Case No. 17-4074

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTAH NATIVE PLANT SOCIETY and GRAND CANYON TRUST,

Plaintiffs-Appellants,

v.

U.S. FOREST SERVICE and TONY TOOKE,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Utah
District Court Case No. 2:16-cv-00056-PMW
(Hon. Magistrate Judge Paul M. Warner)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

To determine whether the district court had before it a "final agency action" to review, the Forest Service's responses to the three requests for action made by the Grand Canyon Trust and Utah Native Plant Society[1] must be separately examined. The same is true to resolve the Service's arguments about enforcement discretion. Yet the Service's brief repeatedly lumps the three responses together and applies the law to them in a facile way, all while telling the Court a dubiously abridged story: that the State of Utah "released" mountain goats on State land, whereupon the goats "wandered" into the Manti-La Sal National Forest. In truth, the State flew the goats in helicopters halfway across Utah, over a high desert plateau, and turned them loose intending for them to head for the mountains in the National Forest. The Service had the power to prevent or require a permit for the State's use of the Forest for goat habitat, and the agency has forsaken its jurisdiction by buying into the fiction that the State was just using State land.

The Service has also forsaken the law's strict mandate for safeguarding the Mount Peale Research Natural Area (RNA). Boiled down, the Service's response to the Trust's "failure to act" claim asserts that the agency's rule demanding that it keep the RNA unoccupied and in a "virgin or unmodified condition" leaves the agency leeway to let non-native mountain goats occupy and modify the RNA. That

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[1] We refer to appellants collectively as "the Trust."

argument empties the RNA rule of its meaning and robs the Mount Peale RNA of its *raison d'être*: to keep the peaks of the La Sal Mountains free of uses the Service allows elsewhere in the national forests so that there is an example of what an untouched alpine area looks like.

Applying the law assiduously to the facts yields the conclusion that the district court had jurisdiction over the two claims the Trust appeals.

ARGUMENT

I. By rejecting the Trust's requests, the Service took "final agency action."

A. The Service asserts the wrong standard of review.

Though the Service claimed in the district court to be making a factual attack on jurisdiction, APP40, APP401, the court properly concluded that the attack was facial. *See* Appellants' Opening Br. 49–50 (Aug. 9, 2017) ("Trust's Br."). In the "final agency action" section of its response brief, the Service again casts its attack on jurisdiction as a factual one. Br. for the Fed. Defs. 13–14 (Nov. 9, 2017) ("Feds.' Br."). Two "facts," it says, are in dispute: (1) whether the Service "denied the Trust's request to take action," and (2) whether the agency "authorized, tacitly or overtly, the introduction of mountain goats into the Forest." *Id.* at 14.

But the dispute involving those "facts" concerns the legal conclusions to be drawn from the factual allegations in the complaint. The first "fact" is about whether the agency has taken "final agency action" under the Administrative Procedure Act (APA), a legal issue addressed in this appeal. The second concerns

claims the Trust has abandoned on appeal. *See* APP29–31.

Because the matters in dispute are solely about legal conclusions, the Service has made a facial attack on jurisdiction, and the agency is wrong to assert that the Trust was required to supply "competent proof" of the facts establishing jurisdictional. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Rather, the factual allegations in the Trust's complaint should have been accepted as true, *id.*, and the district court erred by not doing so. Trust's Br. 49–50.

B. The Service gave its last word on the Trust's requests.

When the Service, in response to the Trust's requests, refused to promptly remove the goats from the RNA and determined that the agency lacked authority to prohibit more transplants and regulate the transplants under a special-use permit, the agency consummated its decisonmaking on each request. *See* Trust's Br. 25–40; *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (first of two conditions for agency action to be final is that "the action must mark the 'consummation' of the agency's decisionmaking process"). The Service does not agree, arguing that it chose to "defer" action while studying how the goats affect the RNA. *See* Feds.' Br. 14–24. There are two main problems with this argument.

