No. 10-5204

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OTAY MESA PROPERTY L.P., a California Limited Partnership, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,
Defendants-Appellees,

CENTER FOR BIOLOGICAL DIVERSITY,
Intervenor-Appellee.

On Appeal from the United States District Court
for the District of Columbia
Honorable Rosemary M. Collyer, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief of Plaintiffs-Appellants:

Amicus Curiae Pacific Legal Foundation.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of Plaintiffs-Appellants.

C. Related Cases

This case has neither been before this Court nor any other United States Court of Appeals. Counsel is not aware of any related case currently pending in this Court or in any other court of appeals.

DATED: November 30, 2010.

Respectfully submitted,

M. REED HOPPER
DAMIEN M. SCHIFF

By /s/ Damien M. Schiff
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Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Pursuant to Federal Rule of Appellate Procedure 29 and this Court's scheduling order, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellants Otay Mesa Property L.P., *et al*., and in support of reversal.

IDENTITY AND INTEREST OF AMICUS

PLF is a nonprofit legal advocacy organization that litigates in state and federal courts throughout the country in favor of the principles of limited government, economic freedom, and a balanced approach to environmental regulation. In particular, PLF seeks to ensure that the Endangered Species Act not be misinterpreted and applied in a manner that abuses the legally protected private property rights of individuals, or fails to balance environmental interests with human needs. PLF is therefore interested in this appeal, which concerns, among others issues, whether critical habitat designations are entitled to deference under the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

INTRODUCTION AND SUMMARY OF ARGUMENT

Under *Chevron*, a court must defer to an agency's interpretation of a statute that it is charged with administering, if congressional intent underlying the relevant statutory language is ambiguous and the agency's interpretation is reasonable. *See id*. at 844-45. But before a court can determine whether an agency's interpretation merits *Chevron* deference, the court must first decide whether the interpretation is *eligible*

for such deference.[1] *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Agency interpretations found within policy guides, handbooks, opinion letters, and other documents that do not have the force of law are not eligible for *Chevron* deference. *See Christensen v. Harrison County*, 529 U.S. 576, 587 (2000). Rather, such interpretations are to be deferred to only to the extent that they are persuasive. *See Mead*, 533 U.S. at 234-35.

Below, the district court ruled that the United States Fish and Wildlife Service's designation of critical habitat for the San Diego fairy shrimp merits *Chevron* deference on two points: whether a given area of land should be deemed "occupied" by the species; and whether the "co-extensive" economic impacts of the designation should be taken into account. *See Otay Mesa Property L.P. v. U.S. Dep't of Interior*, 714 F. Supp. 2d 73, 82-83, 87-88 (D.D.C. 2010). *See also id*. at 75 ("Reviewing the final rule at issue, the Court concludes that [the Service] is entitled to *Chevron* deference.") (footnote omitted). The district court was wrong to afford *Chevron* deference. Only those agency interpretations that carry the force of law merit deference. *Christensen*, 529 U.S. at 587. The Service's determination of what constitutes occupied fairy shrimp habitat and fairy shrimp economic impacts does not

[1] This analysis has been termed *Chevron* "step zero," in distinction to *Chevron* step one (whether congressional intent is clear) and *Chevron* step two (whether the agency's interpretation is reasonable). *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 876-78 (2001).

carry the force of law. Rather, the Service's executive action of designation itself, *i.e.*, the demarcation of the metes and bounds of such habitat, carries the force of law. The legal interpretations that precede and enable the designation of critical habitat do not have the force of law because they are not generally applicable, but instead pertain only to one species (here the San Diego fairy shrimp). The designation does not bind the Service or anyone else with respect to other species. Further, the only appellate courts to address the issue have ruled that critical habitat designations are not eligible for *Chevron* deference. For all these reasons, discussed in greater detail below, the judgment of the district court should be reversed.

ARGUMENT

I

STATUTORY INTERPRETATIONS CONTAINED WITHIN A CRITICAL HABITAT DESIGNATION ARE NOT ELIGIBLE FOR *CHEVRON* DEFERENCE

A. An Agency's Interpretation Must Carry the Force of Law To Be Eligible for *Chevron* Deference

The general principle of *Chevron* is that an agency's interpretation of a statute that it is charged with administering is entitled to deference if the relevant statutory text is ambiguous and the agency's interpretation is reasonable. But as the Supreme Court has made clear, not every agency interpretation is eligible for *Chevron*

deference.[2] In *Christensen v. Harrison County*, the Court held that interpretations "which lack the force of law"—such as "policy statements, agency manuals, and enforcement guidelines"—"do not warrant *Chevron*-style deference." 529 U.S. at 587. Instead, such interpretations are "entitled to respect" and merit deference only to the extent that they have the "power to persuade," pursuant to the principles set forth in *Skidmore v. Swift &Co.*, 323 U.S. 134, 140 (1944). *See Christensen*, 529 U.S. at 587.

