declared, “The Draft Economic Analysis can only be read as callous treatment of the people and communities of the Middle Rio Grande Valley . . . .”<sup>64</sup>

Although the issue was not directly before it, the court addressed FWS’s baseline approach.<sup>65</sup> The court noted that FWS only considered optimal conditions and made no attempt to examine or apportion conditions to either the listing or the designation.<sup>66</sup> The district court then pointed out that in order to have a baseline approach, there first must be an established baseline.<sup>67</sup> The court stated, “Nothing FWS presents indicates a realistic baseline, and without a well-researched, and well-reasoned baseline, a determination of ‘no impact’ remains nothing more than an initial concept; . . . the concept by itself is not enough to secure the final rule in question.”<sup>68</sup> The court warned FWS that measures undertaken at the last minute to save the minnow from jeopardy would not be considered a valid baseline, declaring, “[D]esignation of critical habitat in the last half of the eleventh hour provides a poor test.”<sup>69</sup> Even though FWS’s implementation of the baseline approach was not held invalid, the court held that FWS had not considered what the ESA required, and that FWS had not demonstrated a rational basis for its decision to designate the entirety of the middle Rio Grande as critical habitat, or for its conclusion that the designation resulted in no impact.<sup>70</sup>

The court continued its criticism when addressing FWS’s identification of “primary constituent elements.”<sup>71</sup> The FWS identified these elements as: (1) stream morphology that supplies sufficient flowing water to provide food and cover needed to sustain all life stages of the species; (2) water of sufficient quality to prevent water stagnation; and (3) water of sufficient quality to prevent isolated pools that restrict fish movement, foster increased predation by birds and aquatic predators, and congregate pathogens.<sup>72</sup> The court held that “[t]hese findings provide vague generalities that state little more than what is required for any fish species . . . .”<sup>73</sup> The District Court

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Middle Rio Grande Conservancy District at 28 million dollars annually. *Id.* The State of New Mexico claims that “critical habitat for the silvery minnow . . . adversely impacts ‘the ability of municipalities to provide and maintain an adequate domestic water supply,’ as well as the ability of the State to manage flood control . . . .” *Id.* at 1162.

63. *Id.* at 1182-83.

64. *Id.* at 1179.

65. *Id.* at 1182-83.

66. *Id.* at 1183.

67. *Id.*

68. *Id.*

69. *Id.* at 1184.

70. *Id.* at 1183.

71. *Id.* at 1185.

72. *Id.* at 1164.

73. *Id.* at 1184.

went on to recognize that the primary constituent elements did not provide guidance or standards relating to what the protected species required or how the river should be managed to protect the species.<sup>74</sup> The court observed that primary constituent elements were meant to function as a tool in limiting critical habitat, not as a means for expanding it to wherever there existed a potential for those elements to occur.<sup>75</sup> The court concluded that the ESA required a thorough and accurate analysis, even though it was a time-consuming and painstaking process.<sup>76</sup>

*Middle Rio Grande Conservancy District v. Norton* is a continuation of *Middle Rio Grande Conservancy District v. Babbitt*, and occurred after *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife*.<sup>77</sup> It illustrates FWS's continued refusal to acknowledge that CHDs do have an impact despite the holdings in *Catron County* and *New Mexico Cattle Growers*.<sup>78</sup> FWS did not appeal the District Court's finding in *Middle Rio Grande Conservancy District v. Babbitt* that the CHD was arbitrary and capricious.<sup>79</sup> It appealed the court's order requiring FWS to prepare an Environmental Impact Statement (EIS).<sup>80</sup> FWS is required by NEPA to prepare an EIS whenever its action would significantly impact the human environment.<sup>81</sup> FWS first performs an Environmental Assessment (EA) to determine whether the action will have a significant impact.<sup>82</sup> If FWS concludes that the action will have a significant impact, then it performs an EIS.<sup>83</sup> If FWS decides that no significant impact will occur as a result of its action, how-

74. *Id.* at 1185.

75. *Id.* at 1186.

76. *Id.* at 1187.

77. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220 (10th Cir. 2002).

78. *See id.*

79. *Id.* at 1225.

80. *Id.* "The environmental impact statement – the renowned EIS – is the 'detailed written statement' that is required by Subsection 102(2)(C) of [NEPA]." WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 9.5 (2d ed. 1994).

81. *Middle Rio Grande*, 294 F.3d at 1224. In *Catron County Board of Commissioners v. United States Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), the Tenth Circuit panel explained that the EIS should detail: (1) the environmental impact of the action; (2) unavoidable adverse environmental effects; (3) alternatives to the action; (4) relationship between the short-term uses and long-term productivity of the effected environment; and (5) irretrievable and irreversible commitments of resources should the action be implemented. *Id.* at 1434 (citing 42 U.S.C. § 4332(2)(C)(i)-(v) (2000)).

82. *Middle Rio Grande*, 294 F.3d at 1224. An EA is a "'concise public document' that serves to provide evidence and analysis of whether to prepare 'an environmental impact statement or a finding of no significant impact.'" RODGERS, *supra* note 80 § 9.5 (citations omitted).

