No. 15-367

In The Supreme Court of the United States

BEAR VALLEY MUTUAL WATER COMPANY, et al.,

Petitioners,

v.

SALLY JEWELL, et al.,

Respondents.

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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Federal Respondents' Brief in Opposition would perpetuate the split that exists between the circuit courts regarding the National Environmental Policy Act's ("NEPA") application to the designation of critical habitat under the Endangered Species Act ("ESA"). That split has already percolated among the appellate courts for the past 20 years with the result that NEPA is being applied unequally across the United States. Rather than abating, the split has continued among the district courts, with no indication that further percolation of the issue will result in its resolution.

Federal Respondents would also leave intact the Ninth Circuit's remarkable conclusion that the ESA "displaces" NEPA, thus rendering the nation's premier environmental statute inapplicable to activities undertaken by the United States Fish and Wildlife Service ("FWS") under the ESA. This conclusion is so at odds with the language and legislative history of both statutes that neither Respondent attempts to defend it. Instead, Federal Respondents advance the equally specious argument that critical habitat designations, *per se*, have no impact upon the human environment. This assertion fails. The administrative record shows FWS imposed its critical habitat designation – not upon undeveloped, federally owned land – but upon locally-owned land already developed with water supply and flood control infrastructure. FWS's own analysis shows that designation of these lands will physically reduce locally-available water supplies

and interfere with locally-held water rights. According to the Army Corps of Engineers, the designation will also interfere with locally-administered flood control infrastructure, posing a significant threat to downstream life and property.

Federal Respondents would also ratify the Ninth Circuit's decision to eviscerate a provision of the ESA telling federal agencies they "shall cooperate" with local agencies to "resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. §1531(c)(2) ("§2(c)(2)"). Eschewing any reference to the rules of statutory construction – or an attempt to defend the Ninth Circuit's reliance upon *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), the only case cited below to read §2(c)(2) out of the ESA – Federal Respondents simply assert that the "policy goal" of §2(c)(2) is implemented through ESA §4 dealing with the listing of species and designation of critical habitat. But, §4 nowhere addresses "water resource issues"; it says nothing about an obligation to "cooperate"; and the "state agencies" referred to in §4 do not include "local" *water* agencies.

The consequences of ignoring the plain language of §2(c)(2) are of national importance as illustrated by the present case. To resolve long-standing disputes over the waters of the Santa Ana River, local agencies 45 years ago developed an allocation regime relied upon by both upstream and downstream interests. In the course of imposing its critical habitat designation, FWS completely ignored this water allocation regime. Likewise, although California's State Water Board

issued water rights to several petitioners to divert Santa Ana River water for municipal purposes just prior to the critical habitat designation, FWS simply asserted that *it* was not involved in the state proceedings, and imposed its critical habitat determination notwithstanding the consequences to those rights. When local agencies sought the audience of FWS to discuss these concerns, FWS actively sought to avoid them. These actions are inconsistent with the obligations imposed by Congress in §2(c)(2). Moreover, given the hundreds of critical habitat designations to be issued by FWS, Federal Respondents' conduct, unless conformed to the requirements of §2(c)(2), will be serially repeated across the country.

For the following reasons, the Petition for Writ of Certiorari should be granted.

ARGUMENT

I. Federal Respondents' Opposition Fails to Refute the Importance of Granting Certiorari to Resolve the 20-Year-Old Circuit Split Over NEPA's Applicability to the Designation of Critical Habitat

A. Federal Respondents Implicitly Concede That *Douglas County*'s Primary Holding Is Indefensible

Respondents' most telling argument is one they do *not* make: neither Federal Respondents nor the Respondent-Interveners make any attempt to defend the so-called "displacement" theory, the Ninth

Circuit's primary legal reason for declaring that NEPA does not apply to critical habitat designations. As a matter of law, the displacement theory is indefensible. *E.g.*, *Catron County Board of Commissioners v. U.S. FWS*, 75 F.3d 1429 (10th Cir. 1996); *Cape Hatteras Access Preservation Alliance v. U.S. DOI*, 344 F.Supp.2d 108 (D.D.C. 2004). Since even Federal Respondents cannot defend the theory, it is improper for FWS to continue to apply it throughout the majority of the United States.

