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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In designating "critical habitat" for an endangered species or a threatened species under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, the Secretary of the Interior must "tak[e] into consideration" (among other things) "the economic impact * * * of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The question presented is whether that provision requires the Secretary to consider economic conditions that would exist irrespective of his actions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 616 F.3d 983. The opinions of the district court on cross-motions for summary judgment (Pet. App. C1-C73) and on subsequent motions for reconsideration (D1-D25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2010. The petition for a writ of certiorari was filed on October 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, provides "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "a program for the conservation of such endangered species and threatened species." 16 U.S.C. 1531(b). The Act carries out its purposes, in part, by directing the Secretary of the Interior (Secretary), who administers the Act through the United States Fish and Wildlife Service, to designate certain species, and their habitats, for federal protection.

The Act instructs the Secretary to "determine," according to certain specified factors, "whether any species is an endangered species or a threatened species." 16 U.S.C. 1533(a)(1). An "endangered species" is "any species" (except for certain insect pests) "which is in danger of extinction throughout all or a significant portion of its range"; a "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(6) and (20). The Secretary is required to publish a list of all endangered species and threatened species in the *Federal Register*. 16 U.S.C. 1533(c)(1). Endangered species and threatened species receive certain statutory protections. See, *e.g.*, 16 U.S.C. 1536(a)(2), 1538(a).

The Act further instructs that, in conjunction with designating an endangered species or threatened species, the Secretary should, subject to certain qualifiers and exceptions, "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. 1533(a)(3)(A)(i). A species' "critical habitat" includes "the specific areas within the geographical area

occupied by the species, at the time" it is designated an endangered species or a threatened species, "on which are found those physical or biological features * * * essential to the conservation of the species and * * * which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). The "critical habitat" also includes "specific areas outside the geographical area occupied by the species at the time" it is designated an endangered species or a threatened species, "upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). Designation as critical habitat gives an area special protected status against encroachment. See 16 U.S.C. 1536(a)(2).

The Secretary's decision to classify a species as an endangered species or a threatened species must be made "solely on the basis of the best scientific and commercial data available to him." 16 U.S.C. 1533(b)(1)(A). The Secretary's decision to designate critical habitat, must be made "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The 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 exclusion will result in the extinction of the species. *Ibid.*

2. This case concerns "vernal pools," a "unique kind of wetland ecosystem" that consists of "shallow depressions that hold water seasonally" and dry up at other times. *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Four*

Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 68 Fed. Reg. 46,685 (2003). Between 1978 and 1997, the Secretary designated four crustacean species and 11 plant species that live in vernal pools as endangered species or threatened species. Pet. App. A5. The vernal pools that support those species "have a discontinuous distribution west of the Sierra Nevada that extends from southern Oregon through California into northern Baja California, Mexico." 68 Fed. Reg. at 64,685.

On August 6, 2003, after extensive public comment, the Secretary published a final designation of critical habitat for certain vernal-pool-related lands. 68 Fed. Reg. at 46,684. The designation excluded certain areas from classification as critical habitat based on a determination, pursuant to 16 U.S.C. 1533(b)(2), that the economic impact of inclusion outweighed the benefits. 68 Fed. Reg. at 46,745-46,746.

After environmental groups challenged some of those exclusions in court, the Secretary solicited further public comment and published a new final critical-habitat designation on August 11, 2005. Pet. App. C8-C10; see *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon; Evaluation of Economic Exclusions From August 2003 Final Designation*, 70 Fed. Reg. 46,924. Like the original rule, the new rule excluded certain areas (although not precisely the same areas) from the critical-habitat designation based on economic considerations. 70 Fed. Reg. at 46,948-46,952. In total, the final critical-habitat designation includes 858,846 acres in 34 counties in California and one county in southern Oregon. Pet. App. C9.

The Secretary's analysis of the potential economic impact of the critical-habitat designation was consistent with guidance from the Office of Management and Budget. Pet. App. A18; see *Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations*, 68 Fed. Reg. 5492 (2003). The analysis, prepared by an outside consultant, "compare[d] the current state of affairs—the baseline—with how things would look after designation of critical habitat." Pet. App. A18. That is to say, the analysis "projected the economic effects that would occur in the census tracts affected by the designation, *above and beyond* the baseline of the existing regulatory and economic burden landowners and managers currently bear." *Id.* at C49. The Secretary "expressly indicated in [the] analysis that [he] took into account both the economic impact of listing the species" as endangered species or threatened species "and the economic impact of the critical habitat designation." *Id.* at C50 n.17.

