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Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot about the Public Interest It Claims to Protect

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ARIZONA CATTLE GROWERS' ASSOCIATION V. SALAZAR: DOES THE ENDANGERED SPECIES ACT REALLY GIVE A HOOT ABOUT THE PUBLIC INTEREST IT "CLAIMS" TO PROTECT?

I. INTRODUCTION

As the nation struggles to become more environmentally responsible, concerns arise about striking the proper balance between resource conservation and economic growth.[1] Proponents of conservation maintain that economic development contributes to the scarcity of undeveloped resources, thus necessitating regulation.[2] Business leaders, on the other hand, blame the cost of compliance with these regulations for reduced profits and increased layoffs.[3] The Endangered Species Act (ESA) is one such regulation illustrating this debate.[4] Although certain species are reaching extinction at an alarmingly fast rate,[5] the ESA's measures to solve this problem hamper the ability of rapidly growing states like Arizona, New Mexico, and California to "compete for economic development."[6] The debate between preservation and growth bears the question: Is the ESA narrowly tailored to accomplish its objectives or does it focus myopically on protecting fringe species at the disproportionate expense of economic progress?[7]

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1. *See* Ray Vaughan, 27 AM. JUR. 3D *Proof of Facts* 427, § 1 (1994) (acknowledging critics who claim Endangered Species Act hinders economic growth).

2. *See* Jason Scott Johnston, *The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism*, 74 U. COLO. L. REV. 487, 505 (2003) (recognizing economic development as major factor contributing to scarcity of undeveloped resources).

3. *See* Holly M. Mock, *Interstate Competition for Jobs and Industry Through Laxity of Environmental Regulations: Pennsylvania's Response and the Effects*, 7 DICK. L. REV. 263, 267 (1998) (citing business leaders' arguments against environmental regulation).

4. *See* Ann K. Wooster, Annotation, *Designation of "Critical Habitat" Under Endangered Species Act*, 176 A.L.R. FED. 405, § 6 (2002) (discussing competing arguments surrounding ESA).

5. *See* William J. Snape, III, *Joining the Convention on Biological Diversity: A Legal and Scientific Overview of Why the United States Must Wake Up*, 10 SUSTAINABLE DEV. L & POL'Y 6, 6 (2010) (identifying fast rate of species loss).

6. *See* Johnston, *supra* note 2, at 575 (noting constraints ESA places upon economic development).

7. *See* Michael S. Coffman, *The Problem with the Endangered Species Act*, AM. LAND FOUND., http://www.discerningtoday.org/problem_esa_full.htm (last visited Mar. 20, 2011) (highlighting problems with ESA).

Congress had difficulty passing the ESA because it was unable to rely on its commerce powers granted by the Constitution.[8] Instead, Congress based its legislative authority on five international treaties and the Constitution's Supremacy Clause.[9] The ESA openly cedes sovereignty to the international community by stating that its purpose is "to develop and maintain conservation programs which meet national and international standards."[10] As currently interpreted, the ESA is exempt from constitutional takings analysis.[11]

Under the ESA, the Secretary of the Interior, acting through the United States Fish and Wildlife Service (FWS), must place a species on the endangered list if its continued survival is threatened.[12] The FWS must then conduct an administrative proceeding to determine whether the species is, in fact, likely to be threatened in the foreseeable future.[13] If so, the FWS must designate a critical habitat (CH) to promote the species' survival.[14] Although the ESA has existed for thirty-seven years, there is still disagreement about its focus, effectiveness, and the economic approach Congress intended the FWS to employ in making endangered species designations.[15] Rigid adherence to the ESA can cause a particular problem when the FWS's designations involve marginal species whose extinction

8. *See id.* (describing difficulties Congress had passing ESA).

9. *See id.* (describing how ESA was ratified). The ESA was passed pursuant to: (1) Migratory Bird Treaties with Canada and Mexico; (2) the Migratory and Endangered Bird Treaty with Japan; (3) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; (4) the International Convention for Northwest Atlantic Fisheries; (5) the International Convention for High Seas Fisheries of the North Pacific Ocean; and (6) the Convention on International Trade in Endangered Species of Wild Fauna and Flora. *Id.*

10. *See id.* (describing purpose behind ESA); *see also* 16 U.S.C. § 1531 (2006) (declaring purpose and policy of ESA).

11. *See* Coffman, *supra* note 7 (explaining ESA exemption from Fifth Amendment takings analysis based on ratification as international treaty); *see also Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that treaties are supreme law of land).

12. *See* Vaughan, *supra* note 1, § 1 (describing process for designating threatened species under ESA). A species receives no protection until it is designated as endangered. *Id.*

13. *See id.* (detailing procedure for determining whether species needs protection).

14. *See id.* (explaining purpose of critical habitat). Critical habitat refers to specific geographical areas essential for the conservation of threatened or endangered species. 16 U.S.C. § 1532 (2006).

15. Alexander Annett, *Reforming the Endangered Species Act to Protect Species and Property Rights*, THE HERITAGE FOUND., http://www.heritage.org/research/reports/1998/11/reforming-the-endangered-species-act (last visited Mar. 30, 2011) (arguing that ESA has not reached goal because economic analysis encourages people to undermine its objectives).

presents no significant ecological concerns.[16] The preservation of such species through broad CH designations may impose significant restrictions on private property that can destroy the property's value.[17]

The Ninth Circuit's recent decision in *Arizona Cattle Growers' Ass'n v. Salazar* (*Arizona Cattle Growers*),[18] illustrates problems that FWS determinations can present.[19] This case involved a FWS final rule designating 8.6 million acres as CH for the Mexican Spotted Owl (MSO).[20] The final rule was issued in response to the MSO's listing as an endangered species.[21] In June 2010, the Ninth Circuit affirmed the FWS's final rule and upheld the controversial methodology employed by the FWS to reach its critical habitat designation (CHD).[22]

This Note evaluates the Ninth Circuit's decision in *Arizona Cattle Growers.* Part II of this Note describes the factual basis behind the FWS's CHD and briefly introduces the parties.[23] Part III describes the ESA's statutory framework and explains competing statutory interpretations of the ESA.[24] Part IV describes the Ninth Circuit's holding and reasoning in *Arizona Cattle Growers.*[25] Part V scrutinizes the court's holding and discusses potential flaws in the Ninth Circuit's opinion.[26] Finally, Part VI discusses the negative ramifications of the Ninth Circuit's decision and proposes modifications to the ESA that would narrow its focus and make FWS deter-

16. Richard L. Stroup, *The Endangered Species Act,* THE PROPERTY & ENVTL. RESEARCH CENTER, www.perc.org/articles/article648.php?view=print (last visited Mar. 30, 2011) (discussing how ESA fails to weigh importance of species in ecosystem).

17. *See id.* (reporting that FWS fails to weigh ecological concerns for species against economic impact facing affected landowner before promulgating CHDs); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia J., dissenting) (stating that majority's approach can cause financial ruin for property owners).

18. 606 F.3d 1160, 1162-63 (9th Cir. 2010) [hereinafter *Ariz. Cattle Growers II*].

19. For a further discussion of the impact of *Ariz. Cattle Growers II,* see *infra* notes 178-236 and accompanying text.

20. *See Ariz. Cattle Growers II,* 606 F.3d at 1163 (indicating species FWS sought to protect).

21. *See id.* at 1162-63 (explaining why FWS issued final rule).

22. For a further discussion of the Ninth Circuit's holding in *Ariz. Cattle Growers II,* see *infra* notes 111-52 and accompanying text.

23. For a further discussion of the relevant facts of *Ariz. Cattle Growers II,* see *infra* notes 28-58 and accompanying text.

