No. 10-605

In The Supreme Court of the United States

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS DEFENDERS OF WILDLIFE, BUTTE ENVIRONMENTAL COUNCIL, AND CALIFORNIA NATIVE PLANT SOCIETY

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January 5, 2011

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QUESTION PRESENTED

The Endangered Species Act ("ESA") requires that species be listed based solely on the "best scientific evidence" available. The U.S. Fish and Wildlife Service ("FWS") may not consider economics in determining whether a species is threatened or endangered. In contrast, Congress commanded FWS to take into account the potential economic impact of a rule designating critical habitat for such species.

In the present case, FWS used the "baseline" approach to analyze the economic impact of critical habitat for endangered vernal pool species. Under the "baseline" approach, FWS considers the incremental costs of designating critical habitat over and above the costs attributable to listing the species.

1. Did the court of appeals err when, consistent with the intent of the ESA, it upheld the U.S. Fish and Wildlife Service's use of the "baseline" approach to analyze the economic impact of a rule designating "critical habitat," an approach which precludes consideration of the economic impact of listing and other prior conservation actions because these costs would exist regardless of the critical habitat designation?

RULE 29.6 STATEMENT

Respondents Defenders of Wildlife, Butte Environmental Council, and California Native Plant Society are each non-profit, non-stock corporations. They have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

Congress commanded the U.S. Fish and Wildlife Service ("FWS") when designating critical habitat under the Endangered Species Act ("ESA") to take into account the potential economic impact of that designation. Congress did not dictate the form of economic analysis nor did it direct FWS to exclude areas from critical habitat on the basis of that analysis. Indeed, Congress made clear that in most instances critical habitat should be designated as part of the panoply of protections afforded to endangered and threatened species under the ESA.

Petitioners Home Builders Association of Northern California, *et al*. ("Home Builders") urge this Court to disapprove FWS's method for reviewing the economic impact of critical habitat designations. To bolster their petition, Home Builders allege a conflict between the Ninth and Tenth Circuits over whether FWS may use the "baseline" approach to economic analysis, which calculates the cost of listing and other conservation measures that will occur regardless of critical habitat and then determines the additional impact of critical habitat designation.

First, Home Builders mischaracterize the nature of any disagreement between the Ninth and Tenth Circuits. Although the Tenth Circuit did reject the baseline approach in a 2001 opinion, its reasoning was based on a 1986 FWS regulation that two circuits have found unlawful. A reasonable reading of that opinion, and its reliance on this now-defunct

regulation, suggests the Tenth Circuit might well reach a different conclusion if presented with the issue today. In other words, there is no true circuit split at this time that warrants resolution by this Court.

Second, FWS's use of the baseline approach is correct. Several courts have now approved the baseline approach as a reasonable method of assessing the actual costs of a particular critical habitat designation because logically the world with the designation should be compared to the world without it. The baseline approach is the method most consistent with the text and purpose of the ESA.

Third, even if Home Builders were to prevail, the result in this case is unlikely to change. FWS has thoroughly considered the economic impact of this designation through a decade of litigation and remands. Regardless of the analytical method employed or the degree of economic impact, the ESA does not compel FWS to exclude areas from critical habitat.

Fourth, Home Builders failed to challenge FWS's methodology below and in a Rule 28(j) letter to the Ninth Circuit expressly denied they were challenging FWS's use of the baseline approach. Home Builders' presentation of the question to this Court is thus fundamentally flawed, making this case a poor vehicle for reviewing this issue.

The case involves no genuine conflict of authority and was correctly decided. Throughout the proceedings, Home Builders failed to demonstrate how FWS

committed any error in designating critical habitat. The Ninth Circuit's well-reasoned opinion was issued without dissent. Accordingly, this Court should deny the petition.

