

COURT'S SUMMARY – SAN LUIS V. JEWEL

(9TH CIRCUIT SMELT OP.)

The panel reversed in part and affirmed in part the district court's judgment invalidating a 2008 biological opinion by the U.S. Fish and Wildlife Service that concluded that the Central Valley and State Water Projects jeopardized the continued existence of the delta smelt and its habitat.

The Central Valley Project and the State Water Project, operated respectively by the U.S. Bureau of Reclamation and the State of California, supply water originating in northern California to agricultural and domestic consumers in central and southern California. The source of the water—the estuary at the confluence of the San Francisco Bay and the Sacramento-San Joaquin Delta—is the lone habitat for the delta smelt, a threatened species under the Endangered Species Act (“ESA”). After the Bureau of Reclamation requested a biological opinion (“BiOp”), the U.S. Fish and Wildlife Service (“FWS”) concluded that the Central Valley operations would threaten the delta smelt and, as required by the ESA, proposed alternatives to ameliorate the effect on the smelt, including reducing the water exported to southern California. The plaintiffs-appellees—various water districts, water contractors, and agricultural consumers—brought suit under the Administrative Procedure Act against various federal defendants. The district court concluded that the 2008 BiOp was arbitrary and capricious.

(1) Concerning the **scope of the record**, the panel held that the district court overstepped its bounds in admitting additional declarations from the parties' experts. The panel held that it would consider the BiOp and evidence submitted by the parties that the FWS considered in making its decision, and the testimony of the four experts the district court appointed pursuant to Federal Rule of Evidence 706.

Concerning **the merits**, the panel (2) held that the 2008 BiOp's reliance on raw salvage figures to set the upper and lower Old and Middle Rivers flow limits was not arbitrary and capricious. The panel also (3) held that the 2008 BiOp's determination of

X2 (the point in the Bay-Delta at which the salinity is less than two parts per thousand) was not arbitrary and capricious. The panel further (4) held that the BiOp's incidental take statement was not arbitrary and capricious because it included adequate explanation and support for its determinations. The panel also (5) held the record supported the BiOp's conclusions regarding the indirect effects of project operations. The panel disagreed with the district court's determination that the FWS's own regulations and the Administrative Procedure Act required the FWS to explain that the reasonable and prudent alternatives satisfied 50 C.F.R. § 402.02's non-jeopardy factors. The panel (6) held that the FWS's consideration of these factors [50 C.F.R. 402.2] could be reasonably discerned from the record to satisfy any explanation requirements.

Concerning **the cross appeal**, the panel (7) held that the FWS did not violate the ESA by not separating the discretionary from nondiscretionary actions when it set the environmental baseline. The panel also (8) held that the Bureau of Reclamation did not violate the ESA by accepting the 2008 BiOp. The panel (9) affirmed the district court's judgment with respect to the National Environmental Policy Act ("NEPA") claims, and held: NEPA does not require the FWS to prepare an Environmental Impact Statement in conjunction with the issuance of the BiOp; and the Bureau of Reclamation's provisional adoption and implementation of the BiOp triggered its obligation to comply with NEPA. The panel (10) affirmed the district court's order remanding to the Bureau of Reclamation so that it can complete an Environmental Impact Statement evaluating the effects of its adoption and implementation of the BiOp.

Eighth Circuit Judge Arnold dissented from Parts III, IV.A., IV.B, IV.E, and V.B. of the majority opinion, and concurred in the rest. Judge Arnold would uphold the district court's limited admission of evidence outside the administrative record as relevant to the Old and Middle River flow limits and determination of X2, and agreed with the district court that the FWS's determination as to the flow prescription and X2 was arbitrary and capricious. Judge Arnold disagreed with the basis of the district court's conclusion that the non-jeopardy elements must be addressed in the BiOp or administrative record, but would affirm on the issue. Finally, Judge Arnold believes the district court should have found the

Bureau of Reclamation independently liable under the ESA for relying on a legally flawed BiOp.

Judge Rawlinson concurred in the bulk of the majority opinion, but dissented from Part V.C.2. Judge Rawlinson disagreed only with the rationale and conclusion that the Bureau of Reclamation's adoption and implementation of the BiOp triggered its obligation to comply with NEPA by preparing an Environmental Impact Statement that is generally required under the ESA.