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 a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT-INTERVENORS

WILLIAM J. SNAPE, III
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street NW,
Suite 1300
Washington, DC 20005-3412
(202) 536-9351
bsnape@biologicaldiversity.org

JOHN BUSE
Counsel of Record
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
(510) 844-7125
jbuse@biologicaldiversity.org

Counsel for Respondent-Intervenors California Trout, Inc., Center for Biological Diversity, San Bernardino Audubon Society, and Sierra Club

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CORPORATE DISCLOSURE STATEMENT

Respondents California Trout, Inc., Center for Biological Diversity, San Bernardino Audubon Society, and Sierra Club state that they are each non-profit conservation organizations that do not have parent companies, subsidiaries, or affiliates that have issued shares of stock to the public in the United States or abroad.

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STATEMENT OF THE CASE

Congress directed the U.S. Fish and Wildlife Service ("FWS") to designate critical habitat for species listed as endangered and threatened under the Endangered Species Act ("ESA"). 16 U.S.C. § 1533(a)(3). Critical habitat designation means specifying the areas FWS deems essential to the conservation of the species. 16 U.S.C. § 1532(5)(A). It does not involve setting aside preserves for listed species, and does not prohibit, or even regulate, non-federal actions. The primary consequences of critical habitat occur after designation, when federal agencies must consult with FWS to ensure that the actions they authorize, fund, or carry out are not likely to result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). Thus, critical habitat designations

have legal effect only in connection with some other subsequent federal action. *Id.*

This case concerns the critical habitat designation for the Santa Ana sucker, a small, imperiled freshwater fish native to southern California. The Santa Ana sucker was listed as a threatened species in 2000. 65 Fed. Reg. 19,686 (Apr. 12, 2000). In 2010, after two prior attempts, FWS issued a final rule designating critical habitat for the species. 75 Fed. Reg. 77,962 (Dec. 14, 2010). The final critical habitat designation followed extensive opportunities for public comment. FWS released a proposed rule revising Santa Ana sucker critical habitat in 2009. 74 Fed. Reg. 65,056 (Dec. 9, 2009). FWS invited public comment on the proposed rule, and subsequently reopened the public comment period. *Id.*; 75 Fed. Reg. 38,441 (Jul. 2, 2010). It also conducted two public hearings on the proposed designation. 75 Fed. Reg. at 77,989.

During these public comment periods, FWS contacted "appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and [draft economic analysis]." *Id.* FWS received and responded to extensive comments from at least some of the petitioners. 75 Fed. Reg. at 77,994-97; Ninth Circuit Excerpts of Record, Vol. 3, pp. 488-529; 556-86. In these comments, municipality and water district petitioners asserted that the critical habitat designation would affect their water rights and water development infrastructure. *Id.* at pp. 493-94; 526; 528; 564-65.

With its consultant, Industrial Economics, FWS also prepared an economic analysis of the Santa Ana sucker critical habitat designation, which evaluated

costs associated with the socioeconomic concerns raised by petitioners. The draft economic analysis was made available for public comment, and revised in response to comments submitted by petitioners and others. 75 Fed. Reg. 38,441. A final economic analysis was issued prior to the final critical habitat designation. Ninth Circuit Excerpts of Record, Vol. 4, p. 640.

Petitioners filed their legal challenge to the final critical habitat designation in August 2011, raising an array of objections to the designation. Ninth Circuit Excerpts of Record, Vol. 1, pp. 11-12. Respondents California Trout, Inc., Center for Biological Diversity, San Bernardino Audubon Society, and Sierra Club ("Respondent-Intervenors") were granted leave to intervene as defendants. *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 985 (9th Cir. 2015). The district court for the Central District of California granted defendants summary judgment on all claims. *Id.* at 985-86. Petitioners appealed, and the Ninth Circuit affirmed the district court's judgment. *Id.* at 986-95.

