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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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HOME BUILDERS ASSOCIATION OF  
NORTHERN CALIFORNIA, BUILDING  
INDUSTRY LEGAL DEFENSE  
FOUNDATION, CALIFORNIA  
BUILDING INDUSTRY ASSOCIATION,  
CALIFORNIA STATE GRANGE, and  
GREENHORN GRANGE,

Plaintiffs,

and

CITY OF SUISUN,

Plaintiff-Intervenor,

and

TSAKOPOULOS INVESTMENTS,  
TSAKOPOULOS FAMILY TRUST,  
DROSOULA TSAKOPOULOS, and  
GEORGE TSAKOPOULOS,

Plaintiff-Intervenors,

v.

UNITED STATES FISH AND  
WILDLIFE SERVICE; H. DALE  
HALL, Director of the United  
States Fish and Wildlife  
Service; UNITED STATES  
DEPARTMENT OF INTERIOR; and  
GALE A. NORTON, Secretary of  
the United States Department

of Interior,

NO. CIV. S-05-0629 WBS-GGH

MEMORANDUM AND ORDER

1 Defendants,  
2 and  
3 DEFENDERS OF WILDLIFE, BUTTE  
4 ENVIRONMENTAL COUNCIL, AND  
5 CALIFORNIA NATIVE PLANT  
6 SOCIETY,  
7 Defendant-Intervenors.

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8 BUTTE ENVIRONMENTAL COUNCIL,  
9 DEFENDERS OF WILDLIFE,  
10 CALIFORNIA NATIVE PLANT  
11 SOCIETY, SAN JOAQUIN RAPTOR AND  
12 WILDLIFE RESCUE CENTER, SIERRA  
13 FOOTHILLS AUDUBON SOCIETY, and  
14 VERNALPOOLS.ORG,

15 Plaintiffs,

16 v.

17 GALE A. NORTON, Secretary of  
18 the Interior, and U.S. FISH  
19 AND WILDLIFE SERVICE,

20 Defendants.

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22 Plaintiffs brought this action pursuant to the  
23 Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq.; the  
24 National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et  
25 seq.; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§  
26 701 et seq. Plaintiffs challenge the United States Fish and  
27 Wildlife Service's ("FWS") critical habitat designation of over  
28 800,000 acres of land in California and Oregon for fifteen vernal  
pool species. Currently pending before the court are two motions  
for reconsideration, clarification, or amendment of this court's  
November 2, 2006, order, filed by plaintiff, Home Builders

1 Association of Northern California, et al. ("Home Builders") and  
2 plaintiffs and defendant-intervenors, Butte Environmental  
3 Council, et al. ("Environmental Groups"). Also pending before  
4 the court is a motion to intervene as a defendant, filed by the  
5 Regents of the University of California ("Regents").

6 I. Factual and Procedural History<sup>1</sup>

7 Pursuant to the Endangered Species Act, the FWS listed  
8 as endangered fifteen species of plants and animals that live in  
9 vernal pool environments. See 43 Fed. Reg. 44,810 (Sept. 28,  
10 1978); 57 Fed. Reg. 24,192 (June 8, 1992); 59 Fed. Reg. 48,136  
11 (Sept. 19, 1994); 62 Fed. Reg. 14,338 (Mar. 26, 1997); 62 Fed.  
12 Reg. 33,029 (June 18, 1997); 16 U.S.C. § 1533. The fifteen  
13 species are four crustaceans and eleven plants, distributed in  
14 vernal pool complexes located throughout southern Oregon, parts  
15 of California, and parts of northern Mexico. 70 Fed. Reg. 46,925  
16 (Aug. 11, 2005).

17 In September, 1994, when the FWS listed the four  
18 species of fairy shrimp as endangered, it determined that  
19 critical habitat designation for the fairy shrimp was nonetheless  
20 "not prudent" because "such designation likely would increase the  
21 degree of threat from vandalism or other human activities." 59  
22 Fed. Reg. at 48,151. In February, 2001, this court joined other  
23 courts' findings in determining that the FWS' deviation from its  
24 statutory mandate to designate critical habitat, concurrently

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26 <sup>1</sup> The significant factual and procedural history of this  
27 case are described in greater detail in this court's prior order,  
28 which parties now seek the court to reconsider. (Nov. 2, 2006  
Order.) For the purposes of this motion, the following relevant  
facts are sufficient.

1 with the listing of a species as endangered, violated the APA.  
2 Butte Env'tl. Council v. White, 145 F. Supp. 2d 1180, 1185 (E.D.  
3 Cal. 2001).

4           Accordingly, pursuant to an order by this court, the  
5 FWS published a proposed rule to designate 1,662,762 acres of  
6 critical habitat for the fifteen vernal pool species on September  
7 24, 2002. 67 Fed. Reg. 59,884. The FWS subsequently issued an  
8 "initial" final critical habitat designation on August 6, 2003,  
9 that diminished the amount of critical habitat by more than one  
10 million acres. 68 Fed. Reg. 46,684; see Butte Env'tl. Council,  
11 No. 04-0096 at 4. In January, 2004, Environmental Groups  
12 challenged these exclusions from the critical habitat designation  
13 in this court. Butte Env'tl. Council, No. 04-0096, at 4. The  
14 court remanded for reconsideration, but did not set aside the  
15 critical habitat designation in the interim.