STATEMENT OF THE CASE

Home Builders' statement of the case does not provide an adequate history of the litigation. Since 1978, FWS has listed eleven vernal pool-dependent plants and four crustaceans as threatened or endangered. Pet. App. A-4-5. In 1994, when FWS issued a final rule designating four vernal pool crustaceans as endangered or threatened, it declined to designate critical habitat at that time. 59 Fed. Reg. 48,136, 48,151 (Sept. 19, 1994). The Building Industry Association of Superior California ("BIA") challenged the listing and failure to designate critical habitat in the U.S. District Court for the District of Columbia. The court upheld the listing but ordered FWS to designate critical habitat. BIA then struck the critical habitat claim from its complaint in order immediately to appeal the denial of the listing claims. *Bldg. Indus. Ass'n of Superior Cal. v. Norton,* 247 F.3d 1241, 1244 (D.C. Cir. 2001). Meanwhile, in 2001, a federal district court in California also held that FWS violated the ESA and the Administrative Procedure Act by failing to designate critical habitat for these species. *Butte Envtl. Council v. White,* 145 F. Supp. 2d 1180, 1185 (E.D. Cal. 2001).

In response to these suits, FWS proposed designating 1,662,762 acres of critical habitat for these fifteen species in California and Oregon in 2002. 67 Fed. Reg. 59,884 (Sept. 24, 2002). After public comment, FWS excluded five California counties on economic grounds and eliminated other areas on non-economic grounds, reducing the total designation in the final rule by more than one million acres, to roughly 600,000 acres. 68 Fed. Reg. 46,684 (Aug. 6, 2003). Further litigation by environmental and building industry groups, coupled with concerns by the Interior Department's Office of the Inspector General that political appointees improperly influenced decision-making on this issue, led FWS to seek a voluntary remand, which the U.S. District Court for the Eastern District of California granted in October 2004. Pet. App. A-7.

FWS then held an additional public comment period and commissioned a new economic analysis by CRA International, Inc. to determine the likely economic impacts of the designation. 70 Fed. Reg. 37,739, 37,741 (June 30, 2005). CRA International, Inc., *Economic Impacts of Critical Habitat Designation for the Vernal Pool Species* 45-46 (June 20, 2005), *available at* http://www.fws.gov/economics/Critical%20Habitat/Final%20Draft%20Reports/vernal%20pool%20species%20redo/VPS-6-20-05.pdf (visited Jan. 4, 2011). In August 2005, FWS adopted new economic exclusions, 70 Fed. Reg. 46,924, 46,948-52 (Aug. 11, 2005), and in February 2006, issued a final rule designating

858,846 acres of land as critical habitat. 71 Fed. Reg. 7118 (Feb. 10, 2006).

Both sides commenced new litigation over the final rule. Home Builders and a group of intervenors claimed the rule went too far, while Butte Environmental Council *et al*. (Respondents herein) found it lacking. The district court granted FWS summary judgment on Home Builders' claims but ruled for Butte Environmental granting a new remand on whether the designation adequately provided for species recovery, in addition to species survival, as required by *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv*., 378 F.3d 1059, 1069-70 (9th Cir. 2004). *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.,* No. Civ. S-05-0629, 2006 U.S. Dist. LEXIS 80255 (E.D. Cal. Nov. 2, 2006) (Pet. App. C). Motions for reconsideration resulted in still another ruling, although the result did not change. *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.,* No. Civ. S-05-0629, 2007 U.S. Dist. LEXIS 5208 (E.D. Cal. Jan. 24, 2007) (Pet. App. D). After that remand, FWS reissued the rule with no substantive alterations, 72 Fed. Reg. 30,279 (May 31, 2007), whereupon the district court entered judgment for FWS and Home Builders commenced their appeal.

REASONS FOR DENYING THE WRIT

I. No Clear Circuit Split Exists Regarding The Baseline Approach

Home Builders argue that the Ninth Circuit's decision in this case conflicts with a 2001 decision of the Tenth Circuit that overturned a critical habitat designation in which FWS had employed the baseline method of economic analysis. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv*., 248 F.3d 1277 (10th Cir. 2001). Home Builders overstate the existence of any conflict. The Tenth Circuit's decision has been superseded by events and may no longer be good law even in that circuit. Consideration of the Question Presented on the basis of this alleged conflict is not warranted.