Two parts of the Ninth Circuit decision are relevant here. First, the Ninth Circuit rejected petitioners' claim that FWS violated the National Environmental Policy Act ("NEPA") by failing to prepare an environmental impact report for the Santa Ana sucker critical habitat designation. *Id.* at 994. In rejecting this claim, the Ninth Circuit looked to its long-standing controlling precedent in *Douglas County v. Babbitt*, 48 F.3d 1495, 1502 (9th Cir. 1995), which held that NEPA does not apply to critical habitat designations. *Id.* Second, the Ninth Circuit denied petitioners' claim that Section 2(c)(2) of the ESA creates an enforceable right to "cooperation" in

connection with critical habitat designation, holding that this provision, by its express terms, is a declaration of Congressional policy that creates no free-standing enforceable right. *Id.* at 987; 16 U.S.C. § 1531(c)(2). Petitioners seek review of these two parts of the Ninth Circuit's decision.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED AS TO PETITIONERS' NEPA QUESTION

A. The Lack of NEPA Documentation for Critical Habitat Designations Outside the Tenth Circuit is Inconsequential

Petitioners characterize the Ninth Circuit's decision in this case as "in conflict with a decision on the same matter in the Tenth Circuit." Pet. 4. As petitioners acknowledge, however, the Ninth Circuit's *Bear Valley* decision did not create any conflict. Pet. 11. Rather, the conflict arose with the Tenth Circuit's decision in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996). Moreover, it is a conflict without consequence. For nearly 20 years, FWS has accommodated the *Catron County* ruling by providing some NEPA documentation for critical habitat designations for species within the Tenth Circuit—but nowhere else. 62 Fed. Reg. 2,375, 2,379–80 (Jan. 16, 1997). Petitioners would prefer that the Tenth Circuit approach be extended nationwide. They would exploit the minor deviations in FWS practice required to conform to Tenth Circuit law in order to upset the Santa Ana sucker critical habitat designation that the Ninth Circuit has upheld in all respects. There is no exigent reason to reconsider this long-standing practice.

Contrary to petitioners' claim (Pet. 11), the Ninth Circuit's decision does nothing to "reinforce" any conflict. The Ninth Circuit was obligated to follow controlling circuit law established in *Douglas County*, which "holds that 'that [the] NEPA does not apply to the designation of a critical habitat.'" *Bear Valley*, 790 F.3d 977, 994, quoting *Douglas County*, 48 F.3d at 1502. The Ninth Circuit did not expand or elaborate on its decision in *Douglas County*. It did not emphasize any particular part of the *Douglas County* ruling, which held that NEPA does not apply to critical habitat designations based on three distinct grounds. 48 F.3d at 1502-07. In *Bear Valley*, the Ninth Circuit thus merely maintained the status quo with respect to NEPA's applicability to critical habitat designations. It did not reinforce the conflict between *Douglas County* and *Catron County*, nor did it create any additional urgency to address the conflict.

In recent critical habitat designations, FWS has stated that "[i]t is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to [NEPA] in connection with designating critical habitat under the [ESA]." 75 Fed. Reg. at 78,009 (Santa Ana sucker final critical habitat designation); *see* 76 Fed. Reg. 64,996, 65,035 (Oct. 19, 2011) (tidewater goby critical habitat designation). Petitioners overstate the practical effects of this approach. They argue that people within the Tenth Circuit "have a right to be informed of the significant environmental consequences of the designation of critical habitat," while those outside the Tenth Circuit have no such right. Pet. 12. In fact, people everywhere have a right to be informed of the significant environmental—and economic—consequences of critical habitat designation. As the Ninth Circuit

noted in *Douglas County*, the "carefully crafted congressional mandate for public participation in the designation process" provides the same procedural and informational function as NEPA. 48 F.3d at 1503.

