FEATURE ARTICLE

THE *TUCSON HERPETOLOGICAL SOCIETY V. SALAZAR* DECISION AND ITS PROGENY: A MOVE AWAY FROM BLIND DEFERENCE TO AGENCY DECISION-MAKING

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With its 2009 decision in *Tucson Herpetological Society v. Salazar*, 566 F.3d 870 (9th Cir. 2009), the U.S. Court of Appeals for the Ninth Circuit signaled that courts should not blindly defer to scientific decisions made by federal agencies when those agencies fail to adequately explain or justify those decisions. The significant deference afforded federal agencies notwithstanding, *Tucson Herpetological* established a judicial willingness to look behind the decision-making process to ensure that agency decisions are consistent with and supported by the best available science.

In the three years since *Tucson Herpetological*, courts have taken this direction seriously. Six recent Administrative Procedure Act (APA) cases reflect a new trend in case law that gives teeth to the concept that federal agencies must explain their scientific decisions regarding endangered or threatened species. These cases confirm a move away from blind deference to agency decisions and a move toward transparency. In this article, we consider the implications of recent jurisprudence on this topic, particularly for resources users who are in the position of challenging federal agency decision making pertaining to listed species.

Background

In *Tucson Herpetological* and its progeny, courts evaluate federal agency actions under the framework for judicial review of such actions established in the APA. These evaluations occur pursuant to APA mandate that reviewing courts must:

> …hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

This standard is highly deferential. The Ninth Circuit has explained that reviewing courts should defer to "an agency's scientific or technical expertise," particularly when "the agency's decision involves a high level of technical expertise." *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 798 (9th Cir. 2005 (quoting *R-CALF v. U.S. Dept. of Agriculture*, 415 F.3d 1075, 1093 (9th Cir. 2005)); *see also, The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (courts are to be "'most deferential' when the agency is 'making predictions, within its [area of] special expertise, at the frontiers of science'" (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003)). Where agency action requires expert scientific decisions, however, federal agencies are required to "state a rational connection between the facts found and the decision made" to survive APA review. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 10656 (9th Cir. 2004).

Agency decisions made in accordance with some environmental statutes are also subject to the "best available science" requirements. The Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA) require federal agencies to make their listing and consultation determinations on the bases of, respectively, "the best scientific and com-

mercial data" and "best scientific evidence" available. 16 U.S.C. § 1533(b)(1)(A) (ESA § 3); 16 U.S.C. § 1536(a)(2) (ESA § 7); 16 U.S.C. § 1373(a) (MMPA). Thus, although agencies are entitled to significant deference in their expert scientific decisions, they are still obligated to rationally explain their scientific decisions and to make their decisions on the basis of the "best available science." Failure to satisfy these obligations exposes agency decisions to successful challenges by resource users who can demonstrate agency failure to identify and apply best available science.

New Developments in Case Law

Tucson Herpetological Society v. Salazar

In *Tucson Herpetological*, the Ninth Circuit considered whether it was arbitrary and capricious for the Secretary of the Interior (Secretary) to withdraw a rule proposing to add the flat-tail horned lizard to the endangered species list. Plaintiffs, a group of conservation organizations and individual biologists, contended that the decision violated a prior remand order requiring analysis of the species' lost historical range. In support of that contention, they pointed to evidence in the administrative record that purportedly undermined the finding that lizard populations were persisting throughout most of their range.

In response, the Ninth Circuit analyzed support for the agency's finding, acknowledging that:

> …[w]hile [its] deference to the agency is significant, [it] may not defer to an agency decision that 'is without substantial basis in fact.' 566 F.3d at 878 (quoting *Sierra Club v. U.S. EPA*, 346 F.3d 955, 961 (9th Cir. 2003)).

