

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

San Luis & Delta-Mendota Water Authority v. Locke

776 F.3d 971 (9th Cir. 2014) · No. Nos. 12-15144, 12-15289, 12-15290, 12-15291, 12-15293, 12-15296 ·

Decided December 22, 2014

SUMMARY

The Ninth Circuit reviewed challenges to a 2009 Biological Opinion issued by the National Marine Fisheries Service under the Endangered Species Act concerning the effects of Central Valley water operations on threatened and endangered species. The court held that the district court improperly relied on extra-record evidence and failed to give the agency the substantial deference required under the Administrative Procedure Act. It upheld the Biological Opinion in its entirety and remanded for entry of summary judgment in favor of the federal defendants and intervenor-environmental groups.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Richard C. Tallman; Johnnie B. Rawlinson; Thomas O. Rice, District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	December 22, 2014
DOCKET	Nos. 12-15144, 12-15289, 12-15290, 12-15291, 12-15293, 12-15296
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Consolidated cross-appeals from the Eastern District of California's summary-judgment decision reviewing a formal Endangered Species Act Biological Opinion issued by the National Marine Fisheries Service.
STANDARD OF REVIEW	Summary judgment and the district court's evaluation of agency action were reviewed de novo. Admission of extra-record evidence was reviewed for abuse of discretion. The agency action was reviewed under the Administrative Procedure Act's arbitrary-or-capricious standard, with substantial deference to the agency's scientific judgments and review generally limited to the administrative record.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service,

United States Department of the Interior, United States Bureau of Reclamation, The Bay Institute, California Trout, Friends of the River, Natural Resources Defense Council, Northern California Council of the Federation of Fly Fishers, San Francisco Baykeeper, Sacramento River Preservation Trust, Winnemem Wintu Tribe, Pacific Coast Federation of Fishermen's Associations, Inc., Institute for Fisheries Research v. San Luis & Delta-Mendota Water Authority, Westlands Water District, Stockton East Water District, Metropolitan Water District of Southern California, Oakdale Irrigation District, South San Joaquin Irrigation District, Kern County Water Agency, Coalition for a Sustainable Delta, State Water Contractors, California Department of Water Resources

TOPICS

endangered species act administrative procedure act judicial review of agency action standard of review
appellate procedure

PRACTICE AREAS

environmental law administrative law endangered species litigation appellate procedure

QUESTIONS PRESENTED

1. Whether the district court improperly supplemented the administrative record with extra-record declarations and used those declarations to question NMFS's scientific judgments.
2. Whether NMFS's use of raw fish-salvage data, rather than population-scaled data, to establish flow restrictions was arbitrary and capricious.
3. Whether the challenged jeopardy-opinion components concerning winter-run Chinook, Southern Resident orcas, steelhead critical habitat, and indirect mortality factors were arbitrary and capricious.
4. Whether the challenged reasonable and prudent alternatives were arbitrary and capricious because NMFS did not explain why each was essential to avoid jeopardy or separately document compliance with the regulatory non-jeopardy factors.
5. Whether NMFS was required to distinguish discretionary from nondiscretionary project activities in establishing the environmental baseline.
6. Whether the Biological Opinion's indirect mortality factors were indirect effects under the ESA regulations.
7. Whether the Bureau of Reclamation was independently liable under the ESA.

HOLDINGS

1. The district court abused its discretion by admitting extra-record declarations beyond the narrowly construed Lands Council exceptions and using them to substitute expert analysis for NMFS's scientific

analysis.