Since *New Mexico Cattle Growers* was decided, courts outside of the Tenth Circuit have found its rationale no longer persuasive because it was based on a 1986 FWS regulation, 50 C.F.R. § 402.02, that two other circuit courts have struck down as inconsistent with the ESA. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv*., 378 F.3d 1059 (9th Cir. 2004); *Sierra Club v. U.S. Fish & Wildlife Serv.,* 245 F.3d 434 (5th Cir. 2001). Now that FWS no longer follows the regulation, these courts unanimously concluded that the baseline approach is in fact the appropriate method for taking into account the economic impact of critical habitat designation. *See Ariz. Cattle Growers' Ass'n v. Salazar,* 606 F.3d 1160 (9th Cir. 2010), *petition for cert. filed* (U.S. Oct. 1, 2010)

(No. 10-454); *Fisher v. Salazar*, 656 F. Supp. 2d 1357 (N.D. Fla. 2009); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004). As these cases have held, analysis of the impacts of critical habitat logically should include only those costs that would occur as a result of its designation, and not those that would exist even if FWS did not designate any habitat.

FWS previously took the policy position that designation of critical habitat was superfluous and provided no additional protection or benefit to the species. Reflecting this view, FWS adopted a regulation in 1986 that defined the statutory terms "jeopardy" to a species and "adverse modification" of critical habitat. In the words of the Tenth Circuit, the standards FWS set were "virtually identical, or, if not identical, one (adverse modification) is subsumed by the other (jeopardy)." 248 F.3d at 1283. Because FWS viewed adverse modification as functionally equivalent to jeopardy, the agency inevitably found that, using a baseline approach, the designation "was not expected to result in any incremental restrictions on agency activities." *Id.* at 1284.

FWS's 1986 regulation was central to the Tenth Circuit's decision. Indeed, the Tenth Circuit's opinion noted that regulation was the "root of the problem," 378 F.3d at 1283, because it essentially nullified the ESA's command that FWS separately consider the economic analysis. In the court's words: "The 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." *Id*. at 1285. Although the Tenth Circuit noted that the regulation was likely unlawful,[1] the court was "compelled by the canons of statutory interpretation to give some effect to the congressional directive that economic impacts be considered at the time of critical habitat designation." *Id*. at 1285. "Because economic analysis done using the FWS's baseline model is rendered essentially without meaning *by 50 C.F.R. § 402.02*," the court concluded that the baseline approach was inconsistent with statutory intent. *Id*. (emphasis added).

That is no longer the case. After the Fifth Circuit first struck down the 1986 regulation in *Sierra Club*, the Ninth Circuit in *Gifford Pinchot* also found that it conflicted with the text and purpose of the ESA. The *Gifford Pinchot* court held that FWS had misinterpreted the ESA's definition of "destruction or adverse modification" of critical habitat, and had thus overlooked the importance of critical habitat to the recovery – not merely the survival – of listed species. 378 F.3d at 1069-70. "The ESA was enacted not

[1] Citing the Fifth Circuit's holding in *Sierra Club*, the Tenth Circuit panel noted: "Though these regulatory definitions are not before us today, federal courts have begun to recognize that the results they produce are inconsistent with the intent and language of the ESA." 248 F.3d at 1283 n.2.

merely to forestall the extinction of species (*i.e.,* promote a species survival), but to allow a species to recover to the point where it may be delisted." *Id.* at 1070 (citing 16 U.S.C. § 1532(3)). By not considering the value of protecting unoccupied lands that were important to the future recovery of the species, FWS had impermissibly undercut the purpose and value of designating critical habitat. *Id.*

After *Gifford Pinchot*, FWS officially changed its policy and began recognizing that critical habitat provided increased protection for species. U.S. Fish & Wildlife Serv., *Application of the "Destruction or Adverse Modification" Standard under Section 7(a)(2) of the Endangered Species Act* (Dec. 9, 2004), *available at* http://www.fws.gov/midwest/endangered/permits/hcp/pdf/AdverseModGuidance.pdf (visited Jan. 4, 2011). FWS no longer defines adverse modification of critical habitat as the "functional equivalent" of species jeopardy; rather, FWS recognizes that habitat protection may impose additional costs and benefits over and above listing. Now when FWS takes economics into account using the baseline method, the intent of Congress that the additional impacts of designation (but not listing) be taken into account can be fulfilled.

Because *New Mexico Cattle Growers* is inextricably based on an invalid regulation that does not accurately account for how FWS currently assesses the costs and benefits of critical habitat, its holding does not reflect the current state of the law. A true circuit split does not exist.