Applying the APA standard of review, the court stated that:

> …[a]n action will be deemed arbitrary and capricious where the agency offers an explanation for an action 'that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.' 566 F.3d at 878 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The court noted that in previous litigation on the agency's ESA listing decision, the Secretary had admitted that existing population studies were "limited and inconclusive." The Secretary had, nonetheless:

> …infer[red] from the uncertainty in the population studies that lizard populations 'remain[ed] viable throughout most of [the lizard's] current extant range.' *Id.*

The court explained the problem with that approach:

> If the science on population and trends is underdeveloped and unclear, the Secretary cannot reasonably infer that the absence of evidence of population decline equates to evidence of persistence….The Secretary affirmatively relies on ambiguous studies as evidence of persistence (i.e., stable and viable populations), and in turn argues that this 'evidence' of persistence satisfies *Defenders*' mandate and proves that the lizard's lost range is insignificant for purposes of the ESA. This conclusion is unreasonable. The studies do not lead to the conclusion that the lizard persists in a substantial portion of its range, and therefore cannot support the Secretary's conclusion. *Id.* at 879.

Consequently, the court determined that it did not owe deference to the agency's conclusion.

> [A] single attenuated finding represent[ed] the extent of the agency's evidentiary support for its sweeping conclusion that viable lizard populations persist[ed] throughout most of the species' current range. *Id.*

This, in the court's opinion, was simply not enough. This holding marked a shift in the court's presumed deference to an agency's scientific expertise, particularly where science is underdeveloped or unclear, reducing the likelihood of blind deference to scientific decisions in future cases.

Smelt and Salmon OCAP Litigation

While the *Tucscon Herpetological* decision was pending, federal agencies issued biological opinions regarding the Delta smelt and salmonid species in

December 2008 and June 2009, respectively. The colloquially-known Smelt Biological Opinion (BiOp) and Salmon BiOp are the culmination of § 7 consultations on the Operations Criteria and Plan (OCAP), a document governing coordinated operations of California's Central Valley Project (CVP) and State Water Project (SWP). Both BiOps concluded that OCAP operations would jeopardize the target species and adversely modify their critical habitats. As a result, both opinions included reasonable and prudent alternatives (RPAs) to modify CVP and SWP operations.

Many water districts dependent on CVP and SWP supplies challenged the BiOps and RPAs in federal court. The U.S. District Court for the Eastern District of California consolidated these suits into the *Delta Smelt Consolidated Cases* and the *Consolidated Salmonid Cases* (collectively, the OCAP cases). (E.D. Cal. Lead Case Nos. 1:09-CV-407 and 1:09-CV-1053, respectively). Among the many challenges to the BiOps, plaintiffs alleged that the federal agencies had failed to use the best available science in support of their conclusions.

In both cases, the water districts successfully defeated agency claims to sweeping deference to agency conclusions. First, in June 2010, in the *Consolidated Salmonid Cases*, 713 F.Supp.2d 1116 (E.D. Cal. June 1, 2010), the U.S. District Court granted plaintiffs' motion for preliminary injunction to enjoin implementation of several RPA actions. The court held that plaintiffs were likely to succeed on the merits of their claim that federal defendants had failed to use the best available science. *See, e.g.*, 713 F.Supp.2d at 1165-1168. In its decision, the court acknowledged that courts are typically required to defer to agencies' evaluation of "[w]hat constitutes the 'best' available science," but noted that:

> …[c]ourts routinely perform substantive reviews of record evidence to evaluate the agency's treatment of best available science. The judicial review process is not one of blind acceptance. 713 F.Supp.2d at 1158, 1159 (internal citation omitted).

The court went on to explain that "[t]he presumption of agency expertise may be rebutted if the agency's decisions, although based on scientific expertise, are not reasoned" (*id.* (citing *Greenpeace v. Nat'l Marine Fisheries Service*, 80 F.Supp.2d 1137, 1147 (W.D. Wash. 2000)), and that "[a]gencies cannot disregard available scientific evidence better than the evidence on which it relies." *Id.* (citing *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006); *S.W. Ctr. For Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000)). Further, the court reiterated that:

> …[c]ourts are not required to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area. *Id.* at 1160.

With the Salmon BiOp, the failures of the agency to use best available science resulted in decisions that that did not warrant deference.

Next, in December 2010, in the *Delta Smelt Consolidated Cases*, 760 F.Supp.2d 855 (E.D. Cal. 2010), *appeal docketed*, Case No. 11-15871 (9th Cir. Apr. 11, 2011), the U.S. District Court issued a memorandum decision on cross motions for summary judgment, ultimately requiring remand of the Smelt BiOp and RPA. As in the *Consolidated Salmonid Cases*, the court relied on *Tucson Herpetological* for its conclusion that "[t]he deference afforded under the best available science standard is not unlimited." 760 F.Supp.2d at 872. Similarly, the court identified circumstances in which deference would not be warranted. For example:

> …[a] court should 'reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation.' *Id.* at 873 (quoting *N. Spotted Owl v. Hodel*, 716 F.Supp 479, 483 (W.D. Wash. 1988)).