First, it fails to individually account for how the Service responded to each of the Trust's three requests. It is true the Service refused to promptly remove goats from the RNA because it wanted to monitor them. APP78. But the agency rejected

the Trust's other two requests for a different reason: The Service believed it lacked authority to require a permit for or prohibit additional goat introductions because the releases began on State land. *See* Trust's Br. 26–27 (citing APP77–78, APP75). The Service makes no argument specific to these two requests, asserting instead only a general claim that it is "studying" the goats' impacts and has not culminated its decisionmaking. But studying how the goats modify the RNA has no bearing on whether the Service has legal authority to prevent or require a permit for delivering goats into the Forest via adjacent State land. The Service reached a final decision on those two requests when it concluded that it lacked jurisdiction, for it had nothing left to consider.

Second, as the Trust pointed out in its opening brief, the Trust asked the Service to remove the goats "immediately," which the Service refused to do. Trust's Br. 32–34. That imbued the agency's decision with finality, for haste was essential to the Trust's request under the applicable law. The Service responds to that point in two ways.

The agency contends first that judicial review of its decision not to act promptly would be at odds with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Feds.' Br. 20–22. Those statutes require federal agencies to think before acting, the Service points out, and it would have to comply with them before removing the goats. *Id.* The Service next makes a

slippery-slope argument: If an otherwise "interlocutory" agency action can be made final by requesting "immediate" action, the Service asserts, plaintiffs can frame requests for action so that nearly every agency action becomes judicially reviewable. Feds.' Br. 22–24.

The first argument is a straw man. It is true that federal agencies must analyze under NEPA all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). And they must ensure under the ESA that proposed actions are not likely to jeopardize the continued existence of threatened or endangered species. 16 U.S.C. § 1536(a)(2). If in this case, the Service were proposing to remove the goats from the RNA, and if no exemptions from NEPA or the ESA applied,[2] and if the Service were in the midst of NEPA and ESA analysis, then yes, "final agency action" might be lacking. But those are not the facts. The Service is not proposing to remove the goats from the RNA and is not trying to comply with NEPA or the ESA. And it is the agency's decision *not* to do those things that the Trust argues is final. What NEPA and the ESA might oblige the Service to do if the agency chose to remove the goats is irrelevant.

The Service's slippery-slope argument is equally infirm, for it postulates

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[2] Because the Service lacks discretion to leave the goats in the RNA, *see infra* pp. 21–25, the agency would have a case for removing them promptly without ESA consultation or NEPA analysis. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 673 (2007); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1262–63 (10th Cir. 2001).

turmoil that will not result from a ruling for the Trust. The emphasis the Trust put on having requested immediate action has everything to do with the facts of this case and the law in play, meaning that a finding of finality here does not sanction it in every case. Two facets of this case set it apart from the administrative-law-judge hypothetical the Service posits and the cases the Service cites—*Riverkeeper v. U.S. Environmental Protection Agency*, 806 F.3d 1079 (11th Cir. 2015) and *Potash Association of New Mexico v. U.S. Department of the Interior*, 367 Fed. Appx. 960 (10th Cir. 2010) (unpublished), Feds.' Br. 17–20, 22–24.

First, no adjudicatory process exists here for reaching a "final" goat-removal decision that the Service can claim to be in the middle of. Second, the rigid, legal standard in the RNA regulation that prohibits occupancy of the RNA and commands the Service to retain it in a "virgin or unmodified condition," 36 C.F.R. § 251.23, deprives the Service of discretion to dither while "studying" how much the goats modify the RNA. Haste is embedded in the law. Comparing the law at issue in this case to that at issue in *Riverkeeper* illuminates these two points.

When the U.S. Environmental Protection Agency (EPA) gets a petition to withdraw a state's permitting authority under the Clean Water Act, the agency is required to respond in writing. 40 C.F.R. § 123.64(b)(1). It is explicitly authorized to first conduct an investigation. *Id.* In that investigation, EPA must make a judgment about whether the state's program is out of compliance with a list of

rules and regulations such that withdrawing the whole program is warranted. *Id.* at § 123.63; 33 U.S.C. § 1342(c)(4) (prohibiting partial withdrawal of state programs). The criteria EPA must apply do not have the trappings of immediacy and compulsion built in to the "virgin or unmodified" and no-occupancy standards at issue here. *See* 40 C.F.R. § 123.63 (including qualifications like "repeated" issuance of non-conforming permits, failing to seek "adequate" penalties, or failing to develop an "adequate" program). If EPA commences withdrawal proceedings, it must conduct a formal adjudicatory hearing and give the state an opportunity to cure. *Id.* at § 123.64(b) & (b)(3)(ii)(D)(8)(iii). In short, EPA has adjudicatory procedures for revoking permitting authority that anticipate that EPA will take its time, apply its judgment to complex legal criteria, give states an opportunity to cure, and withdraw program authority only as a last resort.

