NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 10-5204

OTAY MESA PROPERTY, L.P., RANCHO VISTA DEL MAR, and OTAY INTERNATIONAL, LLC,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF INTERIOR, U.S. FISH AND WILDLIFE SERVICE, DIRK KEMPTHORNE, in his Official Capacity as Secretary of the Department of the interior,, and LYLE LAVERTY, in his Official Capacity as Assistant Secretary for Fish, Wildlife and Parks, DEPARTMENT OF THE INTERIOR,

Defendants-Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY,

Intervenor-Appellee.

On Appeal from the United States District Court for the District of Columbia in Case No.1:08-CV-00383(Hon. Rosemary M. Collyer, Judge)

BRIEF OF PLAINTIFFS-APPELLANTS

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Corporate Disclosure Statement

As required by Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Appellants, Otay Mesa Property L.P., Rancho Vista Del Mar, and Otay International, LLC, file this corporate disclosure statement, stating that Otay Mesa Property, L.P., Rancho Vista Del Mar, and Otay International, LLC each has no parent corporation and each is not a publicly held corporation.

Otay Mesa Property L.P., Rancho Vista Del Mar, and Otay International, LLC are privately held real estate investment companies. Their interest in this litigation stem solely from the designation of critical habitat on property owned by Appellants.

Certificate as to Parties, Rulings, and Relates Cases

A. Parties and Amici: Appellants, Otay Mesa Property L.P., Rancho Vista Del Mar, and Otay International, LLC were Plaintiffs in the trial court.

Appellees, the United States Department of the Interior, the United States Fish and Wildlife Service, Dirk Kempthorne, in his official capacity as Secretary of the Department of the Interior, and Lyle Laverty, in his official capacity as Assistant Secretary for Fish, Wildlife, and Parks, Department of the Interior were Defendants in the trial court.

The Center for Biological Diversity was Defendant-Intervenor in the trial court. And the National Association of Home Builders and the New Mexico Cattle Growers' Association were amici. Plaintiffs believe there may be amici who seek to participate in this appeal as well.

B. Rulings Under Review: Appellants appeal the decision of the Honorable Rosemary M. Collyer of the U.S. District Court for the District of Columbia, dated May 27, 2010, denying Plaintiffs' motion for summary judgment and granting the Government's cross-motion for summary judgment based on the record in this Administrative Procedure Act case.

C. Related Cases: This case has neither been before this Court nor any other United States Court of Appeals. But these cases relate to the history of the critical habitat designation at issue here: *Southwest Center for Biological Diversity v. Berg*, Civ. No. 98-1866 (S.D. Cal. filed Oct. 14, 1998); *Building Industry Association v. Norton*, Civ. No. 01-7028 (C.D. Cal. filed Aug. 13, 2001); and *Natural Resources Defense Counsel v. United States Department of the Interior*, 275 F. Supp. 2d 1136 (C.D. Cal. 2002).

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Regulations

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Glossary

A.R. — Administrative Record

ESA — Endangered Species Act

FWS — U.S. Fish and Wildlife Service

NRDC — Natural Resources Defense Council

NEPA — National Environmental Policy Act

The Landowners — Appellants-Plaintiffs, Otay Mesa Property L.P., Rancho Vista Del Mar, and Otay International, LLC

PCE — Primary constituent element

Statements of jurisdiction and the case

This Court has jurisdiction of this case under 28 U.S.C. § 1291 as an appeal from a final judgment of the district court for the District of Columbia. Final judgment was entered by the district court on May 27, 2010 and Appellants, Otay Mesa Property L.P., Rancho Vista Del Mar, and Otay International, LLC (collectively "the Landowners"), timely filed their Notice of Appeal on June 8, 2010. On October 8, 2010, the Court enlarged the time for filing the Landowners' opening brief from October 25, 2010 to November 15, 2010.

Issues presented for review and summary of the argument

This appeal presents three issues for review:

Issue 1

> The Endangered Species Act requires that FWS designate critical habitat essential to the survival of the species when the species is listed. Here, FWS waited for six years—until after they were sued—before designating the subject property as habitat, and did so based solely on a 2001 sighting of four San Diego fairy shrimp in a road rut. No San Diego fairy shrimp have ever been seen there again. Is this designation lawful?

The Endangered Species Act (ESA) defines critical habitat as "the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to

the conservation of the species and (II) which may require special management considerations or protection . . . ."[1]

In this case, the U.S. Fish and Wildlife Service ("FWS") designated the Landowners' 143 acres of prime commercial property as critical habitat in 2003 based on only one confirmed sighting of four San Diego fairy shrimp in a tire rut in 2001[2]—a tire rut that is no longer there.[3] That FWS cannot find San Diego fairy shrimp on the subject property is not for lack of trying as FWS biologists have gone back to the subject property at least eight times since 2001 looking for fairy shrimp and—while they did find some other fairy shrimp in a larger body of water on the property—they have never again found a single San Diego fairy shrimp on the subject property.[4] Failing to find more San Diego fairy shrimp on the property, FWS combined the subject property with parcels of other land that are actually occupied by San Diego fairy shrimp and FWS deemed them all "occupied" and part of the same watershed.[5]

As the district court observed, the evidence supporting FWS's designation of the Landowners' property as occupied is "distinctly thin":

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[1] 16 U.S.C. § 1532(5)(A)(i).
[2] A.R. 2322, EDAW Report, from David J. Griffin, Wildlife Biologist, EDAW, Inc., to Christine Moen, U.S. Fish & Wildlife Service (Sept. 19, 2001).
[3] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶ 8.
[4] A.R. 2321–22; A.R. 2303–05.
[5] Designation of Critical Habitat for the San Diego Fairy Shrimp (*Branchinecta sandiegonensis*), 72 Fed. Reg. 70,648, 70,664–65 (Dec. 12, 2007).

> The government's evidence that the San Diego fairy shrimp actually "occupied" the property at the time it was designated is distinctly thin. Plaintiffs argue that without such proof, no habitat can be designated as "critical." Having failed to designate critical habitat when it listed the San Diego fairy shrimp as endangered, FWS did so years later after being reminded of its obligation by a lawsuit.[6]

Despite the thin support for the designation, the district court nevertheless held that the designation was lawful, erroneously concluding that "[t]he passage of time necessarily forced FWS to assume that what it discovered later had existed earlier."[7] But that the San Diego fairy shrimp have never been seen on any portion of the subject property before or since the single sighting in 2001 fails to support FWS's rule designating the subject property as "occupied."

Instead, what the administrative record does support is the conclusion that these four fairy shrimp were picked up by a tire on a Border Patrol agent's jeep (or a recreationalist's off-road vehicle) from an area that is occupied by the San Diego fairy shrimp on or shortly before the sighting in 2001. This vehicle carried the shrimp eggs to the subject property and then deposited them into the tire rut, whereupon they were discovered by a FWS biologist. The administrative record shows that this tire rut—which was nine meters by four meters, and only ten

[6] *Otay Mesa Prop. L.P. v. U.S. Dep't of Interior*, 714 F. Supp. 2d 73, 2010 U.S. Dist. LEXIS 52233 (D.D.C. May 27, 2010).
[7] *Id.* at *2.

centimeters deep[8]—was located on a road frequently traveled and disturbed by recreational vehicle drivers and U.S. Border Patrol agents:

> The majority of pools sampled were artificially-created road ruts and man-made puddles on maintained gravel and non-maintained unpaved roads and trails. Most of these pools were subjected to varying levels of disturbance from regular use by the U.S. Department of Justice Border Patrol and off-road vehicle use by recreationists. These regular disturbances hindered any potential vernal pool/wetland vegetative growth in the pools.[9]

Further, the record shows that:

> ORV [Off-road vehicle] use also imperils the San Diego fairy shrimp. ORVs crush fairy shrimp eggs; less than the weight of an apple can crush dormant fairy shrimp eggs. ORVs can also cut deep ruts, compact soil, destroy native vegetation, and alter pool hydrology. Fire fighting activities, security patrols, military maneuvers, and recreational activities have cumulatively damaged vernal pool habitats in many areas within the range of the species. On the Otay Mesa, law enforcement-related ORV use by the U.S. Border Patrol has adversely impacted vernal pools known to be inhabited by the San Diego fairy shrimp.[10]

That the district court deferred to FWS's unsupported presumption that the fairy shrimp were on the subject property in 1997 (the date of listing), four years before they were discovered in 2001, is reversible error. That FWS did not

[8] A.R. 2326, EDAW Report Attachment 1.
[9] A.R. 2318–19, EDAW Report.
[10] Determination of Endangered Status for the San Diego Fairy Shrimp, 62 Fed. Reg. 4925, 4936–37 (Feb. 3, 1997) (citations omitted).

identify critical habitat for the shrimp at the time of listing in 1997—as the statute requires—is likewise an independent ground for reversal.[11]

Issue 2

> FWS was required by a California district court order to use the "co-extensive" methodology for its economic analysis for this critical habitat designation. But FWS not only failed to use the ordered methodology, it botched the analysis, and failed to analyze the additional impacts of designating the subject property. Was FWS required to comply with the district court order and to perform an accurate economic analysis for the subject property?

