

Pacific Coast Federation of Fishermen's Assoc. vs. Gutierrez

Background:

- A complaint was filed on August 9, 2005 (amended on September 11, 2006) in Federal Court (Fresno) by nine (9) environmental groups challenging NMFS's (previously known as NOAA) salmon and steelhead biological opinion (BioOp)

Timeline:

- Winter-run Salmon listed as endangered on January 4, 1994; Spring-run on September 16, 1999; and Central Valley Steelhead on March 19, 1998.
- Reclamation & DWR initiated Re-consultation on March 12/14, 2004
- NMFS BioOp issued on October 22, 2004 from a BioAssessment completed on June 30, 2004
- Reclamation requested re-initiation of consultation to NMFS on April 26, 2006
- Hearing on Plaintiff's SJ motion held on October 3, 2007.
- Judge issued Order on April 16, 2008
- Scheduling Conference held on April 25, 2008, Supplemental Order issued by court on April 29th (summarized below)
- NMFS (in coordination with Reclamation/DWR) filed species/conditions status report by May 15, 2008
- Plaintiffs and Intervenors file Response to May 15th Report by May 23rd
- NMFS to file Response/updated data by May 29th
- Evidentiary Hearing to begin on June 6, 2008

Court Order:

Judge Wanger issued his 151 page decision on April 16, 2008.

- NMFS acted arbitrarily and capriciously when it found that the CVP/SWP operations would not result in jeopardy to the survival and recovery of the winter-run, spring-run Chinook salmon and Central Valley steelhead species or adversely modify the species' critical habitat
- The BioOp failed to explain contradictory evidence as to the impact of CVP/SWP actions on the survival and recovery of these species;
- The BioOp failed to consider impacts of global climate change;
- CVP's operations under baseline conditions did NOT violate ESA by an irreversible or irretrievable commitment of resources in Section 7(d) of the Act;
- The adaptive management process for salmon was found to be definite, and sufficiently certain to be enforceable, including temperature compliance points, Shasta carryover storage, and changes to the Red Bluff Diversion Operations, all to minimize the impacts to migrating salmonids;

Supplemental Order: (Judge Wanger's Request for current information)

- Current population of species and present likelihood of extinction/extirpation from CVP/SWP operations through September 30, 2008
- Expected impacts to species from CVP/SWP operations currently and through September 30, 2008
- Whether any changes to planned operations through 2008 are required to avoid jeopardy to species; if so, what changes, and impacts of changes to other parties/public? Are there reasonable alternatives to changing operations?
- Other causes impacts

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Pacific Coast Federation of
Fishermen's Associations,
Institute for Fisheries
Resources, et al.,

Plaintiffs,

v.

Carlos M. Gutierrez, in his
official capacity as Secretary
of Commerce, et al.,

Defendants,

San Luis & Delta-Mendota Water
Authority, et al.,

Defendant-Intervenors.

1:06-cv-00245-OWW-GSA

MEMORANDUM DECISION AND ORDER
GRANTING IN PART AND DENYING
IN PART PLAINTIFFS' MOTIONS
FOR SUMMARY JUDGMENT (Doc.
145) AND GRANTING IN PART AND
DENYING IN PART FEDERAL
DEFENDANTS' CROSS-MOTIONS FOR
SUMMARY JUDGMENT (Doc. 160)

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1 [making an] informed decision." *Id.* (internal citations and
2 quotations omitted). Nevertheless, a court should "uphold a
3 decision of less than ideal clarity if the agency's path may
4 reasonably be discerned." *Home Builders*, 127 S. Ct. at 2530.

5 A biological opinion is a final agency action for judicial
6 review purposes under the APA. See *PCFFA*, 265 F.3d at 1033-34
7 (holding that a no jeopardy biological opinion is an agency's
8 final decision).

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10 V. Summary of Parties' Cross-Motions for Summary Judgment.

11 A. Plaintiffs' Motion for Summary Judgment.

12 Plaintiffs assert four major grounds in their motion for
13 summary judgment:

14 First, the BiOp is arbitrary and capricious under the ESA
15 because NMFS failed to establish any reasonable connection
16 between the identified (adverse) impacts to the species and its
17 "no jeopardy" to species and "no adverse modification" of
18 critical habitat conclusions. Within this argument, Plaintiffs
19 maintain NMFS's factual findings in the BiOp directly contradict
20 its "no jeopardy" and "no adverse modification" conclusions
21 because NMFS failed to: (1) conduct an analysis of Project
22 impacts in context of the listed species life cycles and
23 population dynamics; (2) focus on incremental project impacts
24 while arbitrarily ignoring significant adverse effects associated
25 with baseline conditions, which is unsupported by the BiOp's
26 findings; and (3) conduct a comprehensive analysis of impacts
27 associated with the entire federal action during formal
28 consultation.

1 Second, NMFS failed to use the best available science, which
2 demonstrated that global climate change would significantly
3 change the hydrology of Northern California's river systems over
4 foreseeable future OCAP operations.

5 Third, NMFS impermissibly relied on an unenforceable and
6 uncertain adaptive management process, which assumes that
7 unspecified adaptive management measures will reduce Project
8 impacts to the listed salmon and steelhead species despite the
9 BiOp's determination that such measures have shown little benefit
10 for the species.

