

Nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660 and 11-16662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,
Plaintiffs-Appellees,

CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Intervenor-Plaintiff-Appellee

v.

KENNETH LEE SALAZAR, *et al.*,
Defendants-Appellants, and

NATURAL RESOURCES DEFENSE COUNCIL *et al.*,
Defendants-Intervenor-Appellants

On Appeal from the United States District Court for the Eastern
District of California, Case No. 1:09-cv-00407-LJO-DLB

**BRIEF OF *AMICI CURIAE* STATES OF NEBRASKA, ALASKA,
KANSAS, OKLAHOMA, SOUTH CAROLINA, and WYOMING
IN SUPPORT OF PETITION FOR REHEARING (EN BANC)**

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The States of Nebraska, Alaska, Kansas, Oklahoma, South Carolina, and Wyoming (collectively the “*Amici States*”) hereby file this brief in support of the Petition for Rehearing filed by Petitioners-Appellees Kern County Water Agency, the Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California (“*State Contractor Appellees*”) (May 12, 2014). As explained in Circuit Rule 35-1, “When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.” This is just such a case.

The Panel Opinion in *San Luis & Delta-Mendota Water Authority v. Jewell*, 2014 WL 975130, *39 (9th Cir. March 13, 2014) (“*San Luis*”) directly conflicts with the Fourth Circuit’s decision in *Dow AgroSciences v. Nat’l Marine Fisheries Serv.*, 707 F.3d 462 (4th Cir. 2013), which found the Service is obligated to address substantively the “non-jeopardy” elements of reasonable and prudent alternatives (“RPA”) in its biological opinions. The Panel Opinion also cannot be reconciled with the Supreme Court’s holding in *Bennett v. Spear*, 520 U.S. 154, 169 (1997), which found third parties impacted by biological opinions and RPAs had standing sufficient to challenge the same. In addition, the Panel has misapplied the “best scientific and commercial data available” standard contained in 16 U.S.C.

§ 1536(a)(2), and acted as a *de facto* scientific advisory board to justify what the agency itself failed to justify. The intent of the *Amici* States' participation is to underscore the broad national importance of the issues on which the State Contractor Appellees seek rehearing.

I. BACKGROUND ON THE *AMICI* STATES' INTERESTS.

Proper application of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* is of great importance to the *Amici* States. The precise number of consultations ongoing pursuant to 16 U.S.C. § 1536 ("ESA Section 7") is undeterminable. However, in April 2011, the U.S. Fish and Wildlife Service ("Service") reported: "In Fiscal Year 2010, the Service assisted Federal agencies in carrying out their responsibilities under section 7 on more than 30,000 occasions." U.S. Fish and Wildlife Service, Consultations with Federal Agencies, Section 7 of the Endangered Species Act, available at <http://www.fws.gov/endangered/esa-library/pdf/consultations.pdf> (underscore added). Multiple consultations are presently ongoing in each of the *Amici* States, and completed consultations remain subject to reopen as necessary. 50 C.F.R. § 402.16. Given the volume of consultations and breadth of projects to which ESA Section 7 applies - *see* 50 C.F.R. § 402.03 ("all actions in which there is discretionary Federal involvement or control") - the ESA must be properly implemented to avoid significant adverse societal impacts.

The State of Nebraska, for example, relies heavily on the waters of the Missouri and Platte Rivers to sustain municipal, industrial, agricultural, recreational and wildlife values. Both river systems are subject to the long arm of the ESA. Nebraska spent nearly a decade litigating to ensure the ESA was administered on the Missouri River in concert with other federal obligations, including flood control and navigation. *See, e.g., In re Operation of Missouri River System Lit.*, 421 F.3d 618 (8th Cir. 2005); *South Dakota v. Ubbelohde*, 330 F. 3d 1014 (8th Cir. 2003).¹ The U.S. Army Corps of Engineers, which manages the federal facilities on the Missouri River, remains subject to a biological opinion, including sophisticated RPAs, to protect listed species in that system.² In the Platte Basin, Nebraska is engaged with Colorado, Wyoming, and the Department of the Interior, in a partnership to create and maintain habitats in satisfaction of various ESA obligations.³ Nebraska's ability to access its water supplies, and to implement its wildlife recovery objectives in concert with its own priorities, hinges on proper interpretation of the ESA provisions at bar.