The ESA directs the Secretary of the Interior, through FWS, to "designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat."[12] The economic analysis prepared by FWS for this critical habitat designation intentionally violates the order of the district court for the Central District of California, which remanded the designation to FWS because its original economic analysis (just like this one), did not comply with the requirements of the ESA.

The 2004 economic analysis originally prepared by FWS, which complied with the California district court's order, showed that the cost of the proposed designation was $53,042,532.[13] But FWS did not use its 2004 economic analysis

[11] *Otay Mesa Prop.*, 2010 U.S. Dist. LEXIS 52233, at *2.
[12] 16 U.S.C. § 1533(b)(2).
[13] A.R. 18299, Report Addendum: Economic Analysis of Critical Habitat Designation for the San Diego Fairy Shrimp (Sept. 24, 2007).

to determine the area (including the subject property) designated as critical habitat for the San Diego fairy shrimp in 2003. Instead, when FWS produced its new economic analysis on remand, FWS prepared an addendum to the 2004 economic analysis, but reverting back to the very baseline methodology that the California district court had rejected —thereby violating the district court's order. That economic analysis significantly underestimates the economic cost of the regulation at about $23 million.[14]

Under the law of this Circuit, FWS is bound by the original decision ordering FWS to utilize the co-extensive economic analysis methodology. That decision was litigated, finally decided in a published opinion, and the parties (FWS and environmental and building industry) all had the incentive to (and did) fully litigate the issue.[15] Therefore, the district court erred in concluding otherwise.

The district court also erroneously concluded that the *Chevron* doctrine required the court to defer to FWS's interpretation, even though the district court judge acknowledged that she disagreed with FWS's methodology choice.[16] What the district court here failed to recognize, however, is that when an agency, such as FWS's repeatedly changes its policy positions based on litigation strategy, it

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[14] *Id.*
[15] *In re United Mine Workers Employee Benefit Plans Litig.*, 782 F. Supp. 658, 670 (D.D.C. 1992).
[16] *Otay Mesa Prop.*, 2010 U.S. Dist. LEXIS 52233, at *39–40 (May 27, 2010).

provides the court with little or no reliable agency interpretation to which it can defer. As the Supreme Court held in *Immigration and Naturalization Service v. Cardoza-Fonseca*, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[17] And a court does not give *Chevron* deference "to what appears to be nothing more than an agency's convenient litigating position."[18]

But even if FWS would have used the proper methodology, it so botched the economic analysis for this designation that it cannot be sustained. Having calculated the cost of the designation at $53,042,532 in its 2004 economic analysis[19] (using the co-extensive methodology), FWS took a short cut in 2007 (when it reversed position and decided to use the baseline methodology) by simply multiplying by 44% (the percentage increase of land in the revised designation) ($53,042,532 x .44 = $23,140,688).[20] The resulting figure of $23,140,688[21] is thus an arbitrary number having no relationship to the actual economic cost of the designation—regardless of which methodology is used.

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[17] *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
[18] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988).
[19] 72 Fed. Reg. at 70,688; *see also* A.R. 6720.
[20] 72 Fed. Reg. at 70,688.
[21] *Id.*

Finally, FWS admits that its 2004 economic analysis failed to identify additional costs associated with the designation of critical habitat for the San Diego fairy shrimp on the subject property:

> [T]o the extent that the *Pinchot* Decision results in additional "within critical habitat" conservation above that required by existing HCPs that are assumed to provide baseline protection for the SDFS, additional project modification costs not quantified in the DEA may be incurred.[22]

Having made no effort to quantify these additional costs in the 2007 economic analysis—they remain unknown today—and unconsidered by FWS when it designated critical habitat and having botched the underlying calculations used for the economic analysis, FWS provided the district court with several grounds upon which to conclude that the designation of this subject property was arbitrary, capricious, and not in accordance with the ESA. And despite the ample opportunities for so holding, the district court judge erred in deferring to FWS's choice of methodology, and in not holding that this economic analysis failed to comply with the ESA because it was inaccurate and incomplete.

Issue 3

> The National Environmental Policy Act requires an analysis of the environmental impacts of every major federal action affecting the human environment. But FWS only prepares environmental analyses under NEPA for designations of critical habitat in land located within the Tenth Circuit. Since Judge Lamberth's decision in *Cape Hatteras*

[22] A.R. 18302, Report Addendum.

follows the Tenth Circuit, is FWS required to perform a NEPA analysis for critical habitat designations for this case?

NEPA requires that, "to the fullest extent possible," all agencies of the federal government to prepare environmental impact statements for all "major Federal actions significantly affecting the quality of the human environment."[23] Because the lack of an environmental impact statement deprives the decision-maker of important information regarding the potential environmental impacts of his decision, a final agency action that does not comply with NEPA is arbitrary and capricious and will be set aside.[24]

But FWS refused to comply with NEPA in this case, stating that "it is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Act."[25]

FWS's position that NEPA does not apply to critical habitat designations outside the Tenth Circuit is based on a 1995 decision of the Ninth Circuit, *Douglas County v. Babbitt*, holding that the designation of critical habitat on federal land does not trigger NEPA review.[26] But FWS does comply with NEPA for critical

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[23] 42 U.S.C. § 4332(2)(C).
[24] *Cape Hatteras Access Pres. Alliance v. U. S. Dept. of Interior*, 344 F. Supp. 2d 108, 134 (D.D.C. 2004); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004).
[25] 72 Fed. Reg. at 70,665, 70,692.
[26] *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

habitat designations in the Tenth Circuit because that court in *Catron County v. United States Fish and Wildlife Service*[27] rejected the Ninth Circuit's holding.[28]

No court has followed the Ninth Circuit's holding that NEPA does not apply to critical habitat designations. In fact, a recent decision by the district court for the District of Columbia flatly rejects it. In *Cape Hatteras v. U.S. Department of the Interior*, Judge Lamberth reversed and remanded FWS's designation of critical habitat for the piping plover because FWS had (as in this case) failed to comply with NEPA's statutory requirements.[29] After carefully examining both the Ninth Circuit's *Douglas County* holding and the Tenth Circuit's *Catron County* decision, the district court rejected the Ninth Circuit and adopted the reasoning of the Tenth, stating: "Given the different purposes and requirements of these statutes this Court follows the Tenth Circuit's well-reasoned opinion that NEPA applies to designations" of critical habitat.[30] The *Cape Hatteras* court further stated that

> to ignore NEPA while designating critical habitat is to argue for NEPA's implicit repeal by the ESA and amendments to the ESA, an argument not supported by the ESA's text or the legislative history . . . the Ninth Circuit's reasoning cannot be followed.[31]

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[27] *Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996).
[28] *Id.* at 1434 (citations omitted).
[29] *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004).
[30] *Id.* at 134.
[31] *Id.* at 135.

Whether the district court intentionally failed to address the NEPA issue in this case is unclear because the decision is silent on this issue. But because FWS admits that it refuses to comply with NEPA except within the Tenth Circuit, this rule is patently arbitrary, capricious, and contrary to law, so it must be reversed and set aside as unlawful.

Factual and procedural background

This case involves the designation of 143 acres of prime commercial property located along the United States-Mexican border near San Diego, California as habitat critical to the survival for the endangered San Diego fairy shrimp. The Landowners together own approximately 274.55 acres, approximately 143 acres of which the U.S. Fish and Wildlife Service ("FWS") has designated as habitat for the San Diego fairy shrimp.[32] These 143 acres are included in a 391-acre area that FWS refers to as Subunit 5D, a parcel designated by FWS as fairy shrimp critical habitat.[33]

A full-grown San Diego fairy shrimp (*Branchinecta sandiegonensis*) is about the size of an ant and is commonly known as a brine shrimp or "sea monkey."[34] This small aquatic crustacean in the order *Anostraca* lives in vernal pools and other ephemeral rain puddles in coastal Orange and San Diego counties

[32] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick. Decl. ¶¶ 1–4.
[33] *See* Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl., Map of Subject Property, attached to Decl. as Ex. 1.
[34] For a photograph, *see* A.R. 8990.

in southern California and northwestern Baja California, Mexico.[35] According to FWS, "less than 21 ha (200 ac) of occupied vernal pool habitat likely remains" for the San Diego fairy shrimp."[36]

Because the San Diego fairy shrimp can reside in groups of hydrologically connected vernal, or ephemeral, pools that rely on the areas surrounding the pool or its watershed to collect rainfall to fill the vernal pool basins,[37] which are by definition temporary, the life span of a San Diego fairy shrimp is equally brief:

> The species hatches and matures within 7 days to 2 weeks depending on water temperature . . . . The San Diego fairy shrimp disappear after about a month, but animals will continue to hatch if subsequent rains result in additional water or refilling of the vernal pools . . . . The eggs are either dropped to the pool bottom or remain in the brood sac until the female dies and sinks.[38]

When the pool of a fairy shrimp dries up, the shrimp in the pool die.[39] In addition, these fairy shrimp are not mobile.[40] Unless they are carried by some other means, such as being blown by the wind, carried by water, or even be picked up by a tire of a motor vehicle and deposited elsewhere, they remain in the same vernal pool for their entire few months of life.[41]