83. *Middle Rio Grande*, 294 F.3d at 1224. "Preparation of an impact statement serves two primary purposes, to inject environmental considerations into the federal agency's decision making process, and to inform the public that the agency has considered environmental concerns in its decision making process. An EIS also enables critical evaluation of an agency's actions by those outside the agency." *Catron County Bd. of Comm'rs v. United States Fish and Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996) (internal citations and quotations omitted).

ever, then an EIS is not performed.<sup>84</sup> In this instance, FWS claimed that because it had altered the CHD it should be allowed to conduct another EA, and then be allowed to decide whether an EIS was necessary.<sup>85</sup> The court disagreed, reasoning that the silvery minnow was on the brink of extinction partly because of FWS's incompetence in designating critical habitat.<sup>86</sup> The Tenth Circuit court concluded that since FWS had expanded the CHD to include an even larger area, there would be significant environmental impacts, just as there would have been significant environmental impacts in the first, smaller CHD.<sup>87</sup> Due to the overwhelming evidence that there would be significant environmental impacts regardless of the size, shape, or location of the CHD, the Tenth Circuit panel upheld the District Court's order mandating that FWS perform an EIS.<sup>88</sup>

Other courts of appeals have not reached the same conclusions with respect to CHD issues as the Tenth Circuit. In *Catron County*, the Tenth Circuit court held that compliance with NEPA was mandatory when designating critical habitat.<sup>89</sup> The Ninth Circuit Court of Appeals had reached a different conclusion in *Douglas County v. Babbitt*, decided in 1995.<sup>90</sup> NEPA requires government agencies to fully consider the environmental impacts of their actions and to inform the public of the nature of the impacts.<sup>91</sup> The Ninth Circuit court held that the ESA analysis was to replace the NEPA analysis.<sup>92</sup> The court pointed out that when designating critical habitat, FWS

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84. *Middle Rio Grand v. Norton*, 294 F.3d at 1224-25.

85. *Id.* at 1225. In *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), the Tenth Circuit panel observed, "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, *except in rare circumstances*, is to remand to the agency for additional investigation or explanation." *Id.* at 1093 (emphasis added) (internal quotation and citation omitted), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 972 (10th Cir. 1992) (en banc).

86. *Middle Rio Grande v. Norton*, 294 F.3d at 1226.

87. *Id.* at 1231.

88. *Id.*

89. *Catron County Bd. of Comm'rs v. United States Fish and Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996).

90. *Douglas County v. Babbitt*, 48 F.3d 1495 (5th Cir. 1995).

91. *Catron County*, 75 F.3d at 1434.

92. *Douglas County*, 48 F.3d at 1507. In *Douglas County*, the Ninth Circuit relied heavily on *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 836 (6th Cir. 1981), where the Sixth Circuit held that NEPA analysis does not apply to listing decisions under the ESA because: (1) the ESA's purpose would be frustrated because the ESA prevents the consideration of environmental impact; (2) the Secretary of the Interior does not have discretion to consider factors other than those listed in the ESA; (3) the action of listing a species furthers the purpose of NEPA; and (4) the legislative histories of NEPA and the ESA indicate that Congress did not intend for NEPA to apply to listing decisions under the ESA. *Douglas County*, 48 F.3d at 1507. *Pacific Legal Foundation* considered NEPA requirements in the context of listing, in contrast to *Douglas County*, which was considering NEPA requirements in the context of CHDs. *Douglas County*, 48 F.3d at 1503.

was allowed only to examine “economic or any other relevant impact.”<sup>93</sup> The court chose a narrow interpretation of the ESA and held that the environmental impact analysis required by NEPA did not fall under the heading “economic or any other relevant impact.”<sup>94</sup> The Ninth Circuit was willing to agree with FWS that a CHD did not create impacts that needed to be recognized and analyzed because the CHD did not physically alter the land.<sup>95</sup> Therefore, the court reasoned that no environmental impacts occurred, making a NEPA analysis unnecessary.<sup>96</sup> The Tenth Circuit court chose to disagree with this view in *Catron County*, and has moved in the opposite direction from the Ninth Circuit court by continually requiring complete NEPA and ESA analyses.<sup>97</sup>

In *Sierra Club v. United States Fish and Wildlife Service*, FWS refused to perform a CHD on the basis that it would provide no benefit to the species.<sup>98</sup> FWS contended that a CHD would provide no additional protection for the gulf sturgeon since any federal action that would adversely modify critical habitat would also place the species in jeopardy.<sup>99</sup> The Sierra Club argued that the definitions of adverse modification and jeopardy produced results that were inconsistent with the intent of the ESA because both definitions included the term “survival and recovery.”<sup>100</sup> The Sierra Club contended that the ESA requires consultation in critical habitat areas when the action affects recovery alone, and that it was not necessary for an action to affect the survival of the species.<sup>101</sup> The Fifth Circuit Court of Appeals panel agreed, reasoning that the ESA defines “critical habitat” as areas which are “essential to the conservation” of the listed species, and that “[c]onservation is a much broader concept than mere survival.”<sup>102</sup> The Fifth Circuit concluded, “Requiring consultation only where an action affects the

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93. *Id.* at 1503.

94. *Id.* at 1505.

