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Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 418 F.3d 971 (9th Cir. 2005)

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endangered species and their habitat. The biological opinion the EPA relied on was fatally deficient in ignoring indirect effects of the loss of section 7 consultation.

The court then looked for other independent bases on which the EPA could have rationally relied for its transfer decision. The court held the EPA did not give a sufficiently detailed discussion of effects on all listed species, resulting in a failure to consider an important aspect of the transfer decision. The court held the protections the EPA claimed could substitute for section 7 protections were insufficient. These protections included a Memorandum of Agreement between the EPA and an Arizona agency, EPA oversight, the ESA's anti-take provisions, and Arizona state law. The EPA's own Biological Evaluation report did not give sufficient devotion to endangered species protection. The EPA's reliance on assurances from one Arizona state agency was not comprehensive enough to be sufficient.

The court concluded the EPA erred in relying on the biological opinion when it made its transfer decision. Further, the EPA did not provide sufficient independent bases to support its transfer decision. Thus, the EPA entirely failed to consider an important aspect of the problem, making its transfer decision arbitrary and capricious.

The court concluded by vacating the EPA's decision to approve Arizona's pollution permitting application, transferring Defenders' suit challenging the validity of the biological opinion back to the district court, and granting and remanding to the EPA the petition for review for proceedings consistent with its opinion.

Julie M. Schmidt

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 418 F.3d 971 (9th Cir. 2005) (granting preliminary injunction to environmental and conservation organizations based on violation of the Endangered Species Act; ordering the federal agency in charge of the Columbia River Power System to provide summer water spill rather than pass water through turbines in order to avoid harm to threatened species; holding that the district court did not apply an incorrect legal standard by failing to weigh economic harm to the public in reaching its conclusion).

National Marine Fisheries Service ("NMFS") operates the dams and power plants comprising the Federal Columbia River Power System ("FCRPS"), which consists of fourteen sets of dams. The United States District Court for the District of Oregon granted the National Wildlife Foundation ("NWF") a preliminary injunction order, requiring NMFS to pass a specified amount of water through the spill gates of dams rather than through turbines for power generation, in order to avoid irreparable harm to threatened species.

The Columbia River is the fourth largest river on the North American continent. It drains approximately 259,000 square miles, including territory in seven states and one Canadian province. It flows for more than 1,200 miles from the base of the Canadian Rockies to the Pacific Ocean. Every year, hundreds of thousands of salmon and steelhead travel up and down the river and its tributaries. There are now thirteen species of salmon and steelhead protected by the Endangered Species Act (“ESA”), each of which migrate to different parts of the Columbia Basin. The management of the Columbia River System has been heavily influenced by the ESA, which imposes a consultation duty upon federal agencies in an effort to conserve ESA listed species. From the consultation process, the federal agency produces a biological opinion, which assesses the effects of a proposed agency action on the survival of species based on potential harm to the habitat.

In granting the preliminary injunction order, the district court held that NMFS violated the ESA in the issuance of its 2004 biological opinion (“2004 BiOp”). The 2004 BiOp failed to aggregate the impacts from the proposed action, the environmental baseline, and the cumulative impacts as the basis for its jeopardy analysis. Concluding that it could not distinguish between the effects of discretionary and nondiscretionary FCRPS operations, the NMFS created a hypothetical “reference operation” in the 2004 BiOp, to which it compared the discretionary proposed action. Instead of evaluating whether the aggregate of the proposed agency action, the environmental baseline, cumulative effects, and current status of the species would jeopardize the salmon and steelhead, NMFS evaluated whether the proposed agency action, consisting of only the proposed discretionary operation of the FCRPS, would have no net effect on a species when compared to the environmental baseline.

The district court also found that the 2004 BiOp was not entitled to deference because it represented a complete reversal from the prior 2000 opinion. The Ninth Circuit Court of Appeals affirmed the injunction, finding the district court’s conclusions were grounded in the ESA. The court rejected the NMFS argument that the district court erred as a matter of law by failing to weigh economic harm to the public in its preliminary injunction analysis. The court reasoned that such analysis does not apply to ESA cases because Congress has struck the balance in favor of affording endangered species the highest priority.

The Ninth Circuit affirmed the district court’s issuance of a preliminary injunction, but remanded the question of whether the injunction should be more narrowly tailored or modified to the district court. The court expressed no opinion on the ultimate merits of the summary judgment decision before the district court.