3. Following the Secretary's promulgation of the updated rule, the government faced litigation "from both sides" in the Eastern District of California: petitioners, a group of trade organizations, "challenged the final critical habitat designation for going too far," while an environmental group "challenged it for not going far enough." Pet. App. A8. The district court ultimately granted summary judgment for the Secretary on petitioners' claims, but remanded the rule to the agency for reconsideration (which ultimately resulted in no substantive change) based on one of the environmental group's claims. *Id.* at A8-A9.

One of petitioners' arguments in the district court was that the Secretary's economic-impact analysis was deficient because it considered only the impact of the

critical-habitat designation itself, and not the impact of listing the various vernal-pool species as endangered species or threatened species. Pet. App. C48-C50. The district court rejected that argument, concluding that the analysis had, in fact, taken the impact of both regulatory actions into account. *Id.* at C48-C50 & n.17.

On appeal, petitioners focused on a somewhat different economic-impact argument, one that the district court had not directly addressed. See Pet. 6. Petitioners argued "for a 'cumulative' assessment" of economic impact "that would include," in addition to the cost of the Secretary's critical-habitat designation itself, "the costs of complying with other regulations" as well. Pet. App. A18-A19. The court of appeals rejected petitioners' argument. *Id.* at A17-A20. The court observed that "the plain language of [the] ESA"—which requires the agency to consider the "economic impact * * * of specifying any particular area as critical habitat" (16 U.S.C. 1533(b)(2))—"directs the agency to consider only those impacts caused by the critical habitat designation itself." Pet. App. A19. The court declined to analogize the impact analysis required by the ESA to the impact analysis required for different purposes under a different environmental statue, the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* Pet. App. A19. And the court stated that petitioners' position was "contrary to" its decision in *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160 (9th Cir.), petition for cert. pending, No. 10-454 (filed Oct. 1, 2010), which had "rejected the notion" that the Secretary is "'required to attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation.'" Pet. App. A20 (quoting 606 F.3d at 1172).

ARGUMENT

Petitioners renew (Pet. 7-21) their contention that 16 U.S.C. 1533(b)(2) requires the Secretary to "assess[] the incremental impact of [a critical-habitat] designation *in combination with* the economic regulatory baseline." Pet. 11. According to petitioners, it is not enough for the Secretary to determine that the economic burden on affected communities will be, say, $10 million greater with the designation than without it, and to weigh that $10 million cost against the environmental benefits of the designation. Instead, in petitioners' view, the Secretary must compare the environmental benefits of the designation to the total cost of complying with all other regulatory measures in addition to the ESA—and, apparently must consider *all* economic conditions in the affected communities, even if those conditions exist independently of, have nothing to do with, and would be unaffected by, the Secretary's actions. Pet. 11 & n.9. Petitioners would thus have the Secretary in this case consider such factors as "state[] and local land-use laws," "the national economic malaise," the "lingering effects of [California's] just recently resolved budget crisis," and the downturn in California's housing market. Pet. 11 n.9, 15-17 & n.13.

Petitioners' contention lacks merit and was properly rejected by the court of appeals. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. To begin with, petitioners' position is refuted by the plain language of the Act. Section 1533(b)(2) states in relevant part that the Secretary shall designate critical habitat "after taking into consideration the economic impact * * * *of specifying any particular area as crit-*

ical habitat." 16 U.S.C. 1533(b)(2) (emphasis added). The statute accordingly directs the Secretary's attention to the economic impact created by the designation of critical habitat under the ESA. It neither requires nor authorizes the Secretary to consider economic conditions that are unrelated to his actions. See Pet. App. A19.