B. The Circuit Split Regarding NEPA's Application to Critical Habitat Designation; the Resulting Unequal Application of NEPA; and the Many Upcoming Critical Habitat Designations All Support Supreme Court Review

The issue of NEPA's application to the designation of critical habitat began to percolate through the courts more than 20 years ago in *Douglas County v. Lujan*, 810 F.Supp. 1470, 1477-83 (D. Or. 1992), with the district court finding that NEPA applied to the designation of critical habitat. It was overturned three years later by *Douglas County v. Babbitt*, 48 F.3d 1495, 1503, 1505-07 (9th Cir. 1995). In so doing, the Ninth Circuit found the land designated as critical habitat was entirely owned by the federal government and would remain undeveloped, thus, its designation would result in no impact to the physical environment. Problematically, however, the Ninth

Circuit then extended its holding to conclude that designating critical habitat can *never* impact the physical environment. *Id.* at 1506-07.

One month after this Court denied certiorari in *Douglas County* (516 U.S. 1042 (1996)), a circuit split emerged. In *Catron*, the Tenth Circuit found that designating critical habitat to include a river limited flood control and water diversion efforts, resulting in impacts to the physical environment that were "immediate and . . . disastrous." 75 F.3d at 1436. Subsequent Tenth Circuit cases follow *Catron*, reviewing in each case the potential for physical impacts before determining the appropriate level of NEPA review. *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220, 1224-31 (10th Cir. 2002); *Wyoming State Snowmobile Ass'n v. U.S. FWS*, 741 F.Supp.2d 1245, 1253-54 (D. Wyo. 2010). Subsequent Ninth Circuit cases follow *Douglas County*, rejecting NEPA and refusing to consider any case's specific impacts. *See* Pet.13 n.4, *citing cases*.

Subsequently, the split worsened. In *Cape Hatteras*, designated critical habitat included coastal areas used for recreational purposes, and the District Court for the District of Columbia found the designation "may significantly affect" the human environment by preventing or restricting "essential repair and maintenance operations." 344 F.Supp.2d at 116-17, 136. More recently, *Markle Interests, LLC v. U.S. FWS*, 40 F.Supp.3d 744, 767-68 (E.D. La. 2014), considered whether designating a privately-owned tree farm as critical habitat triggered NEPA. *Markle*

found impacts to the *value* of plaintiffs' undeveloped land, not changes to the physical environment. *Id.* at 757, 767-78. Underscoring the confusion, *Markle* reaffirms that NEPA applied in *Catron* because there were impacts to the physical environment but, antithetically, also reaffirms *Douglas County*.

Federal Respondents make light of the circuit split, urging that it continue indefinitely. Fed.Opp.10. However, of the 1,586 listed species in the U.S., *more than half* are still awaiting critical habitat designation. *See* ACWA.Br.7. Deferring resolution of the existing circuit split would thus invite error in hundreds of future cases.

C. Designating Critical Habitat Over Water Facilities Results in Significant Physical Impacts to the Human Environment Because It Prevents or Impedes Necessary Operation and Maintenance

Designating critical habitat has consequences far beyond placing a label on a map. When an area is designated as critical habitat, federal agencies must ensure through ESA §7 consultation that their actions do not adversely alter that habitat, utilizing alternatives proposed by FWS if necessary to achieve that result. 16 U.S.C. §1536(a)(2), (b)(3); 50 C.F.R. §402.02. Section 7 consultation is also triggered when projects of local agencies or private individuals require a federal permit. 16 U.S.C. §1536(a)(2), (3).

Designating critical habitat where ongoing operation, maintenance or control activities are required – like water diversion or flood control facilities – impacts the physical environment because §7 consultation may prevent those efforts entirely or in part and will at least substantially delay them. 75 Fed.Reg. 77962, 77988-89, 77994, 78003 (Dec. 14, 2010).

For these reasons, courts have found imminent impacts to the physical environment when critical habitat is designated over areas used for water diversion or flood protection, because it "prevent[s] the diversion and impoundment of water . . . , thereby causing flood damage," impacts "the ability of municipalities to provide and maintain an adequate domestic water supply," requires federal water managers to reallocate water from municipal or agricultural uses to species, and impedes flood control efforts. *Catron*, 75 F.3d at 1433; *Middle Rio Grande Conservancy District v. Babbitt*, 206 F.Supp.2d 1156, 1162 (D.N.M. 2000), *aff'd sub nom. Middle Rio Grande*, 294 F.3d at 1227-28.

