Nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, & 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,
Plaintiff-Intervenor-Appellee,

v.

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

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

On Appeal from the United States District Court for the Eastern District of California, 1:09-cv-00407-LJO-DLB

APPELLEES KERN COUNTY WATER AGENCY, COALITION FOR A SUSTAINABLE DELTA, STATE WATER CONTRACTORS, AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S PETITION FOR REHEARING EN BANC

ROBERT D. THORNTON (CA 72934)
PAUL S. WEILAND (CA 237058)
ASHLEY J. REMILLARD (CA 252374)
NOSSAMAN LLP
18101 Von Karman Avenue, Suite 1800
Irvine, CA 92612
Telephone: 949.833.7800
Facsimile: 949.833.7878

Attorneys for Plaintiffs/Appellees
Coalition For a Sustainable Delta and
Kern County Water Agency

THOMAS C. GOLDSTEIN (DC 458365)
KEVIN K. RUSSELL (DC 493994)
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., N.W.
Suite 404
Washington, D.C. 20015
Telephone: 202.362.0636

Attorneys for Plaintiff/Appellee
Coalition For a Sustainable Delta

Additional Counsel on Next Page

CHRISTOPHER J. CARR (CA 184076)
WILLIAM M. SLOAN (CA 203583)
MORRISON & FOERSTER, LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7000

MARCIA L. SCULLY (CA 80648)
General Counsel
LINUS MASOUREDIS (CA 77322)
Chief Deputy General Counsel
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
1121 L Street, Suite 900
Sacramento, California 95814-3974
Telephone: (916) 650-2600

Attorneys for Plaintiffs/Appellees
The Metropolitan Water District of Southern California

KERN COUNTY WATER AGENCY
AMELIA T. MINABERRIGARAI
(CA 192359)
P.O. Box 58
Bakersfield, CA 93302-0058
Telephone: (661) 634-1400
Facsimile: (661) 634-1428

Attorneys for Plaintiffs/Appellees
Kern County Water Agency

STEFANIE MORRIS (CA 239787)
General Counsel
STATE WATER CONTRACTORS
1121 L Street Suite 1050
Sacramento, CA 95814
Telephone: (916) 447-7357

GREGORY K. WILKINSON (CA 54809)
STEVEN M. ANDERSON (CA 186700)
BEST BEST & KRIEGER LLP
3750 University Avenue, Suite 400
P. O. Box 1028
Riverside, CA 92502
Telephone: (951) 686-1450
Facsimile: (951) 686-3083

Attorneys for Plaintiffs/Appellees
State Water Contractors

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Federal Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulations

Other Authorities

The Court should grant rehearing en banc of the divided panel ruling in this case. The panel's ruling is extraordinarily—indeed, singularly—important. It upholds actions imposed by the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA) that significantly restrict water deliveries to more than 20 million Californians served by California's State Water Project and the Federal Central Valley Project (Projects), thereby imposing severe societal costs.

Appellees Kern County Water Agency, Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California (Appellees) do not seek en banc review of all the varied issues presented by the case. Rather, Appellees have identified two discrete questions that will govern implementation of the ESA, as well as federal courts' review of agency action under that statute, in many future cases. First, contrary to the plain text of the ESA, the panel excused FWS from basing its actions on the best available scientific information. *See San Luis & Delta-Mendota Water Authority v. Jewell*, No 11-1587, slip op. (Op.) at 53-85 (9th Cir. March 13, 2014) (majority); *id.* 155-159 (dissent). Second, the panel held that FWS need not consider the effect of its actions on third parties. *See* Op. 110-119 (majority); *id.* 159-160 (dissent). Those rulings conflict with the precedent of the Supreme Court, this Court, and other circuits. It is essential to provide district courts, federal agencies, state

governments, and private parties with a consistent body of law to guide their implementation of the ESA going forward.

Importantly, although FWS's actions impose economic consequences that are both certain and dire, they may produce no demonstrable benefit for the delta smelt. Precisely because the panel's ruling does not require FWS to base its actions on the best available science, it is impossible to conclude with any confidence that biological opinions in this and later cases will require measures that are appropriate to protect endangered species. Indeed, in many instances they may be *insufficiently* protective. En banc review is accordingly warranted.