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[35] 72 Fed. Reg. at 70,648.
[36] 62 Fed. Reg. at 4926.
[37] 72 Fed. Reg. at 70,648.
[38] 62 Fed. Reg. at 4926.
[39] *Id.*
[40] *See* 72 Fed. Reg. at 70,664.
[41] *See id.*

In this case, there was one confirmed sighting of four San Diego fairy shrimp on the subject property, in a tire rut. That tire rut—which was nine meters by four meters, and only ten centimeters deep[42]—was located on a road frequently traveled and disturbed by recreational vehicle drivers as well as the U.S. Border Patrol:

> The majority of pools sampled were artificially-created road ruts and man-made puddles on maintained gravel and non-maintained unpaved roads and trails. Most of these pools were subjected to varying levels of disturbance from regular use by the U.S. Department of Justice Border Patrol and off-road vehicle use by recreationists.[43]

The subject property lies in a rugged and hilly coastal-mesa area west of the foothills of the San Ysidro Mountains.[44] It is generally only accessible in heavy-duty utility vehicles such as jeeps, dirt bikes, or on horseback.[45] The property is not accessible by public roads.[46] Because of the impact these off-road vehicles have on the dirt roads, U.S. Border Patrol agents regularly grade the roads in the area, including on the subject property, to eliminate road ruts and to facilitate the Border Patrol's ability to patrol the property:

> Beginning in the Spring of 1995 and continuing until 2002, Border Patrol agent and road grade operator Otis Harper graded the major existing roads that traversed the subject properties but denied creating any new roads. In 1996 and 1997, the Border Patrol placed gravel on

[42] A.R. 2326, EDAW Report Attachment 1.
[43] A.R. 2318, EDAW Report.
[44] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶ 5.
[45] *Id.*
[46] *Id.*

> the north-south road located in Johnny Wolf's Draw on parcels 1 and 4.[47]

Thus, the tire rut that served as a vernal pool for four San Diego fairy shrimp found by FWS on the subject property has long since disappeared.[48]

Designation of the San Diego Fairy Shrimp as endangered

On February 3, 1997, FWS listed the San Diego fairy shrimp as an endangered species.[49] But FWS did not designate critical habitat at that time.[50] Instead, FWS stated that "[b]ased on a composite of available information, the Service estimate[d] that less than 81 ha (200 ac) of occupied vernal pool habitat likely remains" for the San Diego fairy shrimp.[51]

On October 14, 1998, the Center for Biological Diversity filed suit in the U.S. District Court in the Southern District of California challenging FWS's decision not to designate critical habitat and on September 16, 1999, the court ordered FWS to propose critical habitat for the San Diego fairy shrimp.[52]

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[47] *Otay Mesa Prop., L.P. v. United States*, 86 Fed. Cl. 774, 783–84 (2009) (citations omitted).
[48] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶ 8 (Dec. 22, 2008) ("This road rut pool 5 was located on one of the roads that the Border Patrol grades, gravels, and maintains. This road rut no longer exists, having long since disappeared.").
[49] Determination of Endangered Status for the San Diego Fairy Shrimp, 62 Fed. Reg. 4925 (Feb. 3, 1997).
[50] *Id.* at 4937.
[51] *Id.* at 4926.
[52] Proposed Designation of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. 12,181, at 12,182–83 (Mar. 8, 2000).

FWS proposed the initial critical habitat rulemaking on March 8, 2000, designating 36,501 acres of critical habitat.[53] The final rule followed on October 23, 2000, designating approximately 4,025 acres of critical habitat for the San Diego fairy shrimp in Orange and San Diego Counties, California. Notably, the Landowners' land was not included in this designation.[54]

FWS's 2000 designation of critical habitat for the San Diego fairy shrimp (as well as another species, the California gnatcatcher) was challenged by industry interests in a suit filed in the district court for the District of Columbia and by environmental interests, who filed in the Central District of California (where the cases were subsequently consolidated). Admitting that its "baseline" method of economic analysis violated the ESA, FWS moved the court for a voluntary remand, which industry interests supported and environmental groups opposed.[55] FWS specifically requested remand so that it could "reconsider the designations [of critical habitat] in light of . . . *New Mexico Cattle Growers Association v. USFWS*,

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[53] 65 Fed. Reg. at 12,184.
[54] Final Determination of Critical Habitat for the San Diego Fairy Shrimp, 65 Fed. Reg. 63,438 (Oct. 23, 2000).
[55] *See Building Indus. Assoc. v. Norton*, No. 01-7028 (C.D. Cal. filed Jan. 17, 2001) [Docket Nos. 40, 41, 45].

248 F.3d 1277 (10th Cir. 2001)."[56] On June 11, 2002, the district court for the Central District of California granted that request.[57]

The district court agreed with FWS, holding that FWS's use of the "baseline" method of economic analysis disapproved by the Tenth Circuit was substantive error:

> There is no doubt that the Fish and Wildlife Service's failure to perform a proper economic impact analysis in compliance with section 4(b)(2) of the ESA, for the current gnatcatcher and fairy shrimp critical habitats, was substantive error under *New Mexico Cattle Growers*."[58]

The district court therefore ordered FWS to revise the San Diego fairy shrimp critical habitat designation using an economic analysis that accords with the rule announced in *New Mexico Cattle Growers*.[59]

FWS proposed a new designation of critical habitat for the San Diego fairy shrimp on April 22, 2003, encompassing approximately 6,098 acres in Orange and

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[56] *Natural Res. Def. Council (NRDC) v. U.S. Dep't. of Interior*, 275 F. Supp. 2d 1136, 1141–42 (C.D. Cal. 2002).
[57] Order (Jun. 11, 2002), *Building Indus. Assoc. v. Norton*, No. 01-7028 (C.D. Cal. filed Jan. 17, 2001) [Docket No. 48].
[58] *NRDC*, 275 F. Supp. 2d at 1145 (internal citation omitted).
[59] *Id.* at 1156.

San Diego counties, but again the Landowners' property was not included in the designation.[60]

One comment pointed out that the Otay Mesa area (where the subject property is located) is not hospitable to the development of fairy shrimp habitat:

> [T]he East Otay Mesa area support relatively few known locations of the listed San Diego fairy shrimp. The locations that do support fairy shrimp are scattered and are far from comprising any significant vernal pool/fairy shrimp habitat complexes. Additionally, the mesa area generally slopes to the south, providing limited flat areas where fairy shrimp pools could become established. Designation of this area as critical habitat for the San Diego fairy shrimp would not afford additional benefits to the species and would not play a significant role in the eventual recovery of the species.[61]

But on December 12, 2007, FWS published the final rule designating 3,082 acres of critical habitat for the San Diego fairy shrimp, and for the first time including 143 acres of the Landowners' land.[62] In preparing the economic analysis for the 2007 critical habitat designation, FWS flatly contradicted its own position taken in the district court—and the requirements of the district court's remand order—and reverted to the baseline methodology that FWS had asserted (and the district court had ruled) was contrary to the requirements of the ESA.[63]

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[60] Designation of Critical Habitat for the San Diego Fairy Shrimp, 68 Fed. Reg. 19,888 (Apr. 22, 2003); *see also* Pls.' Ex. A to Wick Decl. (showing subject property outlined in red).
[61] A.R. 24126.
[62] Designation of Critical Habitat for the San Diego Fairy Shrimp (*Branchinecta sandiegonensis*), 72 Fed. Reg. 70,648 (Dec. 12, 2007).
[63] A.R. 18300, Report Addendum: Economic Analysis of Critical Habitat Designation for the San Diego Fairy Shrimp (Sept. 24, 2007).

Further, FWS never prepared an Environmental Assessment or an Environmental Impact Statement for this critical habitat designation, claiming this was not required.[64]

On March 3, 2008, the Landowners filed a complaint in district court challenging the designation of their property as critical habitat for the San Diego fairy shrimp. Following briefing and without a hearing, on May 27, 2010, the Honorable Rosemary M. Collyer of the U.S. District Court for the District of Columbia granted summary judgment for FWS.[65] Final judgment in the district court was entered May 27, 2010,[66] and this appeal followed.

Argument

I. Standard of review

This Court employs a de novo standard of review for appeals from a district court's grant of summary judgment in Administrative Procedure Act cases (such as this one): "Because the court ruled on summary judgment, our review is de novo."[67] This de novo standard of review requires this Court to review the

[64] 72 Fed. Reg. at 70,654; *see also* 40 C.F.R. § 1508.
[65] *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 714 F. Supp. 2d 73, 2010 U.S. Dist. LEXIS 52233 (D.D.C. May 27, 2010).
[66] Order (May 27, 2010) [Docket No. 67].
[67] *American Wildlands v. Kempthorne*, 530 F.3d 991 (D.C. Cir. 2008).

challenged agency action on its own and, just like the district court, to apply the arbitrary and capricious standard of the Administrative Procedure Act.[68]

The Supreme Court has summarized the arbitrary and capricious standard:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[69]

Review under the arbitrary and capricious standard is "narrow," but "searching and careful."[70] The "review must not rubber-stamp . . . administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[71]

II. The record does not support FWS's finding that the Landowners' 143 acres was occupied by San Diego fairy shrimp

To sustain its designation of the Landowners' 143 acres as critical habitat, the U.S. Fish and Wildlife Service ("FWS") must identify evidence in the administrative record supporting its finding that the Landowners' property was actually occupied by San Diego fairy shrimp. But because the sole identification of San Diego fairy shrimp on the Landowners' property is a single sighting in 2001

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[68] *Castlewood Products, LLC v. Norton*, 365 F.3d 1076 (D.C. Cir. 2004).
[69] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).
[70] *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378 (1989).
[71] *Ocean Advocates v. U.S. Army Corps of Eng'rs,* 361 F.3d 1108, 1119 (9th Cir. 2004).

of four specimens in a tire rut that has long since disappeared, the record simply fails to support FWS's "occupied" finding.[72] Nor may FWS combine the Landowners' 143 acres into a geographical unit with adjacent occupied property and, by this device, convert it from unoccupied to occupied land.