16           On March 8, 2005, the FWS confirmed its non-economic  
17 exclusion determinations in the August 6, 2003, final rule. 70  
18 Fed. Reg. 11,140 (Mar. 8, 2005). Subsequently, on August 11,  
19 2005, the FWS published its final rule designating approximately  
20 858,846 acres of critical habitat in 34 California counties and  
21 one county in southern Oregon. 70 Fed. Reg. 46,924 (Aug. 11,  
22 2005). This final rule excluded the 20 census tracts that would  
23 suffer the greatest economic impact, along with three for which  
24 the economic benefits of exclusion outweighed the benefits of  
25 inclusion. Id. at 46,931-32, 46,948-52.

26           On March 30, 2005, Home Builders filed a complaint  
27 under the ESA, NEPA, and APA, challenging FWS's critical habitat  
28 designation, (Compl.) and on November 2, 2006, this court ruled

1 on five cross-motions for summary judgment. (Nov. 2, 2006  
2 Order.) The court found that the FWS's reasoning regarding its  
3 exclusions from critical habitat designation failed to adequately  
4 consider the recovery standard under the ESA, pursuant to Gifford  
5 Pinchot Task Force v. U.S. Fish & Wildlife Service, 378 F.3d  
6 1059, 1069 (9th Cir. 2004). (Id. at 70.) The court additionally  
7 held that the exclusion of two particular tracts from the  
8 critical habitat designation (Highway 99 in Tehama County and  
9 land being developed for the University of California at Merced)  
10 was arbitrary and capricious, because the FWS failed to  
11 adequately explain its reasoning. (Id.) Accordingly, the court  
12 remanded the matter back to the FWS, with instructions to submit  
13 a new final rule within 120 days, consistent with the order.  
14 (Id. at 70-71.)

15 On November 16, 2006, the Environmental Groups filed a  
16 motion to amend the judgment pursuant to Rule 59(e), and on  
17 November 17, 2006, Home Builders filed a similar motion. In  
18 addition, on December 11, 2006, the Regents filed a motion to  
19 intervene, claiming that this court's remand of the exclusion of  
20 the tract at Merced has violated a significant protectable  
21 interest.

## 22 II. Discussion

### 23 A. Motion for Reconsideration

24 A district court may reconsider an order under either  
25 Federal Rule of Civil Procedure 59(e) (motion to alter or amend  
26 judgment) or Rule 60(b) (relief from judgment or order).

27 Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985). Both  
28 the Environmental Groups and Home Builders frame their motions as

1 being brought under Rule 59, however both motions were filed more  
2 than ten days after entry of the summary judgment order for which  
3 they seek reconsideration.<sup>2</sup> The court therefore construes both  
4 motions as being brought pursuant to Rule 60(b). Fed. R. Civ. P.  
5 60(b) (“[o]n motion and upon such terms as are just, the court  
6 may relieve a party . . . from a final judgment, order, or  
7 proceeding . . . .”); see Mt. Graham Red Squirrel v. Madigan, 954  
8 F.2d 1441, 1463 n.35 (9th Cir. 1992) (a motion for  
9 reconsideration brought later than ten days after entry of  
10 judgment is construed as a motion brought under Rule 60(b)).

11 Reconsideration is an “extraordinary remedy, to be used  
12 sparingly in the interests of finality and conservation of  
13 judicial resources.” Kona Enters., Inc. v. Estate of Bishop, 229  
14 F.3d 877, 890 (9th Cir. 2000). A motion for reconsideration  
15 “should not merely present arguments previously raised, or which  
16 could have been raised in the initial summary judgment motion.”  
17 United States v. Wetlands Water Dist. 134 F. Supp. 2d 1111, 1130  
18 (E.D. Cal. 2001) (citing Backlund, 778 F.2d at 138).

19 Rule 60(b) “provides for reconsideration only upon a  
20 showing of (1) mistake, surprise, or excusable neglect; (2) newly  
21 discovered evidence; (3) fraud; (4) a void judgment; (5) a  
22 satisfied or discharged judgment; or (6) ‘extraordinary  
23 circumstances’ which would justify relief.” Sch. Dist. No. 1J, 5  
24 F.3d at 1263; Fed. R. Civ. P. 60(b). Under Rule 60(b),  
25 reconsideration is generally only appropriate where the district

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27 <sup>2</sup> Rule 59(e) states that “[a]ny motion to alter or amend  
28 a judgment shall be filed no later than 10 days after entry of  
the judgment.” Rule 54 defines “judgment” as “a decree and any  
order from which an appeal lies.”