I. This Case Presents A Uniquely Significant Dispute Warranting The Attention Of The En Banc Court.

The panel stressed "the enormous practical implications" of this case. Op. at 25. The panel upheld a Biological Opinion (BiOp) issued by FWS on behalf of the Secretary of the Interior (Secretary) under the ESA. The BiOp concluded that the delta smelt, a species listed as threatened under the ESA, would be jeopardized by the long-term operations of the Projects, which are "perhaps the two largest and most important water projects in the United States." *Id.* at 23. On that basis, FWS promulgated an alternative set of actions that require the agencies that operate the Projects to impose crippling restrictions on the distribution of water that "supplies irrigation for seven million acres of agriculture and more than twenty million people, nearly half of California's residents." *Id.* at 27. And it did so at a time of

extraordinary water shortages in the affected areas. *See, e.g.*, California Dep't of Water Resources, *Year's Final Snow Survey Comes up Dry: 3-Year Drought Retains Grip as Summer Approaches* (May 1, 2014), http://ca.gov/drought/news/story-41.html.

The district court found gross flaws in the BiOp and required FWS to reconsider it, but the panel—by a divided vote—reversed. In the long term, the legal principles established by the panel's decision may be as harmful as the immediate practical effects on millions of Californians and the state's economy. The panel opinion broadly insulates from judicial review biological opinions that effectively determine the operations of important state and federal programs. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997) (explaining the "powerful coercive effect on the action agency" of a biological opinion).[1] And although the BiOp at issue in this particular case imposes onerous restrictions on the Projects' water deliveries, in later cases the panel's ruling inevitably will be employed to reject challenges by environmental organizations and other stakeholders to biological opinions that fail to adequately protect endangered species. *E.g., Nat'l Wildlife*

[1] An agency presented with an adverse biological opinion loses its immunity from liability unless it terminates the action under review, implements the alternative proposed by the Secretary, or secures a (very rarely granted) exemption under the statute. 16 U.S.C. § 1536(e). One need look no further than this case, in which, as a practical matter, the Project operators had little choice but to accept the BiOp's crushing consequences and substantially restrict their water deliveries.

Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917 (9th Cir. 2008) (invalidating biological opinion declining to restrict operations of river power system); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (invalidating biological opinion authorizing oil and gas leases).

II. The En Banc Court Should Review The Panel's Holding Excusing The Secretary From Basing The BiOp On The Best Available Scientific Data.

The ESA unqualifiedly requires the Secretary to "use the best scientific and commercial data available" when formulating a biological opinion, including in assessing the impact of the proposed activity and formulating possible alternatives. 16 U.S.C. § 1536(a)(2). The requirement's "obvious purpose" is to "ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise" and to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77. The requirement to use the best available data thus imposes an important, threshold constraint on the Secretary's formulation of a biological opinion. Indeed, it is the premise for the deference that the courts subsequently accord to the Secretary's application of the agency's expertise to that data.

In this case, it is essentially undisputed that in developing the BiOp, the Secretary disregarded "the best scientific and commercial data available" in favor of data and models that FWS and its own advisory bodies recognized were

fundamentally flawed. The panel nonetheless excused the violations for reasons that cannot be reconciled with prior Ninth Circuit decisions and put this Circuit in conflict with other circuits and Supreme Court precedent.

A. The BiOp Failed To Rely On The Best Available Data.

In developing the BiOp, FWS failed to use the best available evidence in establishing two sets of restrictions that combine to drastically limit the ability of the State to store water during wet years and deliver that stored water to address drought conditions in subsequent years.

First, FWS hypothesized that when water flows reached a certain level, the amount of water diverted by the Projects would start to draw fish into their pumps, thereby materially increasing risk to the delta smelt. To test that hypothesis and determine the maximum flows consistent with avoiding jeopardy to the fish, FWS simplistically looked at "the number of delta smelt salvaged from the [Projects'] fish screening facilities" in any given year—that is, the number of fish screened from the pumping stations—in relation to the average flow of water that year. Op. at 54. It concluded that there was a significant increase in salvage once a particular flow rate (for the Old and Middle River) exceeded -5,000 cubic feet per second (CFS). *Id.* at 56-57. Such a break point in the data *could* suggest that once the flows reached that level, the pumping itself—as opposed to other factors, like the size of the fish population—started to cause salvage increases. FWS accordingly

used the -5,000 CFS figure to establish a maximum flow rate for the Projects during as much as six months of the year (December through June). *Id*. at 36-37, 54. The limitations are particularly significant because they apply during the months in which the State receives its highest average precipitation—the period when delivery of water to south of Delta storage facilities is critical to meeting spring and summer water demands.