24. For a further discussion of the ESA's legal background applicable to *Ariz. Cattle Growers II,* see *infra* notes 59-110 and accompanying text.

25. For a narrative analysis of the Ninth Circuit's decision, see *infra* notes 111-52 and accompanying text.

26. For a critical analysis of the court's decision in *Ariz. Cattle Growers II,* see *infra* notes 153-77 and accompanying text.

minations more proportionate to the public interests the statute is designed to protect.[27]

II. FACTS

The *Arizona Cattle Growers* litigation began over twenty years ago in December 1989, when Dr. Robin D. Silver submitted a petition requesting that the FWS designate MSOs as a threatened species under the ESA.[28] At that time, the FWS opined that "designation of critical habitat is prudent, but not determinable right now."[29] Under the ESA, the FWS has a legal obligation to designate a CH for any endangered species at the time of listing or, if indeterminable at that time, within one year.[30] By February 1994, the FWS still had not made a CHD for the MSO.[31] In response, a group of citizens filed suit compelling the FWS to issue the CHD.[32] The U.S. District Court for the District of Arizona ordered the FWS to make the CHD by May 30, 1995.[33] On June 6, 1995, the FWS designated 4.6 million acres of CH for the MSO.[34] On March 28, 1998, however, the FWS revoked its CHD for the MSO.[35]

When the FWS failed to issue another CHD for the MSO, an environmental group sued to compel the agency to act.[36] The FWS conceded it was in violation of the ESA, but requested that the

27. For a discussion of this case's impact on ESA implementation, see *infra* notes 178-236 and accompanying text.

28. *See Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1017 (D. Ariz. 2008) [hereinafter *Ariz. Cattle Growers I*] (explaining events prior to litigation).

29. *See id.* (discussing FWS's failure to designate critical habitat when MSO was listed as threatened species).

30. 16 U.S.C. § 1533 (2006) (describing ESA's procedural requirements for designating CH).

31. *See Ariz. Cattle Growers I*, 535 F. Supp. 2d at 1017 (discussing FWS's failure to issue CHD).

32. *See id.* at 1017-18 (discussing circumstances prior to lawsuit).

33. *See id.* at 1018 (determining that FWS needed to promulgate a final rule for MSO).

34. *See id.* (discussing terms of final rule).

35. *See id.* (detailing FWS's decision to revoke CHD for MSO). The final rule was revoked after the plaintiffs brought a claim alleging that the FWS failed to comply with the review required by the National Environmental Policy Act (NEPA) before issuing its CHD. *Id.* The district court enjoined the FWS from enforcing its designation until the agency conducted a NEPA review. *Id.* Only then did the FWS revoke its final rule. *Id.*

36. *See Ariz. Cattle Growers I*, 535 F. Supp. 2d at 1018 (discussing why environmental group initiated lawsuit against FWS). The plaintiff in the case was the Center for Biological Diversity. *Id.*

court grant additional time for review.[37] The district court, however, rejected the FWS's request.[38] On February 1, 2001, the FWS published its final rule designating 4.6 million acres of CH for the MSO.[39]

Six months later, in August 2001, the Center for Biological Diversity filed suit claiming the FWS's decision to designate only 4.6 million acres violated the ESA.[40] The district court agreed and, on January 13, 2003, directed the FWS to publish a revised proposed order within three months.[41] The FWS again conceded its actions violated the ESA and again requested additional time for review.[42] The court rejected this plea.[43] Accordingly, the FWS published a final rule designating approximately 8.6 million acres of CH for the MSO.[44]

In this final rule, the FWS relied on two types of habitat management: protected areas and restricted areas.[45] Protected areas contain known MSO sites and include a minimum of 600 acres for the best nesting and highly used forest areas.[46] Protected areas contain only seventy-five percent of land MSOs need for foraging, however.[47] Restricted areas, located adjacent to protected habitats, provide additional habitat for the transportation and survival of species.[48] Thus, while not as vital as protected areas, restricted areas serve as an important supplement to protected areas.[49]

The FWS expanded the MSOs' CHD to include protected and restricted areas.[50] Concurrent with publishing its final rule, the FWS adopted an alternative rule excluding all tribal lands from designation, refining CH unit boundaries, and excluding areas identi-

37. *See id.* (noting FWS's acknowledgement of sufficient time to promulgate final rule).

38. *Id.* (finding that FWS did not need additional time to issue final rule).

39. *See id.* (describing final rule designating CH).

40. *See id.* (explaining plaintiffs' argument).

41. *See Ariz. Cattle Growers I*, 535 F. Supp. 2d at 1018 (granting plaintiffs' motion).

42. *See id.* (demonstrating that FWS knew it violated law).

43. *Id.* (describing leniency court had already shown).

44. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1162 (9th Cir. 2010) (discussing conditions of final rule). The Arizona Cattle Growers' Association challenged this final rule. *Id.*

45. *See id.* (discussing factors considered in CHD).

46. *See id.* (explaining requirements of Protected Activity Centers).

47. *See id.* (noting insufficiency of protected areas alone as CH for MSOs).

48. *See id.* (describing importance of restricted areas). Furthermore, restricted areas are occasionally used for nesting. *Id.*

49. *Ariz. Cattle Growers II*, 606 F.3d at 1162 (indicating reasons FWS feels restricted areas are important).

50. *See id.* (discussing FWS's decision to include both types of habitat).

fied as high risk for disastrous fires.[51] In its lawsuit challenging the final rule, the Arizona Cattle Growers' Association (ACG) claimed the FWS mistakenly included areas in its CHD that were unoccupied by MSOs.[52] The FWS therefore bypassed statutory requirements for designating unoccupied areas.[53] The ACG also challenged the FWS's use of a "baseline approach," claiming that through this approach, the FWS failed to consider economic effects of endangered species listings.[54] For these reasons, the ACG argued that the FWS issued a legally impermissible CHD.[55]

The district court rejected the ACG's claims.[56] The court found that the FWS's use of the baseline approach in designating CH conformed with the ESA's statutory requirements.[57] On appeal, the Ninth Circuit affirmed the district court's ruling and held that: (1) the FWS did not arbitrarily treat unoccupied areas as occupied in its CHD; and (2) the FWS's use of the baseline approach in making its CHD satisfied all legal requirements of the ESA.[58]

III. BACKGROUND

Arizona Cattle Growers is one of many legal challenges to the ESA brought by private landowners.[59] These suits are often brought after the FWS issues a CHD for an endangered species.[60] Like most cases against administrative agencies, courts are forced to define the administrative record and determine congressional intent.[61] Furthermore, if the statute in question is ambiguous, the

51. *See id.* at 1162-63 (explaining why certain land was excluded from CHD).

52. *See id.* at 1162 (discussing ACG's first argument).

53. *See id.* (explaining alleged error FWS made in CHD).

54. *Ariz. Cattle Growers II*, 606 F.3d at 1162 (discussing ACG's second legal challenge).

55. *Id.* (summarizing ACG's argument).

56. *See Ariz. Cattle Growers' Ass'n. v. Kempthorne*, 534 F. Supp. 2d 1013, 1036 (D. Ariz. 2008) (holding that FWS's CHD complied with ESA and plaintiffs could not prove habitat was "erroneously designated").

57. *See id.* (recognizing that FWS's use of baseline approach did not incorporate improper factors).

58. *Ariz. Cattle Growers II*, 606 F.3d at 1174 (rejecting ACG's arguments and concluding that baseline approach complied with ESA).

