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# Conservation Easement/Endangered Species Act: Citizen Suit Action Challenges U.S. Fish and Wildlife Service Biological Opinion Evaluating Impacts of Water Use

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The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) addressed in a December 4th Opinion an issue arising out of the federal Endangered Species Act (“ESA”). See *Center for Biological Diversity, et al. v. United States Fish and Wildlife Service, et al.*, No. 22-15809.

A key question was whether an ESA Biological Opinion (“BiOp”) prepared by the United States Fish and Wildlife Service (“Service”) to support a water-savings analysis was based on sufficient evidence.

The United States Army (“Army”) pumps and uses water from the San Pedro Basin in Arizona. The water is pumped to support Fort Huachuca (“Fort”) which is described as a major Army garrison.

This basin is also stated to be home to several plant and animal species protected under the ESA. One of the mitigation measures that the United States proposed to address this impact was a conservation easement.

In describing the conservation easement in this context the Ninth Circuit states it is a:

... promise not to use nearby land for water-intensive agricultural purposes—that would hypothetically save water and not jeopardize wildlife that depend on the basin.

Because of the presence of the threatened and endangered species the Army was required to prepare a biological assessment of the proposed actions (i.e., water use) impact. This is driven by Section 7(a)(2) of the ESA which requires federal agencies to ensure the activities are not likely to jeopardize the continued existence of federal listed species or destroy or adversely modify designated critical habitat.

A BiOp was undertaken by the Service to analyze the effects of the proposed action to the relevant species. It provided the final determination of whether the proposed action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat.

The Ninth Circuit states the focus was the pumping activities. The review included a document denominated a Programmatic Biological Assessment (“PBA”). The PBA is stated to have been undertaken to determine how the Fort’s pumping affected the river basin’s groundwater. This in turn considered the potential impacts on the protected species and their habitat. Activities conducted included:

- A groundwater demand accounting which balanced the amount of water used by the Fort against the amount the Fort returns to the groundwater through recharge measures and water savings.
- A groundwater flow model to study the effects of the Fort's pumping.

The Army sought formal consultation with the Service after completion of the PBA.

The Service then prepared a BiOp. It estimated the Fort's effect on baseflow by incorporating groundwater demand accounting and baseflow predictions from the groundwater model. At that point it conducted the required jeopardy and adverse-modification determinations for the protected species. The result was a conclusion that despite decreased baseflows in the Babocomari River that the Fort would have a minimal effect on the protected species and not jeopardize them or adversely modify their habitats.

The Center for Biological Diversity ("CBD") challenged the BiOp in United States District Court asserting that the Service violated the ESA.

The United States District Court rejected CBD's claims that the Service lacked sufficient support for its conclusion that a conservation easement would yield water savings. The court found that it was reasonably likely that the land subject to the conservation easement would have been used for agricultural use and that the Service did not err in determining that the easement saved water.

CBD appealed to the Ninth Circuit.

The Ninth Circuit held that the Service's BiOp lacked evidence to support its water-savings analysis. The Service was held to have failed to adequately demonstrate that the benefit from the conservation easement would be "reasonably certain" under the relevant ESA regulations.

The Service was stated to have:

. . . provided little evidence and relied mostly on speculation to claim water savings.

The relevant ESA regulation is stated to require that the "effects" of the "proposed action" be reasonably certain – as opposed to the action itself.

The test for whether certain is "reasonably certain" (i.e., an effect is reasonably certain to occur) must be based on clear and substantial information as opposed to speculation or conjecture.

Reasonably certainty was stated to be absent because:

- The BiOp struggled to provide evidence that the land subject to the easement would ever have been used for agriculture.
- The BiOp assumed that water savings would begin immediately in 2014

The Ninth Circuit reverses the United States District Court summary judgment for the Service and remands with instructions that the water-savings analysis be evaluated in a new BiOp.

A copy of the Opinion can be downloaded [here](#).