

Annual Operating Plans for Dam Operation Do Not Require Environmental Reviews

The U.S. Bureau of Reclamation is required by federal law to prepare Annual Operating Plans for the Glen Canyon Dam on the Colorado River in northern Arizona. But, the Ninth Circuit ruled, it is not required to conduct an environmental review each time it prepares such a Plan. [*Grand Canyon Trust v. U.S. Bureau of Reclamation*](#) (9th Cir. Aug. 13, 2012) In 1995, the Bureau prepared an Environmental Impact Statement to address the dam's environmental impacts under the National Environmental Policy Act. As required by the Endangered Species Act, the Bureau also consulted with the U.S. Fish & Wildlife Service regarding the dam's impacts on an endangered fish known as the humpback chub. This consultation resulted in a series of Biological Opinions and Incidental Take Statements, the latest of which were issued in 2011. The plaintiff argued that the Bureau was required to comply with NEPA and the ESA each time it prepared an Annual Operating Plan. The court disagreed, finding that because the Bureau is required by statute to prepare the Annual Operating Plans, there is no discretionary federal agency action that triggers the duty to consult with the Fish & Wildlife Service. The court also rejected plaintiff's challenge to the validity of a prior Biological Opinion issued in 2009 and an Incidental Take Statement issued in 2010, finding this claim moot since the 2011 Biological Opinion and Incidental Take Statement superseded the prior documents. In finding there was no ESA violation, the court emphasized that what triggers consultation is the establishment of the operating criteria for the dam, not the submission of annual plans that merely chronicle the dam's ongoing operation pursuant to those adopted criteria. Turning to NEPA, the court found that the Bureau's preparation of Annual Operating Plans was not "major federal action" triggering the duty to prepare an environmental review. In line with its analysis under the ESA, the court explained that the operation of the dam was an ongoing project for which NEPA analysis already had been done. Here, the Bureau was not making any changes to that existing project merely by preparing an annual plan. The court also explained that the term "agency action" under the ESA is actually broader than the term "major federal action" under NEPA – as a result, because the court found there was no "agency action" under the ESA, it followed there was no "major federal action" under NEPA. The court applied the applicable legal standards, but pragmatism played an equally important role. As the court emphasized, to allow opponents to launch a "challenge on an annual basis for each Annual Operating Plan would be unduly cumbersome and unproductive," as "annual challenges could not likely be resolved fully before the next Annual Operating Plan came along." The court concluded that such "an unending judicial process" would have "no benefit" to endangered species or the environment. This is the third decision this summer by the Ninth Circuit that addresses the issue of what constitutes discretionary "agency action" under the ESA. In *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012), the court, in a controversial 7-4 en banc decision, ruled that the U.S. Forest Service's decision not to act – by allowing small-scale recreational miners to exercise their mining rights under federal law without first preparing a detailed plan of operations – was agency action triggering consultation. But in *Natural Resources Defense Council v. Salazar*, 686 F.3d 1092 (9th Cir. 2012), the court reached the opposite result, holding that the Bureau of Reclamation's decision to renew Central Valley Project water delivery contracts was not agency action triggering consultation. The court reasoned that the Bureau lacked discretion over the contracts due to its legal obligations to deliver the water. That the Ninth Circuit has issued three rulings on this issue within a few months attests to the significance of the subject and the controversy surrounding it.

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