59. *See* Michael S. Coffman, *The Problem with the Endangered Species Act*, NEWS WITHVIEWS.COM (Aug. 2, 2003), http://www.newswithviews.com/Coffman/mike2.htm (reporting that private landowners bring challenges under ESA).

60. *See id.* (discussing procedures surrounding citizen suits under ESA).

61. *See N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281-82 (10th Cir. 2001) (outlining how courts review cases under ESA).

court must decide what deference should be given to the agency's statutory interpretation.[62]

A. The Endangered Species Act

As the nation struggles to find a balance between environmental conservation and economic prosperity, these same interests often collide in cases challenging the FWS's CHDs under the ESA.[63] The ESA states that "the United States has pledged itself as a sovereign state. . . to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction."[64] Courts must therefore determine whether the FWS has properly interpreted the ESA to further these congressional objectives and the public interest.[65]

To protect a threatened species, the FWS must place that species on the endangered list.[66] Further, the FWS must conduct an administrative proceeding to determine whether the species is threatened, or will likely be threatened in the foreseeable future.[67] If so, the FWS must designate CH necessary to ensure survival of the species.[68] Disagreement nevertheless remains regarding the economic approach that Congress intended the FWS to use in making CHDs.[69] Additionally, courts implicitly disagree on the level of deference to give the FWS's review of relevant evidence and its interpretation of statutory language.[70]

B. Administrative Requirements

The FWS implements the ESA through an administrative proceeding subject to the notice and rulemaking procedures defined

62. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (detailing requirements for judicial review of agency action).

63. *See* Coffman, *supra* note 7 (arguing that ESA protects endangered species at cost of diminishing economic productivity).

64. 16 U.S.C. § 1531 (2006) (describing intent behind passing ESA).

65. *See* Coffman, *supra* note 7 (advocating criteria courts should use in deciding cases under ESA).

66. *See* Vaughan, *supra* note 1, § 1 (indicating species is not protected until placed on endangered list).

67. *Id.* (explaining procedural requirements leading up to designation).

68. *See* 16 U.S.C. § 1533 (2006) (requiring FWS to make CHD).

69. *See* Wooster, *supra* note 4, at § 6 (discussing approaches courts have used in interpreting ESA).

70. For a further discussion of the disagreements courts encounter when reviewing agency decisions under the ESA, see *infra* notes 88-110 and accompanying text.

in the Administrative Procedure Act (APA).[71] During the proceeding, the FWS first must determine whether a particular "species is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[72] If so, the FWS must then designate and list the species as endangered regardless of the species' significance to the environment or the ecological niche it occupies.[73] Once a species is listed as endangered, the FWS must make the CHD required to "ensure" the species' survival.[74]

To define the CH, the ESA requires the FWS to "weigh all economic factors involved."[75] In preparing a CHD, the FWS often interprets the ESA to require a baseline approach.[76] Under this approach, the FWS assumes its designation of a species as endangered has an economic impact.[77] The FWS, however, believes it is statutorily precluded from considering this impact when deciding to list a species.[78] Additionally, the FWS asserts there is rarely any additional economic consequence from a CHD once a species has been listed as endangered.[79] Thus, the economic situation that exists following an endangered species designation provides a "baseline" for measuring any added economic impact from a CHD.[80]

Under its baseline approach, the FWS will consider only possible economic factors that arise after the species has been included

71. *See* Vaughan, *supra* note 1, § 2 (describing procedure required under APA).

72. *See* 16 U.S.C. § 1532 (2006) (explaining preliminary questions FWS must decide).

73. *See* 16 U.S.C. § 1533 (2006) (indicating that FWS performs no balancing test before making decision to designate species).

74. *See id.* (describing factors in CHDs).

75. *See id.* (providing requirements ESA imposes on FWS). The ESA mandates that the Secretary of the Interior "shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.*

76. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010) (explaining how FWS believes baseline approach conforms with ESA even though it may impose economic burdens).

77. *See id.* (discussing FWS's choice to employ baseline approach and effects of decision).

78. *See id.* (noting that FWS feels it must use baseline approach and should not consider economic burdens).

79. *See id.* at 1172-73 (summarizing FWS's belief that baseline approach is fair).

80. *See id.* (describing baseline approach).

on the endangered list.[81] The FWS believes any economic impact from listing the species falls below the baseline and cannot be considered when making a CHD.[82] The FWS claims this baseline approach is consistent with the plain language of the ESA because the statute requires that listing determinations be made solely based on the best scientific and commercial data available.[83]

C. Judicial Review of Agency Decisions

Federal courts have jurisdiction to review the FWS's CHDs because they generally involve final rules raising issues arising under federal law.[84] In reviewing CHDs, courts typically employ a two step test.[85] First, the court determines whether Congress has spoken clearly in the ESA about the issue under consideration.[86] Second, if Congress has not spoken clearly, the reviewing court must determine whether the agency interpretation of the relevant statutory language has the "power to persuade."[87]

D. Rejection of the Baseline Approach

Numerous federal courts have addressed citizen challenges to the FWS's use of the baseline approach in making CHDs under the ESA.[88] *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Service* (*New Mexico Cattle Growers*)[89] involved one such challenge.[90] The Tenth Circuit noted that judicial review of an agency

81. *See Ariz. Cattle Growers II*, 606 F.3d at 1172-73 (discussing how FWS applies baseline approach).

82. *See id.* at 1172 (clarifying why costs associated with species listing are separate from FWS's CHD).

83. *See id.* (detailing FWS's argument that baseline approach properly interprets ESA's language).

84. 28 U.S.C. 1331 (2006) (stating that courts can claim federal question jurisdiction).

85. *See* N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1281 (10th Cir. 2001) (describing test courts employ when reviewing informal agency interpretation of federal statute); *see also U.S. v. Mead Corp.*, 533 U.S. 218, 231 (2001) (holding that if agency action has not undergone formal or informal rulemaking, it is not subject to *Chevron* deference).

86. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (describing two-step analysis courts must use when reviewing agency's construction of statute).

87. *See* Mead Corp., 533 U.S. at 228 (stating that agency decision is not subject to *Chevron* deference, but must have "power to persuade" reviewing court).

88. For a further discussion of citizen challenges to the ESA, see *infra* notes 88-110 and accompanying text.

89. *N.M. Cattle Growers*, 248 F.3d at 1280 (discussing citizen challenge to FWS's use of baseline approach).

90. For a further discussion of *N.M. Cattle Growers*, see *infra* notes 89-96 and accompanying text.

decision interpreting a federal statute normally requires *Chevron* deference.[91] In this case, however, the FWS conceded that *Chevron* deference was inappropriate because the baseline approach was not mandated by the ESA, nor was it the product of informal rulemaking.[92] The FWS therefore agreed that the baseline approach constituted informal agency interpretation that must have the power to persuade the reviewing court.[93]

In *New Mexico Cattle Growers*, the Tenth Circuit rejected the FWS's CHD because it did not comport with minimum guidelines required by the ESA.[94] The court noted that Congress intended the FWS to consider economic factors for every CHD.[95] Because the baseline economic approach excludes all economic impact of the listing, the court found that it violated the ESA and thus rejected the CHD.[96]

The D.C. Circuit similarly rejected the FWS's baseline approach in *Home Builders Ass'n of Northern California v. Norton*.[97] Further, in *Building Industry Forest Foundation v. Norton*,[98] the D.C. Circuit determined that the baseline economic approach was deficient under the ESA because it failed to consider all necessary economic factors when promulgating a CHD.[99] Although the court refused to endorse a rule identical to the one proposed in *New Mex-*

91. *See N.M. Cattle Growers*, 248 F.3d at 1281 (explaining how *Chevron* is normally standard that courts use when reviewing agency decisions).

