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16 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
17

18 ASSOCIATION OF CALIFORNIA WATER)
AGENCIES, et al.) CV F-00-6148-REC/DLB
19)
Plaintiffs,) DEFENDANTS' MOTION FOR
20) VOLUNTARY REMAND OF
v.) CRITICAL HABITAT DESIGNATION
21)
DONALD L. EVANS, in his official) The Honorable Judge Coyle
22 capacity as Secretary, United States Department)
of Commerce; et al.)
23)
24 Defendants.)
25)

26 Defendants, Donald L. Evans, Secretary of Commerce, et al, (hereinafter "NMFS"),
27 hereby respectfully move the Court for a voluntary remand of the Final Critical Habitat Rule
28 for nineteen Evolutionarily Significant Units (ESUs) of Pacific salmonids for the purpose of

1 allowing the Service to revisit its economic analysis and then use that analysis in the balancing
2 process undertaken in designating critical habitat as required by ESA section 4(b)(2), 16 U.S.C.
3 § 1533(b)(2). Specifically, since the filing of this case, the Tenth Circuit Court of Appeals
4 issued a decision addressing the scope of the analysis of economic impacts under ESA section
5 4(b)(2) in designating critical habitat. New Mexico Cattle Growers Ass'n v. U.S. Fish &
6 Wildlife Service, 248 F.3d 1277 (10th Cir. May 11, 2001). In light of this recent decision,
7 NMFS believes that it is in the best interest of all parties to avoid further litigation on the
8 sufficiency of this particular economic analysis because of its similarity to the economic
9 analysis which was before the Tenth Circuit Court of Appeals. Therefore, without the
10 necessity for an adjudication on the merits, NMFS is prepared to remand the critical habitat
11 designation for the nineteen ESUs, reconsider its existing economic analysis, and use the new
12 economic analysis in the balancing process required by ESA section 4(b)(2), 16 U.S.C. §
13 1533(b)(2). NMFS requests that the existing critical habitat designation be left in place to
14 ensure protections for the nineteen ESUs during the interim. The grounds for this motion are
15 set forth in the accompanying memorandum in support.

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18 Respectfully submitted this 21st day of September, 2001.

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13 UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA

15 ASSOCIATION OF CALIFORNIA WATER
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16 Plaintiffs,

17 v.

18 DONALD L. EVANS, in his official
19 capacity as Secretary, United States Department
of Commerce; et al.

20 Defendants.
21

) CV F-00-6148-REC/DLB

) **MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
VOLUNTARY REMAND OF
CRITICAL HABITAT DESIGNATION**

) The Honorable Judge Coyle

22 Defendants, Donald L. Evans, Secretary of Commerce, et al, (hereinafter "NMFS"),
23 hereby respectfully move the Court for a voluntary remand of the Final Critical Habitat Rule
24 for nineteen Evolutionarily Significant Units (ESUs) of Pacific salmonids for the purpose of
25 allowing the Service to revisit its economic analysis and then use that analysis in the balancing
26 process undertaken in designating critical habitat as required by ESA section 4(b)(2), 16 U.S.C.
27 § 1533(b)(2). Specifically, since the filing of this case, the Tenth Circuit Court of Appeals
28 issued a decision addressing the scope of the analysis of economic impacts under ESA section

1 4(b)(2) in designating critical habitat. New Mexico Cattle Growers Ass'n v. U.S. Fish &
2 Wildlife Service, 248 F.3d 1277 (10th Cir. May 11, 2001). In light of this recent decision,
3 NMFS believes that it is in the best interest of all parties to avoid further litigation on the
4 sufficiency of this particular economic analysis because of its similarity to the economic
5 analysis which was before the Tenth Circuit Court of Appeals. Therefore, without the
6 necessity for an adjudication on the merits, NMFS is prepared to remand the critical habitat
7 designation for the nineteen ESUs, reconsider its existing economic analysis for the critical
8 habitat for the nineteen ESUs, and to use the new economic analysis in the balancing process
9 required by ESA section 4(b)(2), 16 U.S.C. § 1533(b)(2). NMFS requests that the existing
10 critical habitat designation be left in place to ensure protections for the nineteen ESUs during
11 the interim.

