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Ninth Circuit Upholds Measures to Protect Salmon Under the Endangered Species Act

In *Aluminum Co. of America v. Administrator, Bonneville Power Admin.*,¹ a recent case involving the continuing conflict between salmon and hydropower—"the two great natural resources of the Columbia River Basin"—the Ninth Circuit Court of Appeals upheld a 1995 decision by the Bonneville Power Administration (BPA) to adopt measures recommended by the National Marine Fisheries Service (NMFS).² By adopting the measures, the BPA sought to avoid "jeopardy"³ in the continued existence of two protected species of salmon in the Columbia River Basin.⁴ Several companies that purchase power from the BPA then filed suit,⁵ claiming that the BPA acted arbitrarily or

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¹. *Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1157 (9th Cir. 1999), cert. denied, 528 U.S. 1138 (2000).
². Once it is determined that a protected species "may be present" in an area and a "biological assessment" concludes that the species is "likely to be affected" by an action, Section 7 of the Endangered Species Act (ESA) requires the action agency formally to consult with the Secretary of the Interior or Commerce. 16 U.S.C. § 1536(c)(1), (a)(2). With regard to salmon, the Secretary of Commerce has delegated its authority to NMFS. If the resulting "biological opinion" concludes that the proposed action would jeopardize the species—or destroy or adversely modify critical habitat, as in this case—the action may not go forward unless NMFS can suggest "reasonable and prudent alternatives" that avoid such jeopardization, destruction, or adverse modification. See *id.* at § 1536(b)(3)(A), (a)(2).
³. An action would "jeopardize" a species if it "reasonably would be expected to reduce the reproduction, numbers or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild." 50 C.F.R. § 404.02 (2001). "Recovery," in turn, means "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act." *Id.*
⁴. This case involved endangered Snake River sockeye and threatened Snake River spring/summer and fall chinook salmon.
⁵. The competing environmental and economic interests in the Columbia River basin have spawned several NMFS decisions and biological opinions, as well as years of litigation. Following a 1992 decision to increase water flows to protect juvenile salmon, several power purchasers unsuccessfully challenged two related "no jeopardy" biological opinions issued by NMFS. Pac. N.W. Generating Co-op. v. Brown, 38 F.3d 1058 (9th Cir. 1994). While that case was pending, NMFS issued another "no jeopardy" opinion in 1993, and yet another in 1994. An Oregon district court then disapproved of the 1993 opinion, *Idaho Dept. of Fish & Game v. National Marine Fisheries Service*, 850 F. Supp. 886 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995), and identified errors shared by the 1993 and 1994 opinions. As a
capriciously in relying on NMFS’s finding of jeopardy and slate of recommended mitigation measures. The petitioners argued that the BPA should have conducted an independent analysis, one they believed would have resulted in a “no jeopardy” finding. The Ninth Circuit disagreed. Citing the Supreme Court’s decision in Bennett v. Spear, 520 U.S. 154, 169-70 (1997), which observed that a “jeopardy” finding by a consulting agency has a “powerful coercive effect” and that a federal agency disregards such a finding “at its own peril,” the court refused to force the BPA to “reinvent the wheel” and conduct an independent jeopardy analysis.6

The Ninth Circuit’s decision is important because it establishes that a federal agency is not required to conduct an independent study when adopting the findings of a consulting agency so long as “nothing more is offered than evidence and arguments already considered by the consulting agency.”7 The court also declined to impose a higher evidentiary burden on an agency’s adoption of a “jeopardy” finding than that required for a “no jeopardy” finding.8 Finally, and perhaps most significantly, the court agreed with NMFS that incremental improvements in the health of an animal population are insufficient to justify an agency’s failure to adopt protective measures, since the regulatory definition of jeopardy requires both survival and recovery.9

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result, NMFS reinitiated consultation and issued the 1995 biological opinion at issue in the instant case.

6. Aluminum Co., 175 F.3d at 1161.
7. Id.
8. Id.
9. Id. at 1162 n.6. The court specifically noted that “the regulatory definition of jeopardy, i.e., an appreciable reduction in the likelihood of both survival and recovery, 50 C.F.R. § 402.02, does not mean that an action agency can ‘stay the course’ just because doing so has been shown slightly less harmful to the listed species than previous operations.” Aluminum Co., 175 F.3d at 1162.