This is a different case. There are no regulatory procedures for studying what to do about goat transplants into goatless RNAs. There is no designated decision-maker tasked with reaching a final decision. Unlike *Potash Association* and the Service's ALJ hypo, there are no avenues for administrative appeal. *See Potash Assoc.*, 367 Fed. Appx. at 964–66. And the RNA regulation's stern commands demand prompt action. By refusing to remove the goats from the RNA promptly, the Service has given its last word that it will not follow the no-occupancy and "virgin or unmodified" standards in the RNA regulation.

The "pragmatic" considerations about state and federal cooperation at issue in *Riverkeeper* also do not apply here. *Contra* Feds.' Br. 19–20. It is true the federal government often cooperates with states to manage wildlife on federal lands. But the Service's voluntary commitment to cooperate on *some* wildlife-management tasks, *see* 36 C.F.R. § 241.2,[3] does not require the Service to scuttle its RNA-management mandates and work with Utah to reach a "reasonable resolution," Feds.' Br. 20, of the State's unauthorized use of the RNA. Decades of precedent make clear that states' powers over wildlife are subordinate to the Service's wide-ranging authority to regulate "uses" of national forests and to protect forests from harm. *See* 16 U.S.C. § 551; *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); Trust's Br. 6–13, 27–29.[4] No law requires any "give and take" with the State before the Service obeys the RNA regulation's mandates, and indeed, those mandates eliminate the Service's discretion to "cooperate" with the State's obstinate decision to put goats into the RNA.

The facts of this case and the RNA regulation demand prompt action from the Service to remove the goats from the RNA. The agency has reached a final

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[3] The regulation does not demand cooperation generally "in the management of wildlife," Feds.' Br. 3, or "in the development and management of the national forests," *id.* at 20, but only in crafting plans for securing desirable wildlife populations and in removing the "crop" of game and the like. 36 C.F.R. § 241.2.

[4] The regulation the Service cites accordingly recognizes that the Service—not the states—"shall determine" how much national forest land to devote to wildlife protection. 36 C.F.R. § 241.2.

decision that it will not do so. And the agency's response to the Trust's other two requests is equally final, for the Service has culminated its decisionmaking on the question of its jurisdiction over the State's goat transplants. The first prong of *Bennett* is satisfied.

C. Legal consequences flowed from rejecting the Trust's requests.

When the Service denied the Trust's requests, the agency sanctioned the State's unpermitted goat transplants and inflicted a concrete injury on the Trust. *See* Trust's Br. 30–32, 37–38. That determined the State's rights and had legal consequences, satisfying *Bennett's* second finality condition. 520 U.S. at 178. The Service disagrees, in a line of argument whose contentions are difficult to discern.

The agency's main claim is that legal consequences flowed, not from the Service's responses to the Trust, but from "the State's status as a sovereign and as a landowner." Feds.' Br. 25. The agency's underlying point seems to be that it lacked jurisdiction to do anything about the transplants. Feds. Br.' at 25. But it may be arguing that, whether or not it has jurisdiction, its response to the Trust is not legally at fault because the Service "opposed" the transplants. *Id.* at 27.