¹ The Service's obligation to evaluate third-party impacts when adopting RPAs was litigated before the district court. *In re Operation of the Missouri River Sys. Lit.*, 363 F. Supp.2d 1145, 1161 (D. Minn. 2004). But, the issue was rendered moot on appeal by supervening events. 421 F.3d at 631.

² *See* http://www.fws.gov/feature/Mo_river.html.

³ *See* <https://www.platteriverprogram.org/Pages/Default.aspx>.

II. ARGUMENT.

A. The Panel Reads Out of Existence a Substantive Standard Contained in 50 C.F.R. § 402.02.

If the Service concludes an agency action will jeopardize a listed species, the Secretary “shall suggest those reasonable and prudent alternatives ... that can be taken by the Federal agency or applicant in implementing the agency action.” 16 U.S.C. § 1536(b)(3)(A). The Secretary of the Interior has promulgated a regulation defining “reasonable and prudent alternatives” as:

... alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction, that is (*sic*) economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02 (underscore added).

“It is the duty of a reviewing court to ensure that an agency follows its own procedural rules.” *Kelley v. Calio*, 831 F.2d 190, 191-2 (9th Cir. 1987), *citing* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417-19 (1971). Yet the Panel finds that, as a mere definition, 50 C.F.R. § 402.02 carries no substantive weight and that nothing in the rule “obligates the [Service] to address the non-jeopardy factors when it proposes RPAs.” *San Luis*, 2014 WL 975130,

*39.

As a preliminary matter, the Panel's conclusion that a definition of this sort inherently lacks legal substance is misguided. As the Supreme Court noted in a comparable situation regarding 29 U.S.C. § 652(8):

While it is true that § 3 is entitled "definitions," that fact does not drain each definition of substantive content. For otherwise there would be no purpose in defining the critical terms of the statute. Moreover, if the definitions were ignored, there would be no statutory criteria at all to guide the Secretary in promulgating either national consensus standards or permanent standards other than those dealing with toxic materials and harmful physical agents. We may not expect Congress to display perfect craftsmanship, but it is unrealistic to assume that it intended to give no direction whatsoever to the Secretary in promulgating most of his standards.

Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 641, n. 45 (1980). This rationale led the Court to reject the government's assertion that a definition designed to implement a regulatory scheme was essentially meaningless. It applies with equal vigor in the case of RPAs.

The Fourth Circuit directly addressed the substantive import of the so-called "non-jeopardy" elements embodied in the definition of RPAs. There, as here, the Secretary asserted "the economic feasibility requirement [is] simply a limitation that the [RPA] be economically *possible*, without any need for discussion" in a biological opinion. *Dow AgroSciences*, 707 F.3d at 474 (emphasis original). The Fourth Circuit expressly rejected that interpretation, because it "effectively reads out the explicit requirement" of the regulation. *Id.* Further, without discussion of

economic feasibility, it is “impossible for [a court] to review whether the recommendation satisfied the regulation and therefore was the product of reasoned decisionmaking.” *Id.* at 475.

The Panel’s conclusion also conflicts with the Supreme Court’s ultimate holding in *Bennett*, which involved another western water dispute on the Klamath River in Oregon. There, the Service issued a biological opinion to the U.S. Bureau of Reclamation that recommended an RPA to reduce downstream releases. The irrigation districts and ranchers sued. After addressing the scope of the ESA’s citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), the Court addressed whether the plaintiffs could bring certain other claims under 5 U.S.C. § 706 in the Administrative Procedure Act (“APA”).

The *Bennett* Court concluded that plaintiffs had standing to assert their APA claim challenging a biological opinion because they fell within the zone of interests protected by the “best scientific and commercial data available” standard in 16 U.S.C. § 1536(a)(2). As explained by the Court:

Petitioners contend that the available scientific and commercial data show that the continued operation of the Klamath Project will not have a detrimental impact on the endangered suckers, that the imposition of minimum lake levels is not necessary to protect the fish, and that by issuing a Biological Opinion which makes unsubstantiated findings to the contrary the defendants have acted arbitrarily and in violation of § 1536(a)(2). The obvious purpose of the requirement that each agency “use the best scientific and commercial data available” is

to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives. That economic consequences are an explicit concern of the ESA is evidenced by § 1536(h), which provides exemption from § 1536(a)(2)'s no-jeopardy mandate where there are no reasonable and prudent alternatives to the agency action and the benefits of the agency action clearly outweigh the benefits of any alternatives. We believe the "best scientific and commercial data" provision is similarly intended, at least in part, to prevent uneconomic (because erroneous) jeopardy determinations. Petitioners' claim that they are victims of such a mistake is plainly within the zone of interests that the provision [§ 1536(a)(2)] protects.

