



Ninth Circuit Critical Habitat Decision Casts Shadow on Habitat Conservation Plan "No Surprises" Assurances

06.26.2015

In a decision that casts a shadow on the enforceability of contractual assurances in habitat conservation plan ("HCP") agreements, the U.S. Court of Appeals for the Ninth Circuit rejected various Endangered Species Act ("ESA") and National Environmental Policy Act ("NEPA") challenges to the U.S. Fish and Wildlife Service's ("Service") designation of critical habitat for a native fish species (the Santa Ana Sucker) on the Santa Ana River in Southern California. *Bear Valley Municipal Water Company v. Jewell*, No. 12-57297 (9th Cir. June 25, 2015).

This is the first case to address the interplay between the "No Surprises" Rule and the Service's discretion under section 4 of the ESA to exclude areas from critical habitat based on "economic impact" and "any other relevant impact . . ." The No Surprises Rule imposes limitations on the ability of the federal wildlife agencies to require additional land, water or money from HCP permittees for species covered by the HCP. The case is also the first to address whether the ESA policy provision directing the federal wildlife agencies to coordinate with local agencies to "resolve water resource issues" imposes enforceable obligations on the wildlife agencies.

The decision culminates two decades of controversy concerning the sucker and habitat conservation planning in Riverside County. In the 1990s, the Service approved two ESA conservation plans covering the Santa Ana sucker, including the Western Riverside County Multiple Species Habitat Conservation Plan ("Western Riverside HCP") – a multi-species conservation plan covering over a million acres in urban Southern California. The 2010 critical habitat rule relating to the sucker designated 9,331 acres of critical habitat on three river systems, including 3,048 acres on the Santa Ana River covered by the Western Riverside HCP.

The implementing agreement for the Western Riverside HCP provided that "to the maximum extent allowable", unless the Service found that the HCP was not being implemented, the Service would not designate critical habitat for a covered species that was adequately conserved by the Western Riverside HCP. The Service did not make the finding required by the agreement, and the court acknowledged that the Western Riverside HCP was being implemented. Many regional HCPs include provisions requiring the Service to make similar findings before designating critical habitat for a species covered by a plan.

The Ninth Circuit concluded that the plaintiffs' concerns about the potential for the imposition of additional conservation measures were "speculative" and thus did not violate the "No Surprises" Rule. The Court acknowledged the "valid concerns" of the Western Riverside HCP permittees regarding the Service's commitments in the implementing agreement, but then stated that the Service "may not relinquish its statutory obligation to designate essential critical habitat by contract with third parties."

The Ninth Circuit decided the issues on appeal as follows:

1. The policy provision in the ESA regarding consultation with agencies to "resolve water resource issues in concert with conservation of endangered species" is a "non-operative statement of policy" that is implemented through the listing and critical habitat designation provisions of the ESA. The Service complied with the procedures applicable to designation of critical habitat.
2. The Service's designation of critical habitat on the Santa Ana River within the area of the Western Riverside HCP complied with the ESA and did not violate the agreement implementing the HCP. The Service's decision to **not exclude** the HCP areas from critical habitat is committed to the discretion of the Service and is not reviewable by the court. In any event, the critical habitat designation did not violate the HCP agreement because the Service has not imposed additional requirements on the parties to the agreement.
3. The designation of critical habitat in areas that are not occupied by the sucker complied with the ESA. The ESA allows the Service to designate unoccupied areas of critical habitat if the Service finds that the designation is essential to the conservation of the species and the designated occupied areas are inadequate to conserve the species. The Service concluded that the unoccupied areas were "essential" because they provide water and coarse sediment necessary to maintain preferred substrate conditions.
4. The designation of critical habitat is not subject to NEPA. The panel concluded that it was bound by the prior Ninth Circuit decision holding that NEPA does not apply to the designation of critical habitat.