In drafting the Endangered Species Act (ESA), Congress distinguished between land occupied by the species and unoccupied land, defining critical habitat as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[73]

A designation of critical habitat that ignores the distinction Congress drew between occupied and unoccupied land does not comply with the ESA, as the Ninth Circuit recently stated in a case involving endangered owls:

> It is possible for the FWS to go too far. Most obvious is that the agency may not determine that areas unused by owls are occupied merely because those areas are suitable for future occupancy. Such a

[72] *See* Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶ 8 (Dec. 22, 2008).
[73] 16 U.S.C. § 1532(5)(A).

position would ignore the ESA's distinction between occupied and unoccupied areas.[74]

Because in this case FWS did not designate any unoccupied land as critical habitat, finding instead that all of the 3,082 acres it designated as critical habitat were occupied,[75] the designation of the Landowners' 143 acres as critical habitat can be sustained only if the record supports FWS's finding that the Landowners' property was occupied by San Diego fairy shrimp. The sighting of four San Diego fairy shrimp in a tire rut in 2001[76]—a tire rut that is no longer there[77]—falls far short of the necessary support.

A. The single reported 2001 sighting of four San Diego fairy shrimp in a road rut that no longer exists is insufficient to support FWS's finding that the 143 acres is occupied critical habitat

FWS made no individualized finding that San Diego fairy shrimp actually occupied 143 acres of the Landowners' property. Instead, FWS simply made a blanket factual finding that all 3,082 acres that it designated as critical habitat are occupied by San Diego fairy shrimp. The final rule states: "All areas designated as critical habitat for San Diego fairy shrimp are occupied,"[78] and "[w]e consider all of the vernal pool complexes designated as critical habitat to have been

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[74] *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2009).
[75] 72 Fed. Reg. 70,666 ("We are designating 3,082 ac (1,248 ha) of land as critical habitat for San Diego fairy shrimp in 5 units with a total of 29 subunits.").
[76] A.R. 2322, EDAW Report, from David J. Griffin, Wildlife Biologist, EDAW, Inc., to Christine Moen, U.S. Fish & Wildlife Service (Sept. 19, 2001).
[77] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶ 8.
[78] 72 Fed. Reg. at 70,664.

occupied at the time of listing and to be currently occupied by the San Diego fairy shrimp."[79]

The district court itself admitted that the evidence supporting FWS's designation of the Landowners' property is "distinctly thin."[80]

The administrative record does not contain facts on which FWS or the district court could find that the Landowners' property is occupied by San Diego fairy shrimp, as required by 16 U.S.C. § 1532(5)(A). Although the record does contain numerous surveys of the property conducted under the aegis of FWS, there is only one confirmed identification of the species on the Landowners' property. That positive identification occurred in 2001, in a "road-rut pool" located on a "heavily-traveled dirt road . . . ."[81] That particular road rut has long since disappeared, as the Border Patrol regularly grades, gravels, and maintains this particular road to provide access for its vehicles to patrol the nearby Mexican border.[82] Indeed, on subsequent visits to this location (known as pool 5), the biologists found no traces of San Diego fairy shrimp.[83]

Contrary to FWS's finding that all of the 3,082 acres it designated as critical habitat were occupied when the species was listed in 1997, nothing in the record

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[79] *Id.* at 70,666.
[80] *Otay Mesa Prop.*, 2010 U.S. Dist. LEXIS 52233, at *2.
[81] A.R. 2322, EDAW Report, from David J. Griffin, Wildlife Biologist, EDAW, Inc., to Christine Moen, U.S. Fish & Wildlife Service (Sept. 19, 2001).
[82] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶ 8 (Dec. 22, 2008).
[83] A.R. 2326 (documenting survey of pool 5 on March 15, 2001).

suggests that this temporary tire rut (or the fairy shrimp it contained) even existed in 1997. The administrative record shows that the tire rut—which was nine meters by four meters, and only ten centimeters deep[84]—in which the four fairy shrimp were found in 2001 was located on a road frequently traveled and disturbed by recreational vehicle drivers as well as the U.S. Border Patrol.[85]

Nothing in the record refutes common experience that tire ruts are impermanent and that it is therefore highly unlikely that this particular tire rut, discovered in 2001, would have existed four years earlier without being washed out, altered, or destroyed by vehicles passing over it. And as the unrefuted declaration of Mr. Wick establishes, that tire rut no longer exists.[86]

U.S. Border Patrol agents regularly grade roads (including this one) on the Landowners' property to eliminate road ruts, as the Court of Federal Claims stated in a case involving this very property.[87]

FWS investigators were never again able to find San Diego fairy shrimp in this tire rut or anywhere else on the Landowners' property despite repeated attempts to do so. They surveyed the subject property eight times during the wet

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[84] A.R. 2326, EDAW Report Attachment 1.
[85] A.R. 2318, EDAW Report.
[86] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶ 8 (Dec. 22, 2008) ("This road rut pool 5 was located on one of the roads that the Border Patrol grades, gravels, and maintains. This road rut no longer exists, having long since disappeared.").
[87] *Otay Mesa Prop.*, 86 Fed. Cl. at 783–84 (citations omitted).

season, from January 23, 2001 to May 16, 2001,[88] without ever finding San Diego fairy shrimp on the Landowners' property again. That the discovery of fairy shrimp in the tire rut could never be duplicated, despite intensive investigation by the same biologists who made the initial discovery, strongly suggests that this 143-acre tract was not occupied by San Diego fairy shrimp at the time of listing in 1997 or at the time it was designated in 2007. FWS's failure to explain this contrary evidence undermines its "occupied" finding, as one district court has ruled:

> In this case, the court must conclude that in light of Defendants' failure to articulate a rational reason for including the areas in question within the occupied critical habitat in the face of the evidence to the contrary, it was an abuse of discretion for the Service to do so.[89]

Finally, no San Diego fairy shrimp were ever identified in the cattle pond on the Landowners' property; FWS simply assumed that the unidentified fairy shrimp sighted there were, in fact, the endangered San Diego species:

> On January 23, 2001, *Branchinecta* sp. larvae were observed in pool #68 [an artificially created cattle tank or pond that temporarily fills with run-off following rain events] . . . , and although were not identified to the species level, they are presumed to be San Diego fairy shrimp . . . .[90]

The record discloses no reason and FWS offers no reason why FWS should presume these *Branchinecta* (fairy shrimp) larvae to be *Branchinecta*

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[88] A.R. 2321–22, EDAW Report.
[89] *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 268 F. Supp. 2d 1197, 1221–22 (E.D. Cal. 2003).
[90] A.R. 2322, EDAW Report.

sandiegonensis rather than any of the 40 other species of *Branchinecta* identified by the Integrated Taxonomic Identification System[91] that the FWS Web site identifies as "a source for authoritative taxonomic information on plants, animals, fungi, and microbes of North America and the world."[92] In fact, the record goes on to show that Riverside fairy shrimp, not San Diego fairy shrimp, were positively identified in pool 68 in March of 2001.[93]

In short, an unidentified sighting of what could be any one of a number of common fairy shrimp species is not evidence that the Landowners' property is occupied by the endangered San Diego fairy shrimp.

B. FWS may not combine the Landowners' unoccupied land with other, occupied land and then designate the entire unit as "occupied"

In defending this rule, FWS asks this Court to allow it to combine the Landowners' unoccupied land in a "subunit" with other lands that are occupied by San Diego fairy shrimp, designate the combined area as "subunit 5D," and then call the entire combined area "occupied critical habitat."[94] This approach is,

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[91] Integrated Taxonomic Information System, http://www.itis.gov/.
[92] San Diego Fairy Shrimp Species Profile, http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=K049 (last visited Sept. 27, 2010).
[93] A.R. 2322, EDAW Report.
[94] 72 Fed. Reg. at 70,666, 70,674.

however, precluded by the statutory requirement that FWS segregate occupied areas from unoccupied, treating them differently.[95]

The ESA underscores the importance of occupancy by requiring that FWS only designate "specific areas within the geographical area occupied by the species,"[96] and courts have upheld FWS's exclusion of lands by metes and bounds description[97] and by general word description.[98] Particularly with a non-mobile species like fairy shrimp, the designation of large tracts of unoccupied land as critical habitat by pretending that it is in fact occupied, does nothing to preserve the species and, through useless Section 7 consultations,[99] diverts FWS's efforts to preserve the fairy shrimp where they actually are found.