But as the district court explained—quoting an independent expert review panel established by FWS to review the BiOp—the "[t]otal number [of fish] salvaged is influenced by a variety of factors, *particularly the number of fish in the population*." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 890 (E.D. Cal. 2010) (hereafter, SLDMWA) (emphasis added). In other words, if FWS's data showed more fish being trapped by the Projects, one important possible reason is that there simply *are more fish*. FWS's decision to account for the relative volume of *water*, but not the relative volume of *fish*, produced unadjusted salvage figures that may substantially overstate, or understate, the effect of the Projects on the overall smelt population.

Using FWS's methodology, it was impossible to discern, for example, whether the high salvage of delta smelt recorded in 2000 was due to the high flow rate that year or instead the fact that the smelt population was the highest it had been in two decades. *See* 4 ER 814; 3 ER 621. As a result, FWS could not

intelligently determine whether the seemingly substantial increase in salvage at rates above -5,000 CFS was actually caused by pumping levels or just a coincidence driven instead by higher fish populations. Moreover, because it is impossible to discern whether the increased salvage at flow rates above -5,000 CFS during the study period was the result of the increase in flow or simply increased fish populations, the -5,000 CFS limit similarly could have been too high or too low. *See SLDMWA*, 760 F. Supp. 2d at 894-95. As a consequence, the district court concluded that flow rates set by FWS on the basis of its raw salvage data "are meaningless as management tools" and "cannot be used to set specific flow prescriptions." *Id*. at 891.

These problems were obvious and had been pointed out to FWS by the agency's own peer review panel. 760 F. Supp. 2d at 890. The panel had also recommended an easy solution: FWS could simply "normalize" the salvage rates for each year by dividing the total number of fish salvaged by available indices of the overall smelt population. *Id.* Indeed, as the district court found—on the basis of the peer review panel findings and additional expert testimony before it—"the use of normalized salvage data rather than gross salvage data is the standard accepted scientific methodology." *Id.* at 889. And, in fact, "FWS itself had stated that it could verify its conclusion 'by normalizing the salvage data by the estimated population size,'" Op. at 58, having used the normalized data in another portion of

the BiOp, 760 F. Supp. 2d at 890. But the agency inexplicably declined to do so and moreover failed to provide any explanation in the BiOp "why it selectively used normalized salvage data in some parts of the BiOp but not in others." *Id.*

The panel majority did not doubt that FWS failed to use the best available data. *See* Op. at 56 ("That the FWS could have done more in determining OMR flow limits is uncontroverted."); *id.* at 62-63 n.24 (describing that court-appointed experts "believed the BiOp to have fallen short in this analysis" because of the failure to consider normalized data). Nor did the majority contest the district court's conclusion that the error could have had a drastic impact on the water restrictions FWS imposed. *See* 760 F. Supp. 2d at 894 (noting petitioners' expert, using normalized data, found "no statistically significant relationship between OMR flows and adult salvage for flows less negative than -6,100 [cfs] at the very least"); *id.* at 895 (observing that differences of this magnitude could have "very substantial" effects on "the amount of lost annual water supply, with resulting adverse effects on human welfare and the human environment").

The panel nonetheless sustained the BiOp, holding that it was "within the FWS's discretion" to ignore normalized data—notwithstanding that the data were the statutorily required best available scientific data—because that decision led to a more "conservative" result, Op. at 56, intended to "protect the maximum absolute

number of individual smelt," in a context in which "precision [was] virtually impossible," *id*. at 60.

The panel further concluded that the agency's reliance on invalid data was excused because the non-normalized data was not the *sole* information taken into account in setting the flow limits. It was thus possible that the agency would have reached the same decision if it had instead followed the law and actually used the best available data. *See* Op. at 64-71. Finally, the panel concluded that even if the flow rate limits were based on invalid data, they were simply "one part of a complicated dynamic system" of limitations proposed by the BiOp. *Id.* at 71. As explained below, neither the language of the ESA nor the cases interpreting the statute authorize an agency's failure to "use the best available scientific and commercial data available" on any of these grounds.

