

RECENT FEDERAL DECISIONS

NINTH CIRCUIT UPHOLDS BIOLOGICAL OPINION REGARDING IMPACTS OF CENTRAL VALLEY PROJECT AND STATE WATER PROJECT OPERATIONS ON SALMONID SPECIES

San Luis & Delta-Mendota Water Authority v. Locke, ___F.3d___, Case No. 12-15144 (9th Cir. Dec. 22, 2014).

Following its recent decision upholding requirements for Central Valley Project (CVP) and State Water Project (SWP) operations (*see, San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (*Delta Smelt Consolidated Litigation*) (9th Cir. 2014) designed to prevent jeopardy to Delta smelt, on December 22, 2014, the Ninth Circuit Court of Appeals upheld federal Endangered Species Act (ESA) based restrictions designed to protect San Joaquin and Sacramento Valley Salmonids. The court held that the National Marine Fisheries Service's (NMFS) determination that CVP/SWP operations caused jeopardy to salmon, steelhead, sturgeon, and southern resident killer whales was entitled to deference and the trial court's use of "extra-record" evidence to substitute its own judgment for that of the expert federal agency (here NMFS) was improper.

Background

On May 19, 2006, the U.S. Bureau of Reclamation (Bureau) requested consultation with the Commerce Department's National Marine Fisheries Service regarding the long-term effects of CVP/SWP operations on all listed species under the Endangered Species Act.

Pursuant to § 7 of the ESA, NMFS issued its chinook Salmon/Sturgeon Biological Opinion on June 4, 2009 (Salmonid BiOp), and found CVP/SWP operations jeopardize the continued existence of winter and spring-run chinook salmon, steelhead, green sturgeon, and southern resident killer whales. NMFS also concluded CVP/SWP operations destroy or adversely impact critical habitat for all such species other than the southern resident killer whale.

Because NMFS found CVP/SWP operations cause jeopardy to federally protected species, NMFS provided over 70 Reasonable and Prudent Alternatives (RPAs)—actions that, if followed by Reclamation,

are intended avoid the likelihood of harm to these species. The RPAs included releasing water from Goodwin and New Melones Dams on the Stanislaus River to cool river temperatures and encourage steelhead spawning, and restricting pumping from the Sacramento-San Joaquin Delta by proscribed flow-to-export ratios to protect young salmonids.

The District Court's Ruling and Appeal

On June 15, 2009, San Luis & Delta-Mendota Water Authority and Westlands Water District filed suit against the Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA) and NMFS. The action was consolidated with several others challenging the Salmonid BiOp; the California Department of Water Resources intervened as plaintiff. Plaintiffs generally challenged the prescribed release of water down the Stanislaus River and the flow-to-export ratios that limit export of water from the Delta.

Following cross-motions for summary judgment—which introduced thousands of pages of new evidence by declaration—on September 20, 2011, the District Court concluded NMFS acted in an arbitrary and capricious manner when it developed key portions of the Salmonid BiOp. Among other things, the U.S. District Court found NMFS acted improperly when it: (1) relied upon fish salvage data that was not scaled to population; (2) did not sufficiently support its classifications of various salmonids; (3) failed to reconcile aspects of the Salmonid BiOp with a separate 2009 Orca BiOp; (4) did not explain how project operations would reduce steelhead spawning habitat; (5) did not provide sufficient support for the conclusion that CVP/SWP operations promote invasive species; (6) failed to provide support the use of "maximum steelhead habitat" as a benchmark for evaluating listed species in the Stanislaus River; and

(7) failed to establish how each RPA was essential under the ESA or complied with the Central Valley Project Improvement Act.

On these grounds, the District Court invalidated much of NMFS' Salmonid BiOp and ordered the agency to reconsider its findings. Seasonal restrictions on CVP/SWP operations were left in place pending completion of that review. Plaintiffs and defendants subsequently cross-appealed.