1 court (1) is presented with newly discovered evidence, (2)  
2 committed clear error or the initial decision was manifestly  
3 unjust, or (3) if there is an intervening change in controlling  
4 law. See Westlands Water Dist., 134 F. Supp. 2d at 1131.<sup>3</sup>

5 1. Environmental Groups' Motion

6 The Environmental Groups argue that this court's  
7 conclusion that the FWS failed to adequately consider the  
8 recovery standard in specifying its exclusions cannot be squared  
9 with the relief granted, asserting that the non-economic  
10 exclusions must also be remanded for reconsideration by the FWS.  
11 (Envtl. Groups Mot. for Recons. 3-7.) The Environmental Groups  
12 also seek clarification of two aspects of this court's previous  
13 order, requesting this court: 1) to instruct the FWS that it may  
14 not engage in "coextensive" economic impact analysis of  
15 exclusions to the critical habitat designation on remand; and 2)  
16 to vacate all exclusions. (Id. at 7-9.)

17 This court's November 2, 2006, order found fault with  
18 the FWS's exclusions to its critical habitat designation, as  
19 analyzed under Section 4(b)(2) of the ESA, 16 U.S.C. §  
20 1533(b)(2), based on its failure to adequately analyze the

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24 <sup>3</sup> The court notes that analysis under Rule 59(e) would  
25 result in the same outcome. Under Rule 59(e), reconsideration is  
26 appropriate only if the "district court (1) is presented with  
27 newly discovered evidence, (2) committed clear error or the  
28 initial decision was manifestly unjust, or (3) if there is an  
intervening change in controlling law." Sch. Dist. No. 1J,  
Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir.  
1993) (limiting the use of reconsideration to "highly unusual"  
circumstances).

1 recovery benefits conferred by a critical habitat designation.<sup>4</sup>  
2 (Nov. 2, 2006 Order 63.) (“This court is . . . unconvinced that  
3 the FWS actually considered the recovery benefits of critical  
4 habitat designation.”) With regard to the ultimate relief  
5 granted, the court therefore remanded the exclusions to the FWS  
6 for reconsideration consistent with the order. (Id. at 70.)  
7 (“The FWS’s exclusions of critical habitat pursuant to § 4(b)(2)  
8 . . . and accompanying economic analysis, must be remanded to the  
9 FWS. . . .”)

10 The Environmental Groups, however, point to language in  
11 this court’s prior order which they assert is incongruous with  
12 the court’s ultimate conclusion regarding consideration of the  
13 recovery standard. (Envtl. Groups Mot. for Recons. 5.) (“[T]he  
14 Court cannot hold that FWS failed to consider the recovery  
15 benefits while simultaneously concluding that its balancing of  
16 benefits used to justify its exclusions is reasonable.”) (citing  
17 Nov. 22, 2006 Order 64 (“[T]he court cannot find that the FWS  
18 abused its discretion with regard to its consideration of  
19 benefits.”)) The Environmental Groups are of course correct--the  
20 paragraph beginning on page 63 of this court’s November 22, 2006,  
21 order was included in error and is inconsistent with the  
22 preceding ten pages of discussion. Accordingly, the court will  
23 amend its prior order, withdrawing this contradictory paragraph.  
24 As reasoned on pages 53 through 63 of this court’s prior order,  
25 the FWS’s economic analysis did not adequately consider the

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27 <sup>4</sup> “Recovery benefits” refers to the requirement that the  
28 promulgated Rule adequately address not only the mere survival of  
the endangered species, but also its recovery.

1 recovery benefits of critical habitat designation in designating  
2 its exclusions.

3 a. Non-Economic Exclusions

4 The question still remains regarding what significance  
5 that holding has for the non-economic exclusions. The  
6 Environmental Groups contend that, because the FWS's economic  
7 analysis failed to adequately consider the recovery standard when  
8 balancing the benefits of exclusion with the benefits of  
9 designation as critical habitat, the non-economic exclusions were  
10 also invalid as a matter of law. The court reviews the FWS's  
11 decision to exclude areas pursuant to Section 4(b)(2) "for abuse  
12 of discretion." Bennett v. Spear, 250 U.S. 154, 172 (1997).

13 As explained in great detail, this court's previous  
14 order held that the FWS's engaged in improper economic analysis  
15 with regard to the exclusions from critical habitat because it  
16 neglected to consider the recovery of the species. As the Ninth  
17 Circuit made clear in Gifford Pinchot Task Force v. U.S. Fish &  
18 Wildlife Service, 378 F.3d 1059, 1063 (9th Cir. 2004), the  
19 definitions of "jeopardize" and "destruction or adverse  
20 modification" were sufficiently similar, so that a Section 7  
21 consultation would be triggered, under either definition, only  
22 when a species' survival is threatened. Accordingly, Gifford  
23 invalidated the regulation's definition of "adverse  
24 modification," as inconsistent with the ESA's recovery goal.

25 This court's inquiry in its November 22, 2006, order  
26 focused on a section of the Service's final rule wherein it  
27 indicated that "[t]his section allows the Secretary to exclude  
28 areas from critical habitat for economic reasons if she

1 determines that the benefits of such exclusion exceed the  
2 benefits of designating the area as critical habitat." 70 Fed.  
3 Reg. 46,948. In an effort to demonstrate compliance with  
4 Gifford, this section of the Rule professed an allegiance to the  
5 Ninth Circuit's guidance. 70 Fed. Reg. 46,948 ("[O]ur current  
6 methodological approach to conducting economic analyses of our  
7 critical habitat designations is to consider all  
8 conservation-related costs.").