95. *Id.* The Ninth Circuit panel in *Douglas County* relied heavily on *Metropolitan Edison Co. v. People Against Nuclear Energy*, in which the Supreme Court addressed NEPA requirements and explained that the word “environmental” pertained only to the proposed action’s effect on the physical environment, while emphasizing that “although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment.” *Douglas County*, 48 F.3d at 1505 (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983)).

96. *Douglas County*, 48 F.3d at 1505.

97. *Catron County Bd. of Comm’rs v. United States Fish and Wildlife Serv.*, 75 F.3d 1429, 1439 (10th Cir. 1996). See *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220 (10th Cir. 2002), *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1998).

98. *Sierra Club v. United States Fish and Wildlife Serv.*, 245 F.3d 434, 437 (5th Cir. 2001).

99. *Id.* at 439.

100. *Id.* at 441.

101. *Id.*

102. *Id.* 16 U.S.C. § 1532(3) (2000) defines “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” *Id.*

value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.”<sup>103</sup> This decision directly addressed the “adverse modification” definition upon which FWS based its CHD decisions, and declared to be an invalid interpretation.<sup>104</sup> This was the first case to recognize that FWS’s implementation of the definition of “adverse modification” is contrary to the intent of the ESA. Recovery requires a much larger area than survival. The holding in *Sierra Club* dramatically increased the CHD’s importance by making recovery the sole threshold requirement for a showing of adverse modification to critical habitat.

#### PRINCIPAL CASE

In *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Service*, the plaintiff directly challenged FWS’s economic analysis of the CHD.<sup>105</sup> *New Mexico Cattle Growers* began in the United States District Court for the District of New Mexico where it was dismissed on the merits.<sup>106</sup> The District Court applied *Chevron* deference to FWS’s interpretation of the statute and use of the baseline approach, and concluded that it was not a violation of the ESA.<sup>107</sup> The plaintiffs appealed, and a three-judge panel for the Tenth Circuit heard the case.<sup>108</sup>

The Tenth Circuit court decided that *Chevron* deference was not appropriate because the statutory interpretation that resulted in the baseline approach had never undergone the formal rulemaking process and therefore was not entitled to deference.<sup>109</sup> The court explained that it was necessary to determine Congressional intent when interpreting statutes.<sup>110</sup> In order to determine Congressional intent, the court “will assume that Congress’s intent is expressed correctly in the ordinary meaning of the words it employs .

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103. *Sierra Club*, 245 F.3d at 442.

104. *Id.* at 443. The Fifth Circuit court additionally noted, “[O]ur holding applies only to the definition of ‘destruction or adverse modification.’ The remainder of [the regulation] – including the regulation’s definition of ‘jeopardize the continued existence of’ – is unaffected by our ruling.” *Id.* at 443 n.61.

105. *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277, 1280 (10th Cir. 2001).

106. *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141 (D.N.M. 1999). The District Court for the District of New Mexico held that “[t]he Service properly evaluated economic impacts in an incremental manner from those associated with listing . . . .” *Id.* at 1158. The court additionally held that “the FWS conducted an adequate analysis, considered the existence of other habitat protections, [and] reviewed economic effects on local communities . . . .” *Id.* at 1159.

107. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1281.

108. *Id.* at 1279.

109. *Id.* at 1281. In fact, FWS conceded that *Chevron* deference was not appropriate. *Id.* The court labeled the baseline approach an “informal interpretation” not entitled to deference. *Id.*

110. *Id.*

. . . Where the language of the statute is plain, it is improper for this Court to consult legislative history in determining Congressional intent.”<sup>111</sup>

The Tenth Circuit panel recognized that the purpose of the ESA is to conserve species and their habitat, that listing was to be based solely on scientific information, and that a CHD required an economic analysis.<sup>112</sup> The Tenth Circuit panel additionally acknowledged that a CHD may include areas found both inside and outside the area occupied by the species.<sup>113</sup> The court discussed the definitions of “adverse modification” and “jeopardy” and concluded that the definition of the latter subsumed the former.<sup>114</sup> Although the definitions were not directly before the court, it declared that they were the roots of the problem because FWS’s position on economic impact analysis stemmed from its interpretation of the definitions.<sup>115</sup>

FWS argued that no impact flowed from the CHD because it provided identical protection as listing the species.<sup>116</sup> FWS contended that any action that would adversely modify critical habitat would also jeopardize the existence of the species.<sup>117</sup> FWS asserted that agency actions that are “likely to adversely modify critical habitat but not to jeopardize the species for which it is designated are extremely rare historically, and none have been issued in recent years.”<sup>118</sup> The Tenth Circuit court rejected this argument and referred to *Catron County*, where it held that impact does flow from a CHD.<sup>119</sup> The Tenth Circuit panel then pointed out that the plaintiffs had been granted standing, which implicitly confirmed that some impact had to have been attributed to the CHD.<sup>120</sup> Otherwise, the petitioners would not have had standing to challenge the CHD because they would not have suffered injury from it.<sup>121</sup>

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111. *Id.* at 1281-82 (quoting *St. Charles Inv. Co. v. CIR*, 232 F.3d 773, 776 (10th Cir. 2000)).

112. *Id.* at 1282.