II. The Baseline Approach Is Proper For Analyzing The Economic Impact Of Critical Habitat

FWS properly "[took] into consideration" the economic impacts "of specifying any particular area as critical habitat." 16 U.S.C. § 1532(b)(2). FWS hired CRA International, Inc. to prepare a thorough economic analysis, and determine the economic baseline for the affected areas. CRA followed Office of Management and Budget guidance that the "baseline should be the best assessment of the way the world would look absent the proposed action." 68 Fed. Reg. 5492, 5517 (Feb. 3, 2003); Pet. App. A-7-8. The analysis compared the state of affairs prior to designation of critical habitat – i.e., the baseline – with "how things would look after designation of critical habitat." Pet. App. A-7-8, A-18. As part of this analysis, the consultant included consideration of compliance with other state and local zoning and natural resource laws. Pet. App. A-19. The analysis "estimates the total cost of species conservation activities without subtracting the impact of pre-existing baseline regulations (i.e., the cost estimates are fully coextensive)." Pet. App. C-49. CRA also analyzed the "administrative costs associated with Section 7 consultations for listing a species, as well as the designation of critical habitat." Pet. App. D-15.

As noted above, various courts have held that this analytical approach complies with the ESA. In *Cape Hatteras*, the court held that "[t]he baseline approach is a reasonable method for assessing the

actual costs of a particular critical habitat designation" because logically "the world with the designation must be compared to the world without it." 344 F. Supp. 2d at 130. Under the holding of *Cape Hatteras,* Home Builders' preferred approach would conflict with the ESA, because FWS "must not allow the costs below the baseline to influence its decision to designate or not designate areas as critical habitat," as "[t]hat would be inconsistent with the ESA's prohibition on considering economic impacts during the species listing process." *Id.*; *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d at 1152 (agreeing that "the baseline approach was both consistent with the language and purpose of the ESA and that it was a reasonable method for assessing the actual costs of a particular critical habitat designation.").

The court in *Fisher v. Salazar* further explained that once FWS abandoned its "functional equivalence theory" after *Gifford Pinchot*, the baseline approach became "a reasonable method, consistent with the language and purpose of the ESA for assessing the actual costs of a particular habitat designation." 656 F. Supp. 2d at 1371. The *Fisher* court noted that the Fifth Circuit had also rejected FWS's "functional equivalence theory" in a case challenging FWS's failure to designate critical habitat for the Gulf sturgeon, and thus, if presented with the issue, would logically approve the baseline approach. *See id.* at 1369 (citing *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001)).

Since *Gifford Pinchot* and *Sierra Club,* the baseline approach has been FWS's preferred method of economic analysis. Approved by numerous courts, it is the approach that best fulfills the requirements of the ESA.

III. The Secretary Of The Interior's Decision To Perform An Exclusion Analysis Is Discretionary, Thus The Result In This Case Is Unlikely To Change Under Any Analytical Method

Home Builders' petition is predicated on the notion that FWS would designate fewer acres of land if the agency were to accept their measure of economic impact. This is not likely.

An Interior Solicitor's Opinion recently concluded that "language of the statute appears to give the Secretary broad discretion in determining whether to exclude areas." Department of the Interior, Solicitor's Opinion M-37016, at 6, *available at* http://www.doi.gov/solicitor/opinions/M-37016.pdf (visited Jan. 4, 2011). Indeed, FWS "is not required to perform an exclusion analysis" at all, "no matter how severe the impacts of a designation might be." *Id*. at 17. After considering economic and other impacts of designation, FWS may, *but need not*, elect to exclude an area from designation based on its consideration and weighing of these factors. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19.

Here, FWS has already conducted a thorough economic analysis and is well aware of the potential

costs and benefits of critical habitat and other conservation measures. Home Builders would clearly prefer that FWS give more weight to their assertions of economic injury in hopes that the agency might designate fewer acres of critical habitat. But FWS is neither required to adopt Home Builders' analytical scheme nor, if FWS did so, would it be obligated under the ESA to designate fewer acres of critical habitat for the vernal pool species.