12 ARGUMENT

13 A The Service Is Willing To Reconsider the Critical Habitat Economic Analysis 14 In This Case.

15 On May 11, 2001, the Tenth Circuit issued its decision in New Mexico Cattle Growers
16 Ass'n v. U.S. Fish & Wildlife Service, 248 F.3d 1277 (10th Cir. May 11, 2001). In New
17 Mexico Cattle Growers, plaintiffs challenged the U.S. Fish and Wildlife Service's (FWS)
18 critical habitat designation for the Southwestern willow flycatcher, claiming that the FWS'
19 "baseline approach" to analyzing economic impacts of critical habitat designation was
20 erroneous. Under the baseline approach, those impacts attributable to the listing of the species
21 itself are not included in the economic impact consideration of critical habitat designation;
22 rather, the economic impact analysis takes into account only those impacts attributable to the
23 critical habitat designation itself, above any impacts attributable to the listing. Id. The Tenth
24 Circuit disagreed with FWS' approach, finding that "Congress intended that the FWS conduct
25 a full analysis of all of the economic impacts of a critical habitat designation, regardless of
26 whether those impacts are attributable co-extensively to other causes." Id.

27 It would be a waste of the Court's and the parties' resources to continue to wrangle over
28 the merits of the economic analysis and related issues because NMFS has determined not to

1 contest the merits of the economic analysis portion of this suit but to move for a voluntary
2 remand as to the economic analysis issues. We elaborate below on the Court's equitable
3 powers to grant this remedy.

4 B. Granting a Request for a Voluntary Remand is Within the Court's Equitable
5 Discretion and Promotes Judicial Efficiency.

6 A "voluntary remand" is a request by an agency for "remand without [judicial]
7 consideration of the merits," while "a court-generated remand" is "a remand after
8 consideration of the merits." Central Power & Light Co. v. United States, 634 F.2d 137, 145
9 (5th Cir. 1980). The power to remand a decision without judicial consideration is vested in a
10 court's equitable powers. According to the Supreme Court, "[t]he jurisdiction to review the
11 orders of [an agency] is vested in a court with equity powers, and while the court must act
12 within the bounds of the statute and without intruding upon the administrative province, it may
13 adjust its relief to the exigencies of the case in accordance with the equitable principles
14 governing judicial actions." Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364,
15 373 (1939).

16 A voluntary remand is consistent with the principle that "[a]dministrative agencies have
17 an inherent authority to reconsider their own decisions, since the power to decide in the first
18 instance carries with it the power to reconsider." Trujillo v. General Electric Co., 621 F.2d
19 1084, 1086 (10th Cir. 1980) (citing Albertson v. FCC, 182 F.2d 397, 399 (D.C. Cir. 1950)).
20 It also serves the interests of judicial economy by allowing an agency to reconsider and rectify
21 an erroneous decision without further expenditure of judicial resources. E.g., Ethyl Corp. v.
22 Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) (granting EPA's opposed motion for voluntary
23 remand to consider newly developed evidence) ("We commonly grant such motions [for
24 voluntary remand], preferring to allow agencies to cure their own mistakes rather than wasting
25 the courts' and the parties' resources reviewing a record that both sides acknowledge to be
26 incorrect or incomplete."); id. at 524 n.3 (collecting cases). cf. Marathon Oil Co. v. EPA, 564
27 F.2d 1253, 1268 (9th Cir. 1977) (at oral argument, EPA sought a limited voluntary remand;
28 court ordered broader remand). Thus, this Court has the equitable power to grant Defendants'

1 request for a voluntary remand of the economic analysis issues for the nineteen ESUs of
2 Pacific salmonids without the necessity of making a finding on the merits.

3 C. This Court Should Grant Defendants' Request for a Voluntary Remand of the
4 Prudency Determinations Without Inappropriately Restricting the Secretary's
Delegated Decision-making Discretion.