Second, the majority separately excused FWS's failure to use the best available data in establishing a factor—the point in the Bay-Delta at which the salinity is less than two parts per thousand, known as "X2," Op. at 16,—that "directly affects how much water can be exported . . . for agricultural and domestic purposes" during years of above-normal precipitation, *id.* at 75. The dispute over the calculation of X2 is of "critical" importance, *id.*, because it could determine the availability of up to 1 million acre feet of water per year for human consumption,

see, e.g., AR 001869-001870, an amount that would meet the annual water needs of several million people.

To judge the effects of future operations on the location of X2, FWS used computer models to compare the effect of future operations against a simulated historical baseline. Based on that comparison, the BiOp concluded that Project operations were responsible for shifting the median location of X2 upstream by ten to fifteen percent, thereby significantly reducing the amount of habitat available for the delta smelt. *See* 5 ER 966-967. FWS then established further flow restrictions designed to counteract that assumed effect. Op. at 37, 74-75.

The problem, however, is that FWS used one model to establish the baseline (a program called "DAYFLOW") and a vastly different model (called "CALSIM II") to predict the effect of future operations. Op. at 75. The result was a comparison of apples to oranges. As the majority acknowledged, CALSIM II differs substantially from DAYFLOW in important ways that affect whether their results provide a valid basis for comparison. *Id.* at 76. For example, the former assumes that "environmental regulation and non-Project water demands" have remained static while the latter does not, and the two use entirely different mathematical methods to model water flow. *Id.* But FWS nonetheless reached its conclusions regarding the location of X2 by "compar[ing] the two different models without discussing or accounting for the resulting bias." *Id.* at 77. By failing to

take into account the biases inherent in the CALSIM II to DAYFLOW comparison, it was impossible for FWS to determine whether the changes in X2 that the BiOp attributed to Project operations were, in fact, due to Project operations or instead were due to one of the other sources of bias. 5 ER 1090.

For that reason, the district court found that FWS acted arbitrarily by failing to calibrate the two models to take into account the bias inherent in a comparison of their results. Op. at 80. But again, the majority reversed on the ground that it was required to defer to FWS's conclusions. *Id.* at 83. The majority reasoned that it was sufficient that FWS reasonably concluded that *other* possibilities for determining X2 than calibrating the models—the options of using either the DAYFLOW model or the CALSIM II model *exclusively*—would be imperfect too. *Id.* ("The fact that FWS chose one flawed model over another flawed model is the kind of judgment to which we must defer.").

B. The Panel's Rulings Cannot Be Reconciled With The Unambiguous Mandate Of The ESA, The Supreme Court's Interpretation Of The Statute, This Court's Prior Precedents, Or The Law Of Other Circuits.

The panel erred in holding that because FWS has substantial discretion to resolve factual questions and make recommendations designed to avoid damage to endangered species and their habitats, courts must similarly defer to an agency's decision to ignore the best available data in exercising that discretion. The best

available science rule is a mandatory procedural requirement, compliance with which must be zealously enforced by the courts.

The statute unambiguously mandates that the Secretary "*shall use* the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2) (emphasis added). The Supreme Court thus held unanimously in *Bennett v. Spear*, 520 U.S. at 172, that "the terms of § 1533(b)(2) are plainly those of obligation rather than discretion." In turn:

> "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'"

Id. (brackets and emphasis in original).

The panel thus departed from text and precedent by holding that FWS could ignore normalized salvage data because doing so led to the more "conservative" result the agency favored. Op. at 61. Even if FWS has discretion to adopt a "conservative" approach to setting flow limits, the statute is clear that it must exercise that discretion on the basis of the best available scientific data—it cannot, as the panel held, rely upon invalid data simply because they support a purportedly more conservative result. As the dissent explained, "Appellants do not dispute that the sources of bias existed, or that the biases were significant or material; and the clear purpose of requiring FWS to use the best scientific evidence available is to

ensure that the ESA is not implemented haphazardly or based on surmise or speculation." Op. at 158-59. After all, a principal purpose of Congress in enacting the best available data requirement was to "avoid needless economic dislocation produced by agency officials *zealously but unintelligently* pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77 (emphasis added).