113. *Id.*

114. *Id.* at 1283. The court examined the definitions and stated, “[T]he standards are defined as virtually identical, or, if not identical, one (adverse modification) is subsumed by the other (jeopardy).” *Id.*

115. *Id.* FWS’s policy position on CHDs is that they are “unhelpful, duplicative, and unnecessary.” *Id.* FWS maintains that CHD’s do not “result in any incremental restrictions on agency activities.” *Id.* at 1284. Therefore, no economic impacts are attributable to the CHD. *Id.*

116. *Id.* at 1283-84.

117. *Id.* at 1284.

118. *Id.* (internal quotation and citation omitted).

119. *Id.* (citation omitted).

120. *Id.* “If the injury alleged is attributable wholly to listing, then the appellants suffer no injury from the CHD and cannot establish standing to challenge it.” *Id.*

121. *Id.* at 1283.

The Tenth Circuit court then addressed the primary issue, which was determining the statutory meaning of “economic impact.”<sup>122</sup> The court began by addressing the FWS regulations defining “jeopardy” and “adverse modification,” and concluded that the current definitions rendered any economic analysis meaningless.<sup>123</sup> The court pointed out that the statutory language of the ESA was plain.<sup>124</sup> The statute states that critical habitat is to be designated “on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”<sup>125</sup> The Tenth Circuit panel recognized that it was “compelled by the canons of statutory interpretation to give some effect to the congressional directive” stated in the ESA.<sup>126</sup> Because no meaningful economic analysis was done under FWS’s current system, the Tenth Circuit court held that the baseline approach to economic analysis was not in accord with the language or intent of the ESA.<sup>127</sup> Thus, FWS was required to analyze all of the economic impacts of a critical habitat designation “regardless of whether those impacts are attributable co-extensively to other causes.”<sup>128</sup>

The Tenth Circuit panel rejected the argument that economics would be inserted into the listing process and declared that requiring an evaluation of costs at a point subsequent to listing placed the economic analysis at exactly the point where Congress intended.<sup>129</sup> The court recognized that its holding could result in certain areas being excluded from a CHD, but maintained that this is what Congress intended.<sup>130</sup> The species would still have the protection of being listed as endangered, a process that would not be affected by this decision.<sup>131</sup> The Tenth Circuit court concluded by pointing out that if the FWS position that the protections afforded by a CHD are subsumed by the protections of listing is correct, then its holding would not result in decreased protection for endangered species or their habitat.<sup>132</sup>

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122. *Id.*

123. *Id.*

124. *Id.* at 1285.

125. 16 U.S.C. § 1533(b)(2) (2002).

126. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1285.

127. *Id.*

128. *Id.*

129. *Id.* The Tenth Circuit court recognized that two federal courts had addressed this issue: *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141, 1158 (D.N.M. 1999), and *Trinity County Concerned Citizens v. Babbitt*, No. 92-1194, 1993 WL 650393, at \*4 (D.D.C. Sept. 20, 1993), and had concluded that the baseline approach did insert economics into the listing process. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1285.

130. *Id.*

131. *Id.*

132. *Id.*



## ANALYSIS

*New Mexico Cattle Growers* oversimplified two important aspects of analyzing economic impacts attributable to a CHD. The first is the definitions of “adverse modification” and “jeopardy” and their impact on economic analysis. The second is the baseline approach as it relates to the statutory requirements of the ESA. The Tenth Circuit court was correct, however, in determining that FWS’s current implementation of the baseline approach does not comply with the requirements of the ESA. Additionally, FWS regulations interpreting the ESA ignore the structure and intent of the statute. These regulations stem from FWS’s policy positions with respect to CHDs. The combination of FWS regulations and policy render the economic analysis meaningless, which is an outcome that is inconsistent with the plain language, structure, and intent of the ESA.

*Definitions*

As the *New Mexico Cattle Growers* court recognized, the root of the problem lies in the definitions of “adverse modification” and “jeopardy.”<sup>133</sup> FWS defines “jeopardy” as any action that would “reduce appreciably the likelihood of both the survival and recovery of a listed species” and “adverse modification” as action that “appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”<sup>134</sup> The definitions are very similar; each contains the phrase “survival and recovery of a listed species.” FWS’s position is that the two definitions are nearly identical, declaring, “Actions satisfying the standard for adverse modification are nearly always found to jeopardize the species concerned . . . .”<sup>135</sup> The court in *New Mexico Cattle Growers* declared that the jeopardy standard subsumed the adverse modification standard.<sup>136</sup> Various other courts have reached the same conclusion.<sup>137</sup>

Although adverse modification and jeopardy are implemented as though they were identical, they have the potential to be very different. Currently, FWS attempts to implement the two standards in the same way by clinging ferociously to its stance that CHDs are duplicative, unnecessary, and provide no additional protection for a species.<sup>138</sup> But landowners and environmental groups alike recognize the differences between the two. Ad-

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133. *Id.* at 1283.

134. 50 C.F.R. § 402.02 (2001).

135. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1284 (citation omitted).

136. *Id.* at 1283.

137. *See Am. Rivers v. Nat’l Marine Fisheries Serv.*, No. 97-36159, 1999 U.S. App. LEXIS 3860, at \*5 (9th Cir. Jan. 11, 1999) (agreeing with the agency that jeopardy and critical habitat are closely related and thus the jeopardy discussion properly encompasses the critical habitat analysis).

138. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1283.

verse modification is a much broader and more powerful concept than jeopardy to the species in two respects. First, the species does not have to be present in the area to trigger critical habitat protection. The definition of critical habitat specifically includes “areas outside the geographical area occupied by the species at the time it is listed . . . .”<sup>139</sup> Second, adverse modification is much easier to show than jeopardy. Jeopardy relates directly to the species’ survival, whereas adverse modification could possibly pertain solely to a change in the species’ habitat.

FWS claims that even an alteration in unoccupied areas would jeopardize the existence of the species.<sup>140</sup> Because the flycatcher’s needs were expected to shift over time, FWS had designated entire reaches of rivers as critical habitat, areas which the species was not currently occupying.<sup>141</sup> The New Mexico Cattle Growers Association argued: “FWS’s economic analysis was arbitrary because it could not have reasonably determined that actions that would trigger ‘adverse modification [to habitat]’ review would already be under review pursuant to the ‘jeopardy’ standard.”<sup>142</sup> FWS responded that “protection of existing and potential nesting habit [sic] was necessary to avoid ‘jeopardy’ to the species . . . .”<sup>143</sup> Thus, FWS concluded “there would be no additional protection for flycatcher habitat, arising separately from the designation.”<sup>144</sup> Therefore, FWS reinforced its stance that CHDs do not provide additional protection, and maintained that jeopardy protection was adequate even for those areas that were currently unoccupied by the species.<sup>145</sup>

FWS’s position is incorrect because it is much more difficult to argue that the species’ survival is “jeopardized” when the species is not present in the area.<sup>146</sup> Additionally, it is much easier to show that the value of the species’ habitat has been appreciably diminished than it is to show that the likelihood of the survival and recovery of the species has been reduced appreciably. For example, if a road is built through an area that has been designated critical habitat for the desert tortoise, it might easily be shown

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139. 16 U.S.C. § 1532 (5)(A)(ii) (2000).

140. *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141, 1158 (D.N.M. 1999).

141. *Id.*

142. *Id.*

143. *Id.* at 1159.

144. *Id.*

145. *Id.*

146. *Arizona Cattle Growers’ Ass’n v. United States Fish and Wildlife Serv.*, 63 F. Supp. 2d 1034 (D. Ariz. 1998). The District of Arizona was addressing whether harm could be demonstrated by habitat modification. *Id.* at 1042. “If [FWS is] unable to provide evidence indicating that the listed species even exists on the allotments at issue, they certainly cannot show that the habitat modification they speak of will ‘actually kill[ ] or injure[ ] wildlife.’” *Id.* (quoting 50 C.F.R. § 17.3 (1994)). Although the issue was harm, not jeopardy, this case illustrates the court’s reluctance to find that habitat modification in areas where the species is not present results in actual injury to wildlife. *See id.* at 1044-45.

that the area has been adversely modified because tortoises are often run over on roads. However, it would be far more difficult to show that the overall survival of the species has been jeopardized. After all, the tortoise survives over a large region; one road through a small portion would probably not jeopardize the existence of the entire species.<sup>147</sup>

Most importantly, the ESA itself mandates a difference between jeopardy and critical habitat. Listing is a process that is separate from the process of critical habitat designation. When making the listing decision, the Secretary is to base this decision “solely on the basis of the best scientific . . . data available . . .”<sup>148</sup> When making the critical habitat designation, the Secretary is to base this decision “on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”<sup>149</sup> The ESA goes on to permit the Secretary to exclude areas from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, an option that is obviously not available to the Secretary when making listing decisions.<sup>150</sup> Clearly, the statute demands separate criteria and processes for listing and designation. FWS’s claim that critical habitat provides no additional protection may be true, due to the way it is currently implemented. The designation is not meaningless, however, because the process that FWS undertakes when designating habitat requires additional compilation and evaluation of information than its listing process.

Additionally, when a species is listed, federal agencies are compelled to consult with FWS to insure that the agency action does not “jeopardize the continued existence” of the species.<sup>151</sup> Yet after a critical habitat has been designated, federal agencies are required to consult with FWS to insure that its action does not “result in the destruction or adverse modification” of critical habitat.<sup>152</sup> If Congress had intended that critical habitat offer no additional protection for the species, it would have been pointless for it to specify different standards (“adverse modification” for habitat and “jeopardy” for the species) for reviewing agency conduct. Congress could have ordered that agency action was not allowed to jeopardize the existence of the species when referring to both listing and critical habitat protections, but it did not do so. Congress instead chose to use different words (“jeopardy” and “adverse modification”) when describing the standards, and presumably these words were intended to convey different meanings. This concept is best illustrated by looking to the legislative history of the 1978 amendments

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147. Memorandum from Mark Squillace Professor of Law, University of Wyoming, to Scotti Shingleton (April 2002) (on file with author).

148. 16 U.S.C. § 1533(b)(1)(A) (2000).

149. *Id.* § (b)(2).

150. *Id.*

151. *Id.* § 1536(a)(2).