5 The Supreme Court has found that where an administrative record of an agency action
6 does not support that action, the proper course is to remand the decision to the agency. Camp
7 v. Pitts, 411 U.S. 138, 142 (1977); National Wildlife Federation v. Burford, 871 F.2d 849, 855
8 (9th Cir. 1989). The Supreme Court has also acknowledged the limited scope of circumstances
9 in which a court may order an executive agency to make a specific discretionary determination.
10 See Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333
11 (1976) (judicial review of agency action ordinarily requires remand to agency so that agency
12 can exercise its discretion); Citizens for Balanced Environment and Transportation, Inc. v.
13 Volpe, 650 F.2d 455 (2nd Cir. 1981) (court's role is limited; it may not substitute its judgment
14 for that of agency). Courts have adhered to this doctrine in ESA cases. See Idaho Farm Bureau
15 Federation v. Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (remanding to Service for notice
16 and comment and review of record to determine whether to list Bruneau Hot Springs snail as
17 endangered); Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 629 (W.D. Wash. 1991)
18 (remanding to Service for review and analysis of petition to list Northern spotted owl as
19 endangered).

20 Plaintiffs may argue that this Court should reach the merits of the agency's decision in
21 order to guide and restrict the Service's decision-making on remand and to ensure that NMFS
22 does not pour old wine into new bottles by re-releasing the same economic impact decisions
23 that it previously made. Such an argument would be misplaced. It is an established legal
24 principle that agencies are presumed to act in accordance with the law and that their actions
25 enjoy a presumption of regularity from the courts. See Citizens to Preserve Overton Park v.
26 Volpe, 401 U.S. 402, 415 (1971) (agency decision is entitled to a presumption of regularity);
27 United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926) ("The presumption of
28 regularity supports the official acts of public officers, and, in the absence of clear evidence

1 to the contrary, courts presume that they have properly discharged their official duties.”);
2 National Tank Truck Carriers v. EPA, 907 F.2d 177, 185 (D.C. Cir. 1990) (citations omitted)
3 (“We will not, indeed we cannot, dictate to the agency what course it must ultimately take . .
4 . . It may even be that the EPA will choose some other solution altogether. In any event, that
5 choice is the agency's and not ours.”) Accordingly, guided by this presumption of regularity the
6 Court should presume that NMFS will act lawfully on remand even without a decision on the
7 merits.

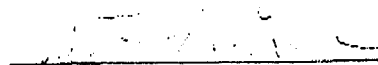
8 Moreover, reaching the merits of the critical habitat designation now risks wasting the
9 parties’ and Court’s resources, because the designation may change after remand. If Plaintiffs
10 are satisfied with any prospective changes that may be made, it may obviate the need for further
11 litigation. If Plaintiffs are still dissatisfied after remand, or if the designation remains the
12 same as present, they may renew their challenges at that time. Proceeding now, however, does
13 not advance the ball at this point.

14 D. Defendants’ Request for a Voluntary Remand has Rendered the Economic
15 Analysis Issues Moot.

16 Finally, NMFS’ decision to make new economic impact determinations for the nineteen
17 ESUs renders Plaintiffs’ summary judgment challenge to the merits of the economic analysis
18 moot, because no case or controversy between the parties exists. Under Article III of the
19 Constitution, federal courts have jurisdiction only to hear live “cases” or “controversies”
20 between parties. U.S. Const. Art. III, § 2. As the Ninth Circuit has stated, “[a] claim becomes
21 moot when ‘the issues presented are no longer ‘live’ or the parties lack a legally cognizable
22 interest in the outcome.’” Shoshone-Bannock Tribes v. Fish and Game Commission, Idaho,
23 42 F.3d 1278, 1281 (9th Cir. 1994) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982)).
24 Because NMFS has already volunteered to give Plaintiffs the full extent of the relief to which
25 they would otherwise be entitled if successful on the merits--i.e., a remand for reconsideration
26 and redetermination of the economic impacts of critical habitat for the nineteen ESUs-- the
27 Court lacks jurisdiction to reach the merits of this case, and any opinion rendered would be
28 advisory.

1 For these reasons, Defendants respectfully request that the Court grant their motion for
2 a voluntary remand of the economic analysis issues for the nineteen ESUs of Pacific
3 salmonids, to allow NMFS to make new economic impact determinations consistent with the
4 guidance of the Tenth Circuit Court of Appeals.

5 Respectfully submitted this 14th day of September, 2001.

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