FWS therefore had no factual basis for finding that the Landowners' property is currently occupied by San Diego fairy shrimp and thus no regulatory basis for designating the subject property as critical habitat for that species. Accordingly, the final rule must be set aside as it applies to the Landowners' land, on the ground that it is arbitrary and capricious.

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[95] 16 U.S.C. § 1532(5)(A); *Arizona Cattle Growers Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1027–29 (D. Ariz. 2008).
[96] 16 U.S.C. § 1532(5)(A)(i).
[97] *Arizona Cattle Growers Ass'n*, 534 F. Supp. 2d at 1027–28.
[98] *Cape Hatteras*, 344 F. Supp. 2d at 126.
[99] *See* 16 U.S.C. § 1536(a)(2).

C. Other than a small area, the majority of the 143 acres of the subject property lacks vernal pool complexes—the "primary constituent element" required for this designation

San Diego fairy shrimp live only in vernal pools.[100] In its final rule, FWS identified vernal pools among the three "primary constituent elements" (PCEs) that must be present in order to designate land as fairy shrimp critical habitat: (1) certain types of vernal pool complexes; (2) appropriate connecting hydrology, and (3) appropriate soils and topography.[101] The administrative record, however, identifies vernal pools on only a small portion of the Landowners' property, and thus fails to support the designation of most of the Landowners' 143 acres as critical habitat.[102]

In its final rule, FWS identified three PCEs for the San Diego fairy shrimp. The final rule states:

> Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the San Diego fairy shrimp's PCEs are:
>
> (1) Vernal pools with shallow to moderate depths (2 in (5 cm) to 12 in (30 cm)) that hold water for sufficient lengths of time (7 to 60 days) necessary for incubation, maturation, and reproduction of the San Diego fairy shrimp**,** in all but the driest years;
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> (2) Topographic features characterized by mounds and swales and depressions within a matrix of surrounding uplands that result in complexes of continuously, or intermittently, flowing surface water in

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[100] 72 Fed. Reg. at 70,648.
[101] *Id.* at 70,665.
[102] *Cape Hatteras*, 344 F. Supp. 2d at 120 (internal citations omitted) (citing 16 U.S.C. § 1532(5)(A)(i); 50 C.F.R. § 424.12(b)(5)).

> the swales connecting the pools described in PCE 1, providing for dispersal and promoting hydroperiods of adequate length in the pools (i.e., the vernal pool watershed); and
>
> (3) Flat to gently sloping topography, and any soil type with a clay component and/or an impermeable surface or subsurface layer known to support vernal pool habitat (including Carlsbad, Chesterton, Diablo, Huerhuero, Linne, Olivenhain, Placentia, Redding, and Stockpen soils).[103]

In response to the comments filed by the Landowners and other East Otay Mesa property owners asserting that much of their lands did not contain the PCEs for fairy shrimp, FWS made a specific finding that, in its view, those lands do possess all three PCEs:

> The areas we are designating as critical habitat contain the features essential for the conservation of the San Diego fairy shrimp. Critical habitat subunit 5D on eastern Otay Mesa contains vernal pools that support known locations of the San Diego fairy shrimp and the watershed area necessary to maintain the vernal pools. The area designated as critical habitat gently slopes to the south and contains several vernal pools dispersed across an area of approximately 391 ac (158 ha).[104]

There are no facts in the record, however, supporting the existence of vernal pools on most of the subject property.

First, FWS identified vernal pools on only a small portion of the Landowner's property and yet it designated 143 acres of that property as critical

[103] 72 Fed. Reg. at 70,665.
[104] *Id.* at 70,653.

habitat.[105] Indeed, as discussed above, only one small road rut, perhaps four meters wide, possibly held San Diego fairy shrimp,[106] and that road rut no longer exists. FWS has identified approximately 30 other unoccupied vernal pools on the subject property.[107] Collectively, these pools comprise, at most, a quarter of the 143 acres.

But these 30-odd pools are unoccupied by San Diego fairy shrimp and will likely never become inhabited. As FWS explains, fairy shrimp can only be transported short distances by water flow between vernal pool complexes: "During periods of high rainfall, adult fairy shrimp and cysts (dormant eggs) may be transported between vernal pools in a complex as individual pools become connected by over surface flows of water."[108] Further, the topography of the land around the subject property, in the words of FWS, "gently slopes to the south."[109] Because the unoccupied vernal pools on the subject property lie far away to the north and to the east of any known inhabited pools of San Diego fairy shrimp,[110] the surface flow of water during periods of high rainfall will flow south and not towards these unoccupied vernal pools. Consequently, fairy shrimp cannot migrate to these unoccupied vernal pools and establish a colony there.

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[105] Pls.' Ex. 1 to Pls.' Mot. for Summ. J., Wick Decl. ¶¶ 1–4.
[106] A.R. 2351.
[107] A.R. 2305, 2351.
[108] 72 Fed. Reg. at 70,664.
[109] *Id.* at 70,653.
[110] A.R. 2351.

Finally, designation of much of the 143 acres cannot be justified as watershed for the occupied vernal pools of fairy shrimp because it is south of the alleged fairy shrimp pools.[111] Again, the water in this area of Otay Mesa flows to the south.[112] Most of the 143 acres lies to the south and to the east of FWS's identified pools of fairy shrimp and will drain south without encountering pools of fairy shrimp.[113] Accordingly, the record does not support FWS's conclusion that the 143 acres provides watershed for the San Diego fairy shrimp.

III. FWS's economic analysis violates the district court's order on remand and also fails to accurately calculate the economic impact of this designation

The Endangered Species Act (ESA) directs the Secretary of the Interior, through FWS, to "designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat."[114] The economic analysis prepared by the U.S. Fish and Wildlife Service ("FWS") for this critical habitat designation intentionally violates the order of the District Court for the Central District of California, which remanded the designation to FWS because its original

[111] *See* Pls.' Ex. A attached to Pls.' Ex. 1 to Pls.' Mot. for Summ. J. (showing the subject property, outlined in red, in relation to the designated critical habitat).
[112] 72 Fed. Reg. at 70,653.
[113] *See* Pls.' Ex. A attached to Pls.' Ex. 1 to Pls.' Mot. for Summ. J.
[114] 16 U.S.C. § 1533(b)(2).

economic analysis, like the present one, used a "baseline" methodology that did not comply with the requirements of the ESA.

But this analysis is also flawed because, even under the baseline methodology, it fails to accurately calculate the economic impact of that designation. The district court in this case incorrectly deferred to FWS's decision to ignore the California district court's order governing this case and FWS's own prior interpretations of the economic analysis requirement.

A. FWS's economic analysis violates the district court's order and principles of issue preclusion

FWS first promulgated a rule designating critical habitat for the San Diego fairy shrimp in 2000.[115] That designation was challenged by both environmental and industry groups and FWS sought a voluntary remand to revise its economic analysis because the economic analysis prepared for that 2000 designation used the so-called "baseline" methodology that had since been invalidated by the Tenth Circuit Court of Appeals in *New Mexico Cattle Growers v. U.S. Fish and Wildlife Service*.[116] The environmental groups opposed remand, defending FWS's baseline methodology, but the district court for the Central District of California (Judge

[115] 65 Fed. Reg. at 63,438; 72 Fed. Reg. at 70,649.
[116] *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001).

Wilson) ruled for FWS, finding its baseline economic analysis violated the requirements of the ESA.[117]

On remand, in 2004, FWS initially produced an economic analysis using the co-extensive methodology consistent with the court's order. That analysis states:

> [I]n an effort to ensure that this economic analysis complies with the instructions of the 10th Circuit as well as to ensure that no costs of the proposed critical habitat are omitted, the potential effects associated with all section 7 impacts in or near proposed critical habitat are fully considered. In doing so, the analysis ensures that any critical habitat impacts that are co-extensive with the listing of the species are not overlooked.[118]

The 2004 economic analysis complied with the California district court's order and it determined the cost of the proposed rule at $53,042,532.[119]

But FWS did not use its 2004 economic analysis, prepared in compliance with the district court's order, to determine the area designated as critical habitat for the San Diego fairy shrimp in 2007. Instead, FWS suddenly produced an addendum to that economic analysis in which it explicitly reversed position and reverted to the very baseline methodology that FWS itself had rejected in 2002—intentionally violating the district court's order remanding this critical habitat designation, and contradicting its own concession in the district court that the

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[117] *NRDC*, 275 F. Supp. 2d at 1156; *see also N.M. Cattle Growers Ass'n*, 248 F.3d at 1277.

[118] A.R. 6740, Draft Report: Economic Analysis of Critical Habitat Designation for the San Diego Fairy Shrimp (Apr. 7, 2004) (citations omitted).