The court identified several instances where the U.S. Fish and Wildlife Service (FWS) failed to utilize the best available science (*e.g.* its decision in the BiOp to use gross salvage numbers instead of normalized salvage data) and then failed to explain that decision. *Id.* at 890, 894. The court described the latter failures as:

> …an abdication of the duty to satisfy the basic APA requirement that the agency 'articulate[ ] a rational connection between the facts found

> and the choice made.' *Id.* at 894 (quoting *Ariz. Cattle Growers' Ass'n*, 272 F.3d at 1236).

Ultimately, the court found the Smelt BiOp and RPA "arbitrary, capricious, and unlawful," and remanded to FWS. *Id.* at 970.

Recent developments in the OCAP cases further evidenced the court's willingness to scrutinize the scientific underpinnings of agency action. During a September 16, 2011, hearing on defendants' motion to stay pending appeal in the *Delta Smelt Consolidated Cases*, the U.S. District Court reiterated its frustration with agency failures of explanation and utilization of the best available science. In an oral statement of decision that has subsequently received substantial media attention, the court criticized the testimony of two witnesses for the federal government, discounting their conclusions that the injunctive relief previously granted would jeopardize the continued existence of the Delta smelt. The court found agency bad faith, noting that:

> …the only inference that the Court can draw is that [the testimony] is an attempt to mislead and to deceive the Court into accepting what is not only the best science, it's not science. (Reporter's Transcript of Proceedings (Sept. 16, 2011), at 17:20-25.)

Also in September 2011, the U.S. District Court issued a memorandum decision on cross motions for summary judgment in the *Consolidated Salmonid Cases*, ___F.Supp.2d___, 2011 (E.D. Cal. Sep. 20, 2011) requiring remand of the Salmon BiOp and RPA. The court again cited *Tucson Herpetological* as authority "for the proposition that, while a court must be deferential in areas where there is scientific uncertainty, such deference is not unlimited." 2011 WL 452293 at *11 n.6. As in the *Delta Smelt Consolidated Cases*, the court identified multiple instances where the National Marine Fisheries Service failed to use the best available science (*e.g.* in the BiOp's conclusions about the connection between Project operations and pollution and/or food limitations) and then failed to explain that decision. *Id.* at *139-40.

Together, the *Consolidated Salmonid Cases* and *Delta Smelt Consolidated Cases* represent successful efforts by resource users to challenge agency action. While litigation on the Salmon and Smelt BiOps is far from finished, the decisions to date demonstrate that the agency decision-making process is subject to judicial scrutiny, even where that process implicates the particular area of the agency's scientific expertise, and irrespective of whether the ultimate agency decision appears to favor or disfavor protected species.

Other Decisions

Three other decisions in 2010 follow from *Tucson Herpetological* and confirm that scientifically unsupported agency action may be successfully challenged. While each of the cases involves a challenge to agency action brought by environmental organizations rather than resource users, the holdings confirm the authority of courts to scrutinize and overturn agency decisions that are not supported by good science.

In *South Yuba River Citizens League v. NMFS*, 723 F.Supp.2d 1247 (E.D. Cal. July 8, 2010), the court emphasized that the deference due an agency's scientific expertise did not eliminate the obligation of the agency to explain its conclusions on the record. The U.S. District Court explained:

> Even for scientific questions, … a court must intervene when the agency's determination is counter to the evidence or otherwise unsupported. 723 F.Supp.2d at 1256 (citing *Sierra Club v. United States EPA*, 346 F.3d 955, 962 (9th Cir. 2003), amended by 352 F.3d 1187 (9th Cir. 2003)).

Environmental plaintiffs attacked the agency's vague justifications for a no-jeopardy BiOp. The court agreed, holding that it:

> …'cannot simply take the agency's word that the listed species will be protected under the planned operations: 'If this were sufficient, the NMFS could simply assert that its decisions were protective and so withstand all scrutiny.' *Id.* at 1267 (quoting *Nat'l Wildlife Fed'n v. Natl' Marine Fisheries Service*, 524 F.3d 917, 935 n. 16 (9th Cir. 2007)).