In *Catron County*, the Tenth Circuit concluded that the critical habitat designation process only partially fulfilled the primary purposes of NEPA, but did not address the public participation mandates of the critical habitat designation process described in *Douglas County*. *Compare Catron County*, 75 F.3d 1437 *with Douglas County*, 48 F.3d at 1503. As the Ninth Circuit explained, before FWS can issue a final critical habitat designation, it must "(1) publish a notice and the text of the designation in the Federal Register; (2) give actual notice and a copy of the designation to each state affected by it; (3) give notice to appropriate scientific organizations; (4) publish a summary of the designation in local newspapers of potentially affected areas; and (5) hold a public hearing if one is requested." *Douglas County*, 48 F.3d at 1503. A proposed critical habitat designation is a proposed rulemaking subject to public comment. 5 U.S.C. § 553; 16 U.S.C. § 1533(b)(4). Critical habitat designations must also "include a brief description and evaluation of those activities (whether public or private) which … may be affected by such designation." 16 U.S.C. § 1533(b)(8). People are informed of the significant environmental consequences of critical habitat designation whether they are within or without the Tenth Circuit.

Nor can petitioners complain that they were not apprised of the economic consequences of the Santa Ana sucker critical habitat designation. In every critical habitat designation, FWS must "tak[e] into consideration the economic impact, the impact on

national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). For the Santa Ana sucker critical habitat designation, FWS prepared and made available for public comment a draft economic analysis. 75 Fed. Reg. 38,441. The final economic analysis considered, among other things, the effects of the designation on water supply. Pet. App. 156-62.

In comments on the Santa Ana sucker critical habitat designation and the accompanying economic analysis, petitioners raised concerns about the impact of the designation on water supply and flood control activities. *See*, *e.g.*, 75 Fed. Reg. at 78,001-06. FWS responded to these comments in the final rule. *Id.* Petitioners may not be satisfied with the responses, but they have not explained how NEPA would have provided a better forum to raise these concerns or allowed FWS to address them in a more satisfactory way. Petitioners fail to demonstrate that they or anyone else have been deprived of information regarding the environmental effects of critical habitat designations because FWS does not provide a NEPA analysis for designations outside the Tenth Circuit.

Petitioners likewise offer no evidence that anyone in the Tenth Circuit receives superior or even qualitatively different information about the environmental effects of critical habitat designation as a result of the NEPA analysis FWS performs for designations within that circuit. Indeed, in the 2012 critical habitat designation for the spikedace and loach minnow, the species at issue in *Catron County*, FWS determined that the environmental effects of the designation, including effects on flood control activities, were insignificant. 77 Fed. Reg. 10,810, 10,898 (Feb. 23, 2012). Rather than preparing a full

environmental impact statement, FWS prepared an environmental assessment and a finding of no significant impact. *Id.* In response to comments that FWS failed to adequately disclose "agency analysis processes as is called for by NEPA," FWS noted that the comment and response section of the final critical habitat designation provided the feedback requested. *Id.* Thus, the NEPA analysis that was the direct fruit of *Catron County* summarily determined that the designation had no significant effect on the environment, and when commenters cited the perceived inadequacies of the NEPA process, FWS cited the public comment opportunities afforded *under the ESA*. In both the spikedace/loach minnow and Santa Ana sucker designations, FWS addressed comments regarding the effects of critical habitat on flood control and water management activities. 75 Fed. Reg. 77,993-94, 78,002-05; 77 Fed. Reg. 10,890, 10,903. Petitioners contend that people within the Tenth Circuit have a right to be informed of the environmental consequences of critical habitat designation, but in practice, this means being informed that there are no environmental consequences. 77 Fed. Reg. 10,898.

The conclusion that the spikedace/loach minnow designation will not have a significant effect on the environment is not merely anecdotal. As the Ninth Circuit correctly concluded in *Douglas County*, critical habitat designations do not require NEPA analysis because they do not involve any alteration of the physical environment. 48 F.3d at 1505-06. Future designations within the Tenth Circuit are likely to adopt the same conclusion for the same reason, and FWS will accordingly prepare findings of no significant impact. Thus, while FWS deliberately follows different courses within and without the Tenth

Circuit (*see* 62 Fed. Reg. at 2,379-80), this distinction has little or no practical consequence, as people are informed of the environmental and economic consequences of critical habitat designations wherever they happen to live.