152. *Id.*

to the ESA. One of the purposes of the amendments was to introduce flexibility into the ESA.<sup>153</sup> Congress chose to do this by defining critical habitat for the first time, and requiring the consideration of economic impacts before designating critical habitat.<sup>154</sup> Congress was concerned that all of the habitat of a listed species could be designated as critical, and chose to limit the protection provided by a CHD.<sup>155</sup> In adding consideration of economic impacts to the CHD process, Congress recognized that “the resultant critical habitat will be different from that which would have been established using solely biological criteria.”<sup>156</sup> Congress acknowledged that in some situations critical habitat would not be designated at all.<sup>157</sup> Were such situations to occur, however, “agencies would still be prohibited from taking an action which would jeopardize the existence of the . . . species.”<sup>158</sup> The amendments decreased the importance of critical habitat by expanding the factors to be considered and limiting its scope, but the protection provided by listing remained unaltered.<sup>159</sup>

Therefore, FWS’s current practice of collapsing adverse modification into the jeopardy standard is contrary to the intent of the ESA. The Fifth Circuit Court of Appeals panel reached this conclusion in *Sierra Club v. U.S. Fish and Wildlife Service*, holding that “[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.”<sup>160</sup> Lending more support to this interpretation is the version of the ESA passed by the Merchant Marine and Fisheries House Committee, which defined species or habitat degradation as either the placing in jeopardy of the continued existence of the species, or the destruction or adverse modification of critical habitat.<sup>161</sup> This definition indicates that Congress believed that jeopardy related to the existence of the species, while adverse modification pertained to critical habitat.

*New Mexico Cattle Growers* adopted a narrow view of jeopardy and adverse modification that is probably incorrect in a larger sense because jeopardy probably is not meant to encompass adverse modification. How-

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153. H.R. REP. NO. 95-1625, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453.

154. *Id.* at 25, 17.

155. *Id.* at 25.

156. *Id.* at 17.

157. *Id.*

158. *Id.*

159. *Id.* The critical habitat provisions in the ESA were revisited again in 1982, but the focus was on extension of the deadline for designating critical habitat. The basis for designating critical habitat remained unchanged from existing law. Patlis, *supra* note 19, at 166-68.

160. *Sierra Club v. United States Fish and Wildlife Serv.*, 245 F.3d 434, 442 (5th Cir. 2001).

161. Patlis, *supra* note 19, at 154.

ever, the validity of the definitions was not directly before the court.<sup>162</sup> The issue before the court was the statutory meaning of “economic impact.”<sup>163</sup> Although the court recognized that the “root of the problem” was FWS’s policy position that CHDs were “unhelpful, duplicative, and unnecessary,” a position which stemmed directly from FWS’s definitions of “jeopardy” and “adverse modification,” the court chose not to directly address those issues.<sup>164</sup> Instead, the Tenth Circuit court focused on the meaning of “economic impact” and FWS’s current implementation of an economic analysis.<sup>165</sup> In a practical sense, the court was correct in concluding that the definition of jeopardy subsumes adverse modification because of the manner in which FWS implements its policies concerning the two and the affect that this implementation has on the economic analysis.<sup>166</sup> The Tenth Circuit panel did recognize that the Fifth Circuit court had directly addressed the issue in *Sierra Club*, and concluded that adverse modification was inconsistent with the intent and purposes of the ESA.<sup>167</sup> Because the court expressed its dislike for the definitions and refused to accept FWS’s position that no impact flowed from the CHD, it seems likely that the definitions will be subject to further scrutiny in the future.<sup>168</sup>

### *Baseline Approach*

Under the ESA, the Secretary’s role is to utilize the best scientific data available to identify which species are in danger of extinction, list those species, identify which habitat features are necessary for the species’ survival, and identify the areas where those features exist.<sup>169</sup> The ESA then requires the Secretary to perform two distinct tasks when designating critical habitat: (1) consider economic and other relevant impacts, and (2) perform a cost/benefit analysis and exclude particular areas where the benefits of exclusion outweigh the benefits of designation.<sup>170</sup>

FWS’s interpretation problem begins with the consideration of economic and other relevant impacts. FWS claims that it uses the baseline ap-

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162. *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001).

163. *Id.*

164. *Id.*

165. *Id.* at 1285.

166. *Id.* at 1283.

167. *Id.* at 1283 n.2.

168. *Id.* at 1283-84.

169. 16 U.S.C. §§ 1532(5)(A), 1533(b)(2) (2000).

170. *Id.* § 1533(b)(2). After designating critical habitat for the flycatcher, FWS concluded: “[T]here would be no additional protection for flycatcher habitat, arising separately from the designation.” *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141, 1159 (D.N.M. 1999). FWS went on to conclude: “[T]here would be no additional economic impacts above those associated with review under the ‘jeopardy’ standard, as the habitat would already be subject to review to protect the species itself.” *Id.*

proach to avoid inserting economics into the listing process.<sup>171</sup> However, this is not really the issue. Even if FWS had the economic analysis of a CHD completed at the time of listing it would not be allowed to consider that information when making the listing determination.<sup>172</sup> When assessing whether the baseline approach is a valid interpretation of the ESA, the court must determine which economic impacts the FWS is statutorily required to consider in performing an economic analysis for a CHD. The baseline approach attributes impacts to the listing and does not consider them. It considers only the impacts that are “in addition” to the listing. The Tenth Circuit panel held that this was an invalid interpretation of the ESA because it rendered the economic analysis meaningless in that all economic impacts were consistently attributed to listing.<sup>173</sup> If Congress intended that all impacts be considered regardless of their cause, then this view is correct. If Congress intended that critical habitat provide additional protection for the species, apart from the protection provided from listing, and that only the additional protection a CHD provided was to be evaluated, then the Tenth Circuit court is incorrect.