The argument heading and parts of the text suggest that the Service means for these arguments about state sovereignty to apply to the Trust's goat-removal request. Feds.' Br. 24, 27. But the proposition that the Service has jurisdiction to remove the goats from the RNA regardless of whether they were released on State

land is beyond doubt, *see, e.g.*, *Hunt v. United States*, 278 U.S 96, 100 (1928), and the Service admits as much in its brief, Feds.' Br. 21. It is equally beyond doubt that the Service's refusal to remove goats from the RNA is a *sine qua non* of the goats' presence in the RNA. The goats have been occupying and modifying the RNA for around four years, inflicting an injury on the Trust. Trust's Br. 37–38. If the Service removed the goats, the injury to the Trust would go away. The State's "sovereign authority," Feds.' Br. 27, is beside the point.

The Service makes another argument about the goat-removal request that is not about state sovereignty. The agency says that its response to the Trust "did not limit future actions" and "removal might occur in the future," Feds.' Br. at 26, an argument the Service repeats in an effort to distinguish *U.S. Army Corps of Engineers v. Hawkes*, 136 S.Ct. 1807 (2016), Feds.' Br. 27–28 (The "Service's response … committed the agency to further investigation … [and] … [t]herefore … did not impose legal consequences…."). But that is just another way for the Service to repackage its claims about whether it culminated its decisionmaking process. That argument sheds no light on what consequences flowed from the agency's refusal to remove the goats from the RNA. It is only about how the consequences might be allayed in the future if the agency changes course, "a common characteristic of agency action" that does not make the action unreviewable. *Hawkes*, 136 S.Ct. at 1814.

The Service's state-sovereignty argument seems to take aim at the Trust's other two requests: those asking the Service to prevent additional transplants and to require the State to get a permit for using the Forest. But the argument still falls short. After all, the Service literally "determined rights," *see Bennett*, 520 U.S. at 178, when it decided the State had "sovereign authority," Feds.' Br. 27, to release goats on State land without a federal permit even though the State's purpose was to use national forest land as goat habitat.

The Service's nominal "opposition" to the transplants, *see id.*, does not strip that determination of its legal effect. Opposing the transplants by asserting that they would be an unpermitted "use" of the national forest that would put the State at peril of a federal lawsuit would have had legal consequences. *See Hawkes*, 136 S.Ct. at 1815 (agency determination had legal consequences by depriving plaintiff of safe harbor from liability and warning that acting without a permit would "risk … significant criminal and civil penalties."); *Denver ex rel. Bd. of Water Comm'rs v. Bergland*, 695 F.2d 465, 473 (10th Cir. 1982) (forest service decision ordering city to stop building a canal across national forest lands and obtain a special-use permit was final agency action); *CSI Aviation Servs., Inc., v. U.S. Dep't of Transp.*, 637 F.3d 408, 412–13 (D.C. Cir. 2011).

Taking the opposite position that the Service could do nothing to stop or require a permit for the transplants was equally consequential, for it gave the State

a green light not only to proceed, but to proceed without a permit. *See Grand Canyon Trust v. Pub. Serv. Co. N.M.*, 283 F. Supp. 2d 1249, 1252–53 (D.N.M. 2003) (agency's decision that no permits were required was final agency action that determined power plant's rights by allowing construction without permits). That determination was not a generally applicable reiteration of an agency's long-standing interpretation of the law, like that at issue in the case the Service cites, *Independent Equipment Dealers Association v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). Nor was it "an advisory, non-binding opinion" with no effect on whether or not federal approval was needed, like the letter at issue in *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1027, 1032–33 (10th Cir. 2017) (recognizing that the activity at issue could proceed without an eligibility determination by the federal government). It was a decision on the facts of this case that determined the State's right to go forward with the transplants by removing the barrier of halting the transplants and seeking a federal permit.

The Service pads its argument with a claim that the only way "the United States" can "alter the use of non-federal property" without a landowner's consent is by filing a lawsuit. Feds.' Br. at 25–26. That claim, whether true or not, is a red herring. The question is not how the Service could have enforced the law had it determined it had jurisdiction and told the State to stop releasing goats. The question is whether the Service's determination that it lacked jurisdiction had legal

consequences by allowing the State to use the Forest. Indeed, this case is not about the State's use of "non-federal property" but about its use of the Forest and RNA. Had the State kept the goats on State land, this lawsuit would not exist. The truth is, the State purposely introduced the goats into the national forest via State land, and the Service's repeated claim that the goats "wandered" into the Forest, Feds.' Br. 1, 5, 9, is absurd. Vagabond goats do not need helicopter rides over the desert to get to new terrain.