2. NMFS acted within its substantial discretion by using raw salvage data, together with other studies and population-based incidental-take data, to establish flow restrictions.
3. The challenged components concerning winter-run Chinook, Southern Resident orcas, steelhead critical habitat, and indirect mortality factors were not arbitrary or capricious.
4. The ESA and its implementing regulations do not require NMFS to explain why each reasonable and prudent alternative is essential, to select the best alternative, or to fully document compliance with each non-jeopardy factor in 50 C.F.R. § 402.02.
5. The record adequately supported Actions IV.2.1, IV.2.3, IV.3, IV.4.2, III.1.2, III.1.3, and III.2.2, and those actions were not arbitrary or capricious.
6. NMFS was not required to segregate discretionary and nondiscretionary aspects of coordinated project operations when establishing the environmental baseline.
7. The mortality factors identified in the Biological Opinion were direct effects of the project operations, not indirect effects under 50 C.F.R. § 402.02.
8. The challenge asserting that Reclamation was independently liable under the ESA was dismissed because it depended on the alleged legal invalidity of the Biological Opinion, which the court rejected.

KEY QUOTATIONS

“We hold that the district court did not give NMFS the substantial deference it is due under the APA.” (776 F.3d at 976)

“But reviewing courts may not look to this evidence as a basis for questioning the agency’s scientific analyses or conclusions.” (776 F.3d at 982)

“Section 402.02 is a definitional section; it is defining what constitutes an RPA, not setting out hoops that the [consultation agency] . . . must jump through.” (776 F.3d at 1004)

“These two examples show that an indirect effect—as envisioned by 50 C.F.R. § 402.02—is one that the action makes possible (or indeed, more probable), but does not directly cause.” (776 F.3d at 1017)

FACTUAL BACKGROUND

The federal Central Valley Project and California State Water Project pump and convey water from California's Sacramento-San Joaquin Delta to agricultural and domestic users. Their operations alter river flows, affect fish habitat, and can entrain or otherwise harm listed species, including several salmonid species and Southern Resident orcas. At Reclamation's request, NMFS prepared a 2009 Biological Opinion concluding that continued project operations would jeopardize listed species and proposing more than seventy reasonable and prudent alternatives governing project operations.

PROCEDURAL HISTORY

Water districts and related parties challenged NMFS's 2009 Salmonid Biological Opinion concerning continued operation of the Central Valley and State Water Projects. The district court consolidated the actions, granted and

denied portions of the parties' cross-motions for summary judgment, and invalidated several components of the Biological Opinion under the Administrative Procedure Act while upholding others. The Ninth Circuit reviewed the district court's summary-judgment rulings and evidentiary ruling concerning extra-record evidence, reversed the invalidations, affirmed the rulings challenged on cross-appeal, and remanded for entry of summary judgment in favor of defendants.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the portions of the district court's opinion invalidating components of the Biological Opinion, affirm the district court on the three cross-appeal issues, and remand for entry of summary judgment in favor of defendants. Each party shall bear its own costs.

CASES CITED

- *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2004)
- *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014)
- *Camp v. Pitts*, 411 U.S. 138 (1973)
- *Fence Creek Cattle Co. v. U.S. Forest Service*, 602 F.3d 1125 (9th Cir. 2010)
- *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443 (9th Cir. 1996)
- *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980)
- *Marsh v. Oregon Natural Resources Defense Council*, 490 U.S. 360 (1989)
- *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010) (per curiam)
- *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)
- *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)
- *Alabama Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004)
- *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974)
- *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983)
- *Pacific Coast Federation of Fishermen's Associations v. United States Bureau of Reclamation*, 426 F.3d 1082 (9th Cir. 2005)
- *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006)
- *Bennett v. Spear*, 520 U.S. 154 (1997)
- *Am. Wildlands v. Kempthorne*, 530 F.3d 991 (D.C. Cir. 2008)
- *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1993)
- *Miccosukee Tribe of Indians of Florida v. United States*, 566 F.3d 1257 (11th Cir. 2009)
- *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)
- *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998)

- National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976)
- Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy James Webb, as Secretary of the Navy, Pyramid Lake Paiute Tribe of Indians v. U.S. Department of the Navy, 898 F.2d 1410 (9th Cir. 1990)
- In re Consolidated Salmonid Cases, 791 F. Supp. 2d 802 (E.D. Cal. 2011)

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