As discussed in the previous section, Congress seemed to be implementing two separate concepts, one pertaining directly to the species and one concerning habitat.<sup>174</sup> Thus, the baseline attempt is a valid interpretation of the ESA. Yet, the Tenth Circuit court had a legitimate point when it declared, “[T]he regulation’s definition of the jeopardy standard as fully encompassing the adverse modification standard renders any purported economic analysis done utilizing the baseline approach virtually meaningless.”<sup>175</sup> The baseline method was held invalid because no meaningful economic analysis occurred.<sup>176</sup> This was not because of the baseline approach per se; rather, it was held invalid because FWS interprets the adverse modification standard as not providing additional protection from the jeopardy standard. If FWS changed its definitions, or its interpretation of them, and recognized that CHDs do provide a higher standard of protection for the species, then the Tenth Circuit panel’s only reason for invalidating the baseline approach would disappear. Once again, the Tenth Circuit panel was probably incorrect overall in invalidating the baseline approach, but in a practical sense the decision moved FWS closer towards complying with the statutory command to consider economic impacts.

FWS now has two choices. It can either consider economic impacts attributable to listing, or it can recognize that CHDs provide additional pro-

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171. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1285.

172. The Secretary is required to make the listing decision “solely on the basis of the best scientific and commercial data available to him . . .” 16 U.S.C. § 1533(b)(1)(A).

173. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1285.

174. See *supra* notes 148-59 and accompanying text.

175. *New Mexico Cattle Growers Ass’n*, 248 F.3d at 1285.

176. *Id.*

tection, establish a valid baseline, and determine which impacts are attributable to listing and which are attributable to the CHD. The latter option is somewhat more formidable considering the problems due to FWS's lack of relevant information highlighted in *Middle Rio Grande Conservancy District v. Babbitt*.<sup>177</sup> Yet, the former would not completely accomplish the objective of providing a meaningful analysis of economic impacts. The ESA orders consideration of economic impacts, and it requires the Secretary to weigh the benefits of those impacts against the benefits of specifying the area as critical habitat. If the Secretary determines that the economic benefits of exclusion outweigh the benefits of critical habitat, then he can choose not to include an area in the designation.<sup>178</sup> If there were no baseline, however, the Secretary's cost/benefit analysis would be meaningless because the economic activity to which the Secretary gave more weight in excluding the area still would be prohibited if it jeopardized the existence of the species.<sup>179</sup> The federal agency would be back at square one because it still would have to obtain a "no jeopardy" opinion from FWS.<sup>180</sup> If FWS is forced to consider the impacts of listing co-extensively with the impacts of the CHD, the result will be an economic analysis, but it will not be especially meaningful.

Forcing FWS to recognize a valid baseline and attribute economic impacts to a CHD promises to be a formidable task given that it has consistently been FWS's position that no impact flows from, or can be attributed to, a CHD.<sup>181</sup> The Tenth Circuit court explicitly disagreed with this approach in *Catron County Board of Commissioners*, holding that a CHD does have substantial impacts.<sup>182</sup> Four years later, FWS designated a CHD that was so lacking in scientific support that the District Court for the District of New Mexico declared the CHD arbitrary and capricious.<sup>183</sup>

FWS then followed this decision with an appeal to the Tenth Circuit Court of appeals panel in *Middle Rio Grande Conservancy District v. Nor-*

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177. *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156 (D.N.M. 2000). See *supra* notes 59-76 and accompanying text.

178. 16 U.S.C. § 1533(b)(2) (2000).

179. *Id.* § 1536(a)(2). All federal agencies are required to consult with FWS to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence . . ." of the species. *Id.*

180. *Id.* § 1536(b). If the impact of an agency action on a listed species is significant, the agency and FWS may be required to prepare a biological evaluation and a biological opinion on the impact. *Id.* § 1536(c). If FWS concludes that the action will not result in jeopardy, it then issues to the federal agency an incidental take statement that protects the agency from prosecution if the species is harmed during the agency action. *Id.* § 1536(o). If FWS decides that the agency action will jeopardize the species, it must provide the agency with reasonable and prudent alternatives. *Id.* § 1536 (b)(3)(A).

181. *New Mexico Cattle Growers Ass'n*, 248 F.3d at 1283.

182. *Catron County Bd. of Comm'rs v. Babbitt*, 75 F.3d 1429, 1436 (10th Cir. 1996).