[119] A.R. 18299, Report Addendum: Economic Analysis of Critical Habitat Designation for the San Diego Fairy Shrimp (Sept. 24, 2007).

baseline method violated the ESA. That economic analysis significantly underestimates the economic cost of the regulation at about $23 million.[120] The record shows that FWS freely admitted it was reverting to the baseline methodology used in the original (2000) economic analysis (and disapproved by the California district court), explaining:

> The current practice of the Service in its economic analysis of proposed critical habitat regulations is to estimate the impacts occurring as a result of baseline regulations and then estimate the impacts that are incremental to that baseline (i.e., impacts caused solely by the designation of critical habitat).[121]

The challenged rule is thus based on an economic analysis that uses the baseline methodology that the California district court rejected (at FWS's request), and which the *New Mexico Cattle Growers* Court held to be inconsistent with 16 U.S.C. § 1533(b)(2) of the ESA:

> [W]e conclude Congress intended that FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes. Thus, we hold the baseline approach to economic analysis is not in accord with the language or intent of the ESA.[122]

As FWS itself urged before the California district court, FWS's use of the baseline method, disapproved by the Tenth Circuit, was in fact substantive error:

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[120] *Id.*

[121] A.R. 18300 Report Addendum: Economic Analysis of Critical Habitat Designation for the San Diego Fairy Shrimp (Sept. 24, 2007).

[122] *N.M. Cattle Growers Ass'n*, 248 F.3d at 1285.

> There is no doubt that the Fish and Wildlife Service's failure to perform a proper economic impact analysis in compliance with section 4(b)(2) of the ESA, for the current gnatcatcher and fairy shrimp critical habitats, was substantive error under *New Mexico Cattle Growers*.[123]

But even more fundamentally, "when a district court directs an agency to proceed under a certain legal standard, the agency has no choice but to conduct its proceedings and to render its decision pursuant to that standard."[124] Thus, FWS had no choice. It was required to conduct an economic analysis under the coextensive methodology because the district court had already ordered it to do so. It had no "discretion" to violate Judge Wilson's valid and binding final order.[125]

Further, the final decision of the District Court for the Central District of California invokes the issue preclusion principles of res judicata and collateral estoppel, precluding FWS from re-litigating the appropriate method of economic analysis for this critical habitat designation. This Circuit applies the pragmatic, transactional approach of the Restatement to determine what issues are, in fact, precluded from re-litigation.[126]

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[123] *NRDC*, 275 F. Supp. 2d at 1145 (internal citation omitted).
[124] *Occidental Petroleum Corp. v. Securities and Exchange Comm'n,* 873 F.2d 325, 330 (D.C. Cir. 1989).
[125] Judge Collyer held that "despite the district court order by Judge Wilson, as long as the FWS fully explained itself and acted within the scope of its discretion, it was free to change its mind. . . ." *Otay Mesa Prop.*, 2010 U.S. Dist. LEXIS 52233, at *40.
[126] *Tembec, Inc. v. United States*, 570 F. Supp. 2d 137, 141 n.5 (D.D.C. 2005) (citations omitted).

There are three requirements for the application of collateral estoppel and res judicata: (1) that the issue was actually litigated in the prior case; (2) that it was actually determined by the court; and (3) that the parties had the incentive to actually litigate the issue:

> First, the issue "must have been actually litigated, that is, contested by the parties and submitted for determination by the court." Second, the issue "must have been "actually and necessarily determined by a court of competent jurisdiction." Third, preclusion "must not work an unfairness" because "the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial."[127]

Thus, as the Supreme Court has held, a federal agency is estopped from re-litigating an issue that it has already litigated against a party in a different court.[128]

As the Landowners explained in district court, the original rulemaking designating critical habitat for the San Diego fairy shrimp was set aside in *Natural Resources Defense Council (NRDC) v. U.S. Department of Interior*[129] and remanded for further rulemaking. In *NRDC*, FWS told the district court that the baseline economic analysis methodology was inconsistent with the requirements of the ESA and requested a voluntary remand.[130] The matter was fully litigated, with

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[127] *In re United Mine Workers*, 782 F. Supp. at 670 (citations omitted).
[128] *Stauffer Chemical v. United States*, 464 U.S. 165, 166–67 (1984).
[129] 275 F. Supp. 2d 1136 (C.D. Cal. 2002).
[130] *Id.* at 1141–42.

the environmental plaintiffs opposing remand and supporting the baseline methodology,[131] while the building industry plaintiffs supported FWS's motion.[132] After briefing and argument by all parties, the district judge agreed with FWS, holding that the rulemaking was invalid:

> There is no doubt that the Fish and Wildlife Service's failure to perform a proper economic impact analysis in compliance with section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), for the current gnatcatcher and fairy shrimp critical habitats, was substantive error . . . ."[133]

The *NRDC* decision was a final appealable order under *Occidental Petroleum*.[134] If FWS disagreed with the district court's order, its remedy was to appeal—not to simply openly defy the district court's final order because it now disagrees with it eight years later.

Accordingly, the *NRDC* decision meets all three requirements for res judicata: it was litigated, it was finally decided in a published opinion, and the parties (FWS and environmental and building industry) all had the incentive to (and did) fully litigate the issue. [135]

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[131] *Id.* at 1137.
[132] *See id.* at 1136.
[133] *Id.* at 1145.
[134] *Occidental Petroleum*, 873 F.2d at 331–32.
[135] *United Mine Workers*, 782 F. Supp. at 670.

B. The district court should not have deferred to FWS's most recent flip-flop interpretation of the ESA

Although it disagreed with FWS's choice of methodology, the district court here incorrectly concluded that the *Chevron* doctrine required the court to defer to FWS's interpretation.[136]

What the district court failed to recognize, however, is that in this case, FWS's repeated flip-flop on whether the ESA requires a baseline or a co-extensive analysis leaves the court little or no reliable agency interpretation to which it can defer. As the Supreme Court held in *Immigration and Naturalization Service v. Cardoza-Fonseca*,[137] "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[138] And although it is true that an agency can adapt to changing circumstances, the court should not defer to positions taken by the agency purely for litigation purposes. A court does not give *Chevron* deference "to what appears to be nothing more than an agency's convenient litigating position."[139] Nor does *Chevron* authorize an agency to exercise "discretion" to defy final and binding district court orders.[140]

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[136] *Otay Mesa Prop*, 2010 U.S. Dist. LEXIS 52233, at *39–40.
[137] 480 U.S. 421 (1987).
[138] *Id.* at 488.
[139] *Bowen*, 488 U.S. at 212–13.
[140] *See Occidental Petroleum*, 873 F.2d at 330 ("[W]hen a district court directs an agency to proceed under a certain legal standard, the agency has no choice but to conduct its proceedings and to render its decision pursuant to that standard.").

As the California district court stated, FWS used the baseline method to prepare economic analyses (including the economic analysis for the original designation of San Diego fairy shrimp critical habitat in 2000) up until the Tenth Circuit ruled that method invalid.[141]

But in 2001, the Tenth Circuit held in a *Chevron* step one analysis that FWS's baseline methodology was inconsistent with the language of the ESA:

> [W]e conclude Congress intended that the [Fish and Wildlife Service] conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable coextensively to other causes. Thus, we hold the baseline approach to economic analysis is not in accord with the language or intent of the ESA.").[142]

Over the objection of the environmental plaintiffs, the California district court granted FWS's motion for voluntary remand so it could revise the economic analysis in accordance with the Tenth Circuit's holding.[143]

In fact, FWS adopted a national policy to follow the Tenth Circuit's ruling, and sought remand of several critical habitat designations.[144] And in a separate case, another judge of the District Court for the District of Columbia approved a consent decree remanding FWS's designation of critical habitat for the West Coast salmon and steelhead, again endorsing FWS's adoption of the economic analysis

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[141] *NRDC*, 275 F. Supp.2d at 1140–41 (footnote and citation omitted).
[142] *N.M. Cattle Growers*, 248 F.3d at 1277.
[143] *NRDC*, 275 F. Supp. 2d at 1141.
[144] *Home Builders Ass'ns. of Northern California v. Norton*, 293 F. Supp. 2d 1, 4 n.2 (D.D.C. 2002).

standard utilized in *New Mexico Cattle Growers*.[145] In a third case, the Northern District of California endorsed the *New Mexico Cattle Growers* rule and set aside FWS's designation of critical habitat for the California whipsnake.[146]

Applying its nationwide policy, after remand, FWS prepared and published a revised proposed designation of critical habitat for the San Diego fairy shrimp[147] and prepared an economic analysis using the co-extensive method approved by the California district court. In that 2004 economic analysis, FWS explained:

> [I]n an effort to ensure that this economic analysis complies with the instructions of the 10th Circuit as well as to ensure that no costs of the proposed critical habitat are omitted, the potential effects associated with *all* section 7 impacts in or near proposed critical habitat are fully considered. In doing so, the analysis ensures that any critical habitat impacts that are co-extensive with the listing of the species are not overlooked.[148]

Then, without explanation, FWS again flip-flopped and decided to resurrect the baseline methodology.[149] The district court's unquestioned deference to this most recent agency policy, without requiring an explanation of FWS's reversal of

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[145] *National Ass'n of Home Builders v. Evans*, 2002 WL 1205743, at *3 (D.D.C. April 30, 2002).
[146] *Home Builders Ass'ns of Northern California v. U.S. Fish and Wildlife Serv.*, 268 F. Supp. 2d 1197, 1230 (E.D. Cal. 2003) (internal quotation marks omitted).
[147] Designation of Critical Habitat for the San Diego Fairy Shrimp (*Branchinecta sandiegonensis*); Proposed Rule, 68 Fed. Reg. 19,888 (Apr. 22, 2003).
[148] A.R. 6740.
[149] 72 Fed. Reg. at 70,688.

position, was error because the agency failed to provide a reasoned explanation for its reversal of policy.[150]

C. Regardless of methodology, the administrative record does not support the agency's calculation that the economic impact of the designation is $23,140,688

Quite apart from the methodology, FWS also botched the economic analysis for this designation. Having calculated the cost of the designation at $53,042,532 in its 2004 economic analysis[151] (using the co-extensive methodology), FWS took a short cut in 2007 (when it reversed position and decided to use the baseline methodology) by simply multiplying by 44% ($53,042,532 x .44 = $23,140,688).[152] The resulting figure of $23,140,688[153] is an arbitrary number having no relationship to the actual economic cost of the designation—whether analyzed under the baseline, co-extensive, or any other method.