92. *See id.* (concluding that FWS's final rule did not deserve *Chevron* deference).

93. *See id.* (highlighting FWS's concession that *Chevron* deference was not appropriate). The court noted that it would determine if the agency's interpretation of the ESA had "the power to persuade." *Id.*

94. *Id.* at 1285 (reasoning that baseline approach is not in accord with language or intent of ESA).

95. *Id.* at 1284-85 (noting that economic effects of species listing should be considered when FWS performs economic analysis of proposed CHD designation under ESA).

96. *See N.M. Cattle Growers*, 248 F.3d at 1281 (holding that ESA does not permit baseline approach).

97. 293 F. Supp. 2d 1, 4 (D.D.C. 2002) (rejecting baseline approach). The proceeding was remanded, however, because, "[t]he Department of the Interior has represented to the Court its intention to apply the *New Mexico Cattle Growers* methodology to all critical habitat determinations." *Id.* at 4.

98. 231 F. Supp. 2d 100 (D.D.C. 2002).

99. *See id.* at 105 (holding baseline approach inadequate); *see also Wyoming State Snowmobile Ass'n v. U.S. Fish & Wildlife Serv.*, No. 09-cv-00095-F., 2010 WL 3743933 (D. Wyo. Sept. 10, 2010) (finding that baseline approach does not consider required impacts stemming from CHDs).

ico Cattle Growers, it suggested that the FWS hone its policies in light of the *New Mexico Cattle Growers* decision.[100]

E. Endorsement of the Baseline Approach

While no court has explicitly rejected *New Mexico Cattle Growers*, certain courts have refused to endorse its position.[101] The D.C. District Court stated that the baseline approach is a reasonable method for assessing the actual economic costs of particular CHDs under the ESA.[102] This court noted that to find the true costs of designation, "the world with the designation must be compared to the world without it."[103] The U.S. District Court for the Northern District of Florida endorsed this analysis and explained how costs that exist independently of CHDs cannot be costs "of specifying any particular area as critical habitat."[104] The court further opined that "[t]o the extent the Tenth Circuit's co-extensive approach permits consideration of economic consequences not attributable to the designation, it is inconsistent with the mandate of the ESA."[105]

Similarly, in *Otey Mesa Property v. United States Department of Interior*,[106] the D.C District Court eventually accepted the FWS's baseline approach.[107] The court remanded the proceeding for reconsideration by the FWS based on the Tenth Circuit's reasoning in *New Mexico Cattle Growers*.[108] The court concluded that the Tenth Circuit's opinion was "well reasoned, and in accordance with the congressional intent of the statute."[109] The court noted, however, that while it would not adopt the baseline approach, it would accept

100. *See Bldg. Indus.*, 231 F. Supp. 2d at 104-05 (implying that FWS should strongly consider reasoning of *N.M. Cattle Growers* on remand).

101. For a further discussion of courts refusing to endorse *N.M. Cattle Growers*, see *infra* notes 102-110 and accompanying text.

102. *See Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 129-30 (D.D.C. 2004) (advocating baseline approach).

103. *See id.* (explaining why baseline economic approach was appropriate).

104. *See Fisher v. Salazar*, 656 F. Supp. 2d 1357, 1370 (N.D. Fla. 2009) (holding baseline approach in accordance with ESA); *see also Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1145 (N.D. Cal. 2006) (finding baseline approach adequate for making CHDs).

105. *See Fisher*, 656 F. Supp. 2d at 1370 (suggesting *N.M. Cattle Growers* decision was inconsistent with plain meaning of ESA).

106. 714 F. Supp. 2d 73 (D.D.C. 2010).

107. *See generally id.* at 86-87 (suggesting baseline approach is inadequate). This case involved a FWS final rule designating critical habitat under the baseline approach. *Id.*

108. *See id.* at 77 (advocating approach similar to *N.M. Cattle Growers*).

109. *Id.* at 77 (supporting Tenth Circuit's reasoning).

the FWS's use of the baseline approach on remand because Congress entrusted such decisions to agencies.[110]

IV. NARRATIVE ANALYSIS

In *Arizona Cattle Growers*, the Ninth Circuit affirmed the district court's decision to uphold the FWS's CHD for the MSO.[111] In its decision, the Ninth Circuit analyzed two issues.[112] First, it addressed whether the FWS bypassed the ESA's statutory requirements by considering treated areas in areas unoccupied by MSOs.[113] Second, the court analyzed whether the FWS's use of the baseline approach satisfied the ESA's mandate requiring CHDs to consider all economic factors.[114]

A. Scope of the Term "Occupied Areas"

The Ninth Circuit first considered whether the FWS improperly included areas unoccupied by MSOs in its CHD.[115] The ACG argued that the district court erred because the FWS's final rule failed to distinguish between occupied and unoccupied habitat in its CHD.[116] The 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; and (ii) 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.[117]

110. *Id.* at 88 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984)) (demonstrating level of deference court gave to agency).

111. *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1174 (9th Cir. 2010) (affirming district court's decision).

112. *See id.* at 1162 (noting that ACG preserved two issues on appeal).

113. *See id.* (discussing ACG's first argument).

114. *See id.* (detailing ACG's second argument).

115. *See id.* (explain where court began its analysis of ACG's arguments).

116. *See Ariz. Cattle Growers II*, 606 F.3d at 1162 (acknowledging ACG's argument that FWS bypassed ESA's statutory guidelines).

117. 16 U.S.C. § 1532(5)(A) (2006) (defining crticial habitat).

The Ninth Circuit noted that the ESA differentiates between occupied and unoccupied areas in determining protected habitat.[118] The court, therefore, first needed to determine what makes an area occupied under the ESA.[119]

The court found two factors relevant to this determination.[120] The first is the uncertainty factor—when the FWS believes owls are present in an area, but lacks the requisite proof.[121] The second is the frequency factor—when MSOs are shown to have a slight presence in an area.[122] The ESA permits a determination of occupied or unoccupied based on which of the two is more likely.[123] Thus, the Ninth Circuit explained that the FWS need not refrain from acting even if it cannot justify its decision with absolute confidence.[124] Additionally, the court rejected the ACG's argument that "occupied" has an unambiguous meaning.[125]

Believing the term occupied depends on numerous factors, the Ninth Circuit looked to the persuasiveness of the FWS's interpretation of the ESA.[126] The FWS defines "occupied critical habitat" as habitat containing members of the species at the time of the designation.[127] According to the FWS, a species does not have to occupy CH consistently throughout the year for habitat to be considered occupied.[128] The Ninth Circuit noted that this definition "at the very least is entitled to deference proportional to its power to per-

118. *See Ariz. Cattle Growers II*, 606 F.3d at 1164 (commenting on statutory language in ESA).

119. *See id.* (discussing process for analyzing ACG's argument that FWS included unoccupied areas in 2004 final rule).

120. *See id.* (analyzing issues court felt it needed to resolve before reaching decision on whether species occupied land).

121. *See id.* (explaining definitions of occupied under ESA).

122. *See id.* (determining whether MSOs are present in area).

123. *See Ariz. Cattle Growers II*, 606 F.3d at 1163 (explaining how certain areas are hard to classify as either occupied or unoccupied). The court noted that a grey area exists in determining whether an area is occupied for the purposes of CHDs. *Id.*

124. *See id.* (authorizing FWS to act in face of some doubt).

125. *See id.* (explaining convoluted meaning of occupied in this sense). The court noted that the word, standing alone, does not provide a clear standard for how often a species must occupy an area for that area to be included within the endangered species CH. *Id.*

126. *See id.* (illustrating test courts use in determining whether habitat is occupied). Important factors include how frequently the area is used, why the area is used, and how important the area is for species' continued existence. *Id.*

127. *See id.* at 1164 (detailing FWS's definition of CH).