183. *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1194 (D.N.M. 2000)

ton.<sup>184</sup> *Middle Rio Grande Conservancy District v. Norton* demonstrates the extent to which FWS engages in massive delays and inadequate decision-making.<sup>185</sup> The silvery-minnow was listed as endangered in 1994, but FWS repeatedly failed to make a designation of critical habitat.<sup>186</sup> FWS was ordered to perform a CHD in 1999.<sup>187</sup> That CHD was declared arbitrary and capricious in 2000 because of an inadequate analysis that lacked factual support.<sup>188</sup> In 2002, however, FWS persists in claiming that it should be allowed more time to assess whether significant environmental impact will occur.<sup>189</sup> Throughout the entire CHD process, FWS has claimed continuously that the CHD will have no impact nor provide any protection for the silvery minnow.<sup>190</sup>

*Middle Rio Grande Conservancy District v. Norton* is a prime example of how committed FWS is to its position in spite of the large amount of evidence to the contrary. The initial CHD proposed by FWS required a continuous flow of water in an entirely appropriated river where large portions are completely dry for parts of the year without first making a finding of no significant environmental impact. Surely removing thousands of metric tons of water from its current use and releasing it into the Rio Grande would result in some form of environmental impact.<sup>191</sup> Despite FWS's position to the contrary, the Tenth Circuit court has remained steadfast in requiring FWS to consider the ramifications of the CHD and to perform a thorough analysis.<sup>192</sup>

Even though FWS has decided to implement the Tenth Circuit court's holding in *New Mexico Cattle Growers Ass'n* nation-wide, and consider the economic impacts of the listing and the CHD co-extensively when conducting the economic analysis, this does not mean that FWS has recognized that a CHD provides additional protection.<sup>193</sup> In fact, considering the listing and designation co-extensively only serves to further collapse the

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184. 294 F.3d 1220 (10th Cir. 2002).

185. *Id.*

186. *Id.* at 1223-24.

187. *Id.* at 1224.

188. *Id.* at 1225.

189. *Id.*

190. *Id.* at 1227-29.

191. *See id.*

192. *Id.* at 1231. *See also* *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156 (D.N.M. 2000); *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001); *Catron County Bd. of Comm'rs v. United States Fish and Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996).

193. In designating critical habitat for the piping plover, FWS responded to comments that it was still failing to comply with *New Mexico Cattle Growers Ass'n* by explaining: "This [revised] approach to baseline definition . . . is similar to that employed in previous approaches in that the goal is to understand the incremental effects of a designation. However, it does provide more extensive discussion of pre-existing baseline conditions than previous critical habitat economic analyses." 67 Fed. Reg. 57,638, 57,672 (September 11, 2002).



designation process into the listing process. An overall change in FWS's position on this issue seems unlikely given that FWS maintains that the cost of designating critical habitat vastly outweighs the benefits.<sup>194</sup> Additionally, FWS faces serious budget shortages.<sup>195</sup> A memorandum from the director of FWS, dated November 17, 2000, informed regional directors that the agency lacked sufficient funds to conduct any species' listing or CHDs beyond those which had been mandated by court order.<sup>196</sup>

In *New Mexico Cattle Growers*, the Tenth Circuit panel was able to throw out the entire baseline concept and simplify the process by ending the impact allocation game, but whether this was beneficial remains to be seen. At the very least, FWS will be forced to conduct an economic analysis, which will move the designation process closer to what the ESA requires. The ESA mandates that the Secretary weigh the economic benefits against the benefits of designation. This cannot occur until the economic benefits are assessed in a meaningful way. Although *New Mexico Cattle Growers* mandates an assessment, unfortunately it is probably not the correct assessment. *New Mexico Cattle Growers* did recognize that the ESA mandates an economic analysis, and it's holding is a first step towards recognition and enforcement of the requirements and intent of the ESA.

#### CONCLUSION

In *New Mexico Cattle Growers* the Tenth Circuit panel correctly required FWS to provide a meaningful economic analysis, but incorrectly invalidated the baseline approach. In order to accurately assess the economic impacts of a CHD, the listing of the species must be isolated. The Tenth Circuit panel recognized that the definitions of "adverse modification" and "jeopardy" were the cause of the problem, yet then glossed over it by concluding that the jeopardy standard subsumed the adverse modification standard. The Tenth Circuit court took a significant step towards enforcing the statutory requirements of the ESA by requiring a meaningful analysis of economic impacts. The court, however, failed to consider whether co-extensive consideration of listing would really contribute to the "meaningfulness" of the analysis. The cost/benefit analysis that is performed when deciding which areas to include in the designation would be meaningful if FWS recognized that impacts do flow from a CHD and analyzed those im-

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194. Due to a limited budget, FWS has established priority guidelines and has ranked critical habitat designations as the lowest priority because the protection that is provided by a CHD applies only to federal actions and "provides only limited conservation benefits beyond those achieved when a species is listed as endangered or threatened." Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 231 (2000) (citing Endangered and Threatened Wildlife and Plants; Final Listing Priority Guidance for Fiscal Year 1997, 61 Fed. Reg. 64,475, 64,480 (December 5, 1996)).

195. Quarles & Lundquist, *supra* note 23, at 62.

196. *Id.*

pacts separately from those attributable to listing. In order to fulfill the intent and mandates expressed in the ESA, FWS should recognize that CHDs can and should offer greater protection than listing, and perform an economic analysis based solely on the economic impacts attributable to the CHD.

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## GENERAL LAW DIVISION

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