The Court elaborated upon *Christensen* in *Mead*. There, the issue was whether United States Customs Bureau ruling letters—decisions of individual customs offices determining the appropriate tariff or duty to be applied to a given set of imports—merit *Chevron* deference. In holding that these letters are eligible only for *Skidmore*, not *Chevron*, deference, the Court explained how a court is to determine whether an agency interpretation is eligible for *Chevron* deference:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

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[2] *Cf.* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 Admin. L. Rev. 783, 833 (2007) ("A new model for judicial review of agency interpretations seems to be emerging. That model is one in which the mandatory obligation to defer, set forth in *Chevron*, is limited.").

Mead, 533 U.S. at 226-27. With respect to Customs letters, the Court observed that such letters *do* have binding legal force as between the importer and the agency over a discrete transaction, but that this binding effect is insufficient standing alone to qualify for the "force of law" effect that warrants *Chevron* deference. *See id*. at 232 (noting that Customs' authority to issue "binding classifications does not . . . bespeak the legislative type of activity that would naturally bind more than the parties to the ruling"). Although the Court hinted that agency interpretations that are treated as precedent for other cases may be eligible for *Chevron* deference even if they are not strictly speaking binding in subsequent cases, the Court nevertheless underscored that "precedential value alone does not add up to *Chevron* entitlement." *Id*.

Thus, under *Mead*, an interpretation cannot have the "force of law" if it does not operate like "law"—*i.e.*, if it fails to set forth a rule broadly applicable to the relevant regulable class—and instead limits itself to explaining how the rule applies to one member of the class. *Cf.* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 816 (2002) (observing that the *Mead* inquiry entails among other considerations "whether Congress has authorized agency action that has a legal effect that generalizes to more than the agency and the party who requests it"); Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 Admin. L. Rev. 783, 807 (2007) (describing the

Mead majority opinion as "understand[ing] a 'rule' to include a generalizable pronouncement encompassed in an adjudicative decision").

The Court returned to *Mead* in *Barnhart v. Walton*, 535 U.S. 212 (2002), which concerned the Social Security Administration's interpretation of the Social Security Act's disability payment program. The agency had informally interpreted the Act in a way adverse to the plaintiff, and subsequently formalized that interpretation through notice-and-comment rulemaking. The plaintiff, based on this regulatory history, objected to affording *Chevron* deference to the agency's interpretation. *See id*. at 221. The Court denied the objection and held that the agency's interpretation was eligible for *Chevron* deference, reasoning that "whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue." *Id*. at 222 (citing *Mead*, 533 U.S. at 229-31). The Court further explained that:

> the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Id.

The Court thus added several considerations to flesh out *Mead*'s "force of law" criterion: the factor of "interstitiality" tracks to *Chevron*'s acknowledgment that

ambiguous statutory provisions are tacit congressional delegations of lawmaking power to agencies; the factors of expertise, importance, and complexity implicate the common-sense notion that agencies are in a better position than courts to understand and interpret arcane technical matters; and the factor of "careful consideration" harkens to *Chevron*'s limitation that deference be afforded only to reasonable interpretations. Richard W. Murphy, *A "New" Counter*-Marbury*: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 Admin. L. Rev. 1, 23 (2004). Hence, it is not enough for a legal interpretation to have binding effect; rather, it must be accompanied by other factors, such as a confirmed agency practice or significant deliberation preceding the rule's promulgation, before *Chevron* deference may be considered.[3] *See, e.g.*, *Fed. Election Comm'n v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185-86 (D.C. Cir. 2001) (holding that Federal Election Commission advisory opinions are eligible for *Chevron* deference on the basis of several considerations, among them that the opinions "have binding legal effect" *and* are "safe harbors" for any person relying on them).

Barnhart's relevance here is its affirmance of the *Christensen* and *Mead* dichotomy between agency interpretations that have, and do not have, the force of

[3] One commentator contends that *Barnhart*'s main addition to *Mead* is the rule that "interpretive issues entwined with administration [are] prima facie more entitled to deference than issues involving the principal parameters of the statute." Gifford, *supra*, at 832.

law. Under *Mead*, interpretations lacking the force of law are ineligible for *Chevron* deference; under *Barnhart*, even some interpretations that have the force of law are nonetheless ineligible for *Chevron* deference. It follows that a legal interpretation developed only to support a single executive action (and thus lacking the force of law) would not be eligible for *Chevron* deference under *Mead*, much less under *Barnhart*.