9 This court found, however, that despite the FWS's  
10 assertions that they considered recovery in their economic  
11 analysis, the few references to the recovery standard in this  
12 section of the rule merely constituted last minute additions of  
13 language, in a hollow attempt to satisfy Gifford. (Nov. 2, 2006  
14 Order 60-63.) The economic analysis used to designate these  
15 twenty three exclusions was improper, and accordingly these  
16 exclusions were remanded back to the FWS.

17 The various non-economic exclusions, however, did not  
18 employ the same such balancing of economic benefits and costs--  
19 indeed, by definition, these exclusions were based on non-  
20 economic factors.<sup>5</sup> Of course, regardless of the type of analysis  
21 used to exclude areas from the critical habitat designation, the  
22 FWS continues to have an obligation to consider the recovery  
23 goals of the ESA. To this end, this court conducted a separate  
24 inquiry into the FWS's analysis of the non-economic exclusions.  
25 (Nov. 2, 2006 Order 64-70.) After lengthy analysis, this court

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27 <sup>5</sup> 16 U.S.C. 1533(b)(2) does not specify exactly how an  
28 agency is to analyze exclusions, merely that it determine whether  
the "benefits of such exclusion outweigh the benefits of  
specifying such area as part of the critical habitat."

1 found that FWS had reasonably concluded that the non-economic  
2 exclusions were governed by alternative land management plans  
3 which already adequately incorporated the ESA's recovery goals.  
4 (Id. at 65 (affirming exclusion of Carrizso Plain National  
5 Monument); id. at 67 (affirming exclusion of national wildlife  
6 refuges and the Coleman National Fish Hatchery complex); id. at  
7 67-68 (affirming exclusion of lands with Habitat Conservation  
8 Plans ("HCPs")); id. at 69 (affirming exclusion of two areas of  
9 land belonging to the Department of Defense).<sup>6</sup> Thus, while the  
10 twenty three economic exclusions were remanded for consideration  
11 of the recovery goals, this court found that the non-economic  
12 exclusions sufficiently followed Gifford's reasoning and were not  
13 an abuse of discretion requiring remand.

14 b. Coextensive Economic Analysis

15 The Environmental Groups also seek clarification from  
16 this court, requiring express instruction that the FWS may not  
17 consider coextensive costs in its analysis on remand. In order  
18 to understand the impact of this court's previous order with  
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20 <sup>6</sup> The rule indicates that FWS's analysis considered  
21 recovery for: 1) Carrizso Plain National Monument by noting that  
22 "Goals and Implementation Guidelines of the CPRMP include  
23 management for the long-term conservation and recovery of listed  
24 plants and animals," 70 Fed. Reg. 46,947; 2) national wildlife  
25 refuges and the Coleman National Fish Hatchery complex by noting  
26 that exclusion will not appreciably increase the likelihood of  
27 activities that would "diminish the value of the habitat for  
28 conservation of the species," 70 Fed. Reg. 11,151; 3) lands  
governed by HCP's, by noting that "[t]he purpose of such an HCP  
is to describe and ensure . . . that the action does not  
appreciably reduce the survival and recovery of the species," 70  
Fed. Reg. 11,151; and 4) Department of Defense lands by noting  
that they were excluded pursuant to 16 U.S.C. 1533(a)(3)(B),  
prohibiting designation of critical habitat for lands subject to  
integrated natural resource management plans (INRMPs), 70 Fed.  
Reg. 11,153-54.

1 regard to coextensive analysis, it is necessary to briefly  
2 recount the court's reasoning parsing two relevant cases, New  
3 Mexico Cattle Growers v. U.S. Fish & Wildlife Service, 248 F.3d  
4 1277 (10th Cir. 2001), and Gifford Pinchot, 378 F.3d 1059.

5 The Cattle Growers case rejected a "baseline" approach  
6 to analyzing the economic impact of critical habitat designation,  
7 in favor of a "coextensive" approach. Cattle Growers, 248 F.3d  
8 1285. A baseline approach uses a "but for" method of determining  
9 what economic impacts flow from a critical habitat designation.  
10 By contrast, a coextensive approach to analyzing economic impact  
11 allows an agency, in considering the impact of a critical habitat  
12 designation (whose purpose is ensuring the survival and recovery  
13 of the species), to also consider the economic impact of listing  
14 the species as endangered (whose sole purpose is ensuring the  
15 survival of the species).

16 Admittedly, some courts have criticized the reasoning  
17 of Cattle Growers, because the coextensive analysis permits an  
18 agency to consider the economic impact of listing a species in  
19 contravention of the ESA's intent.<sup>7</sup> Cape Hatteras Access Pres.  
20 Alliance v. U.S. DOI, 344 F. Supp. 2d 108, 130 (D.D.C. 2004)  
21 ("The Service, however, must not allow the costs below the  
22 baseline to influence its decision to designate or not designate  
23 areas as critical habitat. That would be inconsistent with the  
24 ESA's prohibition on considering economic impacts during the  
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26 <sup>7</sup> The ESA mandates that an endangered species listing  
27 determination be based "solely on the basis of the best  
28 scientific and commercial data available." 16 U.S.C. §  
1533(b)(1)(A). Economic analysis is not a factor in the  
analysis.