The Service's responses to the Trust's requests let goats occupy and modify the RNA, inflicting harm on the Trust, and they determined that the State had the right to transplant goats into the Forest via State land without a permit and without federal interference. *Bennett's* second prong is satisfied for all three responses, and the district court's ruling on "final agency action" should therefore be reversed.

II. The Service's determinations are reviewable because there is law to apply.

The Service contends in the alternative that its decision to deny the Trust's three requests is "committed to agency discretion by law" and is therefore unreviewable under 5 U.S.C. § 701(a)(2) of the APA. Feds.' Br. 29–33.

To make this argument, the Service claims that the Trust asked the agency to take "an enforcement action" against the State by "destroying" the goats and "precluding further releases on State land." Feds.' Br. 31. Citing *Heckler v. Chaney*, 470 U.S. 821 (1985), the Service says that enforcement decisions are

presumptively unreviewable, Feds.' Br. 29–31, and that the Trust cannot rebut this presumption because no "statute" constrains the Service's exercise of its enforcement powers, Feds.' Br. 30, 32. The Service then addresses the real law at issue—the RNA regulation—but makes only a conclusory assertion that the regulation does not say how the Service "is to use its enforcement discretion." Feds.' Br. 32–33.

The Service's argument is not tailored to the agency's responses to the Trust's three requests, but instead superficially asserts that this case is about an "enforcement" decision and is therefore committed to the Service's discretion. Yet whether a decision is "committed to agency discretion by law" depends on the specific laws at issue. When the relevant law is applied to each of the Trust's requests, the Service's argument flounders.

A. APA review is available when there is law to apply.

There is a "strong presumption" in favor of judicial review of administrative action. *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670 (1986). This presumption can be rebutted in two ways: (1) if "statutes preclude judicial review"; or (2) if "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Though the first exception is not relevant here, it provides context for applying the second one, which the Service invokes. "[I]n the absence of an express statutory prohibition of judicial review," the Tenth Circuit has

explained, "an agency bears 'the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the agency's] decision.'" *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988) (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)) *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

Section 701(a)(2) supplies a "very narrow exception" and is "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotation omitted). The question is whether there is a "meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. Law to apply can be found not only in underlying statutes, *Heckler*, 470 U.S. at 832–33, but also (contrary to the Service's claim, Feds.' Br. 30, 32) in agency regulations, *see Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642–43 (10th Cir. 1990).

To mount its argument, the Service relies extensively on *Heckler*, Feds.' Br. 29–32, a case in which the Supreme Court recognized a presumption against review of agency "enforcement" decisions and found the presumption had not been rebutted in that case because the relevant statute lacked meaningful standards for judging the agency's decision. 470 U.S. at 824, 830, 835 (finding relevant statute

gave the government "complete discretion … to decide how and when" to pursue enforcement). That result—just like the Court's conclusion in an earlier case, *Dunlop v. Bachowski*, that judicial review was available—turned on the specific laws that applied to the agency's enforcement decision. *See Heckler*, 470 U.S. at 833–34. And that is the key point: It is the particular law at issue that matters, not simply whether the agency says its decision is an exercise of enforcement discretion.

As the Tenth Circuit has said:

> *Dunlop* and *[Heckler]* … both stand for the proposition that judicial review is available if 'Congress has provided us with law to apply.'

Hodel, 848 F.2d at 1075 (quoting *Heckler*, 470 U.S. at 834); *see also Burnett*, 920 F.2d at 642–43 (finding decision reviewable due to "the presence of readily identifiable objective criteria that [the agency] expressly relied on").

Heckler also identified two specific avenues that may allow for review of agency "enforcement" decisions, including a refusal to "institute proceedings based solely on the belief that [the agency] lacks jurisdiction." 470 U.S. at 833 n.4. That makes sense, for when an agency uses a perceived lack of legal authority to explain its enforcement decision, there is necessarily law to apply. Thus, to determine whether judicial review may be had, the fundamental question in every instance is whether there is law to apply.