B. Critical Habitat Designations Lack the Force of Law with Respect to the Legal Interpretations They Contain

As *Mead* reveals, the determination of whether an agency's interpretation is eligible for *Chevron* deference goes beyond whether the interpretation is incorporated within a larger executive action that applies the law to a given set of facts in a manner producing legal effect. The *Mead* Customs letter *did* have legal effect, but the Court nevertheless concluded that it was ineligible for *Chevron* deference because it did not purport to cover a large class of persons, or set forth a rule of law binding the agency in future, similar cases. *See* 533 U.S. at 233. Every executive action, after all, necessarily implies some degree of legal interpretation, for it is the law that gives impetus, shape, and legitimacy to the executive's activities. Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 Admin. L. Rev. 1303, 1304 (2000) ("In the process of executing the laws, the executive branch is perpetually involved in giving the law meaning."); Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 236 (1985) ("Law

application . . . . involves relating the legal standard of conduct to the facts established by the evidence."). The executive acts not on its own, but rather because it interprets the law as requiring action based on a given set of facts. Hence, just because an action has binding effect does not mean that the legal interpretations implicit in that action have the "force of law."

An essential ingredient to "law" is that it be generally applicable. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); *BMW v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) ("[T]he uniform general treatment of similarly situated persons . . . is the essence of law itself.").[4] As *Mead* instructs, the legitimacy of compulsion cannot on its own justify *Chevron* deference, otherwise the Customs letter there at issue, which was legally binding on the importer (but on the importer only), would have received deference. A critical habitat designation is generally applicable in the limited sense that its

[4] *See also* John Rawls, *A Theory of Justice* 131 (1971) ("First of all, principles should be general. That is, it must be possible to formulate them without the use of what would be intuitively recognized as proper names, or rigged definite descriptions."); Lon L. Fuller, *The Morality of Law* 47 (2d ed. 1964) ("The desideratum of generality is sometimes interpreted to mean that the law must act impersonally, that its rules must apply to general classes and should contain no proper names."), *cited in* Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 Wake Forest L. Rev. 409, 427 n.92 (1999).

demarcation of the specific areas of habitat, and the legal consequences that accompany that demarcation, apply to all persons. But the interpretations of the ESA's critical habitat provisions, which undergird every designation, are not generally applicable. They pertain only to the species at issue, not to all protected species. They do not have precedential, much less binding, force on the Service with respect to other designations:[5] the Service can define "occupied critical habitat" for the fairy shrimp in one way, and define occupied habitat for a spotted owl in an entirely different manner. *Cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 120 (D.D.C. 2004) ("The Service does not have a regulation that imposes a single definition of 'occupied' for all species; rather, the Service has retained flexibility and defines the term differently depending on a given species's characteristics."). Particularly in this respect, critical habitat designations are analogous to the *Mead* Customs letters. *Cf.* 533 U.S. at 233; Merrill, *supra*, at 816-17 ("Any interpretation eligible for judicial deference must invoke some rule of decision—some legal principle or rationale. An administrative scheme that disclaims any binding effect beyond the party to the ruling . . . is one that generates no 'law' in the relevant sense and hence cannot have the 'force of law.' ").

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[5] *Cf.* Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 222 (2006) ("[T]he most plausible reading of the Court's approach in *Mead*" is that "a decision has the 'force of law' if the agency is legally bound by it as well.").

In *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272 (D.C. Cir. 2004), this Court afforded *Chevron* deference to two letters written by the Food and Drug Administration to the parties interpreting various statutory provisions dealing with drug approval and patenting. The Court rejected the analogy to the *Mead* Customs letters on the grounds that the interpretations at issue emerged from a "complex[] statutory scheme" requiring the "reconcil[ation of] various statutory provisions," and "made no great legal leap but relied in large part on [the agency's] previous determination of the same or similar issues and on its own regulations." *Id*. at 1280. The same cannot be said for the Service's legal interpretations within critical habitat designations, which either represent a particular application of an existing, broader regulation (which itself is eligible for *Chevron* deference), or are meant to govern only the species at issue and not to influence other species' designations. For example, there is no longstanding regulatory history for the Service's interpretation of what constitutes "occupied critical habitat" for the fairy shrimp. And as this case's somewhat peculiar procedural history demonstrates, the Service's approach to economic analyses has not been consistent, unlike the agency's practice in *Mylan*. *See Otay Mesa*, 714 F. Supp. 2d at 86-88.[6]

[6] The difference between *Chevron* and *Skidmore* deference in *Mylan* was, ultimately, of little moment. *See* 389 F.3d at 1280 n.6 (observing that the court would have deferred to the agency's interpretation under *Skidmore*).