11 Fourth, the Bureau's reliance on the purportedly flawed BiOp
12 violates its independent and ongoing duty under the ESA to ensure
13 that its actions do not harm listed species or their critical
14 habitat. Plaintiffs advance two sub-arguments: First, the Bureau
15 has failed and is failing to ensure that its actions do not harm
16 listed species or their critical habitats. More specifically,
17 the Bureau is acting arbitrarily and capriciously in relying on
18 the NMFS BiOp, which was fatally flawed upon issuance.
19 Additionally, the Bureau's reliance on the BiOp is arbitrary and
20 capricious in light of new information that emerged after its
21 issuance, which demonstrated that the BiOp's conclusions were
22 seriously flawed from the outset. Second, the Bureau is making
23 irreversible and irretrievable commitments of resources in
24 violation of ESA § 7(d) without lawfully completing consultation
25 under ESA § 7(a)(2).

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27 B. Federal Defendants' Motion for Summary Judgment.

28 Federal Defendants' cross-motion for summary judgment has

1 GRANTED on the condition that Federal Defendants continue to take
2 no actions during reconsultation that make any irreversible or
3 irretrievable commitment of resources which forecloses the
4 formulation or implementation of reasonable and prudent
5 alternative measures. It is necessary that further proceedings
6 be held to determine whether the 2004 BiOp should be vacated.
7 The 2004 BiOp must be REMANDED to NMFS and the Bureau for further
8 consultation in accordance with the requirements of law.

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VII. Conclusion.

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12 It is not the Court's prerogative nor within its competence
13 to usurp the executive function to perform the Agency's work to
14 determine whether Project operations will or will not jeopardize
15 the winter-run Chinook, fall-run Chinook, or CV steelhead species
16 or adversely modify their critical habitat. These
17 responsibilities are by law committed to the discretion and
18 expertise of the expert agency, NMFS, and action agency, the
19 Bureau. The Court's authority is limited to determining the
20 lawfulness of the Agencies' actions or inactions.

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22 The 2004 BiOp did not analyze the recovery of the three
23 species and any effect global climate change will have over the
24 next 25 years, the relevant duration of Project operations. The
25 BiOp is incomplete and in the respects specifically identified,
26 inexplicably inconsistent as to the species' survival and
27 recovery. The BiOp is unlawfully silent on critical habitat
28 effects.

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30 An entire failure to consider an important aspect of the
31 problem and a failure to explain contradictory record evidence

1 makes the BiOp arbitrary and capricious under *National Ass'n of*
2 *Home Builders*, 127 S.Ct. at 2529. Under the APA, a reviewing
3 court must then remand the BiOp to the consulting agency. The
4 court is without authority to proceed to decide the merits of the
5 dispute until the Agencies have had the opportunity to discharge
6 their statutory duties under the ESA. NMFS must provide rational
7 and fact-based grounds for its new biological opinion based on
8 the best science available.

9 The following rulings are issued on the pending motions:

10 1. On the NMFS BiOp, Plaintiffs' motion for summary
11 judgment is:

12 a. GRANTED as to NMFS's record findings and analyses
13 which fail to explain contradictory evidence as to the survival
14 and recovery of all three species. Federal Defendants' cross-
15 motion for summary judgment on this issue is DENIED;

16 b. GRANTED as to the failure to analyze the adverse
17 effect and modification on the critical habitat of the three
18 species. Federal Defendants' cross-motion for summary judgment
19 on this issue is DENIED;

20 c. GRANTED as to ESA analysis on the three species'
21 life cycles and population dynamics. Federal Defendants' cross-
22 motion for summary judgment on this issue is DENIED;

23 d. GRANTED on the condition that NMFS complete its
24 incremental Project impact analysis in relation to baseline
25 conditions. Federal Defendants' cross-motion on this issue is
26 DENIED;

27 e. DENIED as to the failure to address "Entire Agency
28 Action." Federal Defendants' cross-motions for summary judgment

1 motion on this issue is GRANTED;

2 f. GRANTED as to the issue of Global Climate Change
3 and effects of the Hydrology of Northern California Rivers.
4 Federal Defendants' cross-motion for summary judgment on this
5 issue is DENIED;

6 g. DENIED on the issue of the sufficiency of Adaptive
7 Management Plan and Mitigation Measures. Federal Defendants'
8 cross-motion on this issue is GRANTED;

9 2. Plaintiffs' motion for summary judgment as to the
10 Bureau's ESA § 7(a)(2) Obligations and § 7(d) Obligations is:

11 a. DENIED as to the issue that the Bureau could not
12 rely on the 2004 NMFS BiOp. Federal Defendants' cross-motion on
13 this issue is DENIED;

14 b. GRANTED as to unexplained internal contradictions
15 about survival and recovery of the species. Federal Defendants'
16 cross-motion on this issue on is DENIED;

17 c. GRANTED on the issue of Global Climate Change.
18 Federal Defendants' cross-motion on this issue is DENIED;

19 d. DENIED as to the issue of the Temperature Control
20 Point location. Federal Defendants' cross-motion for summary
21 judgment on this issue is GRANTED;

22 e. DENIED as to alleged Failure to Consider 100% of
23 Water Deliveries. Federal Defendants' motion on this issue is
24 GRANTED;

25 f. DENIED on the issue of failure to explain
26 Information Identified After the ESA Consultation Process was
27 completed. Federal Defendants' cross-motion for summary judgment
28 on this issue is GRANTED;