B. The Service's conclusion that it lacked jurisdiction is reviewable.

The Service told the Trust it would neither prohibit the State's transplants nor require a permit for them because the Service lacked jurisdiction over the State's use of State land. APP75, APP77–78. But when an agency declines to take action based on its belief that jurisdiction is wanting, Section 701(a)(2) does not preclude judicial review. *See Heckler*, 470 U.S. at 833, n. 4; *Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, 785 F.2d 1098, 1100 (D.C. Cir. 1986) (holding that courts may review jurisdiction-disclaiming decisions); *cf. Sierra Club v. Yeutter*, 911 F.2d 1405, 1412 (10th Cir. 1990) (evaluating possible *Heckler* exceptions, but finding that Forest Service did "not contend that it is without jurisdiction").

Two cases addressing this basis for judicial review are particularly on point. In *Montana Air Chapter No. 29 v. Federal Labor Relations Authority*, 898 F.2d 753 (9th Cir. 1990), the Ninth Circuit reviewed a non-enforcement decision made by an agency's general counsel because it was based on his belief that he lacked jurisdiction to take the action sought. *Id.* at 757. And in *Idaho Rivers United v. U.S. Forest Service*, 2013 WL 474851 (D. Idaho Feb. 7, 2013) (unpublished), the court found reviewable a Forest Service claim that it had "no jurisdiction" to stop a state-approved shipment of "megaloads" on a state highway passing through a national

forest. *Id. at* *3, *6–9.[5]

The same outcome on the question of reviewability should prevail in this case. The Service's decision that it lacked authority to prevent or require a permit for Utah's goat transplants is a legal determination not committed to the agency's discretion. As the Trust explained in its opening brief, there is law to apply in the U.S. Constitution, the Organic Act of 1897, and Service's regulations, which together give the Service jurisdiction to regulate the State's use and occupancy of the national forest for transplanted mountain goats, irrespective of their release point. Trust's Br. 27–29, 6–10. Because there is law to apply, the Service's decision is judicially reviewable.

C. The RNA regulation supplies meaningful standards for reviewing the Service's no-removal decision.

The Trust asked the Service to remove goats from the RNA because their presence violates the mandates that the Service retain the RNA "in a virgin or unmodified condition" and not permit occupancy of the RNA. *See* 36 C.F.R. § 251.23. Those mandates supply a meaningful standard for judicial review.

The question for the merits is whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), under the RNA rule to allow non-native mountain goats to occupy and modify the RNA

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[5] The court went on to hold that the Forest Service "clearly" had jurisdiction to review the state's "approval of mega-load permits." 2013 WL 474851, *7.

while the Service "stud[ies] the issue in cooperation with the State," Feds.' Br. 19. That is a question courts are well equipped to answer. The Service does not have unfettered "enforcement" discretion when it comes to allowable uses of the RNA.[6]

Courts routinely evaluate agency "enforcement" decisions where there is law to apply. In *Sierra Club v. Hodel*, the Tenth Circuit held that a federal agency's refusal to "enjoin or regulate" a Utah county's plan to improve a road passing through federal public lands was reviewable:

> [Federal law] assigns to the [federal agency] the responsibility … to manage [wilderness study areas] in a manner so as not to impair the suitability of such areas for preservation as wilderness ... [and] to take any action required to prevent unnecessary or undue degradation… Further, the duty to define and protect roadless areas of more than 5,000 acres having … wilderness characteristics … imposes a definite standard on [the agency].

848 F.2d at 1074–75 (internal citations and quotations omitted). These were meaningful standards that allowed the court to determine if federal land would "remain[] roadless," "whether the boundaries of public lands and rights-of-way will be breached," and whether improving the road "will impair the suitability of

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[6] Having induced the district court to hold incorrectly that the Multiple-Use Sustained-Yield Act "requires" the Service to cooperate with states, APP35 (citing 16 U.S.C. § 530), *see also* APP43, APP54, the Service again asserts incorrectly that it has "statutory requirements" for "cooperation with the State regarding wildlife management," and that it has discretion to balance those "requirements" with protecting national forests. Feds.' Br. 31. That is not true. *See* Trust's Br. 38–39. No statute requires cooperation. The Service has voluntarily agreed by rule to some cooperation with the states while specifically reserving to itself the final say over how to devote national forests to "wildlife protection." *See* 36 C.F.R. § 241.2.