B. Addressing Petitioners' Question Will Not Alter the Ninth Circuit's Bear Valley Decision

In *Douglas County*, the Ninth Circuit determined that critical habitat designation is not subject to NEPA for three distinct reasons. First, it held that Congress intended the ESA's critical habitat procedures to displace the requirements of NEPA. 48 F.3d at 1502-05. Second, it held that NEPA does not apply to actions that preserve the physical environment, such as critical habitat designations, because NEPA analysis "is unnecessary when the action at issue does not alter the natural, untouched physical environment at all." 48 F.3d at 1505. Third, the Ninth Circuit held that "NEPA does not apply to the designation of a critical habitat because the ESA furthers the goals of NEPA without demanding an [environmental impact statement]." 48 F.3d at 1506.

In this case, the Ninth Circuit held that petitioners' NEPA claim "is foreclosed by the controlling law of this Circuit, which holds 'that [the] NEPA does not apply to the designation of a critical habitat.'" 790 F.3d at 994, quoting *Douglas County*, 48 F.3d at 1502. In its *Bear Valley* decision, the Ninth Circuit did not rely on any particular aspect of *Douglas County*, but all three grounds for not requiring NEPA for critical habitat designations discussed in *Douglas County* apply here. 790 F.3d at 994. If Congress intended the ESA's

critical habitat procedures to displace the requirements of NEPA, the displacement rationale applies to all critical habitat designations.

Additionally, like the northern spotted owl critical habitat designation at issue in *Douglas County*, the Santa Ana sucker designation does not alter the physical environment. Critical habitat designations identify the areas FWS deems essential to the conservation of a listed species. 16 U.S.C. § 1532(5)(A). In future consultations regarding actions permitted or performed by other federal agencies that may affect designated critical habitat, FWS and the federal action agency must ensure that the action does not destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). If FWS finds the action will destroy or adversely modify critical habitat, it must suggest "reasonable and prudent alternatives" that avoid this result. 16 U.S.C. § 1536(b)(3)(A). These future consultations will be associated with federal actions that alter the physical environment, and may result in modifications to the federal actions in ways that are beneficial to the environment, but the designation of critical habitat itself does effect any change on the physical environment.

Finally, the third *Douglas County* rationale—that the ESA furthers the goals of NEPA without demanding NEPA analysis—applies to all critical habitat designations, including the Santa Ana sucker designation.

Petitioners seek review by questioning only one of the grounds discussed in *Douglas County*: whether the provisions of the ESA displace the provisions of NEPA or otherwise render NEPA analysis unnecessary when FWS designates critical habitat. Pet. ii. The question presented does not apply to the second *Douglas County*

rationale because that rationale relates to the fact that critical habitat designations do not alter the physical environment, not to whether the provisions of the ESA displace or otherwise render NEPA analysis unnecessary. Similarly, the question does not apply to the third *Douglas County* rationale, which refers to the convergent goals of the ESA and NEPA, not to whether the provisions of the ESA displace the provisions of NEPA or render NEPA analysis unnecessary.

Petitioners have not sought review of *Douglas County's* other grounds for not requiring NEPA review of critical habitat designations. In particular, resolution of petitioners' question presented would not alter *Douglas County's* holding that critical habitat designations do not trigger NEPA analysis because by their nature they do not alter the physical environment. Petitioners concede that *Douglas County* could have been decided on the sole ground that the northern spotted owl critical habitat designation does not alter the physical environment. Pet. 21-22. The same is true in this case, however, although petitioners raise a disputed factual issue as to whether the Santa Ana sucker designation will significantly affect the human environment. Pet. 22-23. The outcome in this case would be the same even if the panel that decided *Bear Valley* could not rely on *Douglas County's* displacement rationale.

C. Petitioners Present a Factual Question as to the Environmental Effects of the Santa Ana Sucker Critical Habitat Designation

In *Douglas County*, the Ninth Circuit concluded that critical habitat designations in general are not subject to NEPA because they are actions that preserve, rather than alter, the physical environment. 48 F.3d

at 1505-06. Petitioners read *Douglas County* as being limited to the unique facts of that case, and contend that NEPA review should be required for the Santa Ana sucker critical habitat designation because "uncontroverted evidence in the record demonstrates that significant impacts to the human environment may result" from the designation. Pet. 19, 22.