Because the critical habitat designation in the case at bench similarly covers dams, water diversion facilities, wastewater treatment plants, and flood control structures, substantially identical impacts to the physical environment are present. 75 Fed.Reg. at 77977-79. Federal Respondents' Final Rule and their own economic impact report recognize these impacts. *Id.* at 77969 (noting water diversions, alteration of

stream channels, reduction of water quantity associated with municipal and recreational activities as requiring special management for the Santa Ana sucker); App.156-62; 4ER:645 (FWS estimates Final Rule will cost the local region up to $1.09 *billion*, including losing between 15,000 and 25,800 acre-feet of water annually out of river water rights of 27,000 acre-feet). Many of these impacts, such as the loss of vital municipal water supplies, entail environmental impacts. App.160-62; *Middle Rio Grande*, 294 F.3d at 1227-29. Finally, the Army Corps of Engineers submitted uncontradicted, expert opinion that the Final Rule "would impact flood control project operations and consequently impact the ability of the [Santa Ana River Mainstem Project] to provide the authorized level of flood protection" to prevent $15 *billion* in losses across three counties. App.153-54. Federal Respondents entirely disregard the record in the case at bench and simply pretend these physical impacts do not exist.

While Federal Respondents now claim that analysis of potential environmental impacts of critical habitat designations is "speculative" (Fed.Opp.13), the impacts were sufficiently concrete for Federal Respondents to evaluate in their economic report. App.160-62. Moreover, Federal Respondents admit such environmental reviews are *routinely* prepared for critical habitat designations throughout the Tenth Circuit. 75 Fed.Reg. at 78001; *Middle Rio Grande*,

294 F.3d at 1225; *see also* 48 Fed.Reg. 49244 (Oct. 25, 1983) (NEPA review performed for *all* critical habitat designations before 1983).

The circuit split regarding the application of NEPA to the designation of critical habitat has existed for 20 years and has not been resolved by the passage of time. Instead, it has gotten worse. Given the hundreds of critical habitat designations remaining and the importance of NEPA's disclosure and public comment provisions, equity demands that one standard be adopted for the entire United States.

II. This Court Should Settle Whether ESA §2(c)(2) Has Legal Effect

A. Review of the Ninth Circuit's §2(c)(2) Holding Is Proper

Federal Respondents ignore the rules of this Court when they suggest that review of Petitioners' §2(c)(2) question presented is precluded because the Ninth Circuit's decision is one of first impression. Fed.Opp.21. To the contrary, Rule 10(c) of the Court's Rules states that it is within this Court's discretion to grant certiorari where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." This is such a case.

The Ninth Circuit ruled that §2's *title*, "Congressional findings and declarations of purposes and policy," *ipso facto* renders subsection §2(c)(2)

unenforceable as a matter of law (App.19) relying solely upon this Court's decision in *Hawaii* for support.[1] Respondents never attempt to defend the Ninth Circuit's misuse of *Hawaii*, which dealt with "whereas" clauses in a joint-resolution, not a codified provision enacted by Congress. Moreover, it is evident that Federal Respondents now recognize that declarations of policy *can* create standalone rights. Fed.Opp.20, 22 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Delta Airlines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 977 (D.C. Cir. 2013); *13th Regional Corp. v. U.S. DOI*, 654 F.2d 758, 762 (D.C. Cir. 1980)).

The operative effect of a landmark federal act's codified statutory provision is a question too important to be decided on the basis of a cursory statement of law that conflicts with the jurisprudence of this Court. Indeed, this is precisely the kind of circumstance anticipated by Rule 10(c).

B. §2(c)(2) Sets Forth a Specific Duty and a Justiciable Standard

ESA §2(c)(2) is indistinguishable from the statutory declarations of policy recognized by Federal Respondents as enforceable in *Overton Park*, *Delta Airlines* and *13th Regional Corp*. Fed.Opp.20, 22. Each case involved a command set forth *within* a

[1] The Ninth Circuit's decision does not analyze the text of §2(c)(2) itself.

declaration of policy, yet each court found the command to be substantive, enforceable and standalone. *Overton Park*, 401 U.S. at 411 (command that "the Secretary shall not approve any . . . project . . . that requires the use of any [parkland] unless" two criteria are met set forth in subsection titled "Declaration of Policy" (23 U.S.C. §138(a)) was a "plain and explicit bar"); *Delta Airlines*, 718 F.3d at 977 (command that Export-Import Bank "shall take into account any serious adverse effect of such loan . . . on the competitive position of the United States industry" set forth in sentence beginning "It is also the policy of the United States that . . . " (12 U.S.C. §635(b)(1)(B)) was a reviewable mandate); *13th Regional Corp*., 654 F.2d at 762 (command that "the Secretary is authorized and directed . . . to make a study of all Federal programs primarily designed to benefit Native people" set forth in statute titled "Congressional findings and declaration of policy" (43 U.S.C. §1601(c)) was a reviewable "peremptory command"). Respondents summarily state that these cases involve substantive standards and specific mandates while §2(c)(2) sets forth general statements of policy, but fail to show how §2(c)(2)'s text is distinguishable from the statutory provisions considered in these cases. (Fed.Opp.20, 22; Int.Opp.14.) It is not.