Ultimately, the petition for a writ of certiorari in this case is a statement of policy preference; it fails to demonstrate any error in the appellate court ruling and does not compel a conclusion that FWS's designation of critical habitat for the vernal pool species is worthy of further review.

IV. Home Builders Did Not Properly Raise The Question Presented On Appeal

The argument Home Builders now make in support of certiorari was never squarely presented to the Ninth Circuit, and was in fact specifically disclaimed in filings with that court. While the Ninth Circuit was considering this case, that court decided another challenge to designation of critical habitat. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), *petition for cert. filed* (U.S. Oct. 1, 2010) (No. 10-454). Counsel for the federal Respondents informed the panel of the decision via a Rule 28(j) letter and asserted its relevance to the issues in this case. In response, Home Builders argued that

Arizona Cattle Growers – which upheld the FWS's use of the baseline approach to economic analysis – was not relevant to this case. Home Builders' letter states: "Th[e government's] contention is incorrect. In this appeal, the Home Builders contend, among other things, that the Federal Defendants' failure to assess the *cumulative* impact of the critical habitat designation is illegal." Letter from M. Reed Hopper to Molly Dwyer, Clerk, Ninth Circuit (June 10, 2010) (Appendix A).

Indeed, what Home Builders actually alleged in their briefs was not that FWS erred in using the baseline approach or that the Ninth Circuit should adopt the Tenth Circuit's reasoning in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv*., 248 F.3d 1277 (10th Cir. 2001). In fact, Home Builders did not even cite *New Mexico Cattle Growers* in their opening or reply briefs. Rather, Home Builders alleged that FWS violated the National Environmental Policy Act ("NEPA") by failing to conduct an adequate "cumulative effects" analysis pursuant to 42 U.S.C. § 4321. A NEPA violation is, of course, a completely different legal issue, which the Ninth Circuit properly rejected, and which Home Builders do not allege in their present petition.

Although the Ninth Circuit, in rejecting Home Builders' NEPA claim, briefly discussed the analogous guidance of *New Mexico Cattle Growers* and the controlling *Arizona Cattle Growers*, the issue of whether FWS should have adopted a "baseline" or "co-extensive" approach to economic analysis was not

squarely before the court and never briefed by Home Builders. Such a defect should be fatal to Home Builders' petition for writ of certiorari. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 459-60 (8th ed. 2002).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 5, 2010

[LOGO] **PACIFIC LEGAL FOUNDATION**

June 9, 2010

Ms. Molly Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Home Builders Association of Northern California v. U.S. Fish & Wildlife Service*, No. 07-16732

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellants Home Builders Association of Northern California, *et al.*, provide this response to the citation letter of supplemental authorities submitted by the Federal Defendants. In that letter, the Federal Defendants contend that this Court's decision in *Arizona Cattle Growers' Association v. Salazar* (*AGCA*), No. 08-15810, 2009 U.S. App. LEXIS 29107 (9th Cir. June 4, 2010), upholding the use of a "baseline" approach to the economic impact analysis mandated by Section 4(b)(2) of the Endangered Species Act, 16 U.S.C. § 1533(b)(2), is relevant to the same issue raised in the Home Builders' appeal. That contention is incorrect. In this appeal, the Home Builders contend, among other things, that the Federal Defendants' failure to assess the *cumulative* impact of the critical habitat designation is illegal. *See* Opening Br. at 34-36. The contention is distinct from the *AGCA* issue of whether the economic impact of the designation, in isolation, can or should be determined using a

baseline as opposed to a "coextensive" approach. *See* Reply Br. at 19 n.6.

AGCA does, however, speak to an issue relevant to the Home Builders' appeal. The Federal Defendants contend that, to designate occupied critical habitat, they need only identify those physical or biological features essential to a species's survival and not its recovery. Further, the Federal Defendants contend that they need not know when a species will be deemed "conserved" before designating critical habitat. The Home Builders contend that this approach contravenes the Court's holding in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). *See* Opening Br. at 24-25; Reply Br. at 3-5. The Court's discussion of *Gifford Pinchot* in *AGCA* is consistent with the Home Builders' argument. *See AGCA,* 2009 U.S. App. LEXIS 29107, at *15.

Respectfully submitted,

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By /s/ Damien M. Schiff
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