Petitioners are mistaken that evidence of environmental effect is "uncontroverted." They cite "substantial effects on local water supplies, water rights, water conservation efforts, and environmental justice," but on closer inspection, all of these alleged effects reflect petitioners' unsubstantiated opinion regarding either purely economic effects or the speculative consequences of future federal actions, not the critical habitat designation itself. Pet. 22; Ninth Circuit Excerpts of Record, Vol. 3, pp. 493-94 (comments of San Bernardino Valley Municipal Water District, Western Municipal Water District, and City of Riverside claiming that designation may impair water rights in some unspecified manner); 526 (comment requesting that FWS consider effects of designation on water rights and water development projects); 528 (comment claiming that exclusion of critical habitat subunits 1A and 1B would "avoid a significant loss of water supply—from a fiscal, public service, and public policy perspective"); 564-65 (comment claiming without explanation that designation would "prevent or restrict the development, operation or maintenance of a variety of water supply projects.").

Federal respondents and respondent-intervenors vigorously contested petitioners' claims that the Santa Ana sucker designation would have any of the alleged environmental impacts. *See* Fed. Defs.' Answering Br.

at 20-21 (alleged environmental impacts are really economic injuries); Intervenor-Defs.' Answering Br. at 10. Petitioners nonetheless attempt to re-argue this disputed factual issue by assuming in their question presented that the Santa Ana sucker designation "has the potential to significantly affect the human environment." Pet. ii. Petitioners' bid for review based on a disputed factual matter should be denied.

II. THE WRIT SHOULD BE DENIED BECAUSE SECTION 2(c)(2) OF THE ESA EXPRESSES NO MANDATORY DUTY AND ESTABLISHES NO ENFORCEABLE RIGHTS

Section 2(c)(2) of the ESA states, in full, that "[i]t is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. § 1531(c)(2). Petitioners seek review based on the erroneous premise that Section 2(c)(2) "sets forth a mandatory duty." Pet. 27. Section 2(c)(2) is, on its face, a declaration of policy. By itself, it does not create any mandatory, enforceable duty. Petitioners have failed to present any substantial issue for review.

Petitioners contend that "the issue of whether statutory declarations of policy can create substantive and enforceable rights is an important question of federal law," but fail to identify any authority finding a free-standing enforceable duty in comparable policy declarations. Pet. 25. The Ninth Circuit's *Bear Valley* decision creates no conflict with decisions of this Court or between circuits.

In the primary case cited by petitioners, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411

(1977), this Court held that Section 4(f) of the Department of Transportation Act and Section 138 of the Federal-Aid Highway Act "are clear and specific directives." Both statutes provided that the Secretary of Transportation "'shall not approve any program or project' that requires the use of any public parkland 'unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . .'" *Citizens to Preserve Overton Park*, 401 U.S. at 411, quoting 23 U.S.C. § 138 (1964 ed., Supp. V); 49 U.S.C. § 1653(f) (1964 ed., Supp. V). The Court found in this language "a plain and explicit bar to the use of federal funds for construction of highways through parks [where] only the most unusual situations are exempted." *Id.*

The Court held that the provisions at issue in *Citizens to Preserve Overton Park* are "clear and specific directives" because, in contrast to Section 2(c)(2) of the ESA, they actually contain clear and specific directives. *Id.* These directives follow language declaring that it is "the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites," but by their express terms, they are more than mere declarations of policy. *Id.* at 405, nn.2-3. Section 2(c)(2) of the ESA differs from these provisions because, by its express terms, it is nothing more than a declaration of policy. 16 U.S.C. § 1531(c)(2).