The lack of adequate explanation and/or rational connection between the facts and conclusion reached in this case made the BiOp's conclusion arbitrary and capricious.

In *Humane Society of the U.S. v. Locke*, 626 F.3d 1040 (9th Cir. Nov. 23, 2010), the agency's failure to satisfactorily explain its finding that sea lions were having a "significant negative impact" on listed salmonid populations led the Ninth Circuit to confirm the bite in the requirement of agencies to explain their scientific determinations. The court characterized the lacking explanations as "procedural errors" serious enough to warrant vacating the agency's MMPA and NEPA decisions. 626 F.3d at 1048. "Without an adequate explanation," the court explained, it was:

> precluded from undertaking meaningful judicial review" and unable to "ascertain whether NMFS has complied with its statutory mandate under the MMPA. (*Id.* at 1049, 1052)

With *Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. Dec. 7, 2010), the Ninth Circuit again confirmed the obligation of the wildlife agencies "to articulate a rational connection between the facts found and the conclusions made." 628 F.3d at 529 (internal quotations omitted). As in *South Yuba*, plaintiffs alleged agency failure to explain a no-jeopardy determination. Even in a context where the wildlife agency was due some degree of deference, the court recognized its duty to "engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it." *Id.* at 521 (quoting *Nat'l Wildlife Fed'n*, 524 F.3d at 927). Following its review, the court agreed with plaintiffs that the agency's failure to explain the no-jeopardy determination warranted remand of the § 7 BiOp at issue. The court pointed to multiple failings by the agency in support of its holding, including the failure to explain individual findings (*i.e.*, "that the action would not affect the 'current distribution and abundance of the bull trout in the action area'") and the bigger failure to "articulate a rational connection between its findings and its ultimate conclusion – that the action would not cause jeopardy at the recovery unit scale." *Id.* at 528.

Most recently, in *Greater Yellowstone Coalition, Inc. v. Servheen*, ___F.3d___, Case No. 09-36100 (9th Cir. Nov. 22, 2011), the Ninth Circuit affirmed the U.S. District Court's judgment vacating a decision to delist the Yellowstone population of grizzly bears, because FWS did not adequately explain why a trend of decline in an important food source was not a threat to the grizzly population. The court acknowledged "that scientific uncertainty generally calls for deference to agency expertise," but noted that it "nonetheless [had] a responsibility to ensure that an agency's decision is not arbitrary." Going further, the court stated that:

> …[i]t is not enough for the Service to simply invoke 'scientific uncertainty' to justify its action. … The Service must rationally explain why the uncertainty regarding the impact of whitebark pine loss on the grizzly counsels in favor of delisting now, rather than, for example, more study. *Id.*

Without further explanation of the FWS' decision to delist, the Ninth Circuit explained, it "might as well be deferring to a coin flip."

Conclusion—What This Means for Resource Users

Together, the cases described above create a body of law that puts teeth in the concept that federal agencies have to explain their scientific decisions regarding endangered or threatened species, and will be required to comply with statutory mandates to use the best available scientific data. This concept applies regardless of the type of determination—jeopardy or no-jeopardy—and is available for use by environmental organization and resource user plaintiffs alike.

Knowing that agencies' scientific decisions regarding listed species may now be subject to more intensive judicial analysis, it is increasingly important for resource users to preserve their objections and lay the groundwork for possible litigation by participating in the decision-making process. Resource users can ensure that agencies have relevant scientific information before a decision is made, by providing information in comment letters, by actively participating in public forums, and through other modes of public participation. They may retain their own experts, conduct their own research, provide the results of that research to the agency, critique agency science and provide better science. Parties should become involved early in the decision-making process so their information is in front of the agency well before a decision is made. In so doing, resource users can effectively force agencies to address such scientific in-

formation, or be placed in the uncomfortable position of explaining to a reviewing court why the provided scientific information was not considered. Resource users may find more success in litigation when they have assisted the agency by providing the "best available science." They will have a better opportunity to persuade a federal judge to overturn agency action if they have provided the best available science during the decision-making process.

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