Considering unrelated economic impacts to be part of the economic impact of the critical-habitat designation is inconsistent with the "cost/benefit" analysis that the statute contemplates for critical-habitat designations. See 16 U.S.C. 1533(b)(2) (critical-habitat designations must take into account the "economic impact * * * of specifying any particular area as critical habitat," and the 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"). Because the Secretary cannot avoid unrelated economic impact by declining to designate critical habitat, it makes little sense to consider it to be an impact of his critical-habitat decision.

To the extent that there is any ambiguity in the statute, the Secretary's interpretation is entitled to deference. Petitioners do not dispute the Secretary's authority to interpret the Act, and the notice-and-comment procedures followed in making the critical-habitat designation confirm that deference is warranted. *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001).

2. Petitioners identify no authority that supports their argument. Their reliance (Pet. 7-11) on the Tenth Circuit's decision in *New Mexico Cattle Growers Ass'n* v. *United States Fish & Wildlife Service*, 248 F.3d 1277 (2001), is misplaced. That decision—which petitioners did not cite in either their opening brief or their reply

brief in the court of appeals—did not address the argument that petitioners are making here. It instead addressed the separate question of whether an analysis of the "economic impact" of a critical-habitat designation must include an analysis any economic impact of the related agency action of "listing" the relevant species as an endangered species or a threatened species. *Id.* at 1281-1285.

In particular, the Tenth Circuit in *New Mexico Cattle Growers* addressed the permissibility of the following practice:

> In order to determine what the "economic impact" of a [critical-habitat designation] will be, the [Secretary] has adopted an incremental baseline approach (the "baseline approach"). The baseline approach utilized by the [Secretary] is premised on the idea that the listing of the species (which will occur prior to or simultaneously with the [critical-habitat designation]) will have economic impacts that are not to be considered. The 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." Thus, the baseline approach moves any economic impact that can be attributed to listing below the baseline and, when making the [critical-habitat designation], takes into account only those economic impacts rising above the baseline.

248 F.3d at 1280. The Tenth Circuit concluded that this "baseline approach to economic analysis is not in accord with the language or intent of the ESA." *Id.* at 1285.

Contrary to petitioners' suggestion (Pet. 8-9), *New Mexico Cattle Growers* did not present, much less de-

cide, the question of whether, in designating critical habitat, the Secretary must consider economic conditions that have no connection at all to his own actions. Rather, the Tenth Circuit in that case simply adopted "the approach advocated by the appellants": that the Secretary must "take into account all of the economic impact of the [critical-habitat designation], regardless of whether those impacts are caused co-extensively by *any other agency action* (such as listing) and even if those impacts would remain in the absence of the [critical-habitat determination]." 248 F.3d at 1283 (emphasis added). As the district court in this case observed, the Secretary's decision here expressly complied with *New Mexico Cattle Growers* by considering the economic impact both of listing the 15 vernal-pool species as endangered species and threatened species and of designating certain vernal-pool-related areas as critical habitat. Pet. App. C49-C50; see 70 Fed. Reg. at 46,928.

3. Petitioners contend (Pet. 8-11) that certiorari is warranted because of a purported conflict between *New Mexico Cattle Growers* and the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160 (9th Cir.), petition for cert. pending, No. 10-454 (filed Oct. 1, 2010). The government's separate brief in opposition in *Arizona Cattle Growers' Ass'n* addresses the assertion that those two cases are in conflict. But even assuming that they are, the fact remains that there is no conflict between *New Mexico Cattle Growers* and *this* case. The mere fact that the decision below cites *Arizona Cattle Growers' Ass'n* (see Pet. App. A18, A20) for certain propositions does not make the decision inconsistent with *New Mexico Cattle Growers*. Indeed, petitioners themselves filed a letter with the court of appeals insisting that the argument they are making

here was "distinct from" the ultimate issue decided in *Arizona Cattle Growers' Ass'n*. 07-16732 Docket entry No. 30, at 1 (9th Cir. June 9, 2010).

4. Petitioners' remaining arguments (Pet. 12-20) similarly fail to present any reason for further review. Those arguments focus primarily on the policy impact of environmental decisions like the one at issue here. But petitioners' policy disagreements with environmental regulation in general, or with the Secretary's discretionary decision to designate critical habitat here, are not proper subjects for this Court's review. See 16 U.S.C. 1533(b)(2) (permitting Secretary to decide whether benefit of designation outweighs economic impact).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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