The panel likewise erred in holding that FWS was excused from using the best scientific information available because, in the end, any approach to estimating a safe level of flow was an inherently uncertain task. Op. at 59-61. That holding conflicts with precedent from this Court and others holding that "FWS cannot ignore available biological information," simply because the best available data may be less than complete or resolve all uncertainty. *Conner v. Burford*, 848 F.2d at 1454. In *Connor*, for example, this Court held that "incomplete information about post-leasing activities does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available." *Id.* It reasoned that "Congress, in enacting the ESA, did not create an exception to the statutory requirement of a comprehensive biological opinion" for situations in which the agency faced incomplete information. *Id; see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 525 (9th Cir. 2010) ("[R]egardless of any uncertainty regarding the proposed infrastructure improvement, it was incumbent on the Service 'to use the best

information available'") (citation omitted)); *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005) (same); *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (statute "prohibits the Secretary from disregarding available scientific evidence . . . . [e]ven if the available scientific and commercial data were quite inconclusive").

Likewise, the majority put this Court in conflict with other circuits when it held that FWS's failure to use the best available data was excused because the agency *also* relied on *other* data in setting flow rates, and the flow rates were part of a larger system of restrictions. Consistent with the unambiguous statutory text, other circuits have recognized that agencies must, without exception, "seek out and consider *all* existing scientific evidence relevant to the decision at hand. They cannot ignore existing data." *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004) (emphasis added; citation omitted); *see also Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1265 (11th Cir. 2009) (explaining that "the Service is required to seek out and consider all existing data"); *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (same); *Ecology Center v. U.S. Forest Serv.*, 451 F.3d 1183, 1194-95 n.4 (10th Cir. 2006) (same).

It makes no difference that the best available data the agency ignored were not the *only* data that would inform the agency's resulting decision. The deference the agency's conclusions are afforded is conditioned upon its compliance with the

statutory mandate that it exercise its judgment on the basis of full consideration of all the best available data. As the dissent explained:

> "Because FWS based its flow prescription solely on the unexplained use of raw salvage data, . . . its expertise in methodological matters is not entitled to deference, since that use was not rationally connected to the best available science; and because FWS did not consider all relevant factors or articulate a rational connection between the facts found and the choices made, . . . the district court [was correct that FWS's] determination as to the flow prescription was arbitrary and capricious."

Op. at 157 (citations omitted).

The panel's conclusion that the agency's violation of the best available data requirement was effectively harmless (because the agency took into account other data and because the error effected only one part of the remedial measures the agency recommended) ignores both that courts lack the expertise to determine what an agency would have decided with better information and the "rudimentary administrative law [principle] that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett*, 520 U.S. at 172. Thus, for example, in *Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency (EPA)*, 684 F.2d 1041, 1055 (1st Cir. 1982), the First Circuit recognized that, "after conducting real time simulation studies and any other tests and studies which are suggested by the best available science and technology," the agency might still reach the same result. But it deemed that fact irrelevant: after actually

assessing the best available data, "at least the EPA will have done all that was practicable prior to approving a project." *Id.*[2]

C. En Banc Review Is Further Warranted Because In The Process Of Disregarding Settled Law On The Best Available Data Standard, The Panel Majority Also Threw Into Disarray The Circuit's Precedents Regarding The Admissibility Of Extra-Record Materials To Review The Validity Of Agency Action.

The panel also contravened settled circuit law permitting courts to consider extra-record evidence to evaluate whether an agency has satisfied its obligation to consider statutorily required factors, including, as in this case, the best available scientific data. The panel accepted that a court may reach outside the administrative record when "supplementation is necessary to determine if the agency has considered all factors and explained its decision." Op. at 46 (quoting *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010)); *see also, e.g., Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 760 n.5 (9th Cir. 1996) (considering expert testimony for that purpose). But it

