Cross-posted at CPRBlog.

The Supreme Court today denied certiorari on two Endangered Species Act cases, Arizona Cattle Growers Association v. Salazar and Home Builders Association of Northern California v. US Fish and Wildlife Service. The cases were considered together because they raise the same issue: how the economic impacts of critical habitat designation should be calculated. Development and extraction interests hoped the Court would use the cases to force the U.S. to take a broader view of those impacts.

The ESA requires that the Fish and Wildlife Service designate critical habitat when it lists a species as endangered or threatened. The listing decision must be based solely on the species' biological status. In determining critical habitat, by contrast, FWS must take into economic and other impacts into consideration and may exclude areas from critical habitat if it finds "that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat" unless including the area is necessary to prevent extinction.

FWS has adopted what it calls a "baseline" approach to the required economic analysis. It considers only the incremental costs imposed by critical habitat designation on top of any costs already imposed by listing alone. The costs imposed by ensuring that federal actions do not jeopardize the continued existence of a listed species, as section 7 requires, or by section 9's prohibition on unpermitted take, do not factor into the agency's determination of critical habitat. The resulting economic analyses generally conclude that the economic impacts of critical habitat will be fairly small. In its recent economic analysis of critical habitat designation for the polar bear, for example, FWS opined that critical habitat designation would not bring any additional conservation requirements. It concluded that the only costs added by critical habitat were a small amount of additional administrative costs associated with more complex section 7 consultation.

Development interests were hoping the Court would take these cases because there is a circuit conflict. In New Mexico Cattle Growers Association v. FWS, 248 F.3d 1277 (2001), the Tenth Circuit found FWS's baseline approach invalid, concluding that

> Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.

I'm not surprised that the Court declined to take up these cases. They raise a narrow

question of statutory interpretation not likely to hold much appeal for the justices (or their clerks). That question is complicated by issues of how much deference would be due FWS’s consistently-maintained baseline approach. The apparent circuit conflict is somewhat softened by events since the *New Mexico Cattle Growers* decision. At that time, FWS was asserting that there were *no* incremental impacts of critical habitat designation, because the Act’s protections for critical habitat were precisely co-extensive with the protection against jeopardy. Several courts have found that the rules underlying that interpretation were unlawful, and FWS now concedes that critical habitat sometimes imposes additional consultation requirements and can impose added restrictions. Finally, it’s not clear that there is anything other than rhetoric at stake in this argument. FWS cannot reduce critical habitat below the minimum needed to prevent extinction, no matter what its economic consequences. The developers probably are hoping that FWS will trim critical habitat around the edges if it has to do their version of economic analysis, but what they really want is to get the full costs of endangered species protection on the record. That’s surely not insignificant from a political point of view, but its not a compelling reason for the Supremes to get involved.