

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Center for Biological Diversity v. Raimondo

No. 3:22-cv-00117-JD (N.D. Cal. Mar. 14, 2023) · No. 3:22-cv-00117-JD · Decided March 14, 2023

SUMMARY

The Northern District of California granted the Center for Biological Diversity summary judgment in part, holding that the National Marine Fisheries Service unlawfully issued a 2021 incidental-take permit for the Washington/Oregon/California sablefish pot fishery. The court concluded that the Marine Mammal Protection Act required a take reduction plan for ESA-listed humpback whales and that insufficient funding did not eliminate that requirement. The court deferred consideration of remedies and the challenge to the 2020 biological opinion.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	James Donato
JURISDICTION	United States District Court for the Northern District of California
DECIDED	March 14, 2023
DOCKET	3:22-cv-00117-JD
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff brought an action under the Marine Mammal Protection Act and Endangered Species Act, reviewed under the Administrative Procedure Act, challenging NMFS's issuance of a 2021 incidental take permit for the Washington/Oregon/California sablefish pot fishery. The parties filed cross-motions for summary judgment.
STANDARD OF REVIEW	Under the Administrative Procedure Act, agency action is upheld unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court resolved the record-based challenge through summary judgment, which is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	Unknown

PARTIES

Center for Biological Diversity v. National Marine Fisheries Service,
Gina Raimondo

TOPICS

environmental law administrative procedure act judicial review of agency action statutory interpretation
remedies

PRACTICE AREAS

environmental law administrative law statutory interpretation judicial review of agency action remedies

QUESTIONS PRESENTED

1. Whether the MMPA required NMFS to develop or be developing a take reduction plan for ESA-listed humpback whales interacting with the sablefish pot fishery.
2. Whether NMFS lawfully issued the 2021 incidental take permit under 16 U.S.C. § 1371(a)(5)(E)(i)(III) without a take reduction plan having been developed or being developed.
3. Whether NMFS's interpretation of the MMPA funding and prioritization provision relieved it of the obligation to develop a take reduction plan.
4. What remedy should follow from the unlawful permit issuance and whether CBD could independently challenge the 2020 biological opinion.

HOLDINGS

1. Under the plain language of 16 U.S.C. § 1387(f)(1), NMFS was required to develop and implement a take reduction plan for the ESA-listed humpback whales interacting with the sablefish pot fishery.
2. NMFS violated the MMPA and APA by issuing the 2021 incidental take permit without determining that a take reduction plan had been developed or was being developed for the ESA-listed humpback whales.
3. NMFS's interpretation could not overcome the unambiguous statutory text, and the court declined to defer to an interpretation that conflicted with the MMPA's mandatory requirements.

KEY QUOTATIONS

“The difference between the mandatory “shall” and the discretionary “may” in Section 1387(f)(1) is obvious.” (Discussion at 1)

“Nothing about the prioritization process transforms a mandatory duty into a discretionary one.” (Discussion at 2)

“Consequently, NMFS’s conclusion that the requirements of Section 1371(a)(5)(E) were satisfied without a take reduction plan being under development was arbitrary and capricious.” (Conclusion at 2)

FACTUAL BACKGROUND

NMFS issued a 2021 incidental take permit authorizing commercial fishing operations in the Washington/Oregon/California sablefish pot fishery to incidentally take ESA-listed humpback whales. The fishery uses tens of thousands of ocean-bottom pots connected in long strings, and humpback whales can become entangled in the gear, suffering injury or death. When NMFS issued the permit, it had neither developed nor begun developing a take reduction plan for the whales, although the MMPA required such a plan for the relevant strategic stock and fishery.

PROCEDURAL HISTORY

CBD challenged NMFS's 2021 permit authorizing the incidental taking of ESA-listed humpback whales in the sablefish pot fishery. The parties filed cross-motions for summary judgment. The court granted CBD's motion in part on its second claim, holding that NMFS unlawfully issued the permit without having developed or begun developing a required take reduction plan. The court deferred resolution of the appropriate remedy and CBD's independent challenge to the 2020 biological opinion, setting a status conference to address those matters.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand order was issued at this stage. The court deferred the appropriate remedy and scheduled a status conference to address remedies and the challenge to the 2020 biological opinion.

CASES CITED

- *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1256-57 (9th Cir. 2017)
- *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 733 (9th Cir. 2020)
- *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1017 (9th Cir. 2012)
- *Center for Community Action & Environmental Justice v. FAA*, 2023 WL 2213470, at *4 (9th Cir. Feb. 24, 2023)
- *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)
- *Ecological Rights Foundation v. FEMA*, 384 F. Supp. 3d 1111, 1119 (N.D. Cal. 2019)
- *San Luis v. Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 627 (9th Cir. 2014)
- *Friends of Del Norte v. California Department of Transportation*, No. 18-cv-00129-JD, 2023 WL 2351649, at *5 (N.D. Cal. Mar. 3, 2023)
- *Northwest Motorcycle Association v. USDA*, 18 F.3d 1468, 1471-72 (9th Cir. 1994)
- *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)
- *Center for Biological Diversity v. EPA*, 847 F.3d 1075, 1084 (9th Cir. 2017)
- *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 185 (1978)
- *Friends of Gualala River v. Gualala Redwood Timber, LLC*, 552 F. Supp. 3d 924, 931 (N.D. Cal. 2021)
- *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 652 (2007)

- Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 15 (2008)
- Center for Biological Diversity v. Salazar, 695 F.3d 893, 899 (9th Cir. 2012)
- Kohola v. National Marine Fisheries Service, 669 F. Supp. 2d 1182, 1191 (D. Haw. 2009), vacated as moot, 439 F. App'x 618 (9th Cir. 2011)
- Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014)
- Michigan v. DeVos, 481 F. Supp. 3d 984, 991 (N.D. Cal. 2020)
- City of Los Angeles v. Barr, 941 F.3d 931, 940 (9th Cir. 2019)
- Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 412 (2011)
- Arizona v. United States, 567 U.S. 387, 453 (2012) (Alito, J., concurring in part and dissenting in part)
- Graham County Soil & Water Conservation District v. United States ex rel. Wilson, 559 U.S. 280, 298 (2010)
- Kingdomware Technologies, Inc. v. United States, 579 U.S. 162, 172 (2016)

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