[2] Notably, the panel did not purport to apply the stringent harmless error test required by this Court's precedents. *See, e.g. Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059, 1071 (9th Cir. 2004) (explaining that error is harmless only if the agency shows that the mistake "*clearly* had *no bearing* on the procedure used or the substance of the decision reached") (emphasis in original, citation omitted); *id.* at 1071 n.7 (explaining that in conducting harmless error review "[i]n no case are we to hypothesize the FWS's rationales; nor are we to accept the FWS's post hoc rationalizations because such explanations provide an inadequate basis for judicial review of the BiOps."); *id.* at 1072 (noting that if FWS claims harmless error "the agency is no longer entitled to deference in its defense of the BiOps").

concluded that this exception did not permit the district court to rely on expert testimony to contradict FWS's claim that it had used the best available scientific evidence. Op. at 47-48. The majority thus faulted the district court for permitting a "battle of the experts," *id*. at 47, on "matter[s] of scientific fact," including whether the use of mismatched models to predict X2 values comported with best scientific practices, *id*. at 48 (citing *SLDMWA*, 760 F. Supp. 2d at 904-07).

Extra-record expert testimony, however, is essential to establishing that data not considered by an agency represents the best scientific data available. It frequently is not possible to establish that the Secretary's action was not based on the "best" data until *after* the Secretary acts. This Court has recognized that it "will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). In the context of enforcing the best available data mandate, the administrative record, almost by definition, will be devoid of evidence relating to the ignored data. And it is unlikely that the agency itself will build a record showing that the missing data are better than the data the agency considered. Nor can there be any serious dispute that expert witness testimony is an appropriate means of introducing the required, but missing, information. *Cf. Inland Empire*

Pub. Lands Council, 88 F.3d at 760 n.5 (considering extra-record expert testimony to decide whether "the Service overlooked factors relevant to a proper population viability analysis").

As the dissent explained, the panel's error is magnified by its departure from established circuit precedent requiring review of the district court's decision to admit expert testimony to understand the BiOp for an *abuse of discretion*, not de novo. *See* Op. at 155-56 (dissent); *Lands Council v. Powell*, 395 F.3d 1019, 1030 n.11 (9th Cir. 2005) (citing *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996)) ("A district court's decision whether to admit extra-record evidence is reviewed for abuse of discretion."); *see also Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993); *Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988). Under the correct abuse of discretion standard, this Court will reverse a district court only if "[i]t based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc), *cert. denied*, 131 S. Ct. 2096 (2011).

There was no such abuse of discretion here. This case was ideally suited for the admission of explanatory expert testimony. The panel itself was openly "sympathetic to the district court's need for a scientific interpreter." Op. at 47. The majority recognized "the BiOp is a bit of a mess. And not just a little bit of a

mess, but, at more than 400 pages, a big bit of a mess. And the FWS knew it." *Id.* at 50. In point of fact, it is "a jumble of disjointed facts and analyses." *Id*. at 52.

In suggesting that the district court admitted without conditions "more than forty expert declarations from the appellees," notwithstanding the appellants' motion to exclude those declarations, Op. at 47, the panel gives insufficient respect to the district court's diligent efforts to ensure that the expert testimony would be limited to appropriate subject matter. In fact, the appellants only moved to exclude ten appellee declarations prepared by five declarants in the summary judgment proceedings. 5 ER 1132; 2 ER 417, 419. In response to the appellants' motion to strike, the district court carefully reviewed the declarations on a line by line basis, striking certain passages and retaining others. 2 ER 252-253; 1 SER 8-17.

Only the two DWR declarations of Aaron Miller were admitted in whole. *See* 2 ER 252-253. Miller—"a DWR technical engineer who worked closely with Reclamation to develop Calsim II," Op. at 157 (dissent)—explained that, "[b]y comparing Dayflow model data to CalSim II modeled data, the Service's effects analysis introduces three sources of bias that render the comparison scientifically unreliable." 5 ER 967. As the dissent recognized, there was "no abuse of discretion" in considering that testimony because "the district court relied on this extra-record evidence simply to determine whether FWS had considered all relevant factors, here, the sources of bias, before relying on the comparison to

analyze the effects of proposed Projects operations on smelt and its habitat, including X2's location. Doing so was well within the court's role." Op. at 157-58 (citation omitted).

Unless reviewed en banc, the panel decision in this case will hamper courts' ability to fulfill their duty to "engage in a careful, searching review to ensure that the agency has made a rational analysis," *Wild Fish Conservancy*, 628 F.3d at 521 (citation omitted), based on "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2).

