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[9TH CIRCUIT UPHOLDS CRITICAL HABITAT DESIGNATION FOR MEXICAN SPOTTED OWL](#)

Arizona Cattle Growers' Ass'n v. Salazar, ___ F.3d ___, No. 08-15810 (9th Cir. 2010)

By *Robert Uram*, *James Rusk* & *Alex Merritt*

The Ninth Circuit Court of Appeals this month decided two key issues related to the designation of critical habitat for species protected under the Endangered Species Act ("ESA"): (1) what constitutes an "occupied" area for purposes of designating critical habitat; and (2) the proper approach to analyzing the economic impacts of a critical habitat designation. The Ninth Circuit ruled for the Fish & Wildlife Service ("FWS") on both issues, deferring to the agency's interpretation of "occupied" and approving the agency's use of the "baseline" approach.

The case arose in 2004 when the FWS designated 8.6 million acres of critical habitat for the Mexican spotted owl. The Arizona Cattle Growers' Association ("Arizona Cattle") challenged the validity of that designation. The district court awarded summary judgment to the FWS, and Arizona Cattle appealed on two grounds. First, Arizona Cattle argued that the FWS impermissibly interpreted the term "occupied" so that it could avoid a statutory requirement under the ESA. Second, Arizona Cattle argued that the FWS improperly used the "baseline" approach in evaluating the economic impacts of the critical habitat designation, which excludes impacts that would occur even in the absence of the critical habitat designation.

FWS's Interpretation of "Occupied" Areas

Section 3 of the ESA defines critical habitat for listed species as including "the specific areas within the geographical area occupied by the species, at the time it is listed . . . and . . . specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." Thus, the FWS faces a "more onerous procedure" to designate unoccupied areas as critical habitat—it must first determine that such areas are essential for the conservation of the species.

In designating critical habitat for the Mexican spotted owl, the FWS interpreted "occupied" to include areas that owls used only intermittently—for activities like hunting, dispersal, and migration—but did not permanently inhabit. Arizona Cattle proposed its own interpretation of "occupied," which would have included only those areas that an owl "resides in"—i.e., areas in which owls are continually present.

The court decided that "occupied" does not provide an unambiguous standard for the FWS to apply and that "[d]etermining whether a species uses an area with sufficient regularity that it is 'occupied' is a highly contextual and fact-dependent inquiry." Because such an inquiry is "within the purview of the agency's unique expertise," and because the FWS had previously defined "occupied" in a manner similar to the proposed interpretation in its Endangered Species Consultation Handbook, the court gave deference to the FWS interpretation. The court also found the FWS interpretation consistent with the broad conservation goals of the ESA and the agency's authority to act in the face of uncertainty. In contrast, the court reasoned that the "resides in" interpretation would conflict with that authority and "would make little sense as applied to non-territorial, mobile, or migratory animals—including the owl—for which it may be impossible to fix a determinate area in which the animal 'resides.'"

The court also drew support for its conclusions from its opinion in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir., 2004). In that case, the Ninth Circuit invalidated an FWS regulation that defined "adverse modification" of critical habitat in a way that focused exclusively on the value of the habitat for species survival, while ignoring its value for species recovery. Similarly, the *Arizona Cattle* court reasoned that the "resides in" interpretation focused too narrowly on owl survival and ignored the broader purposes of the critical habitat designation, which are recovery and conservation.

The court therefore held that "the FWS has authority to designate as 'occupied' areas that the owl uses with sufficient regularity that it is likely to be present during any reasonable span of time." Importantly, however, the FWS does not have boundless discretion in classifying areas of potential habitat as occupied. The court cautioned that the "agency may not determine that areas unused by owls are occupied merely because those areas are suitable for future occupancy." Such an approach would "ignore the ESA's distinction between occupied and unoccupied areas."

After approving the FWS's interpretation of "occupied," the court determined that the FWS had not treated any unoccupied areas as occupied and had not acted arbitrarily and capriciously in designating critical habitat for the owl.

The "Baseline" Approach to Economic Analysis

The Ninth Circuit also had to choose between competing approaches to the economic analysis required for proposed critical habitat designations. The court again ruled for the FWS, approving the agency's "baseline" approach and rejecting the "co-extensive" approach previously endorsed by the Tenth Circuit.

Under the baseline approach, the agency does not consider economic impacts that will occur regardless of the critical habitat designation—for example, the economic impacts that stem from the listing decision

itself. In contrast, under the co-extensive approach, the agency considers all economic impacts, even those that would occur in the absence of the critical habitat designation. The difference between the baseline approach and the co-extensive approach is illustrated by an example the court provided in its opinion:

"[S]uppose that the decision to list the owl as endangered resulted in a ban on logging in a particular area, and that designating that area as critical habitat would independently result in the same ban. Because the listing decision would result in the logging ban even if the agency did not designate critical habitat in that area, the baseline approach would not treat the ban as a burden that was imposed by the critical habitat designation."

Arizona Cattle argued that the FWS erred by using the baseline approach instead of the co-extensive approach, and noted that the Tenth Circuit had disapproved the baseline approach in *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir., 2001). The Ninth Circuit rejected Arizona Cattle's argument and declined to follow *N.M. Cattle Growers*. The court noted that the Tenth Circuit's opinion was premised on the FWS definition of "adverse modification" that was later invalidated in *Gifford Pinchot*. Moreover, the court reasoned that the baseline approach was more logical than the co-extensive approach because "[t]he very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made."

Conclusion

Overall, the *Cattle Growers* opinion reaffirms the principle that the courts should defer to the FWS in its administration of the ESA, as to issues that lie within the agency's unique expertise. It also clears the way for FWS to apply a flexible definition of "occupied" in making future critical habitat designations, which are often the subject of litigation. Finally, the opinion affirms an approach to economic analysis that embraces only those economic effects that are causally related to the critical habitat designation. This approach is consistent with that used in other contexts under federal law, such as the analysis of environmental impacts under the National Environmental Policy Act.

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