1 species listing process."); see also Ctr. for Biological  
2 Diversity v. Bureau of Land Mgmt., 422 F. Supp. 2d 1115, 1152  
3 (N.D. Cal. 2004). However, in Cattle Growers, the court was  
4 given the choice between possibly ruling contrary to the ESA's  
5 intent (via coextensive analysis), or explicitly violating the  
6 ESA's provision that a critical habitat designation be made upon  
7 consideration of the "economic impact." As discussed supra, this  
8 was because the definition of "adverse modification" effectively  
9 conflated the survival and recovery goals of the species, thereby  
10 subsuming and rendering null any beneficial impact of critical  
11 habitat designation, analyzed in comparison to the impact  
12 benefits conferred by listing a species. See Cattle Growers, 248  
13 F.3d at 1284-85.

14           However, courts and agencies are no longer "hamstrung  
15 by [their] inability to consider the validity of 50 C.F.R. §  
16 402.02," Cape Hatteras, 344 F. Supp. 2d at 129-30, because the  
17 court in Gifford explicitly invalidated that provision. 378 F.3d  
18 at 1071. Thus, an agency is no longer prevented from engaging in  
19 a meaningful analysis of the economic impact of a critical  
20 habitat designation, above and beyond the impact of listing a  
21 species. While this does undercut the reasoning that the Cattle  
22 Growers court used to invalidate the baseline approach, it does  
23 not require the conclusion that a coextensive analysis is legally  
24 improper.

25           The ESA mandates that the FWS consider various impacts  
26 (economic and other) "of specifying any particular area as  
27 critical habitat." 16 U.S.C. 1533(b)(2). It does not, however,  
28 mandate that in its analysis of those impacts, the FWS be

1 precluded from also considering the impact of listing the species  
2 as endangered. Indeed, the statute's language appears to  
3 anticipate a broad inquiry regarding any potential impacts of the  
4 critical habitat designation. 16 U.S.C. 1533(b)(2) (mandating  
5 consideration of "and any other relevant impact"). In this  
6 respect, Cattle Growers and Gifford Pinchot are not mutually  
7 exclusive--as long as the recovery goals of the ESA are given  
8 appropriate consideration.<sup>8</sup>

9 In its final rule, the FWS indicated that in  
10 "conducting economic analyses, we are guided by the 10th Circuit  
11 Court of Appeal's [sic] ruling in New Mexico Cattle Growers v.  
12 U.S. Fish & Wildlife Service, 248 F.3d 1277 (10th Cir. 2001),  
13 which directed us to consider all impacts, 'regardless of whether  
14 those impacts are attributable co-extensively to other causes.'" 70  
15 Fed. Reg. 46,948. As explained in the November 22, 2006,  
16 order, the FWS additionally retained the CRA International  
17 consulting firm, who projected the economic impacts of the  
18 critical habitat designation above and beyond the baseline  
19 regulatory burden. (Nov. 2, 2006 Order 47 (citing Admin R., Vol.  
20 2, Doc. 358 45-46.) CRA International also analyzed the  
21 administrative costs associated with Section 7 consultations for

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23 <sup>8</sup> It is of course possible that an agency conducting a  
24 coextensive analysis pursuant to Cattle Growers might also be  
25 continuing to follow the invalidated regulatory definition of  
26 adverse modification in 50 C.F.R. § 402.02, and thus would fail  
27 to adequately consider the recovery standard as required by  
28 Gifford Pinchot. It is for this reason that the court's previous  
order noted that "[t]o the extent that the FWS relied on Cattle  
Growers and neglected to consider the effects of the critical  
habitat designation on species' recovery, pursuant to Gifford  
Pinchot, the critical habitat designation is not consistent with  
applicable Ninth Circuit precedent. (Nov. 2, 2006 Order 57  
n.22.)

1 listing a species, as well as the designation of a critical  
2 habitat. (Id. (citing Admin R., Vol. 2, Doc. 358 10.)

3 To the extent that the FWS's coextensive inquiry may  
4 have insufficiently considered the recovery standard, by focusing  
5 solely on those costs which are coextensive with listing, this  
6 court's remand of the twenty three exclusions addresses that  
7 deficiency. However, it is not the coextensive analysis which is  
8 faulty, but the lack of sufficient consideration of the ESA's  
9 recovery standard. Accordingly, this court declines to instruct  
10 the FWS on remand that it may not conduct a coextensive  
11 analysis.<sup>9</sup>

12 c. Vacatur of Exclusions

13 Finally, the Environmental Groups seek vacatur of all  
14 of the exclusions remanded back to the FWS. Indeed, the general  
15 rule is for a court to "hold unlawful and set aside agency  
16 action, findings, and conclusions found to be arbitrary,  
17 capricious, an abuse of discretion or otherwise not in accordance  
18 with law." 5 U.S.C. § 706(2) (A). While the court did find that  
19 the FWS's exclusions were improper, and thus deserving of remand,  
20 this does mandate vacatur.