III. Rehearing En Banc Is Warranted To Review The Panel's Holding That, In Specifying Alternatives To Agency Action, The Secretary May Not Consider The Economic Harm Those Alternatives Will Cause Third Parties.

The en banc court should also review the panel majority's holdings that in a biological opinion the Secretary may specify alternatives to agency action without regard to their economic and technological feasibility, and moreover that the Secretary's assessment of those alternatives may not consider their effects on third parties. Those legal questions play a recurring role in the application of the ESA. Moreover, the ruling departs from prior circuit precedent and creates a square conflict with the Fourth Circuit that will subject the Secretary to irreconcilable directions in preparing biological opinions and that will create inconsistent outcomes depending on the happenstance of where the agency action in question is located.

A. The Panel Wrongly Held That The Secretary Need Not Consider Economic And Technical Feasibility For Third Parties.

The Act provides that, if a biological opinion determines that the agency action under review will jeopardize a listed species or adversely modify its critical habitat, the Secretary "shall suggest those *reasonable and prudent* alternatives"—known as "RPAs"—that "can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A) (emphasis added). The Secretary has promulgated a regulation defining "reasonable and prudent alternatives" as:

> "[A]lternative actions identified during formal consultation [i] that can be implemented in a manner consistent with the intended purpose of the action, [ii] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [iii] that is [sic] *economically and technologically feasible*, and [iv] 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 (emphasis added).

The BiOp in this case calls for supplanting the Projects' longstanding operations with a plan under which water deliveries are dramatically curtailed. The state and federal agencies that administer the Projects raised significant concerns regarding the economic and technological feasibility of the BiOp's proposed alternatives. *See, e.g.*, 3 SER 813-18, 893-94, 896; 4 SER 916-17, 929, 952-53, 956-1008. But FWS deemed its harsh alternatives to be "reasonable and

prudent" without ever addressing—in the BiOp or anywhere else—the alternatives' actual feasibility or the possibility that other equally effective measures could provide adequate protection at a more feasible cost to the people of the State of California. The district court accordingly held that FWS was required to reevaluate the BiOp to provide:

> "some exposition in the record of why the agency concluded (if it did so at all) that all four regulatory requirements for a valid RPA were satisfied. The RPA Actions manifestly interdict the water supply for domestic human consumption and agricultural use for over twenty million people who depend on the Projects for their water supply. 'Trust us' is not acceptable. FWS has shown no inclination to fully and honestly address water supply needs beyond the species despite the fact that its own regulation requires such consideration."

SLDMWA, 760 F. Supp. 2d at 957.

The panel majority reversed, holding as a matter of law that a biological opinion is never required to address the economic and technological feasibility of alternatives to the agency action. It reasoned that the regulation in question "is a definitional section; it is defining what constitutes an RPA." Op. at 113. As a result, the majority reasoned, nothing provides that the "FWS has required itself to provide an explanation [of feasibility] . . . when it lays out an RPA." *Id.* at 114.

The panel majority also held that, although the BiOp does not purport to consider the economic and technological feasibility of the RPAs, those requirements were in fact substantively satisfied (even if never discussed by FWS in the BiOp or the administrative record). The panel reached that conclusion,

however, only by defining the feasibility requirement to *preclude* any consideration of the economic effect on third parties—in this case, the tens of millions of municipal, industrial, and agricultural users of Project water. Op. at 116. Rather, according to the majority, the requirement addresses only whether the "proposed *alternative*"—here, reducing water flow—"is financially and technologically possible" for the *agency*, in contrast to "whether restricting [water flow] will affect its *consumers*," *id.* at 116-17 (second and third emphasis added).

On that basis, the majority held that it was irrelevant as a matter of law whether there were "downstream economic impacts of Reclamation being unable to continue its . . . operations as it has in the past." *Id.* at 117. Having thereby strictly limited the feasibility requirement, the majority found that it was "nearly self-evident" that the RPAs were feasible because "the RPAs do not require major changes affecting Reclamation's ability—financially or technologically—to comply with the RPAs." *Id.* at 118.