Nor is the Ninth Circuit's decision in conflict with this Court's decisions in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) and *Test v. United States*, 420 U.S. 28, 30 (1975). In both cases, the Court

looked to the policy declaration of the Jury Selection and Service Act, 28 U.S.C. Section 1861, but in neither case did the Court find a free-standing enforceable mandate in the policy declaration itself. *Edmonson*, 500 U.S. at 622 (policy is implemented by separate mandate of 28 U.S.C. § 1863 requiring each district court to adopt a plan for locating and summoning prospective jurors, and in the plans themselves); *Test*, 420 U.S. at 29-30 (policy declaration supports specific, unqualified right to inspect jury lists provided by 28 U.S.C. § 1867(f)). Similarly, in *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the Court referred to a policy declaration in the Clean Water Act, 33 U.S.C. Section 1251(g), as background for an issue it expressly declined to decide—whether all of the waters of the United States should be viewed as a single unit, which would mean that no permit would be required to discharge water, unaltered, from one water body to another. 541 U.S. at 105-09. In none of these cases did the Court do what petitioners now ask it to do—find a free-standing enforceable right in a statute that is purely a declaration of policy.

Appellate decisions likewise provide no support for petitioners' effort to read a substantive mandate into Section 2(c)(2)'s declaration of policy. In *Defenders of Wildlife v. Administrator, Environmental Protection Agency*, 882 F.2d 1294 (8th Cir. 1989), the Eighth Circuit looked to another ESA policy declaration, Section 2(c)(1), to interpret rights and duties created elsewhere in the ESA. Contrary to petitioners' contention, the Eighth Circuit did not hold that Section 2(c)(1) itself "imposes substantial and continuing obligations on federal agencies," but cites Section 2(c)(1) as an expression of policy that the ESA imposes substantial and continuing obligations. Pet.

30; *Defenders of Wildlife*, 882 F.2d at 1299-1300 (locating enforceable rights in Sections 7 and 9 of the ESA); *Bear Valley*, 790 F.3d at 987 ("Nothing in *Defenders of Wildlife* establishes or recognizes a free-standing claim based on Section 2(c)(1).").

Petitioners are also mistaken that the Ninth Circuit's decision "conflicts with the plain language and the legislative history of Section 2(c)(2)." Pet. 31. To the contrary, the Ninth Circuit's decision treats Section 2(c)(2) precisely as this provision describes itself: as a declaration of policy. *Bear Valley*, 790 F.3d at 987. As the Ninth Circuit also observed, the conclusion that Section 2(c)(2) does not create an enforceable mandate for some additional procedural step is supported by the ESA's legislative history. *Id.*, citing S. Rep. 97-418, at 25-26 (May 26, 1982) (Senate Committee report for 1982 amendments expressly stating that Section 2(c)(2) was "not intended to and does not change the substantive or procedural requirements of the Act."). The Senate Committee report is not merely extrinsic evidence of Congressional intent, but confirms what the plain language of Section 2(c)(2) says, as an unadorned, unambiguous expression of Congressional intent that by its own terms does not create any new substantive or procedural requirement.

The Ninth Circuit's *Bear Valley* decision affirms rather than frustrates this Congressional intent. As the Ninth Circuit noted, the procedures described in Section 4 of the ESA "outline the scope of 'cooperation' required between the FWS and state and local agencies in designating critical habitat." *Bear Valley*, 790 F.3d at 987-88. Petitioners were not denied these procedures, and Section 2(c)(2) does not afford them any additional and enforceable procedural rights.

CONCLUSION

Petitioners have presented no substantial issue as to either their NEPA question or their effort to locate an enforceable substantive duty in a policy declaration of the ESA. The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. SNAPE, III
CENTER FOR BIOLOGICAL DIVERSITY
1411 K Street NW,
Suite 1300
Washington, DC 20005-3412
(202) 536-9351
bsnape@biologicaldiversity.org

JOHN BUSE
Counsel of Record
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
(510) 844-7125
jbuse@biologicaldiversity.org

Counsel for Respondent-Intervenors California Trout, Inc., Center for Biological Diversity, San Bernardino Audubon Society, and Sierra Club

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