

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiff-Appellee,

v.

UNITED STATES FISH AND
WILDLIFE SERVICE,

Defendant-Appellee,

v.

ROSEMONT COPPER COMPANY,

*Intervenor-Defendant-
Appellant.*

No. 20-15654

D.C. Nos.

4:17-cv-00475-

JAS

4:17-cv-00576-

JAS

4:18-cv-00189-

JAS

OPINION

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted September 23, 2022
Pasadena, California

Filed May 17, 2023

Before: Sandra S. Ikuta, Danielle J. Forrest, and Holly A. Thomas, Circuit Judges.

Opinion by Judge Forrest;
Partial Concurrence and Partial Dissent by
Judge H.A. Thomas

SUMMARY*

Environmental Law

In a case in which intervenor Rosemont Copper Company challenges the U.S. Fish and Wildlife Services's (FWS) designation of certain areas in southern Arizona as critical habitat for jaguar under the Endangered Species Act (ESA), the panel affirmed the district court's vacatur of the FWS's designation of the challenged area as occupied critical habitat; reversed the district court's grant of summary judgment in favor of the FWS regarding its designation of that same area and of Subunit 4b as unoccupied critical habitat; vacated the grant of summary judgment in favor of the Center for Biological Diversity (Center); and remanded with directions that the case be returned to the agency for further proceedings.

This litigation was initiated by the Center after the FWS concluded that Rosemont's proposed mine project would not destroy or adversely modify the designated critical habitat. Rosemont intervened and filed crossclaims against

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the FWS, arguing that certain of its critical-habitat designations for the jaguar violated the Administrative Procedures Act (APA) and the ESA. This case concerns only Unit 3, which covers 351,501 acres and spans several counties and mountain ranges, including the Santa Rita Mountains; and Subunit 4b, which covers 12,710 acres and is a corridor connecting the Whetstone Mountains and the Santa Rita Mountains.

The FWS argued that the district court erred in rejecting the FWS's designation of Unit 3 as occupied critical habitat, and Rosewood argued that the district court erred in upholding the FWS's designation of Unit 3 and Subunit 4b as unoccupied critical habitat because the standard the FWS used was something less demanding than essential for the conservation of species. First, the panel held that the only plausible construction of "essential" in the ESA's definition of "critical habitat" is area that is indispensable or necessary to conservation, not merely beneficial to such efforts. Second, the panel considered whether the FWS's critical habitat designations of Unit 3 and Subunit 4b were proper. Because the FWS designated the northern Santa Rita Mountains as occupied critical habitat based on irrelevant photographs from decades after the jaguar was listed as endangered and a single timely sighting from a different mountain range, the panel affirmed the district court's conclusion that the FWS's challenged occupied critical-habitat designation was arbitrary and capricious.

Next, the panel addressed Rosemont's argument that the FWS failed to follow its regulation governing unoccupied critical-habitat designations. This court discussed the operative version of 50 C.F.R. § 424.12(e) in *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015). The FWS and the Center argued that *Bear Valley* foreclosed

Rosemont's argument that the FWS erred by not sequentially considering both adequacy and essentiality. The panel held that imposing a sequential analysis to determine whether designation of unoccupied critical habitat is proper does not violate *Bear Valley*, which acknowledged both the inadequacy-of-occupied-habitat and essentiality-of-unoccupied-habitat requirements and upheld the FWS's challenged designation where these requirements were both met. Because the panel concluded that *Bear Valley* did not displace the agency's interpretation of Section 424.12(e), the panel considered whether the FWS's designation of Unit 3 and Subunit 4b as unoccupied critical habitat complied with Section 424.12, as interpreted by the agency.

The panel held that because the FSW did not comply with Section 424.12(e) by addressing whether designated occupied critical habitat was adequate to address conservation goals, its designation of Unit 3 and Subunit 4b as unoccupied critical habitat was arbitrary and capricious. The panel rejected the dissent's position that the FWS could properly consider the adequacy of areas occupied at the *time of designation* not just the *time of listing* in deciding whether designation of unoccupied areas was essential. The panel agreed with the Tenth Circuit that the governing version of Section 424.12 required the FWS to consider a species range at the time of listing because any other reasoning would be inconsistent with the ESA. The panel held further that even if the FWS should consider whether areas occupied at the time of designation, rather than listing, were inadequate to conserve the species, the FWS's analysis still fell short because it did not explain why the areas that it found were occupied when it made its unoccupied critical habitat designations were inadequate to conserve the jaguar. The panel concluded that the FWS did

not provide a rational connection between the facts found and the choice made, or articulate a satisfactory explanation to justify its designations of Unit 3 and Subunit 4b as unoccupied critical habitat.

Finally, Rosemont challenged the district court's refusal to remand for reconsideration of the FWS's economic-impact analysis. The panel held that Rosemont had not waived this issue. Rosemont's argument that the FWS needed to revisit its economic-impact analysis became relevant only after the district court concluded that the FWS used the wrong standard in determining that Rosemont's Mine would not adversely affect the designated critical habitat and remanded for the FWS to reconsider that issue. Thus, it was not improper for Rosemont to raise the argument for the first time on appeal. The panel held, however, that directing the FWS to reconsider its economic-impact analysis was premature at this point.

The panel concluded that it need not reach whether the FWS violated the APA in concluding that Rosemont's Mine would not adversely modify the Unit 3 and Subunit 4b critical-habitat designations, which the Center argued in its motion for summary judgment.

Concurring in part and dissenting in part, Judge H.A. Thomas agreed with the majority that the district court correctly vacated the FWS's designation of Unit 3 as occupied critical habitat. She also agreed it would be premature to vacate the FWS's economic-impact analysis. She dissented from the majority's holding that the district court erred in upholding the FWS's designation of Unit 3 and Subunit 4b as unoccupied critical habitat. She would hold that, when considered as a whole, the record amply supported the FWS's determination that habitat

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.