21 Indeed, "when equity demands, the regulation can be  
22 left in place while the agency follows the necessary procedures."

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24 <sup>9</sup> The court also notes the questionable nature of the  
25 Environmental Groups' request. See INS v. Ventura, 537 U.S. 12,  
26 16 (2002) ("Generally speaking, a court . . . should remand a  
27 case to an agency for decision of a matter that statutes place  
28 primarily in agency hands."); Fed. Power Comm'n v. Idaho Power  
Co., 344 U.S. 17, 20 (1952) ("[T]he guiding principle . . . is  
that the function of the reviewing court ends when an error of  
law is laid bare. At that point the matter once more goes to the  
[agency] for reconsideration.").

1 Idaho Farm Bureau Fed. v. Babbitt, 58 F.3d 1392, 1405 (9th Cir.  
2 1995) (citing W. Oil and Gas v. EPA, 633 F.2d 803, 813 (9th Cir.  
3 1980)). Factors to be considered in deciding whether to vacate  
4 or not include: (1) the purposes of the substantive statute under  
5 which the agency was acting, (2) the consequences of invalidating  
6 the agency action, and (3) and potential prejudice to those who  
7 will be affected by maintaining the status quo. Weinberger v.  
8 Romero-Barcelo, 456 U.S. 305 (1982).

9           Significant is the fact that, while the FWS has  
10 committed error requiring remand, that error is minor in the  
11 grand scheme of its analysis. For this reason, the court found  
12 the need to only grant the FWS 120 days in which to correct its  
13 analysis. Moreover, given the slight nature of the agency's  
14 error, there is a legitimate possibility that the agency will be  
15 able to substantiate its rule without altering the ultimate  
16 substance. Fox Television Stations, Inc. v. F.C.C., 280 F.3d  
17 1027, 1048 (D.C. Cir. 2002) (citing Allied-Signal, Inc. v. United  
18 States Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51(D.C. Cir.  
19 1993) ("The decision whether to vacate depends on the seriousness  
20 of the order's deficiencies (and thus the extent of doubt whether  
21 the agency chose correctly) and the disruptive consequences of an  
22 interim change that may itself be changed.").

23           Finally, the court notes its interest in intervening as  
24 little as possible into an already incredibly complex  
25 environmental regulation. W. Oil, 633 F.2d at 813 ("We are also  
26 influenced by the possibility of undesirable consequences which  
27 we cannot now predict that might result from invalidation of the  
28 designations. Our intervention into the process of environmental

1 regulation, a process of great complexity, should be accomplished  
2 with as little intrusiveness as feasible. Under the unusual  
3 circumstances of this case and guided by authorities that  
4 recognize that a reviewing court has discretion to shape an  
5 equitable remedy, we leave the challenged designations in  
6 effect.”) In this court’s prior order, it reasoned that the  
7 balance of equity counsels in favor of leaving the rule in place,  
8 and the Environmental Groups have not presented any reasoning as  
9 to why this finding must be disturbed. Accordingly, the  
10 exclusions to the FWS’s critical habitat designation will not be  
11 vacated.

12 2. Home Builders’ Motion

13 Home Builders seeks reconsideration of this court’s  
14 prior order in two respects. First, Home Builders asserts that  
15 this court’s decision to invalidate two of the twenty three  
16 economic exclusions as arbitrary and capricious effectively  
17 granted relief that no party sought. (Home Builders’ Mot. for  
18 Recons. 1-2.) Secondly, Home Builders argues that this court’s  
19 order did not adequately dispose of their argument that the FWS’s  
20 improperly employed a standard of qualifying an area as a  
21 critical habitat designation as long as it contained one primary  
22 constituent element. (Id. 2-3.)

23 a. Exclusion of UC Merced and Tehama County  
24 Tracts

25 Home Builders contends that their motion for summary  
26 judgment did not seek invalidation of any of the existing  
27 economic exclusions, and thus this court’s relief remanding two  
28 existing economic exclusions (Highway 99 in Tehama County and the

1 development of the University of California at Merced) was  
2 improper. To the extent that Home Builders argues that this  
3 court granted relief sought by no party, this contention is  
4 incorrect. Specifically, the Environmental Groups' motion for  
5 summary judgment sought exactly such relief. (Environmental  
6 Groups Mot. for Summ. J. 25-28.) ("The elimination of these  
7 twenty three census tracts should be set aside . . . .") The  
8 fact that the Environmental Groups chose to object to the  
9 exclusions en masse does not mean that this court is limited to  
10 only finding fault with all, or none, of the exclusions. Both  
11 Home Builders and the Environmental Groups called into question  
12 the validity of the FWS's exclusion analysis, and the court found  
13 fault with only a particular portion of such analysis.  
14 Accordingly, the relief granted was not improper.

