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Pacific Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation, No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745 (N.D. Cal. July 16, 2003)

Pacific Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation, No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745 (N.D. Cal. July 16, 2003) (granting in part and denying in part motions for summary judgment on issue agency action violating Endangered Species Act, where action was partly based on relevant factors and partly arbitrary and capricious; denying temporary restraining order against action not irretrievably committing resources; denying motions for summary judgment on breach of federal fiduciary duty to Indian tribes where evidence remained in controversy).

The United States District Court for the Northern District of California considered multiple motions and cross-motions for summary judgment and a motion for injunctive relief in a case concerning the Endangered Species Act ("ESA") and the Bureau of Reclamation's ("Bureau") fiduciary duties toward Indian tribes. The Pacific Coast Federation of Fishermen's Associations ("PCFFA") moved for summary judgment on the issue of ESA compliance of an opinion the National Marine Fish Service ("NMFS") produced in response to a Bureau proposed plan of operations for its Klamath Reclamation Project ("Project"). The PCFFA also filed for a temporary restraining order to prevent the Bureau from implementing the NMFS opinion's proposed short-term flow rates. The Bureau and NMFS filed cross-motions for summary judgment on the aforementioned issues. The Yurok and Hoopa Valley Tribes ("Tribes") moved for summary judgment on the issue of whether the Bureau had breached its fiduciary duty toward them in its 2002 Project operations. The court granted in part and denied in part the PCFFA's, NMFS', and Bureau's motions for summary judgment. It denied PCFFA's request for a temporary restraining order and denied the Tribes' motions for summary judgment.

The Klamath Reclamation Project's operations affected the interests of area farmers and of the Tribes. The Project area also encompassed critical habitat of the coho salmon, a species listed as threatened under the ESA. The ESA prohibited the Bureau from taking any action likely to jeopardize the continued existence or adversely modify the habitat of the threatened coho. The NMFS opinion was likely to jeopardize the coho's existence if it could reasonably be expected to appreciably reduce the species' chances for recovery.

The Bureau produced an operating plan for the Project for 2002–2012, which it submitted to the NMFS for review. Finding that the long-term flow rates did not comply with the ESA, the NMFS issued a "reasonable and prudent alternatives" opinion to address its deficiencies. The Bureau indicated it would adopt the opinion as its operating plan. The PCFFA moved the court to declare the NMFS opinion, and its accompanying "incidental take statement," arbitrary and capricious and in violation of the ESA.

Where a federal agency action may affect a threatened species, the Administrative Procedures Act directs a reviewing court to determine whether the action was arbitrary and capricious. An action is arbitrary and capricious if it is not based on relevant factors. PCFFA asserted that NMFS acted arbitrarily and capriciously in proposing flow rates that the record did not show were adequate to support the coho. It also asserted the proposed long-term flow rates were arbitrary and capricious because they depended on unsecured future actions of non-federal third parties.

The NMFS relied primarily on two studies with some conflicting results in determining its short- and long-term flow proposals. One study recommended increased minimum flow rates to protect fish populations. The other study found the evidence insufficient to justify higher minimum flows from those adopted for 1990–2000. In composing its opinion, the NMFS attempted to strike a reasonable balance between the two studies.

The opinion proposed a three-phased plan of operations for 2002–2012. The plan embraced incremental increases in minimum flow rates over the course of its operation, to be accomplished through various devices. The final flow rates depended largely on the cooperation of state, tribal, and local entities. When the Bureau agreed to adopt the plan, PCFFA moved the court to declare it arbitrary and capricious and to order NMFS to rescind it.

Pending a final report from NMFS, the Bureau adopted an interim operating plan. PCFFA then filed for a declaration that the interim plan violated the ESA and for an injunction preventing its implementation. The tribes joined PCFFA, adding the allegation that the Bureau had breached its trust responsibilities.

The court found that NMFS' proposed short-term flows were not arbitrary and capricious. PCFFA contended that comparison to the greater long-term flows demonstrated the deficiency of the proposed short-term flows. The studies on which NMFS relied, however, indicated that the lesser short-term flows posed a threat to the coho only if continued for a period longer than the plan's first phase. The two studies were also the best available data, since no more recent completed reports were available. The court found that NMFS relied on relevant factors and denied PCFFA's motion for summary judgment on that part of the issue.

The court also denied PCFFA's motion for a temporary restraining order. The order PCFFA sought required it to show the Bureau's actions, if allowed, would irretrievably commit resources. The NMFS opinion itself, already accepted as valid by the court, refuted PCFFA's contention that the interim plan irretrievably committed the resource in question, the coho salmon.

The court found, however, that the proposed long-term flows were arbitrary and capricious. The Administrative Procedures Act required NMFS, in determining future flow rates, to consider only those non-federal actions that were reasonably certain to occur. Contrary

interests among the entities in question made the requisite level of certainty impossible. The court granted summary judgment against NMFS. Since the NMFS could cure the deficiency before it would have any impact, however, the court held it unnecessary to set the entire opinion aside and remanded it to the agency for amendment.

PCFFA also asserted the incidental take statement was deficient because it failed to specify the amount or extent of the take. NMFS claimed that no meaningful estimate was possible on the available scientific and commercial data. The ESA, however, requires an incidental take statement to quantify the potential take as precisely as is scientifically practicable. It does not forego quantification because it is imprecise. The point of quantifying the potential take is to impose a threshold of liability on the acting agency. The court found that the incidental take statement, lacking such a threshold entirely, was arbitrary and capricious. It remanded the statement for amendment.

The Tribes moved the court to declare the Bureau in breach of its fiduciary duty toward them. As trustee to Indian Tribes, the United States has a fiduciary duty to protect the Tribes' rights and resources. The Bureau was bound to preserve Tribal resources within the Project area, including the coho salmon. The Tribes contended that the Bureau breached its duty to protect their resources by failing to release flows adequate to support fish populations. They alleged the low flow rates directly contributed to large fish kills in 2002. However, the court held that a jury could find for the Bureau based on the evidence. The court denied the Tribes' motions for summary judgment.

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United States v. Michigan, 261 F. Supp. 2d 906 (E.D. Mich. 2003)

(ordering creation of the Southeast Michigan Consortium for Water Quality to assist the court in solving regional water quality problems).

In 1977 and 1987 the Environmental Protection Agency ("EPA") brought two cases against both the Detroit Water and Sewerage Department and the communities it served, and the Wyandotte Wastewater Treatment Plant and the communities it served. These two cases both resulted in consent judgments, which the United States District Court for the Eastern District of Michigan approved and oversaw, addressing a range of problems affecting water quality in southeast Michigan. A related complex water quality case concerned the Rouge River Watershed. The court noted that while the communities involved in the Rouge River Watershed case had utilized several innovations to reduce their adverse impact on water quality, more needed to be done by all of the impacted Southeast Michigan communities to improve the region's water quality.

To assist in this task, the court invited forty governmental leaders to join the Southeast Michigan Consortium for Water Quality ("Consortium") help solve regional water problems. The court