128. *See Ariz. Cattle Growers II*, 606 F.3d at 1164 (promoting flexible reading of term occupied). Migratory birds typify one species that can occupy an area under the FWS's definition without living in the area year-round. *Id.*

suade."[129] The court determined that because protected areas include only seventy-five percent of the MSOs' foraging habitat, it would be impossible to precisely determine an area where MSOs exist.[130] Based on this record, the Ninth Circuit found substantial evidence supporting the FWS's definition of the term occupied.[131]

Finally, the Ninth Circuit found the FWS's interpretation of the term occupied consistent with the ESA's purpose.[132] The ESA was designed to "prevent animal and plant species endangerment and extinction caused by man's influence on ecosystems, and to return the species to the point where they are viable components of their ecosystems."[133] Thus, where data is inconclusive, there is a presumption in favor of allowing the FWS to designate habitat a species is likely to inhabit periodically as occupied to promote the ESA's conservation goals.[134]

B. The FWS's CHDs under the ESA

The Ninth Circuit also noted in its decision that courts must be most deferential when considering agency rulings within its area of expertise.[135] The FWS's 2004 final rule reflected the belief that the CHD was not merely the area needed to protect the MSO; it was the best habitat for the MSO.[136] The court found substantial evidence in the administrative record showing that MSOs regularly use sizeable areas outside of their protected areas for foraging.[137]

The Ninth Circuit rejected the ACG's claim that the FWS had impermissibly shifted its approach prior to its 2004 final rule.[138]

129. *Id.* at 1167 (questioning whether FWS's CHD was entitled to more deference than power to persuade).

130. *See id.* (noting difficulty in determining exact location of MSO).

131. *See id.* (upholding FWS's definition of occupied for MSO).

132. *See id.* at 1166 (explaining legislative intent behind ESA's mandatory broad reading of occupied).

133. *See Ariz. Cattle Growers II*, 606 F.3d at 1166 (quoting Trout Unlimited v. Lohn, 559 F.3d 946, 949 (9th Cir. 2009) (offering original statutory objectives of ESA). The court stressed the emphasis the ESA places on protecting species from man. *Id.*

134. *See Ariz. Cattle Growers II*, 606 F.3d at 1166 (arguing that interpretation of occupied is in accordance with ESA's goals).

135. *See id.* at 1163 (explaining deference shown to FWS decision); *but see N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001) (suggesting that reviewing court should show less deference to FWS's final rule which did not undergo formal or informal rulemaking process).

136. *See Ariz. Cattle Growers II*, 606 F.3d at 1166 (providing FWS's reasoning for designating land in question).

137. *See id.* at 1165 (approving FWS's conclusion drawn from administrative record).

138. *See id.* at 1168-70 (stating that change was not made arbitrarily).

The court acknowledged that the FWS's prior decision merely noted the insufficiency of treating only nesting sites as occupied areas.[139] Further, the court opined that the broader definition of occupied was more acceptable.[140] For this reason, the Ninth Circuit rejected the ACG's argument that the FWS included too much land in its CHD.[141]

C. The FWS's Economic Analysis

The ACG also argued that the FWS's use of the baseline economic approach was improper.[142] According to the ACG, the FWS's process of disregarding economic impacts stemming from endangered species designation renders the CHD economic analysis meaningless.[143] The ACG contended that a co-extensive approach, which included any economic impact of the endangered species designation as a factor to be considered in the CHD, was mandated under the ESA.[144] Further, the ACG claimed that consideration of economic impact was required to accurately assess true economic costs of the CHD in accordance with congressional intent.[145]

The Ninth Circuit rejected the co-extensive approach because it found the FWS reasonably interpreted the statute.[146] To the Ninth Circuit, there was no point in conducting a cost-benefit analysis if it included costs that existed regardless of the CHD.[147] In this regard, the Ninth Circuit found that Congress directed the FWS to designate species in the ESA without considering economic impacts of the decision.[148] Moreover, the court agreed with the FWS's be-

139. *See id.* at 1169 (indicating that FWS's prior approach was too restrictive).

140. *See id.* (approving FWS's new approach). The court found that the FWS set forth adequate reasons for changing the definition of occupied. *Id.* Additionally, the broader approach gave protection to areas intrinsically connected to protected areas and critical to species' survival. *Id.*

141. *See Ariz. Cattle Growers II*, 606 F.3d at 1170 (rejecting ACG's argument).

142. *See id.* at 1162 (summarizing ACG's argument).

143. *See id.* at 1172 (discussing ACG's reasoning regarding why baseline approach conflicts with ESA). The ACG urged the Ninth Circuit to adopt the Tenth Circuit's reasoning in *N.M. Cattle Growers*. *Id.* at 1172-74.

144. *See id.* (describing ACG's argument that baseline approach was inappropriate).

145. *See id.* (relating ACG's interpretation of ESA).

146. *See Ariz. Cattle Growers II*, 606 F.3d at 1172 (rejecting ACG's argument that baseline approach did not meet ESA's requirements).

147. *See id.* at 1172-74 (concluding that costs associated with endangered species designation exist regardless of CHD).

148. *See id.* (approving FWS's interpretation of ESA).

lief that it was unreasonable to consider these costs in performing analysis of the CHD.[149]

The Ninth Circuit also rejected the ACG's argument that the baseline approach allowed the FWS to treat the ESA's requisite economic analysis as a mere procedural formality.[150] To accept that argument, the court held, would amount to a presumption that the FWS will act in an arbitrary and capricious fashion.[151] According to the Ninth Circuit, this presumption was inconsistent with the deference federal courts are legally obligated to show administrative agencies.[152]

V. CRITICAL ANALYSIS

By upholding the FWS's use of its baseline approach in *Arizona Cattle Growers*, it appears that the Ninth Circuit deferred improperly to the FWS's judgment because the agency's methodology failed to undergo formal or informal rulemaking.[153] *Arizona Cattle Growers* essentially allows the FWS to ignore economic consequences resulting from a CHD,[154] which is inconsistent with both Congress's mandate that the FWS consider all economic factors before making CHDs[155] as well as other federal legislation dealing with natural disasters.[156] Thus, the Ninth Circuit's holding disregarded the ESA's

149. *See id.* (explaining difficulty of evaluating costs when designating species).

150. *See id.* at 1175 (stating that costs resulting from CHD will likely be consumed by costs stemming from FWS endangered species designation).

151. *See Ariz. Cattle Growers II*, 606 F.3d at 1175 (expressing that FWS acted reasonably in applying baseline approach).

152. *See id.* (rejecting ACG's argument that FWS can skip analyzing economic effects of listing under baseline approach). While the Ninth Circuit noted the deference reviewing courts must give to agency interpretations, the court did not state the level of deference it was using in reviewing the FWS's final rule. *Id.*

153. *See id.* at 1172 (suggesting that court was too deferential when reviewing FWS's final rule).

154. *See N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1280-85 (10th Cir. 2001) (holding that ESA requires an economic analysis); *see also* Stroup, *supra* note 16 (explaining how true costs of ESA are hidden from taxpayers); *see also* Coffman, *supra* note 7 (expressing that baseline approach hides true costs of administering ESA and FWS is not held accountable for certain decisions).

155. *See N.M. Cattle Growers*, 248 F.3d at 1281-85 (rejecting baseline approach because it does not satisfy ESA requirements). For a further discussion of the Tenth Circuit's rejection of the baseline approach, see *supra* notes 97-100 and accompanying text.