Bennett, 520 U.S. 154, 176-77.

The Panel's conclusion that the Service need not consider impacts to third parties cannot be squared with this reasoning. The *Bennett* plaintiffs would not have had standing to sue over misapplication of the law if the ESA generally, and particularly the regulations designed to implement 16 U.S.C. § 1536 (a)(2), were not designed in some part to protect third party interests. The Panel's view that RPAs can be developed without regard to third party impacts ignores the very point of the *Bennett* Court's rationale.

B. The Panel Misapplied the Best Scientific and Commercial Data Available Standard Embodied in 16 U.S.C. § 1536 (a)(2).

The Panel also erred when it circumvented the Service's failure to abide the best scientific and commercial data available. This is, unfortunately, another in a long line of instances raising serious questions about the level of scientific integrity applied in ESA Section 7 consultations. *See* Congressional Research Service, *The Endangered Species Act and "Sound Science"* (January 23, 2013).

1. The Panel improperly supplied its own reasoning to justify the Biological Opinion.

As a preliminary matter, and despite its admonition to the contrary, the Panel itself went beyond the bounds of standard APA review when it rejected key portions of the record as properly supplemented by the district court,⁴ then went about its own *post hoc* rationalization for the Service's conclusions. *San Luis*, 2014 WL 975130, *11-12. Where an agency fails to articulate a rational connection between the facts found and the choice made, an agency action is arbitrary and capricious. *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001); *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52 (1983). *See also Public*

⁴ As the dissenting opinion by Judge Arnold states, the district court's admission of expert testimony was proper under narrow exceptions articulated by the Ninth Circuit. *San Luis*, 2014 WL 975130, *56-*57, citing *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006), citing *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004) and *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

Employees For Env'l Responsibility v. Beaudreau, --- F. Supp. 2d --- (D.D.C. March 14, 2014) (a court cannot uphold a decision where an agency's path cannot be reasonably discerned). A "reviewing court should not attempt itself to make up for an agency's deficiencies: we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010) (emphasis supplied, internal quotations omitted). That is precisely what the Panel did here.

The peer review panel convened by the Service, as well as Appellee California Department of Water Resources, informed the Service the Biological Opinion was not "clear, concise, complete, or understandable," and that it was "largely unintelligible" - an opinion the Panel adopted when it stated "the BiOP is a jumble of disjointed facts and analyses ... it is a ponderous, chaotic document, overwhelming in size, and without the kind of signposts and roadmaps that even trained, intelligent readers need in order to follow the agency's reasoning." *San Luis*, 2014 WL 975130, *13. The proper course in such situations is to remand to the agency to connect the dots, not for the Court to paint a new picture by cherry picking the record for elements that might support the Service's ultimate conclusion.

2. The Biological Opinion is not based upon the best scientific and commercial data available.

Although “[i]t is for the agencies to determine how best to structure consultation to fulfill [16 U.S.C. § 1536 (a)(2)]’s mandate,”⁵ a failure by the agency to utilize the best scientific and commercial data available is arbitrary and capricious. *Ctr. For Native Ecosystems v. U.S. Fish & Wildlife Serv.*, 795 F. Supp. 2d 1199, 1207 (D. Colo. 2011). The ESA prohibits the Service from disregarding available scientific evidence that is in some way better than the evidence it relies on; it cannot ignore available biological information or fail to develop projections relevant to an analysis of the effects of a proposed action. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 998 (D.C. Cir. 2008); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080–81 (9th Cir. 2006); *Conner v. Burford*, 848 F.2d 1441, 1454 (1988).

To facilitate the Service’s identification and development of the best scientific and commercial data, the agency’s own guidelines call for peer review, in addition to the statutory and regulatory requirements for public comment and consultation with other relevant agencies. *Interagency Policy for Peer Review in ESA Activities*, 59 Fed. Reg. 34270 (July 1, 1994); U.S. Fish and Wildlife Service,

⁵ *Defenders of Wildlife v. U.S. Dep’t of Navy*, 733 F.3d 1106, 1121-22 (11th Cir. 2013).