1. FWS never considered the economic cost of designating the Landowners' property as critical habitat

In 2003, following remand, FWS proposed a new designation of critical habitat for the San Diego fairy shrimp and in 2004, FWS produced an economic analysis of that proposed designation. The 2004 economic analysis failed to consider the economic cost of designating the Landowners' property because at

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[150] *Local 777, Democratic Union Org. Comm. v. National Labor Relations Bd.,* 603 F.2d 862, 882 (D.C. Cir. 1978).
[151] 72 Fed. Reg. at 70,688; *see also* A.R. 6720.
[152] 72 Fed. Reg. at 70,688.
[153] *Id.*

that time FWS did not include the Landowners' 143 acres in its analysis. When in 2007 FWS revised its proposed designation to include the Landowners' property, FWS did not go back to analyze the economic cost of this newly included subunit 5D land. Instead, FWS merely multiplied by 44 % the economic cost it had calculated in 2004—when the Landowners' property was not included in the designation—and thus never considered the economic cost of designating the Landowners' 143 acres.

FWS's 2004 economic analysis examined the economic impact of designating 6,098 acres of publicly and privately owned land as critical habitat, concluding that this designation would affect only 202 acres of privately owned commercial, industrial, and residential property and result in a regulatory cost of $53,042,532.[154] All of the 202 acres were located in Unit 1, the Los Angeles Basin/Orange Management Area, and Unit 3, the San Diego Inland Valley Management Area.[155] None of the Landowners' property, located in Unit 5, the San Diego Southern Coastal Mesa Management Area, was considered in FWS's 2004 economic impact analysis.[156]

[154] A.R. at 6723, 6789, Draft Report.
[155] *Id.* at 6761–62.
[156] 72 Fed. Reg. at 70,661–62, 70,667–69.

FWS's 2007 economic analysis, now under review by this Court, simply took the 2004 calculation of $53,042,532 and multiplied it by 44%.[157] By taking this short-cut for the economic analysis in the current rule, FWS overlooked that the boundaries of the 6,098 acres of proposed critical habitat that it had analyzed in 2004 were different from the boundaries of the 3,082 acres of critical habitat designated in the 2007 rule (and under review by this Court). This was not simply a reduction in proposed habitat, but rather a wholesale shuffle of acreage that deleted large tracts of government and privately owned land while adding significant new sectors of private land that FWS had never considered in the 2004 economic analysis.[158]

For example, the 2007 rule added large tracts of previously exempted privately owned land in Units 4 and 5—including the 143 acres owned by the Landowners.[159] This new privately owned acreage—none of which was included in the 2004 analysis of regulatory costs—included the following: three acres in Unit 4G, four acres in Unit 4H, one acre in Unit 4J, seven acres in Unit 4L, thirteen acres in Unit 5A, 304 acres in Unit 5B, 391 acres in Unit 5D, 537 acres in Unit 5F, and 113 acres in Unit 5G.[160]

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[157] *Id.* at 70,688.
[158] *Id.* at 70,661–62, 70,667–69.
[159] *See id.*
[160] *Id.*

In short, the 2004 analysis did not determine the economic cost of designating the land included in FWS's 2007 designation, but rather a very different grouping of properties—that did not include the Landowners' 143 acres. The fact is that FWS never analyzed the economic cost of designating the Landowners' property as critical habitat contrary to the statutory mandate.[161]

2. FWS's 44% multiplier is arbitrary

To determine the economic impact of this critical habitat designation, FWS simply took the figure it had calculated in 2004, $53,042,532, and multiplied it by 44%.[162] That 44% figure finds no support in the administrative record and the result it yields, $23,140,688, is arbitrary.

First, FWS appears to have based the 44% multiplier on two factual assumptions that lack any support in the record:

- "[B]ut for designation, action agencies may not have initiated consultation with the Service regarding the [San Diego fairy shrimp] in fifty percent of "non-wetted" habitat" and

- "each wetted acre of pool contains an average of about eight acres of watershed in upland areas that will also require protection."[163]

Because the record contains no support for either assumption, the 44% multiplier predicated on those assumptions is arbitrary and capricious.[164]

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[161] 16 U.S.C. § 1533(b)(2).
[162] 72 Fed. Reg. at 70,688.
[163] A.R. 18301–02, Report Addendum.
[164] *Nat'l Welfare Rights Org. v. Mathews,* 533 F.2d 637, 648 (D.C. Cir. 1976).

The record discloses that the first assumption is merely "[b]ased on discussions with the Service" and nothing more.[165] The record contains no data or other analysis supporting this assumption and no explanation of why it was 50% of the total acreage (not 40%, 10%, or 90%) that caused action agencies to initiate consultations because of this rule. The record does not even disclose the substance of these discussions with FWS: With whom? What did they say? Were all in agreement or did they come up with different percentages? How were these differences resolved? Did anyone have any data or experience to support his or her chosen percentage?

The second assumption is derived from a footnote found in the 2004 economic analysis.[166] Table 10 (San Diego Metropolitan Area Airport Costs), a table distinguishing between the relative costs associated with four potential sites for a San Diego metropolitan airport, contains a footnote specifying that the formula used "[a]ssumes that each wetted acre of pools has 8 acres of upland associated with it."[167] There is no indication where this assumption came from, nor whether it is universally true or applies only to the airport property. Except for this footnote, there is no explanation of any basis for the "8 acres" figure used in the 2007 economic analysis to create the 44% multiplier.

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[165] A.R. 18301, Report Addendum.
[166] A.R. 6784, Draft Report.
[167] *Id.*

Additionally, FWS's assertions that "[s]ome pools in a complex have substantial watersheds that contribute to filling the vernal pools, while others fill almost entirely from rainfall" and that "[s]ubsurface inflows from surrounding soils may also be an important factor in the filling of some vernal pools," indicate that there is very likely a wide variation among different properties—thus no universal eight-to-one acres of watershed ratio[168]—and that the ratio of wetted acres of vernal pools to acres of upland watershed varies across different terrain.

Nor does FWS supply any reasoned basis for constructing a formula that mixes watershed acreage, new information, and the likelihood of additional consultations to calculate a multiplier of economic costs. So, while FWS's formula superficially appears scientific, in fact it is nothing more than smoke and mirrors:

> Assuming one acre of wetted pool contains an average of about eight acres of watershed, then approximately 44% of the total designation area ((1 + 8) / (50% x 8) = 44%) provides new information to action agencies about the need to consult.[169]

In short, the 44% figure lacks any foundation in the record, and is therefore arbitrary, capricious, and inconsistent with the requirements of the ESA.

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[168] 72 Fed. Reg. at 70,648 (citations omitted).
[169] A.R. 18302, Report Addendum.

3. FWS never determined the cost of the regulatory baseline and thus could not properly apply the baseline methodology

FWS's shortcut multiplier method for determining economic cost also fails to comply with the very baseline method that FWS now embraces. First, because the 2004 economic analysis did not use the baseline method, it had no need to determine the cost of the regulatory baseline. And when FWS multiplied the 2004 figure by 44 percent, it did not go back and determine the cost of the regulatory baseline. Without ever knowing the cost of the regulatory baseline, FWS cannot possibly determine the increased cost over that baseline—the very cost the baseline method is supposed to calculate.

The regulatory baseline in this case is the original critical habitat designation that FWS made in 2000 and that was replaced by the 2007 designation under review in this case. In 2000, FWS designated 4,025 acres of critical habitat for the San Diego fairy shrimp and this designation remained in effect for more than seven years—until FWS promulgated the current modification of that rule in December 2007, designating approximately 3,082 acres of habitat, including the Landowners' 143 acres (which had not been previously designated):

> Approximately 3,082 acres (ac) (1,248 hectares (ha)) of habitat in Orange and San Diego counties, California, are being designated as critical habitat for the San Diego fairy shrimp. This revised final designation constitutes a reduction of 943 ac (382 ha) from the 2000 designation of critical habitat for the San Diego fairy shrimp.[170]

[170] 72 Fed. Reg. at 70,648.