156. *See generally USDA Emergency Preparedness and Response*, USDA, http://www.usda.gov/wps/portal/usda/usdahome?navtype=MS&navid=SAFETY (last visited Mar.31, 2011) (noting how United States Department of Agriculture (USDA) and fifteen other government agencies provide financial assistance to victims of natural disasters). The USDA recognizes that natural disasters are constant threats to America's farmers. *Id.* The USDA provides relief to farmers who suffer losses

plain language[157] and ignored the delicate balance between environmental protection and economic development that this statute attempts to draw.[158] Finally, the Ninth Circuit failed to address the possibility that a designated species actually might be disfavored from an evolutionary standpoint[159] and failed to take into account whether human actions threatened the MSO.[160]

A. Best Available Science

The Ninth Circuit's decision in *Arizona Cattle Growers* that the FWS can make CHDs based on the "best available science" is too narrow and may ignore broader considerations regarding the ESA's purpose.[161] Under the Ninth Circuit's approach, the FWS's CHDs may prove environmentally unsound by preserving marginal species at the expense of the natural development of more advanced spe-

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due to flood, drought, fire, freeze, tornadoes, pest infestation, and other calamities. *Id.* Judging by the six specifically named categories, and "other calamities," it appears that CHDs could fall under this umbrella. *Id.* American taxpayers already fund twenty-five natural disaster programs within the USDA. *Id.* Protecting endangered species is a national problem. *See* Coffman, *supra* note 7 (explaining taxpayers should be responsible for funding FWS, not just those whose property happens to fall victim to CHD). For a further discussion of the ESA's effects on citizens, see *infra* notes 210-15 and accompanying text.

157. *See Ariz. Cattle Growers II*, 606 F.3d at 1173 (stating that cost-benefit analysis is undercut by incorporating costs existing regardless of CHD); *but see* 16 U.S.C. § 1533 (2006) (detailing that economic factors must be considered in making CHDs).

158. *See* Coffman, *supra* note 7 (explaining why baseline approach is actually counterintuitive to court's conclusion). By refusing to acknowledge the impact of *Arizona Cattle Growers II*, the Ninth Circuit failed to realize why its decision will make it harder for endangered species to thrive in private property. *Id.* For a further discussion of the negative ramifications likely emanating from *Arizona Cattle Growers II*, see *infra* notes 178-236 and accompanying text.

159. *See* Stroup, *supra* note 16 (explaining how FWS often makes designations without proof that humans are responsible for species' decline).

160. *See* Coffman, *supra* note 59 (questioning whether FWS examines reasons particular species becomes endangered).

161. *See* Anna L. George & Richard L. Mayden, *Species Concepts and the Endangered Species Act: How a Valid Definition of Species Enhances the Legal Protection of Biodiversity*, 45 NATURAL RESOURCES J. 369, 374-76 (2005), http://lawlibrary.unm.edu/nrj/45/2/06_george_species.pdf (exemplifying need for more precise species definitions); *see also* Coffman, *supra* note 7 (suggesting that ESA is exploited by environmental groups who wish to see land returned "to a pre-human state"). Furthermore, according to Robert Gordon, director of the National Environmental Institute, evidentiary standards for listing species are poor. *Id.* The FWS can designate species as endangered based on data that is not "reliable, conclusive, adequate, verifiable, accurate or even good." *Id.* For example, the FWS designated species, such as Indian flapshell turtles, based on false information from the United Nations. *Id.* In that case, the FWS did not conduct its own research until after designating the species, when the FWS learned from an expert that the turtle in question was actually one of the most widespread turtles in India. *Id.*

cies.[162] The drastic consequences that result are not limited to listed species and their competitors.[163] These consequences can also extend to private landowners, who may suffer substantial economic harm from CHDs created on their lands.[164]

B. Baseline Economic Approach

Another flaw in the Ninth Circuit's analysis involves the acceptance of the FWS's baseline economic approach.[165] This approach failed to undergo a formal rulemaking process.[166] Accordingly, as the Tenth Circuit noted, the final rule should not be entitled to *Chevron* deference and only should be accepted if it has the power to persuade.[167] Contrary to this holding, the Ninth Circuit suggested that the FWS final rule receive more deference than simply the power to persuade.[168] The court, however, never identified the actual level of deference it used in reviewing the FWS's final rule.[169]

The Ninth Circuit's decision also failed to critically analyze the FWS's bald assertion that no real economic impact flows from a CHD.[170] Putting aside the legal infirmities in the FWS's approach noted by the Tenth Circuit, the Ninth Circuit appears to implicitly

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162. *See* George & Mayden, *supra* note 161 (considering possibility that ESA protection for subsection of species could harm entire species). Very little scientific research on this topic exists, so the answer remains unknown. *Id.*

163. *See* Stroup, *supra* note 16 (examining instances where protection of fringe species has caused greater ecological damage).

164. *See id.* (noting situation where mistakenly issued CHD caused fire that burned down houses). The FWS issued a CHD for the Stephens' Kangaroo Rat, which barred landowners from plowing their land to prevent major fires. *Id.* The "Riverside Fires" eventually burned down twenty-nine homes in the neighborhood where plowing was barred, and victims of the fires did not receive any compensation from the government. *Id.* Additionally, the CHD was later revoked when a judge determined that the FWS circumvented the listing process. *Id.*

165. *See Ariz. Cattle Growers II*, 606 F.3d at 1172 (advocating baseline approach as correct method of economic analysis for determining CHDs); b*ut see* 16 U.S.C. § 1533 (establishing statutory requirements for CHDs).

166. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1281 (10th Cir. 2001) (acknowledging that baseline approach did not go through formal or informal rulemaking process).

167. *Id.* at 1282 (explaining that rules failing to undergo proper rulemaking need to be far more convincing).

168. *See Ariz. Cattle Growers II*, 606 F.3d at 1166 (suggesting that court gave too much deference to FWS final rule). The court noted that the power to persuade was the lowest level of deference under which it would review the final rule. *Id.* at 1165.

169. *See id.* (implying that court might have given too much deference to final rule).

170. *See id.* at 1174 (asserting that economic impact of CHD is negligible).

acknowledge possible economic impacts from this designation.[171] By holding that the ACG had constitutional standing to challenge the FWS's CHD, the court implicitly acknowledged that the CHD had economic impact.[172] Consequently, the Ninth Circuit's decision is internally inconsistent and reached a questionable result.[173] Indeed, if no economic consequences resulted from the MSOs' CHD, then the ACG would not have been within the zone of interests that gave them Article III standing to challenge the CHD.[174]

Finally, the Ninth Circuit erred by concluding that the ESA bars the FWS from considering economic impact in the decision to designate MSOs as endangered.[175] The court failed to recognize that Congress intended the FWS to consider economic factors when making a CHD.[176] By approving the FWS's use of its baseline approach, the Ninth Circuit therefore approved agency action that seems inconsistent with congressional intent.[177]

VI. IMPACT

In *Arizona Cattle Growers,* the Ninth Circuit's myopic emphasis on the ESA's protections for endangered species ignored the economic factors the statute requires the FWS to consider.[178] Meanwhile, the scientific community has struggled to pinpoint reasons for various species' decline.[179] This reality is especially troublesome given the substantial economic consequences that the mere designation of a species can cause.[180]

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171. *See generally id.* at 1173-74 (acknowledging that "designating critical habitat cannot be negligible").

172. *See N.M. Cattle Growers,* 248 F.3d at 1284 (suggesting that party has suffered injury from CHD if court allows party to sue).