[wilderness study areas] for preservation as wilderness or will cause unnecessary or undue degradation." *Id*. at 1076. *See also McAlpine v. United States*, 112 F.3d 1429, 1434 (10th Cir. 1997) ("[R]egulatory factors … provide a meaningful and objective standard by which the court can judge the Secretary's exercise of discretion in this case."); *Payton v. U.S. Dept. of Ag.*, 337 F.3d 1163, 1167–68 (10th Cir. 2003) (holding that agency's discretion to terminate a contract turns on finding that the contractor "fail[ed] to carry out the terms and conditions of [the] contract," a question to decide on "the facts and the law" that "is not left to the unfettered discretion of the agency."); *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1448–50 (10th Cir. 1994) (holding that Service's decision about how to spend settlement money was reviewable because statute required that the money be used for "necessary improvements" to remedy damage to the forest).

As in all these cases, there are meaningful standards here—in the RNA regulation—to judge the Service's refusal to remove mountain goats from the RNA. Review on the merits need ask only whether the goats are occupying or modifying the RNA, and if so, whether it is contrary to the RNA regulation, or arbitrary and capricious, for the Service to permit that to happen. Because the RNA regulation provides a standard for judging the agency's decision not to remove goats from the RNA, that decision is not committed to agency discretion by law.

III. The district court had jurisdiction over the Trust's failure-to-act claim.

Because the RNA regulation imposes discrete mandates that the Service keep the State's transplanted mountain goats from occupying and modifying the RNA, the APA provides a cause of action for redressing the Service's failure to act. Trust's Br. 40–46. The Service says otherwise, reasoning that the regulation just sets a "general standard" but does not "pr[e]scribe discrete acts" the agency must take. Feds.' Br. 37, 35.

But saying that the RNA rule sets a "standard" as if that ends the argument trivializes the language of the rule. The Service cannot "retain" an RNA in a "virgin or unmodified condition," 36 C.F.R. § 251.23, while letting mountain goats transplanted from distant places modify its once-pristine condition. Because the rule's language is unyielding, it commands a discrete act: Keep the non-native goats out of the RNA. And the Service's brief ignores the other part of the RNA rule that prohibits it from permitting "occupancy" of RNAs. *Id.* That too demands that the agency take the discrete act of keeping goats from occupying the RNA.

Reserving judicial review for agencies' failures to take discrete acts they are required to take "protect[s] agencies from undue judicial interference with their lawful discretion" and "avoid[s] judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) ("*SUWA*"). So,

supple legal directives that give federal agencies discretion cannot sustain failure-to-act claims. As an example, consider the duty at issue in *SUWA* to "manage [wilderness study areas] … in a manner so as not to impair the suitability of such areas for preservation as wilderness." *Id.* at 65. An area's suitability for "wilderness" designation depends on many considerations, some of which are elastic: among them, whether the area "generally" appears to have been mostly affected by "forces of nature," with man's imprints "substantially" unnoticeable, and whether the area offers "outstanding" opportunities for solitude or unconfined recreation. *See* 16 U.S.C. § 1131(c). The point at which suitability under these criteria becomes "impaired" is a question of degree. So, as the Supreme Court reasoned, the non-impairment standard does not mandate "the total exclusion of [off-road vehicle] use." *SUWA*, 542 U.S. at 66.

The RNA regulation, in contrast, does mandate "total exclusion" of mountain goats implanted into a once goatless RNA. The Service does not have "lawful discretion" to let RNAs be occupied and modified, and there is no "abstract policy" to work out. *See id.* The rule does not say that the Service will keep the RNA "substantially" unmodified, or in "mostly" virgin condition, or that "undesirable" occupancy shall not be allowed. The regulation is uncompromising: The agency must retain the RNA in a "virgin or unmodified condition" and not

permit its occupancy. 36 C.F.R. § 251.23.[7] And it is uncompromising for a good reason. The whole point of creating RNAs is so that the Service can see what a virgin, unmodified area looks like compared to the vast amount of national forest land that may be occupied and modified.