To be sure, *some* regulatory actions the Service takes concerning critical habitat are generally applicable, and for that reason are better candidates for *Chevron* deference. For example, the Service has separately promulgated regulations governing *all* critical habitat designations. *See* 50 C.F.R. § 424.12 ("Criteria for designating critical habitat"), § 424.19 ("Final rules–impact analysis of critical habitat"). Whereas critical habitat designations, although binding, are not generally applicable, the Service's critical habitat regulations are both binding and generally applicable, in that they apply to all critical habitat designations, regardless of species. In that sense, these regulations are one step closer to having the "force of law" under *Christensen*, *Mead*, and *Barhart*. In contrast, legal interpretations contained within a critical habitat designation, which at most represent the application of the generally applicable critical habitat regulations to the specific physical and biological aspects of a given species, do not bear the force of law, and for that reason are "beyond *Chevron*'s pale." *Cf. Mead*, 533 U.S. at 234.

II

THE ONLY CIRCUITS TO HAVE ADDRESSED THE ISSUE HAVE HELD THAT CRITICAL HABITAT DESIGNATIONS ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

In *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the appellants challenged the Service's designation of millions of acres of

critical habitat for the Mexican spotted owl. One of the objections was that the Service had used too loose a standard for determining what constitutes "occupied" owl habitat. Before resolving that objection, the Ninth Circuit addressed whether any deference should be given to the Service's interpretation of the ESA's requirements for "occupied critical habitat," as applied to the owl. The court acknowledged that the Service's owl-specific standard had not been promulgated in any regulation. The interpretation was contained explicitly only in the Service's appellate briefing, and implicitly in the designation itself. *See id*. at 1165. The court noted, however, that the Service's standard was nearly identical to the generally applicable standard for occupied critical habitat contained in the Service's Endangered Species Consultation Handbook. Acknowledging that the Handbook did not have the force of law,[7] the court declined to afford *Chevron* deference to the Handbook and its interpretation of occupied habitat (incorporated into the owl critical habitat designation) and instead afforded it only *Skidmore* deference. *See id*. If the Ninth Circuit had instead adopted the lower court's approach below, it would have had no need to inquire into whether the Service's interpretation of occupied habitat were found in the Handbook or any

[7] *Contra Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1273-74 (11th Cir. 2009) (holding that the Handbook is entitled to *Chevron* deference).

other internal agency document; the fact that it was incorporated into the owl designation itself would have been enough. But the Ninth Circuit's reference to the Handbook and its application of *Skidmnore* deference confirms that the court did not consider the owl designation itself to carry the requisite force of law with respect to the Service's interpretation of occupied habitat.

The Tenth Circuit in *New Mexico Cattle Growers Association v. United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), reached the same conclusion. There, the appellants had challenged the critical habitat designation for the Southwestern willow flycatcher on the grounds that the Service had failed to take account of critical habitat's "co-extensive" impacts, *i.e.*, those impacts attributable to designation as well as to other ESA provisions. The Service contended there, as in this appeal, that co-extensive impacts could be ignored and that a "baseline" approach—under which only those impacts solely attributable to designation are assessed—could be employed. Before resolving the merits, the court was required to determine what level of deference, if any, to apply to the Service's baseline interpretation of the ESA.

> Normally, when the agency decision at issue involves interpretations of federal statutes, we owe deference to that decision as set forth in *Chevron* . . . . Indeed, the district court in this case, applying *Chevron* deference to the [Service's] use of the baseline approach, did not find it to be a violation of the ESA. The appellants, however, argue that *Chevron* deference is not applicable in this case. We agree.

> The [Service] concedes, in fact, that *Chevron* deference is not due the [Service's] use of the baseline approach in making [critical habitat designations]. Because the statutory interpretation resulting in the baseline approach has never undergone the formal rulemaking process, it remains an informal interpretation not entitled to deference. Instead, we simply ask if the agency's interpretation is "well reasoned" and has the "power to persuade."

Id. at 1281 (citations omitted). Just as the Ninth Circuit, the Tenth Circuit recognized that the articulation and application of ESA legal interpretations within critical habitat designations do not carry the force of law, and for that reason are ineligible for *Chevron* deference.

The district court below did not cite to *Arizona Cattle Growers Association* or *New Mexico Cattle Growers Association*. The court did not embark on any *Chevron* eligibility analysis, instead assuming that *Chevron* applied and then determining whether *Chevron* deference would be warranted. This Court should adopt the conclusion of the Ninth and Tenth Circuits that critical habitat designations do not warrant *Chevron* deference.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

DATED: November 30, 2010.

Respectfully submitted,

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