173. For an explanation of why the baseline economic approach does not comport with the ESA's statutory requirements, see *supra* notes 88-100 and accompanying text.

174. For a discussion of how economic impacts from CHD were realized, see *supra* note 172 and accompanying text.

175. *See Ariz. Cattle Growers II,* 606 F.3d at 1172 (determining that economic impacts were likely from designation of species).

176. *See id.* at 1174 (expressing that baseline approach comports with ESA).

177. *See* 16 U.S.C. 1533 (2006) (stating that economic considerations should be considered when crafting CHD).

178. For a discussion about how the baseline economic approach does not comply with the ESA, see *supra* notes 94-100 and accompanying text. According to the statutory language, economic consequences must be considered when making CHDs. *See* 16 U.S.C. 1533 (2006).

179. *See* George & Mayden, *supra* note 161 (admitting that scientific community cannot determine reasons why several species are endangered).

180. For a further discussion of the ESA's negative economic effects on landowners, see *infra* notes 209-15 and accompanying text.

A. Economic Effects of CHDs

Because the legal basis for the ESA rests in part upon international treaty obligations, the ESA is exempt from constitutional takings analysis.[181] Not only does the baseline approach free the FWS from considering the economic impact of its CHDs, but the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (*Sweet Home*) means that landowners affected by FWS actions are more likely to lose significant value in their land without any compensation.[182] Justice Scalia's dissent in *Sweet Home* warned of possible consequences emanating from the Court's holding in that case.[183]

Justice Scalia acknowledged that the ESA both forbids hunting and killing of endangered animals and provides federal funds for acquisition of private lands to preserve the habitat of endangered animals.[184]

He strenuously objected, however, to the majority's conclusion that the ESA's prohibition on hunting and killing also provided the FWS with statutory authority to preserve habitat on private land.[185] To Justice Scalia, this expansion of the FWS's power was not supported by the ESA and imposed unfairness on landowners that could lead to financial ruin.[186] In this context, *Arizona Cattle Growers* represents the fruition of Justice Scalia's worst fears.[187] As a result of the Ninth Circuit's adoption of the baseline approach, a private citizen could face financial disaster because of a species listing.[188]

181. For a discussion of why the ESA is exempt from constitutional takings analysis, see *supra* note 11 and accompanying text.

182. *See Babbitt v. Sweet Home Chapter of Cmty's for a Great Or.*, 515 U.S. 687, 697-98 (1995) (allowing FWS to punish those who inadvertently take species on their property); *see also* Coffman, *supra* note 599 (arguing that ultimate result of *Sweet Home* is that landowner's property will lose nearly all value when FWS designates property as CH).

183. *See Sweet Home*, 515 U.S. at 731 (Scalia, J., dissenting) (predicting that majority's decision will bankrupt citizens).

184. *See id.* (approving idea that ESA should compensate landowners for their loss).

185. *See id.* (disagreeing with majority's belief that ESA allows FWS to issue CHDs on private land).

186. *Id.* (warning that decision may adversely affect taxpayers); *see also* Stroup, *supra* note 16 (detailing lives ruined by FWS's CHDs on private property).

187. *See Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting) (noting inequity in seizure of private property without compensation).

188. *See* Stroup, *supra* note 16 (discussing disastrous effects ESA has had on "unlucky" landowners).

B. Hidden Costs of the ESA

The ESA is a noble effort to save species from extinction and protect the environment from damaging consequences of human activity.[189] The hidden tragedy of the ESA, however, is that CHDs have the ability to ruin individuals' lives.[190] The media rarely reports the human suffering associated with CHDs.[191] Accordingly, most Americans do not realize that hundreds of thousands of rural citizens face the potential loss of their livelihoods stemming from FWS designations of CHDs under the ESA.[192]

The ESA costs hundreds of millions of dollars per year to implement.[193] The act's laudable objectives could be better promoted if the FWS were required to pay just compensation to landowners negatively affected by its actions.[194] This requirement would force the FWS to recognize the real cost that CHDs have on landowners and taxpayers.[195] Paying just compensation might also lead the FWS to consider more realistically how much land species actually require and which species should receive protection.[196] These considerations would, in turn, deemphasize the protection of marginal species.[197]

The Ninth Circuit's interpretation of the ESA in *Arizona Cattle Growers* means those who have the misfortune of owning land

189. *See* William A. Niskanen, *An Alternative Perspective on the Endangered Species Act*, CATO INSTITUTE (Apr. 21, 1995), http://www.cato.org/pub_display.php?pub_id=6854 (predicting outrage of Americans if they knew effects of CHDs on their fellow citizens).

190. *See* Coffman, *supra* note 59 (explaining how ESA has placed thousands of Americans into bankruptcy); see *also* Stroup, *supra* note 16 (relaying stories of harm ESA has inflicted on small family businesses).

191. *See* Coffman, *infra* note 7 (suggesting that ESA would lose all support if people knew fellow citizens were losing their homes).

192. For a further discussion of Americans who have gone bankrupt because of ESA, see *infra* notes 209-215 and accompanying text.

193. *See* Niskanen, *supra* note 189 (asserting that ESA's implementation costs hundreds of millions of dollars per year); Letter from Robin M. Nazzaro, Dir., Natural Res. & Env't, to Cong. Requesters, United States Cong. (Apr. 6, 2006) (on file with the United States Government Accountability Office) (suggesting that Congress does not know cost of ESA).

194. *See* Coffman, *supra* note 7 (predicting that landowners are more likely to save species when they do not face financial harm for doing so).

195. *See id.* (describing changes FWS would have to make if required to pay for cost of its decisions).

196. *See id.* (explaining how FWS would have to weigh total costs of designating species).

197. *See id.* (reasoning that FWS would designate far less animals endangered if taxpayers knew true costs).

within a CH must shoulder all of the costs.[198] This is a tough burden to place on few individuals, especially when the cause of species' demise may result from the evolution of a more sophisticated species or the behavior of society as a whole.[199] The burden on landowners will not foster additional support for environmental protection and will not address the problems the ESA was designed to eliminate.[200]

C. Effect of Baseline Analysis on Landowners and Species

By upholding the FWS's use of the baseline approach in *Arizona Cattle Growers*, the Ninth Circuit sends a clear message to private landowners: do not make your property hospitable to endangered species.[201] Facing with the prospect of economic ruin upon discovery of an endangered species on their land, landowners are now motivated to destroy any habitat suitable for such a species.[202] At the very least, a landowner could prevent a species from settling on his land.[203] Some landowners are believed to take the drastic step of actually killing the animal to prevent settling.[204] This drastic behavior exemplifies the desperation of certain landowners who are willing to risk the penalties of killing endangered species, including prison time, up to a $100,000 fine, or both.[205]

Aside from environmental disincentives, the Ninth Circuit's decision in *Arizona Cattle Growers* includes hidden costs imposed on landowners.[206] When the value of land affected by a CHD is reduced, landowners still must pay taxes on the original value of their

198. For a further discussion of individuals whose livelihoods have been adversely affected by the creation of a CHD on their land, see *infra* notes 2099-2155 and accompanying text.

199. *See* Nikansen, *supra* note 189 (discussing why landowners should be compensated for their property); *see also Endangered Species Found in and Around Lake Champlain*, LAKE CHAMPLAIN LAND TRUST, http://www.lclt.org/index.php?option=com_content&view=article&id=40&Itemid=30 (last visited Mar. 31, 2011) (discussing different circumstances causing extinction).

200. *See* Stroup, *supra* note 16 (suggesting that current enforcement of ESA is counterintuitive to its goals).

201. *See id.* (explaining chilling effect Ninth Circuit's ruling will have on safety of endangered species on private land).