The RNA rule also does not require some predicate agency determination before its commands kick in. As the Trust explained in its opening brief, Trust's Br. 44–45, that distinguishes this case from the one the Service discusses, *Wyoming v. United States*, 839 F.3d 938 (10th Cir. 2016). *See* Feds.' Br. 36–37. In *Wyoming*, the failure-to-act claim was dismissed not because the law did not require a "discrete act," but because the agency had not made a predicate, discretionary determination that would trigger the agency's obligation to act. 839 F.3d at 945. The RNA regulation, in contrast, requires without qualification that the Service retain the RNA in a virgin or unmodified condition and not permit its occupancy.

The passing argument that the Service makes in a footnote at the end of its brief is meritless partly for this reason. "[T]he Trust can point to no conclusive evidence, or agency finding," the Service asserts, "that the mountain goats are in fact altering the virgin or unmodified conditions of the RNA." Feds.' Br. 37. But

[7] That the Service has some discretion to choose how to remove the goats from the RNA does not mean that the Service does not have a duty to remove them. *See Vietnam Veterans of Am. v. Cent. Intelligence Agency*, 811 F.3d 1068, 1079 (9th Cir. 2015) ("[D]iscretion in the manner in which the duty may be carried out does not mean that the [agency] does not have a duty to perform a 'discrete action' within the meaning of § 706(a) and *SUWA*.").

the RNA regulation's commands are not triggered only after the Service makes some finding or when someone tenders "conclusive evidence" to the Service that the agency is violating the rule. The regulation imposes a self-executing command to keep the RNA unmodified and unoccupied, an exceedingly low threshold.

And the Service's claim that the Trust has not pointed to "conclusive evidence" that the RNA has been modified is off base for three other reasons. First, to survive a facial attack on jurisdiction in a motion to dismiss, the Trust was required only to allege that the goats were modifying and occupying the RNA, facts the district court should have accepted as true. *See* Trust's Br. 43–44 n.15, 50. Second, had the Service mounted a factual attack on jurisdiction,[8] its motion to dismiss should have been converted to one for summary judgment because the jurisdictional issues and merits are intertwined, and any factual dispute over the goats' effects on the RNA should have been gone in the Trust's favor; "conclusive evidence" would not be required. Trust's Br. 50–51. And third, it is disingenuous for the Service to suggest that the goats have not modified the RNA or altered its virgin condition. The Service concluded more than three decades ago that introducing mountain goats into the La Sal Mountains would damage the vulnerable alpine tundra that justified creating the RNA. APP213 (identifying

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[8] Neither of the facts the Service said were in dispute, APP400, had any bearing on the Trust's failure-to-act claim or on whether the RNA had been modified.

"potential ecosystem damage that could accompany a Mountain Goat introduction"); *see* APP207, APP212 (harm goats would cause to "very sensitive and limited" alpine tundra was "major cause for concern"). And an agency biologist wrote in December 2014:

> The introduction of mountain goats into the La Sal Mountains has *already altered ecosystem processes* in the alpine and subalpine zones…. They also add trampling and wallowing activities at unprecedented levels…. [T]he presence of mountain goats in the Mount Peale RNA … jeopardizes the resource values the RNA was established to protect.

APP232 (emphasis added).

Because the Service must keep the RNA unmodified and unoccupied, it has a discrete duty to remove the goats occupying and modifying the RNA.

CONCLUSION

The Service created the Mount Peale RNA, not as a place for people to look at and hunt mountain goats, but as a high alpine region to remain untouched by the sorts of uses—like desert-traversing, airborne goat transplants—that the Service allows elsewhere in our nation's forests. The RNA's commands are unwavering so that purpose may be served. The Service's refusal to follow those commands, and its conclusion that it was powerless to stop or regulate the State's transplants, gave the district court jurisdiction over this case. The district court's judgment should be reversed.

Respectfully submitted this 19th day of December 2017.

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