Information Quality Act Guidelines (“IQA Guidelines”) Part VI.⁶ Data and analytical results that have been subjected to formal, independent, peer review carry a presumption of acceptable objectivity. IQA Guidelines, § IV-3.

In contravention of its own guidance regarding peer-reviewed data, and despite the generally-accepted view of the relevant scientific community, the Service refused to comply with the peer review committee’s recommendations, as well as expert comments, regarding the use of salvage data and the synthesis of models in the Biological Opinion. There was no expectation that the Service conduct new studies; rather, the recommendations simply would have required the Service to utilize the best available data and develop a proper framework of analysis. *See Greenpeace v. Nat’l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1150 (W.D. Wash. 2000) (agency’s failure to analyze data and develop projections rendered biological opinion inadequate under 16 U.S.C. § 1536 (a)(2)). *Compare, In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802, 827 (E.D. Cal. 2011) (The Service is also required to “apply generally recognized and accepted biostatistical principles, which constitute best available science, in reaching its decisions.”)

This refusal by the Service is distinguishable from cases where an agency properly refused to collect new data,⁷ rely upon data with uncertain scientific

⁶http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf

validity,⁸ or where there was a “close call” within the scientific community as to the type and proper analysis of data to be relied upon in a biological opinion.⁹ This is simply a case where the best available scientific and commercial data were rejected.

Furthermore, the Biological Opinion appears to be based largely on affording a “benefit of the doubt” to the Delta Smelt, an overly conservative approach perhaps appropriate only where there are “gaps in the information base.” *Final ESA Section 7 Consultation Handbook*, page 1-7 (March 1998), citing H.R. CONF. REP. NO. 697, 96th Cong., 2nd Sess. 12 (1979). On the record of the district court, it is clear that any gaps in information were a product of the Service’s failure to fill them.

Federal and state water projects vital to the physical and economic survival of half the population of California should not be curtailed on the record in this case. *See Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 219, *order clarified*, 389 F. Supp. 2d 4 (D.D.C. 2005), citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1992) (the Service “could properly reach a no-jeopardy opinion and

⁷ *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 59-60 (D.C. Cir. 2000) (best scientific and commercial data available requirement does not obligate an agency to conduct new independent studies).

⁸ *Trout Unlimited v. Lohn*, 559 F.3d 946, 956 (9th Cir. 2009).

⁹ *Maine v. Norton*, 257 F. Supp. 2d 357, 389 (2003) (“where the scientific data are equivocal, it is the agency’s prerogative to ... make a policy judgment”).

allow a proposed action to proceed even in the face of scientific uncertainty”). *See also* 128 Cong. Rec. 13,184 (1982) (“Section 7 of the [ESA] ... provides a vital consultation mechanism whereby neither desirable projects nor species survival need be sacrificed”).

The Service is not entitled to deference when its conclusion “runs counter to that of other agencies or individuals with specialized expertise in a particular technical area.” *In re Consol. Salmonid Cases*, 791 F. Supp. at 823, *citing Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) (“court may properly be skeptical as to whether [an agency action has] a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of others having pertinent experience”). *See also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 565 (D.C. Cir. 2002) (a court will reject the choice of a model “when the model bears no rational relationship to the characteristics of the data to which it was applied”); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479, 483 (W.D. Wash. 1988) (court should “reject conclusory assertions of agency ‘expertise’ where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation”). Because the Service disregarded the guidance provided by the peer review panel, and refused to incorporate appropriate data and synthesize the models utilized in the Biological Opinion, it plainly failed to establish its reliance

on the best scientific and commercial data available as required by 16 U.S.C. § 1536 (a)(2).

CONCLUSION

For the reasons set forth herein and as explained by the State Contractor Appellees, the Panel Opinion should be reheard by the full Court.

Respectfully submitted this 13th day of May, 2014.

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I hereby certify that on May 13, 2014, I electronically filed the foregoing BRIEF OF AMICUS CURIAE STATE OF NEBRASKA IN SUPPORT OF PETITION FOR REHEARING (EN BANC) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

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