15           However, notwithstanding this fact, the court now takes  
16 the opportunity on this motion to reevaluate its reasoning with  
17 regard to the two tracts, and upon reconsideration, finds that it  
18 was in error. As noted in the November 2, 2006, order, an agency  
19 "is obligated to 'articulate[] a rational connection between the  
20 facts found and the choices made.'" Pac. Coast Fed'n of  
21 Fishermen's Assocs. v. U.S. Bureau of Reclamation, 426 F.3d 1082,  
22 1091 (9th Cir. 2005) (quoting NRDC v. Dep't of Interior, 113,  
23 F.3d 1121, 1126 (9th Cir. 1997)). At that point, it appeared to  
24 the court that, while the FWS had indicated high costs for the  
25 Merced and Tehama tracts, it had made no "relative comparison  
26 amongst all tracts." (Nov. 2, 2006 Order 51.) The FWS had given  
27 "no indication that these two tracts are among the twenty-two  
28 most impacted tracts," and at oral argument the Federal Defenders

1 were unable to articulate why this might be the case. (Id.)

2           Upon reconsideration of the record, in particular the  
3 June 30, 2005, Proposed Rule, 70 Fed. Reg. 37,739, and August 11,  
4 2005, Final Rule, 70 Fed. Reg. 46,924, it now appears that the  
5 FWS did sufficiently explain why the two tracts in question were  
6 included. In the Proposed Rule, the FWS indicated that it was  
7 considering excluding the twenty highest cost areas, as  
8 calculated in their draft economic analysis, and sought comments  
9 explaining why any of these twenty should not be excluded, or  
10 additional tracts should be excluded. 70 Fed. Reg. 37,740. As  
11 affirmed by this court's previous order, the FWS rationally  
12 concluded that because "approximately 80 percent of the total  
13 costs are represented by 25 percent of the critical habitat" in  
14 these twenty tracts, exclusion was reasonable. (Nov. 2, 2006  
15 Order 49-50; 70 Fed. Reg. 37,740.)

16           However, as a result of the public notice and comment  
17 period, the FWS learned of "additional costs" previously not  
18 factored into its economic analysis, in the amount of  
19 "\$10,000,000 for UC Merced and \$6,093,965 for Highway 99." 70  
20 Fed. Reg. 46,950. After adjusting their draft economic analysis  
21 to account for this new information, the new estimated economic  
22 costs of designating as critical habitat UC Merced and Highway 99  
23 in Tehama became \$15,759,870 and \$11,453,799, respectively. 70  
24 Fed. Reg. 46,949 (Table 2). It is now clear that economic costs  
25 of this magnitude do in fact place these two tracts well within  
26 the "twenty-two most impacted tracts," and squarely within the  
27 reasoning previously approved of. Accordingly, the court will  
28

1 amend its prior order.<sup>10</sup>

2 b. Standard for Designating Critical Habitat

3 Home Builders' second request for clarification asserts  
4 that this court failed to address their principal argument that  
5 the Service violated the ESA by evaluating whether areas could be  
6 designated as critical habitat based on whether they contain "one  
7 or more of the species [Primary Constituent Elements ("PCEs)]."  
8 (Home Builders' Mot. for Recons. 2.) Home Builders presently  
9 argues, as they previously did in their motion for summary  
10 judgment, that every area designated as critical habitat must  
11 contain all PCEs. (Id.)

12 Home Builders' contention that this court neglected to  
13 address their argument is without merit. On page 35 of the  
14 November 2, 2006, order, the court made clear in a lengthy  
15 footnote that the particular nature of vernal pools, and their  
16 need to be "fed by upland areas," means that a particular area  
17 "may not be occupied by the species, and may not contain a vernal  
18 pool . . . . Regardless of whether they contain a vernal pool, or  
19 other PCEs, they are still essential to the conservation of the  
20 15 vernal pool species." (Nov. 2, 2006 Order 35 n.7.)

21 A motion for reconsideration "should not merely present  
22 arguments previously raised." Wetlands Water, 134 F. Supp. 2d at  
23 1130 (citing Backlund, 778 F.2d at 138). It is a "extraordinary  
24 remedy," reserved for situations where the court has erred, or

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25  
26 <sup>10</sup> The court wishes to make clear that, while these two  
27 particular tracts are no longer singled out and remanded based on  
28 arbitrary economic analysis, (Nov. 2, 2006 Order 51), it remains  
true, as discussed above, that all twenty-three tracts, including  
these two, are remanded to the FWS for reconsideration consistent  
with this court's order and the recovery standard in Gifford.

1 new relevant information has come to light. Kona, 229 F.3d at  
2 890. It is not a forum for a party to attempt to reargue matters  
3 already decided by the court. Home Builders has already briefed  
4 and argued this point, and the court has already ruled. Other  
5 than simply rehashing previous arguments, Home Builders has not  
6 demonstrated why reconsideration is proper. Accordingly, the  
7 court declines to revisit the issue.

8 B. Regents' Motion to Intervene

9 The Regents are the true owners of the land being  
10 developed as part of the University of California at Merced,  
11 which was originally excluded from the critical habitat  
12 designation in the FWS's August 11, 2005, final rule. The  
13 Regents have invested significant time and money into the  
14 development of UC Merced Project, and the designation of their  
15 land as critical habitat would no doubt interfere with their  
16 development plans. (Regents' Mot. to Intervene 1.) However, as  
17 indicated in their motion, while they have closely monitored the  
18 litigation, until now they have decided not to intervene because  
19 the issues raised by the parties demonstrated that their  
20 interests were adequately represented. (Id.)