B. The Panel's Ruling Conflicts With This Court's Precedent And A Recent Fourth Circuit Decision.

En banc review of the panel's ruling is warranted because it conflicts with this Court's prior decision in *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998), and creates a square circuit conflict with the Fourth Circuit's ruling in *Dow AgroSciences v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013).

In *Southwest Center for Biological Diversity*, this Court held that in reviewing an RPA, the district court must "determine if the final RPA met the standards and requirements of the ESA." 143 F.3d at 523. The regulatory definition of an RPA—including its requirement that the proposal be economically feasible—is plainly among those legal requirements. The Court also rejected any notion that in selecting an RPA, the interests of third parties are irrelevant, explaining that if "two proposed RPAs would avoid jeopardy to the [protected species], the Secretary must be permitted to choose the one that best suits *all of its interests, including political or business interests*." *Id*. 523 n.5 (emphasis added).

Similarly, in invalidating the biological opinion in *Dow AgroSciences*, the Fourth Circuit rejected the Secretary's assertion that "the economic feasibility requirement [is] simply a limitation that the reasonable and prudent alternative be economically *possible*, without any need for discussion" in the biological opinion. 707 F.3d at 474 (emphasis in original). The Fourth Circuit explained that the Government's position "effectively reads out the explicit requirement" of the regulation. *Id.* Further, without discussion of economic feasibility, it is "impossible for us to review whether the recommendation satisfied the regulation and therefore was the product of reasoned decision-making." *Id.* at 475. The court accordingly deemed the agency's failure to discuss economic and technological

feasibility an independent "basis for our conclusion that the BiOp was arbitrary and capricious." *Id.*

The Fourth Circuit's decision also cannot be reconciled with the panel's holding in this case that the "reasonable and prudent" alternative need only be "economically and technologically feasible" for the *agency*, excluding any consideration of its consequences for third parties. In *Dow AgroSciences*, the RPAs required the EPA to impose restrictions on use of certain pesticides as a condition of their registration, *id*. at 473, which was an obviously "feasible" act for the agency. But the Fourth Circuit, in conflict with the panel in this case, found that the Secretary was instead required to address "the possible economic *consequences* of such a requirement." *Id.* at 474 (emphasis added); *see also id.* at 475 ("Such a broad prohibition readily calls for some analysis of its economic and technical feasibility.").

Licensed by the panel's ruling in this case not to consider economic and technological feasibility, and directed to exclude impacts on third parties when it does so, the Secretary is free to impose onerous and impracticable burdens on governmental programs without exploring whether other measures would provide equal protection to endangered species at less draconian cost to the public. Particularly given the resulting conflict with the Fourth Circuit, en banc review is warranted.

Respectfully submitted,

DATED: May 12, 2014

GOLDSTEIN & RUSSELL, P.C.

By: */s/ Thomas C. Goldstein*
THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL

Attorneys for Appellee
COALITION FOR A SUSTAINABLE DELTA

DATED: May 12, 2014

NOSSAMAN LLP

By: */s/ Paul S. Weiland*
ROBERT D. THORNTON
PAUL S. WEILAND
ASHLEY J. REMILLARD

Attorneys for Appellees
COALITION FOR A SUSTAINABLE DELTA AND KERN COUNTY WATER AGENCY

DATED: May 12, 2014

MORRISON & FOERSTER LLP

By: */s/ William M. Sloan*
CHRISTOPHER J. CARR
WILLIAM M. SLOAN

Attorneys for Appellees
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

DATED: May 12, 2014

BEST BEST & KRIEGER LLP

By: */s/ Gregory K. Wilkinson*
GREGORY K. WILKINSON
STEVEN M. ANDERSON

Attorneys for Appellees
STATE WATER CONTRACTORS

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure Rule 35(b)(2) and Circuit Rule 35-4, the undersigned certifies that this petition for rehearing en banc is proportionately spaced, has a typeface of 14 points, and, pursuant to the Court's Order dated April 17, 2014 (ECF No. 122), is no more than 25 pages.

DATED: May 12, 2014

By: */s/ Paul S. Weiland*
PAUL S. WEILAND
NOSSAMAN LLP

Attorneys for Appellees
COALITION FOR A SUSTAINABLE DELTA AND KERN COUNTY WATER AGENCY

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: */s/ Paul S. Weiland*
PAUL S. WEILAND
NOSSAMAN LLP