A proper application of the baseline method would have first determined the economic cost of designating the 4,025 acres that continued to be designated critical habitat for the San Diego fairy shrimp until the current rule took effect in December 2007. And the regulatory change, which should have been the economic cost being measured, would have been the addition of some properties (including 143 acres of the Landowners' property), and the elimination of others, which resulted in the net reduction of 943 acres. FWS's 2007 economic analysis does not even attempt to measure this change between the critical habitat that existed through 2007 and the critical habitat that existed after promulgation of the 2007 designation and thus does not utilize the baseline method as FWS claims. The figure FWS throws out ($23,140,688) is simply an arbitrary calculation that does not inform (and actually misleads) the decision-maker regarding the true economic cost of the designation.

4. The economic analysis admits that it did not determine all of the costs of designation

Finally, FWS admits in its 2004 economic analysis that it has failed to identify additional costs associated with the designation of critical habitat for the San Diego fairy shrimp:

> [T]o the extent that the *Pinchot* Decision results in additional "within critical habitat" conservation above that required by existing HCPs that are assumed to provide baseline protection for the SDFS,

> additional project modification costs not quantified in the DEA may be incurred.[171]

FWS made no effort to quantify these additional costs in the 2007 economic analysis. They remain unknown today—and unconsidered by FWS when it designated critical habitat.

The case referred to, *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*,[172] is a Ninth Circuit decision invalidating an FWS rule that improperly equates jeopardy to the species with adverse modification of critical habitat. Although FWS has never revoked the regulation invalidated by the *Gifford Pinchot* Court, FWS embraces the *Gifford Pinchot* rule as justification for rejecting the co-extensive methodology and embracing the disapproved baseline methodology.[173]

Thus, for FWS to fail to determine the additional costs imposed by adherence to the *Gifford Pinchot* requirements—requirements that FWS does adhere to—is to simply produce an incomplete economic analysis that does not comply with the requirements of the ESA.

V. FWS failed to comply with NEPA

In preparing this critical habitat designation, the U.S. Fish and Wildlife Service ("FWS") made no effort to comply with the National Environmental Policy Act ("NEPA"), which requires federal agencies to examine the

[171] A.R. 18302, Report Addendum.
[172] 387 F.3d 968 (9th Cir. 2004).
[173] A.R. 18302, Report Addendum.

environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency's decision-making.[174] Specifically, NEPA requires, "to the fullest extent possible," all agencies of the federal government to prepare environmental impact statements for all "major Federal actions significantly affecting the quality of the human environment."[175] Because the lack of an environmental impact statement deprives the decision-maker of important information regarding the potential environmental impacts of his decision, a final agency action that does not comply with NEPA is arbitrary and capricious and will be set aside.[176]

FWS's refusal to comply with NEPA in this case was intentional. In the December 12, 2007 final rule designating the Landowner's property as critical habitat, FWS stated, "[i]t is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Act."[177] FWS's position that NEPA does not apply to critical habitat designations outside the Tenth Circuit is based on a 1995 decision

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[174] *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 97 (1983).
[175] 42 U.S.C. § 4332(2)(C).
[176] *Cape Hatteras*, 344 F. Supp. 2d at 134; *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004).
[177] 72 Fed. Reg. at 70,665, 70,692.

of the Ninth Circuit, *Douglas County v. Babbitt*,[178] holding that the designation of critical habitat on federal land does not trigger NEPA review for three reasons: (1) the Endangered Species Act (ESA) displaced NEPA's procedures;[179] (2) NEPA does not apply when "a federal agency takes an action that prevents human interference with the environment"[180] or "do[es] nothing to alter the natural physical environment";[181] and (3) the ESA furthers the goals of NEPA without requiring an environmental impact statement.[182]

FWS complies with NEPA for critical habitat designations in the Tenth Circuit because that court in *Catron County v. U.S. Fish and Wildlife Service*[183] flatly rejected the Ninth Circuit's holding. Reversing FWS's designation of critical habitat for the spikedace and loach minnow for failure to comply with NEPA, the *Catron County* court began by reviewing the expansive congressional mandate found in NEPA.[184]

But the *Catron County* court disagreed with the three reasons the Ninth Circuit had given to support its decision:

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[178] 48 F.3d 1495 (9th Cir. 1995).
[179] *Id.* at 1502.
[180] *Id.* at 1506.
[181] *Id.* at 1505.
[182] *Id.* at 1506–07.
[183] *Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996).
[184] *Id.* at 1434 (citations omitted).

> We disagree with the panel's reasoning. First, given the focus of the ESA together with the rather cursory directive that the Secretary is to take into account "economic and other relevant impacts," we do not believe that the ESA procedures have displaced NEPA requirements. Secondly, we likewise disagree with the panel that no actual impact flows from the critical habitat designation. Merely because the Secretary says it does not make it so. The record in this case suggests that the impact will be immediate and the consequences could be disastrous. The preparation of an EA will enable all involved to determine what the effect will be. Finally, we believe that compliance with NEPA will further the goals of the ESA, and not vice versa as suggested by the Ninth Circuit panel. For these reasons and in view of our own circuit precedent, we conclude that the Secretary must comply with NEPA when designating critical habitat under ESA.[185]

Finally, the Tenth Circuit contrasted NEPA's purpose of protecting "the human environment" with the ESA's purpose of protecting habitat for wildlife and found that they are substantially different in purpose and procedure:

> NEPA's requirements are not solely designed to inform the Secretary of the environmental consequences of his action. NEPA documentation notifies the public and relevant government officials of the proposed action and its environmental consequences and informs the public that the acting agency has considered those consequences. A federal agency could not know the potential alternatives to a proposed federal action until it complies with NEPA and prepares at least an EA.[186]

No court has followed the Ninth Circuit's holding that NEPA does not apply to critical habitat designations and a recent decision by the district court for the District of Columbia flatly rejects it. In *Cape Hatteras Access Preservation*

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[185] *Id.* at 1436.
[186] *Id.* at 1437 (citations omitted).

Alliance v. U.S. Department of the Interior,[187] Judge Lamberth reversed and remanded FWS's designation of critical habitat for the piping plover because FWS had (as in this case) failed to comply with NEPA's statutory requirements. After carefully examining both the Ninth Circuit's *Douglas County* holding and the Tenth Circuit's *Catron County* decision, the district court rejected the Ninth Circuit and adopted the reasoning of the Tenth, stating: "Given the different purposes and requirements of these statutes this Court follows the Tenth Circuit's well-reasoned opinion that NEPA applies to designations" of critical habitat.[188]

The *Cape Hatteras* court's analysis noted the broad application of NEPA to all major federal actions affecting the human environment.[189] The district court then pointed out how radically different the statutory functions of NEPA and the ESA's critical habitat provisions are:

> Because the ESA is not a general environmental statute, the Service's "raison d'etre," when implementing the ESA is not the "protection of the environment" and its designation decision is not "necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework [of NEPA]."[190]

The *Cape Hatteras* court thus concluded that "[t]o ignore NEPA while designating critical habitat is to argue for NEPA's implicit repeal by the ESA and

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[187] 344 F. Supp. 2d 108 (D.D.C. 2004).
[188] *Id.* at 134.
[189] *Id.* at 133–34 (citation omitted).
[190] *Id.* at 135 n.7 (quoting *Int'l Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 650 (D.C. Cir. 1973)).

amendments to the ESA, an argument not supported by the ESA's text or the legislative history . . . the Ninth Circuit's reasoning cannot be followed."[191] The *Cape Hatteras* court further stated that while the ESA and NEPA enjoy similar goals, the ESA does not completely displace NEPA's procedures and requirements: "Both statutes require public airing of impacts, but each statute involves different impacts and protects different interests."[192] The ESA is concerned with "animal life," while NEPA is concerned with "humans' physical environment," thereby defeating the Service's argument that NEPA compliance under the ESA is redundant.[193] The *Douglas County* decision by "the Ninth Circuit does not contemplate how placing restrictions on land use which benefit a species may harm the human environment, may significantly affect it, by preventing or restricting certain activities."[194]

Here, as in *Catron County* and *Cape Hatteras*, FWS's designation of critical habitat on non-federal property significantly impairs and restricts the Landowners' ability to use and develop highly valuable privately owned land. The designation will likely alter not only the use of the Landowners' property, but also the use of other property in the area as development shifts, roads and utilities are rerouted, and land uses changed to avoid disruption of the critical habitat. Given the

[191] *Id.* at 135.
[192] *Id.*
[193] *Cape Hatteras*, 344 F. Supp. at 135.
[194] *Id.* at 136.

location of this property directly in the path of development resulting from the soon-to-be-opened border crossing,[195] the designation of critical habitat for the San Diego fairy shrimp inevitably affects the quality of the human environment in the Otay Mesa area. And these are precisely the kind of effects on the human environment that NEPA requires a federal agency to examine before irretrievably committing itself by final agency action.

FWS's insistence that it need not comply with NEPA renders this rule invalid as arbitrary, capricious, and contrary to law, so that it must be reversed and set aside.[196]

Conclusion

For these reasons, the Court should reverse the district court and hold that the agency acted arbitrarily and capriciously in listing the Landowners' 143 acres as critical habitat for the San Diego fairy shrimp.

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[195] *See Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 2010 U.S. Dist. LEXIS 52233, at *16.

[196] 42 U.S.C. § 4332; *see also Cape Hatteras*, 344 F. Supp. 2d at 136; *Fund for Animals v. Hall*, 448 F. Supp. 2d 127 (2006).

Respectfully submitted,

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