21 Subsequent to this court's November 2, 2006, order, the  
22 Regents sought to intervene based wholly on this court's singling  
23 out of the UC Merced tract.<sup>11</sup> They seek to intervene in order to  
24

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25 <sup>11</sup> "[The lack of a desire to intervene] changed, however,  
26 with the Court's SJ Order, which for the first time singled out  
27 the UC Merced Project, analyzed it separately from the remaining  
28 twenty-one Census tracts whose exclusion the court affirmed, and  
concluded that the Service's analysis for excluding just the UC  
Merced Project was insufficient." (Regents' Mot. to Intervene  
1.)

1 protect their interests in the UC Merced Project, because they  
2 contend it is substantially and individually affected by this  
3 court's previous order. However, as explained in Section  
4 II(A)(2)(a), supra, this court will now be amending its prior  
5 order, withdrawing any reference to the reasoning the Regents  
6 found objectionable. Therefore, the Regents' justification for  
7 intervening is now moot.

8           Indeed, a cursory analysis of the standards for  
9 intervention as a matter of right and permissive intervention  
10 supports this conclusion. Rule 24 allows intervention as a  
11 matter of right under various circumstances "unless the  
12 applicant's interest is adequately represented by existing  
13 parties." Fed. R. Civ. P. 24(a). Because the tract at UC Merced  
14 is no longer singled out for individual treatment, as the Regents  
15 themselves confess, their interests are sufficiently represented  
16 by the parties already involved in the case. (Regents' Mot. to  
17 Intervene 1.)

18           Permissive intervention is allowed when an applicant's  
19 "claim or defense and the main action have a question of law or  
20 fact in common." Fed. R. Civ. P. 24(b). In this case, the  
21 Regents' unique claims have become moot--the reasoning in this  
22 court's previous order to which they are objecting will be  
23 withdrawn pursuant to this order. (Regents' Mot. to Intervene  
24 17) ("Regents' claims and defenses . . . are in direct response  
25 to determinations made by the Court['s November 2, 2006 order] in  
26 this action.") Accordingly, the court will decline to grant the  
27  
28

1 Regents' motion.<sup>12</sup>

2 C. Timing on Remand

3 In this court's previous order, it reasoned that  
4 because the necessary changes were "simply an amendment to a  
5 prior final designation . . . a 120 day deadline is more than  
6 reasonable for this purpose." (Nov. 2, 2006 Order 71 n.27)  
7 (citing Butte Environ. Council v. White, 145 F. Supp. 2d 1180,  
8 1185 (E.D. Cal. 2001) (allowing six months for the FWS to  
9 complete a final critical habitat designation and noting that  
10 many courts have allowed only 120 days for the same action)).  
11 While this court is granting, in part, both motions for  
12 reconsideration of the previous order, the substantive changes  
13 are not great, and thus the issues on remand are similarly minor.  
14 However, in light of the uncertainty created by both motions, the  
15 court will grant the FWS 120 days from the issuance of this order  
16 within which to complete the new critical habitat rule.

17 III. Conclusion

18 IT IS THEREFORE ORDERED that Environmental Groups'  
19 motion for clarification, reconsideration, or amendment be, and  
20 the same hereby is, GRANTED IN PART. The entire paragraph  
21 beginning on page 63 of this court's November 2, 2006, order, is  
22 hereby WITHDRAWN.

23 IT IS FURTHER ORDERED that Home Builders' motion for  
24 clarification, reconsideration, or amendment be, and the same  
25 hereby is, GRANTED IN PART. The two paragraphs on pages 50 and

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26  
27 <sup>12</sup> As this court indicated to the Regents at oral  
28 argument, however, if it becomes necessary for the Regents to  
intervene at a later date (for example, to represent unique  
interests upon appeal) it may do so at that time.

1 51, as well the first paragraph on page 70, of this court's  
2 November 2, 2006, order, regarding the remand specifically of the  
3 exclusions of UC Merced and Tehama County, are hereby WITHDRAWN.

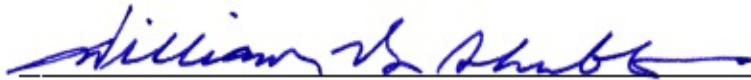
4 IT IS FURTHER ORDERED THAT:

5 (1) in all other respects, Environmental Groups' and  
6 Home Builders' motions for reconsideration be, and the same  
7 hereby are, DENIED;

8 (2) the Regents' motion to intervene be, and the same  
9 hereby is, DENIED;

10 (3) this matter be, and the same hereby is, REMANDED to  
11 the FWS for further action and consideration consistent with this  
12 order, as well as the portions of this court's November 2, 2006  
13 order not withdrawn above. The FWS shall submit a new final  
14 critical habitat rule to the Federal Register for publication  
15 therein within 120 days of the date of this order.

16 DATED: January 23, 2007

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19 WILLIAM B. SHUBB  
20 UNITED STATES DISTRICT JUDGE  
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