202. *See id.* (explaining rationale behind making land unsuitable for endangered species to live).

203. *See* Coffman, *supra* note 59 (describing individuals' desire to keep land from becoming CH).

204. *See id.* (discussing desperation landowners feel). This technique is known as "shoot, shovel, and shut up." *Id.*

205. *See id.* (indicating punishment for taking protected species).

206. *See* Annett, *supra* note 15 (detailing additional costs imposed on landowners beyond CHD).

property.[207] The wealthy may be able to manipulate their assets to absorb these financial consequences.[208] Those economically less fortunate, however, may lose everything.[209]

For example, the FWS issued a CHD in California limiting the amount of water allowed to flow into the central valley in order to protect two endangered fish.[210] Consequently, farmers and ranchers have lost millions of dollars and, in some instances, have lost their property.[211] In 1990, as a result of a FWS CHD, Margaret Rector's land precipitously fell in value from $831,000 to $30,000.[212] Barbara and Dick Mossman mortgaged their farm to begin a logging business, which was initially successful.[213] The business abruptly shut down, however, when their land was designated as CH for the Northern Spotted Owl.[214] None of these landowners received compensation for their loss.[215]

By approving the FWS's baseline approach, the Ninth Circuit endorsed the current, problematic ESA framework.[216] According to the National Wilderness Institute, not a single species has been removed from the ESA due to government action.[217] Defenders of the ESA claim it takes fifty years to determine whether designations are successful. As a result, the unfortunate conclusion is that those affected by an endangered species designation or subsequent CHD, no matter how erroneous or overly-broad, will rarely be able to convince the FWS to correct its error.[218] Landowners within the Ninth

207. *See* Coffman, *supra* note 7 (demonstrating unfairness inherent in certain CHD).

208. *Id.* (suggesting that wealthy Americans will change structure of their land to prevent species from settling).

209. *See id.* (discussing how certain people will lose their livelihoods).

210. *Id.* (explaining ESA's affects on rural Americans).

211. *See id.* (detailing losses people have suffered).

212. *See* Coffman, *supra* note 7 (indicating precipitous loss in value occurring in eighteen months).

213. *See id.* (explaining how wedded couple started logging business).

214. *See id.* (discussing arbitrary decision to shut down couple's business). This situation exemplifies the particular difficulties for people who start logging businesses because the atmosphere inherent in this industry creates an ideal habitat for several endangered birds. *Id.*

215. *Id.* (indicating federal government's refusal to help these individuals). The Mossmans could not file for unemployment insurance because they were self employed. *Id.* One year after the couple lost their logging business, they received a foreclosure notice. *Id.* As a result, the Mossmans lost everything. *Id.*

216. For examples of possible negative consequences from using the baseline approach, see *supra* notes 209-215 and accompanying text.

217. *See* Coffman, *supra* note 7 (concluding that current enforcement of ESA fails to meet its established goal).

218. *See* Annett, *supra* note 15 (describing difficulty of delisting species). One of the ESA's problems is that it has become a form of free land use for federal

Circuit's jurisdiction will find it difficult to secure redress in light of the court's decision in *Arizona Cattle Growers.*[219]

D. Making the ESA Reflect the Public Interest

A more logical legislative approach for species' protection is to expand the ESA's narrow focus.[220] This can be achieved by making all Americans share costs where actual species protection is required.[221] Under the ESA, the FWS only needs to determine that the species is threatened by human activity before designating a species as endangered.[222] In many cases, however, species decline may result from various factors where human activity is not the primary, or even a contributing, cause.[223]

Congress should amend the ESA to compel the FWS to consider the economic consequences of its decisions before they are finalized and implemented.[224] Under the baseline approach, nothing in the ESA requires the FWS to assess the value of land included in a CHD to species preservation in comparison with the resulting economic consequences suffered by landowners.[225] As noted, such economic burdens are likely to be permanent because governmental action has not helped any species get off of the endangered species list.[226] Throughout the period in which the species remains endangered, the landowner will not receive any compensation even though the cause of species population decline may not be attributed to any action of the landowner.[227]

agencies. *Id.* Because land is free, agencies will try and take over property even when the value to species is low and the value to the landowner is high. *Id.*

219. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1160 (9th Cir. 2010) (indicating that Ninth Circuit will continue allowing questionable FWS CHDs).

220. *See* Stroup, *supra* note 16 (arguing that alternative method for ESA enforcement would improve ESA's effectiveness).

221. *See id.* (asserting that cost spreading would make people more willing to comply with ESA). For a further discussion of why Americans should share the ESA's costs, see *infra* notes 224-236 and accompanying text.

222. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 692 (1995) (inferring that ESA was created to stop human activity from interfering with endangered species' survival).

223. *See* Coffman, *supra* note 7 (explaining how FWS is often unsure of precise reasons for species decline).

224. *See* Stroup, *supra* note 16 (concluding that considering ESA's true costs is only way to improve species survival rates). This is because effected landowners will support the ESA instead of subverting it. *Id.*

225. *See id.* (implying that FWS fails to consider external factors important to CHD determinations).

226. *See id.* (noting ineffectiveness of ESA).

227. *See id.* (discussing unfair burden placed on landowner once endangered animal is found on property).

The solution is simple: force the FWS to pay just compensation to any landowner whose property is affected by a CHD.[228] This would require Congress to amend the ESA to require the FWS to consider these economic costs in relation to all endangered species and CHDs.[229] The FWS should set up a mechanism to pay landowners for any "taking" and thereby spread the costs of species protection to all taxpayers.[230] The federal government already absorbs the financial consequences of natural disasters through directed federal aid.[231] Similarly, consequences of species decline are a national issue deserving of a coordinated national response.[232]

Congress should force the FWS to weigh the costs of its actions against the additional protection, if any, it provides to safeguard designated endangered species.[233] Once the FWS is required to address all the consequences of its determinations, it will develop more targeted and cost-effective ways to designate and preserve endangered species.[234] Additionally, amending the ESA will make affected landowners more likely to support FWS actions and stop acting in a manner that might undercut FWS decisions.[235] By implementing these revisions, the ESA could become an administrative mechanism more likely to ensure the survival of species that truly are endangered.[236]

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228. *See* Annett, *supra* note 15 (concluding that paying just compensation is only way to protect landowners and improve ESA's efficiency).

229. *See id.* (suggesting process for factoring economic costs).

230. *See* Stroup, *supra* note 16 (asserting that cost spreading is most rational method to promote real goals of ESA).

231. *See USDA Emergency Preparedness and Response*, *supra* note 156 (demonstrating that federal government should add CHDs to natural disaster list).

232. *See* Coffman, *supra* note 7 (concluding that society should spread costs of implementing ESA if protecting endangered species is national priority).

233. *See* Annett, *supra* note 15 (arguing that FWS decisions will be better reasoned when agency is on budget).

234. *See* Stroup, *supra* note 16 (concluding that FWS will act more rationally when it has to conduct cost-benefit analysis).

235. *See* Coffman, *supra* note 7 (describing rural America's animosity toward and disregard for ESA). Instead of trying to prevent animals from settling on their land, citizens would be open to the protection of endangered species if new systems were in place that promised fair compensation for CHDs. *Id.*

236. *See id.* (concluding that Congress needs to amend ESA to stop government from arbitrarily taking property); *see also* Joe Stumpe, *Citing Species Act, Judge Spares Prairie Dogs*, N.Y. TIMES, Oct. 23, 2010, at A14, *available at* http://www.nytimes.com/2010/10/23/us/23prairie.html (explaining situation where rural citizens' land is taken without any compensation).

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