



NOSSAMAN LLP

The ESA Recovery Standard and the Impact on California's Water Supply

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The “Recovery” Standard Issue

- Does the ESA impose a “conservation” or “recovery” obligation on federal permit applicants?
- Or is the conservation obligation limited to federal agency projects?
- What is the “recovery” standard?
- Does “no jeopardy” mean “recovery”?



The ESA Purpose and “Conservation” Definition

- “Conservation” Definition: “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary” 16 U.S.C. § 1532(3)
- This is referred to as the “recovery” standard by some



The “Conservation” Requirement

- “Conservation” requirement limited to federal agencies under § 7(a)(1)
- Conservation requirement distinct from “no jeopardy”
- Use as a shield to defend decisions favoring conservation
 - *Carson-Truckee Water Conservation Dist. v. Watt* (D. Nev. 1982)





The “Conservation” Requirement

- Use as a sword, but agencies have broad discretion
 - *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of the Navy* (9th Cir. 1990)
 - Rejected Tribe’s claim that 7(a)(1) required Navy to adopt the “least burdensome alternative”
 - 7(a)(1) does not compel federal agencies to adopt a conservation program that will provide only insignificant conservation benefits
- Federal agencies may not ignore their obligation altogether



The Traditional View

Contrast “Conservation” and “No Jeopardy” Obligations

- The conservation obligation is distinct from the “no jeopardy” obligation of § 7(a)(2)
- Different structure of 7(a)(1) and 7(a)(2)
 - (a)(1) applies only to federal agency programs
 - (a)(2) applies to all actions “authorized, funded, or carried out”
 - e.g., federal permit approvals
- Regulations defined the term “jeopardy” to mean “reduce appreciably the likelihood of both the survival and recovery of the species in the wild”
50 C.F.R. § 402.02
- Traditional view prevailed from 1973 – 2006
- *Forest Guardians v. Veneman* (D. Ariz. 2005)
 - Section 7(a)(2) did not impose a conservation standard on jeopardy determinations



Challenges to the Traditional View

The Columbia River Decision

- *National Wildlife Federation v. National Marine Fisheries Service* (D. Or. 2005)
 - Challenge to BO for Columbia/Snake River dams
 - “No jeopardy” provisions of section 7(a)(2) imposed an obligation on the federal agencies to address the impacts on recovery of listed species
 - NMFS argued that its regulations only bar actions that will both reduce appreciably the likelihood of survival of listed species and recovery of listed species
 - Court relied upon cases interpreting the definition of “critical habitat” and the associated obligation to avoid “adverse modification” of critical habitat



Columbia River Decision

9th Circuit Requires Evaluation of Recovery Impacts

- Affirmed the district court decision
 - NMFS must analyze effects on recovery as well as effects on survival
- But did not decide whether “no jeopardy” standard includes substantive recovery component





Columbia River Decision

9th Circuit Requires Evaluation of Recovery Impacts

- Endorsed the reasonableness of the “agencies’ interpretation” of the “jeopardy” definition in the preamble to the section 7 regulations
 - Except in exceptional circumstances, injury to recovery alone would not warrant the issuance of a “jeopardy” biological opinion
51 Fed. Reg. at 19,934



San Diego MSCP Decision

- Invalidated incidental take permit for vernal pool species
 - Service did not require mitigation measures to provide for the conservation of the vernal pool species
 - HCP “must satisfy the ESA goal of conservation, which will allow the species to recover in order to ‘reverse the trend toward extinction’”





Impact of Recovery Decisions

- Section 7 Process will become more difficult
 - Federal agencies required to consider the impact of their actions on recovery in addition to the survival
 - Very few biological opinions and HCPs have addressed impacts on recovery
- It may be difficult to comply with a “recovery” standard in many instances
 - Particularly where a species is very vulnerable
 - But even regional HCPs will face challenges (as evidenced by San Diego MSCP decision)
 - No Surprises Decision provides potential for



Delta Smelt Decision

- Challenge to SWP and CVP Operating Plan (“OCAP”)
- FWS issued a “no jeopardy” biological opinion
 - concluded that OCAP would not adversely modify Delta smelt critical habitat





Delta Smelt, Salmon and California Water Crisis

- Suits alleging that Delta smelt and salmon biological opinions inadequate
- Smelt - May 2007 - district court grants plaintiffs' motion for summary judgment on several grounds
 - *Natural Resources Defense Council v. Kempthorne*, 2007 U.S. Dist. Lexis 42263 (E.D. Cal. May 25, 2007).
- Remedy – Approx. 30% Diversion Reduction
 - System elasticity reduced





Salmon Decision

- *PCFFA v. Gutierrez*
- Companion to Delta smelt case
- Alleging salmon/steelhead bio opinion inadequate





Salmon Decision

- April 2008 – granted summary judgment
- NMFS admitted need for additional analysis
- Court identified several inadequacies, including:
 - Failure explain contradictory evidence re “jeopardy”
 - Failure to evaluate impact on recovery
 - Follows *Nat’l Wildlife Federation*
 - No climate change analysis
 - Inadequate life cycle analysis



Major Issues

- Adaptive management. Smelt DSRAM lacked enforceable mitigation measures
 - “In substance an organizational flow chart”
- Best Available Science
 - New information that undercuts conclusions, even if late breaking, should be discussed in the opinion
- Climate Change
 - “important aspect of problem”
 - Could not determine whether information was “rationally discounted or arbitrarily ignored”





Smelt Decision – Major Issues

- Critical Habitat
 - Opinion used surrogate for smelt critical habitat constituent elements
 - No discussion of impacts of DSRAM on critical habitat
 - Salmon BioOp did not evaluate critical habitat impacts
- Cumulative Effects
 - Opinion identified cumulative effects
 - Court focused on absence of quantitative or qualitative evaluation of impacts
- Recovery Standard
 - No analysis of impact on recovery



No Surprises

“What A Long Strange Trip Its Been”

- 1982 - Section 10 amendment and Conference Report
 - Adopted regulatory definition of “no jeopardy” standard
 - Included specific revocation standard
 - Intended to provide adequate “assurances” that no additional mitigation will be required except as provided in HCP
 - Modeled on San Bruno Mtn. HCP – which included “no surprises” assurances
- 1994 - No Surprises Policy
- 1996 - Litigation Round One -- APA Challenge to Policy
- 1998 - Policy Adopted As Rule
- 1998 - 2005 Litigation Round Two
 - Permit Revocation Rule Adopted
 - Remand for additional notice and comment (2003)
 - Readoption of Permit Revocation Rule
 - D.C. Circuit dismissed appeal as moot
- 2005 – 2007 - Litigation Round Three
 - No Surprises and Permit Revocation Rules Upheld (2007)



Spirit of the Sage Council

- Upholds validity of No Surprises Rule and Permit Revocation Rule
- Section 10 does not require incidental take permits to “promote or even maintain the recovery of listed species”
- Explicitly rejects application of *Gifford Pinchot* and reasoning of MSCP decision
- Specific section 10 permit issuance and revocation standards control over general definition of “conservation”



Reconciling Decisions

- Conflict in decisions
 - Two holding that “no jeopardy” standard does not include “recovery” obligation
 - Two holding that “jeopardy” includes recovery
- Split within and between circuits
 - Two district courts in 9th Circuit reach opposition conclusions
 - D.C. District Court rejects reasoning of Columbia River and MSCP decisions



Questions?

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