Nos. 17-70810, 17-70817

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION, et al., *Petitioners*,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.

On Petition for Review of Action of the United States Environmental Protection Agency

RESPONDENTS' OPPOSITION TO PETITIONERS' PETITION FOR REHEARING EN BANC

JONATHAN D. BRIGHTBILL

Principal Deputy Assistant Attorney General

ERIC GRANT

JEAN E. WILLIAMS

Deputy Assistant Attorneys General

J. BRETT GROSKO MICHELE WALTER

Attorneys

Environment and Natural Resources Division

U.S. Department of Justice

Post Office Box 7611 Washington, D.C. 20044

(202) 305-0342

Brett.Grosko@usdoj.gov

Of Counsel:

MICHELE KNORR
BENJAMIN WAKEFIELD
Attorneys
Office of General Counsel
U.S. Environmental Protection Agency



TABLE OF CONTENTS

GLO	OSSAF	RY	iv
INT	RODU	JCTION	1
STA	ATEMI	ENT	1
	A.	Statutory and regulatory background	1
		Federal Insecticide, Fungicide, and Rodenticide Act	1
		2. Endangered Species Act	2
	B.	Factual background	3
	C.	Panel opinion	3
ARG	GUME	NT	4
I.		panel's decision is consistent with <i>Karuk Tribe</i> and all want precedent	5
II.	The	panel's decision raises no issue of exceptional importance	10
	A.	The panel's decision is unexceptional	10
	B.	The expert wildlife agencies espoused the continued use of EPA's methodology in their 2014 Interim Report to Congress.	12
CO	NCLU	SION	17
CEF	RTIFIC	CATE OF COMPLIANCE	



TABLE OF AUTHORITIES

Cases

American Wild Horse Campaign v. Bernhardt,	
963 F.3d 1001 (9th Cir. 2020)	14
California ex rel. Lockyer v. USDA,	
575 F.3d 999 (9th Cir. 2009)	5-7, 10
Center for Biological Diversity v. U.S. Dep't of Housing & Urban	
Development, 359 Fed. Appx. 781 (9th Cir. 2009)	12
Center for Food Safety v. EPA,	
9th Cir. Nos. 14-73359, 15-71207	12
Defenders of Wildlife v. Flowers,	
414 F.3d 1066 (9th Cir. 2005)	11
Drakes Bay Oyster Co. v. Jewell,	
747 F.3d 1073 (9th Cir. 2014)	14
Friends of Santa Clara River v. U.S. Army Corps of Engineers,	
887 F.3d 906 (9th Cir. 2018)	passim
Ground Zero Center for Non-Violent Action v. U.S. Dep't of Navy,	
383 F.3d 1082 (9th Cir. 2004)	6, 11
Karuk Tribe of California v. U.S. Forest Service,	
681 F.3d 1006 (9th Cir. 2012)	passim
Kohler v. Inter-Tel Technologies,	
244 F.3d at 1182 (9th Cir. 2001)	9, 11
Southwest Center for Biological Diversity v. U.S. Forest Service,	
100 F.3d 1443 (9th Cir. 1996)	6, 11
Western Watersheds Project v. Kraayenbrink,	
632 F.3d 472 (9th Cir. 2011)	5, 9



Statutes, Regulations, and Court Rules

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(a)	1
7 U.S.C. § 136a(c)(5)	
7 U.S.C. § 136a(c)(7)(B)	
Endangered Species Act, 16 U.S.C. § 1531	
16 U.S.C. § 1533	2
16 U.S.C. § 1536(a)(2)	2, 4
Agricultural Improvements Act of 2018, Pub. L. No. 115-334, § 10115, 132 Stat. 4490, 4915-16	17
50 C.F.R. § 402.12	2
50 C.F.R. § 402.14(a).	2, 6
FWS, Interagency Cooperation, 51 Fed. Reg. 19,926 (June 3, 1986)	7
Fed. R. App. P. 35	4
Fed. R. App. P. 40(a)(2)	5
Other Authorities	
National Research Council of the National Academies, Assessing Risks to Endangered and Threatened Species from Pesticides (2013), https://www.nationalacademies.org/our- work/ecological-risk-assessment-under-fifra-and-esa)	13
EPA, FWS, NMFS, and USDA, <i>Interim Report to Congress</i> on Endangered Species Act Implementation in Pesticide Evaluation Programs (Nov. 2014), https://epa.gov/sites/production/files/2015-07/documents/esareporttocongress.pdf	15-16



GLOSSARY

EPA Environmental Protection Agency

ESA Endangered Species Act

FIFRA Federal Insecticide, Fungicide, and Rodenticide Act

FWS Fish and Wildlife Service

NAS National Academy of Sciences

NMFS National Marine Fisheries Service

USFS U.S. Forest Service



DOCKET

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time** alerts and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