As Petitioners have previously noted, "shall" is a term of obligation. Pet.32. In addition, "cooperate" is a specific term that FWS has already expounded upon in the context of the ESA. Pet.33 (citing 59 Fed.Reg. 34274 (July 1, 1994)). "Cooperate" has also

been recognized by courts as creating a mandatory and enforceable standard in the context of other federal statutes. *E.g.*, *Movement Against Destruction v. Volpe*, 361 F.Supp. 1360, 1393 (D. Md. 1973) (reviewing whether process was "carried on cooperatively by States and local communities" in compliance with federal statute).[2, 3]

C. Section 2(c)(2) Is Not Implemented Through §4

Contrary to Respondents' assertion (Def.Opp.18; Int.Opp.16), §2(c)(2) is not implemented through §4(b)(5)(A)(ii) and (i). To the contrary, the statutes impose separate and distinct requirements. First, §2(c)(2) and the requirements of §4(b)(5)(A)(ii) and (i) are triggered by different ESA actions. Section 2(c)(2) applies to *all* ESA actions undertaken by federal agencies that raise water resource concerns. In contrast, §4(b)(5)(A)(ii) and (i) apply whether or not water resources issues are implicated, but only when FWS prepares a regulation that lists a species or designates critical habitat.

Second, §4(b)(5)(A)(ii) and (i) only apply to a "State agency," a term the ESA defines as including

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[2] The command to "cooperate" is commonly used in federal statutes, including those at issue in *Overton Park*, 401 U.S. 402. 23 U.S.C. §138(a); *see also*, *e.g.*, 42 U.S.C. §3131(a).

[3] For the same reasons, §2(c)(2) is not committed to agency discretion by law. Fed.Opp.20 n.7.

only state *wildlife* agencies without mentioning "local agencies." 16 U.S.C. §1532(18). Thus, FWS is *not* required by §4 to extend actual notice or written justification to local water agencies. *See* S. Rep. No. 97-418 at 12 (1982) (§4(b)(5)(A)(ii) actual notice applies to state wildlife agencies); *Idaho Farm Bureau Fed'n v. Babbitt*, 839 F.Supp. 739, 751 n.26 (D. Idaho 1993) (Idaho Department of Water Resources not a "State agency" due §4(i) written justification), *vacated on other grounds by Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995). Consistently, while the requirements set forth in §2(c)(2) and §4(b)(5)(A)(ii) and (i) were adopted together in the 1982 amendments, the legislative record shows that they were analyzed separately without cross-reference. S. Rep. No. 97-418 at 5, 12, 25.

Finally, Federal Respondents fail to reconcile their interpretation of §2(c)(2) and §4(b)(5)(A)(ii) and (i) with the well-settled rule of statutory interpretation that a court must, if possible, give effect to every clause and word of a statute. Pet.31. If §2(c)(2) was to have no legal effect, it is unclear why Congress amended the ESA to include it.

D. Compliance With §2(c)(2) Will Not "Hold Up" ESA Actions

Federal Respondents caution that enforcing §2(c)(2) would grant state and local water resources agencies the power to veto or otherwise "hold up" critical habitat designations. Fed.Opp.19. This is

nonsense. Section 2(c)(2) requires FWS to utilize the expertise of state and local agencies with regard to potential water resource conflicts. Pet.33. It does not dictate outcomes. The Ninth Circuit reached the same conclusion in confirming the Department of Energy's obligation to "consult" with affected States in the preparation of congestion studies in *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072, 1096 (9th Cir. 2011):

> Indeed, presumably DOE could, in the exercise of its sound discretion, come to the same or similar conclusions that it did in the initial study [prepared without consultation]. Of course, it might reach very different conclusions. What is critical is that it follow the statute's mandate and consult with affected States. . . .

Likewise, while federal agencies must consider the expertise and information of state and local agencies knowledgeable about the water resource and species concerns unique to their region, those federal agencies may then proceed to execute their duties under the ESA. Here, FWS's avoidance of local agencies and its dismissal of water allocations issued by the state and its courts led to a misinformed and highly disruptive critical habitat designation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

December 8, 2015

Respectfully submitted,

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