The Ninth Circuit's Decision

Salmon BiOps and RPAs Supported by Sufficient Evidence

The Ninth Circuit reversed the District Court ruling and held both the Salmonid BiOp's conclusions and related RPAs were supported by sufficient evidence.

First, the Ninth Circuit held the lower court's use of new evidence, found outside NMFS' administrative record, constituted an abuse of discretion. The court found that instead of deferring to NMFS' conclusions in the Salmonid BiOp and the related RPAs, the District Court improperly undertook a substantive review of the science supporting the BiOp's conclusions, ultimately substituting its own opinions—and those of the parties' experts—for the opinions of NMFS. The Ninth Circuit ruled opinions and documents from the parties' experts should have been excluded, as their admission improperly "gave the proceedings in the District Court the appearance that the administrative record was open and that the proceedings were a forum for debating the merits of the BiOp."

NMFS' Determination that Project Operations Caused Jeopardy to Salmon Was Supported by Evidence in the Administrative Record

Second, the Ninth Circuit held NMFS' determination that CVP/SWP operations caused jeopardy to federally protected species was not arbitrary or capricious, but instead supported by evidence in the administrative record. Indeed, the court held that NMFS considered all relevant factors, and offered sufficient explanations and causation grounded in evidence, when it: (1) used raw data regarding the number of fish salvaged from pumping operations, rather than data scaled to fish populations, to determine maximum allowable negative flows on the Old

and Middle Rivers; (2) characterized winter-run chinook salmon as "not viable" under current CVP/SWP operations; (3) distinguished year-to-year impacts of commercial salmon harvest on orcas' viability from long-term impacts associated with CVP/SWP operations; (4) relied on studies that demonstrated increased sediment reduced steelhead spawning habitat; (5) concluded that CVP/SWP operations cause indirect mortality of listed species by creating conditions in the Delta that favor non-native species that prey on listed salmonids; and (6) relied on a study that used the goal of maximizing steelhead habitat, but did not abandon the ESA's goal of merely avoiding jeopardy. In so holding, the Ninth Circuit emphasized its responsibility to only determine whether the agency complied with the procedural requirements of the Administrative Procedure Act, which governs review of agency determinations under the ESA such as the conclusions in the Salmonid BiOp, not to make its own judgments about the appropriate outcome on the merits.

As to Salmonid BiOp's RPAs, the Ninth Circuit held NMFS was not required to show how each was *essential* to avoiding jeopardy to any listed species; the ESA does not require that level of precision. The opinion also clarified NMFS did not need to explain why one RPA was selected instead of another, but only that the RPA was reasonably supported based upon a review of the administrative record. Nor was NMFS required to describe how each RPA met the ESA's specific non-jeopardy factors, or show evidence that each RPA was economically or technologically feasible. Instead, NMFS only had to conclude—based on the record—that the proposed RPAs did not further jeopardize the listed species or adversely affect critical habitats. The court thus upheld each RPA identified by NMFS in the Salmonid BiOp, including the 4:1 flow-to-export ratio for water pumped from the Delta; negative flow restrictions of -2,500 to -5,000 cubic-feet per second on the Old and Middle Rivers between January 1 and June 15; achieving 75 percent salvage efficiency for salmonids; and releasing cold water flows, pulse flows, and inundation flows on the Stanislaus River.

In short, the Ninth Circuit upheld NMFS' 2009 Salmonid BiOp and its RPAs entirely, rejected each contention raised by plaintiffs' in their cross-appeal, and remanded for entry of judgment in favor of defendants.

Conclusion and Implications

As in *Delta Smelt Consolidated Cases*, the Ninth Circuit reiterated the importance of judicial deference to both the determinations made by the expert wildlife agency that prepares the BiOp—here NMFS—as well as to the science utilized by that

agency in arriving at its conclusions. On January 12, 2015, the U.S. Supreme Court denied review of *Delta Smelt Consolidated Cases*. It remains to be seen if the plaintiffs will seek rehearing by the Ninth Circuit or request Supreme Court review of the Salmonid BiOp. (David E. Cameron, Meredith Nikkel)

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