



Overview of Delta ESA Litigation

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Overview of ESA

- Section 7 of the Endangered Species Act requires Federal agencies to ensure that any action authorized, funded or carried out by them is not likely to jeopardize the continued existence of listed species or modify their critical habitat.
- If agency determines that a proposed action is likely to adversely affect a listed species or critical habitat, formal consultation is required
- Federal agencies must consult with either USFWS and/or NOAA Fisheries

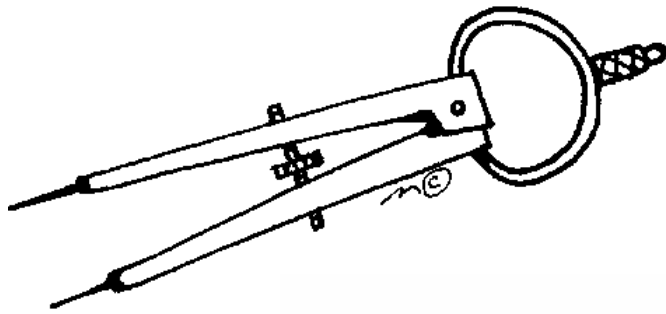
Overview of ESA

- As part of consultation process, wildlife agencies issue a biological opinion (“BiOp”).
- Where appropriate, a BiOp provides an exemption for the “take” of listed species
- If an action is determined by an agency to jeopardize a species or adversely modify critical habitat, agencies suggest Reasonable and Prudent Alternatives (RPAs) that the action agency may take to avoid the likely jeopardy or adverse modification

OPERATIONAL CRITERIA FOR PROJECTS



Legal Standard for Review



Review Under the APA

- Standard of Review:

Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

Review Under the APA

- Court must defer to the agency on matters within the agency's expertise
- Court may not substitute its judgment for that of the agency

Review Under the APA


- Agency must show a rational connection between the facts and its decision
- Agency's decision only needs to be reasonable
- Deference accorded to an agency's scientific or technical expertise is not unlimited

Review Under the ESA

- Agency's actions must be based on the best scientific and commercial data available
- A decision about jeopardy must be made based on the best science available at the time
- “The judicial review process is not one of blind acceptance.”

Delta Smelt Case, 2005 Opinion



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- In February 2005 environmental groups sued USFWS alleging that the BiOp was inadequate
 - BiOp lacked certainty in the adaptive management process providing fish protection
 - Failed to address climate change effects on the smelt and its habitat
 - Failed to adequately consider effects from USBR's delivery of water in its renewal of long term service contracts

Judge Wanger's Ruling on 2005 Delta Smelt BiOp

- Issued decision on summary judgment finding BiOp invalid
- Ordered USFWS to issue a new opinion
- Ordered an interim remedy which changed operations

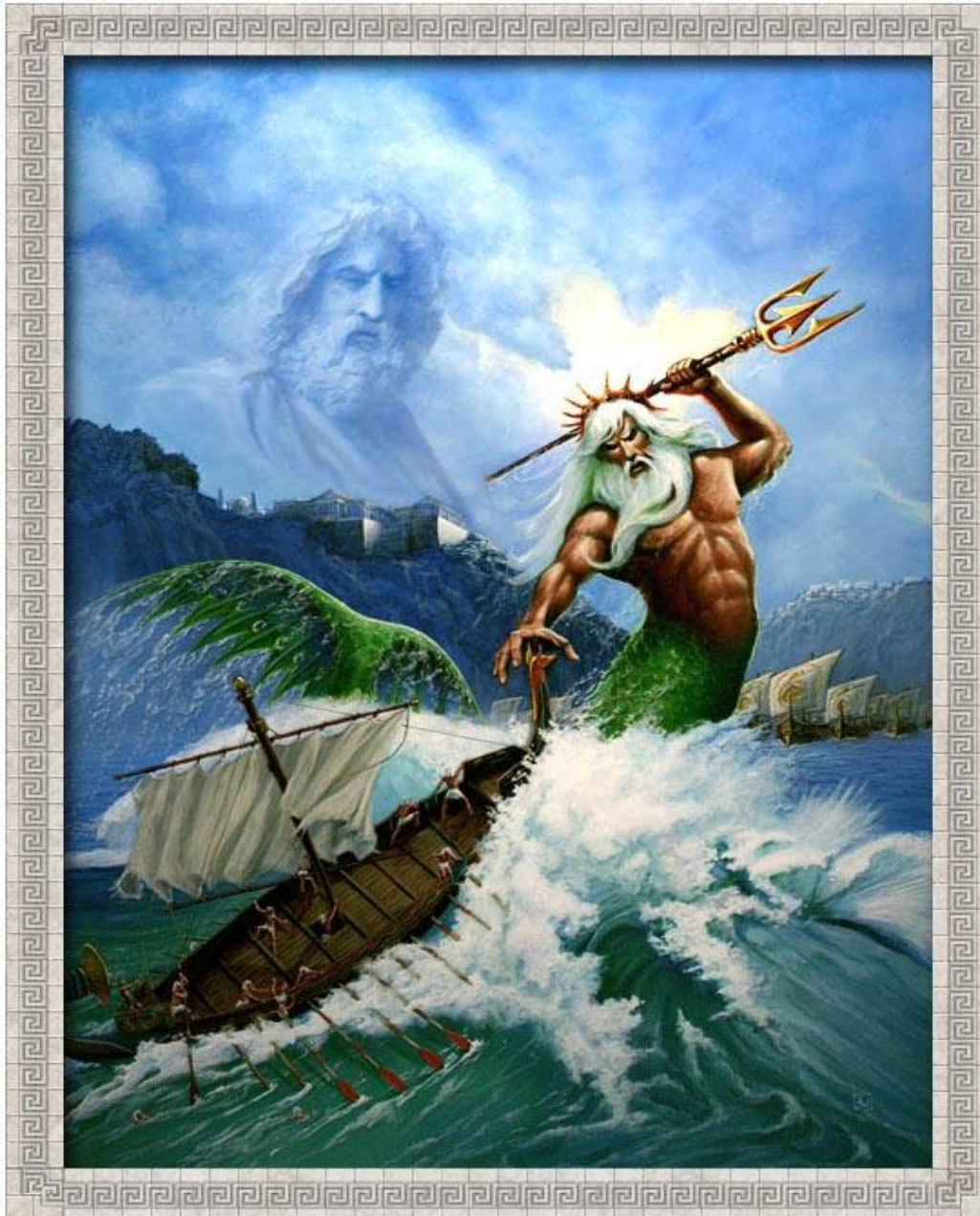
NEW 2008 BiOp



New BiOp

- RPA included several actions to:
 - Protect adult smelt life stage
 - Protect larval and juvenile smelt
 - Improve habitat for growth and rearing
 - Monitor and report

RULING



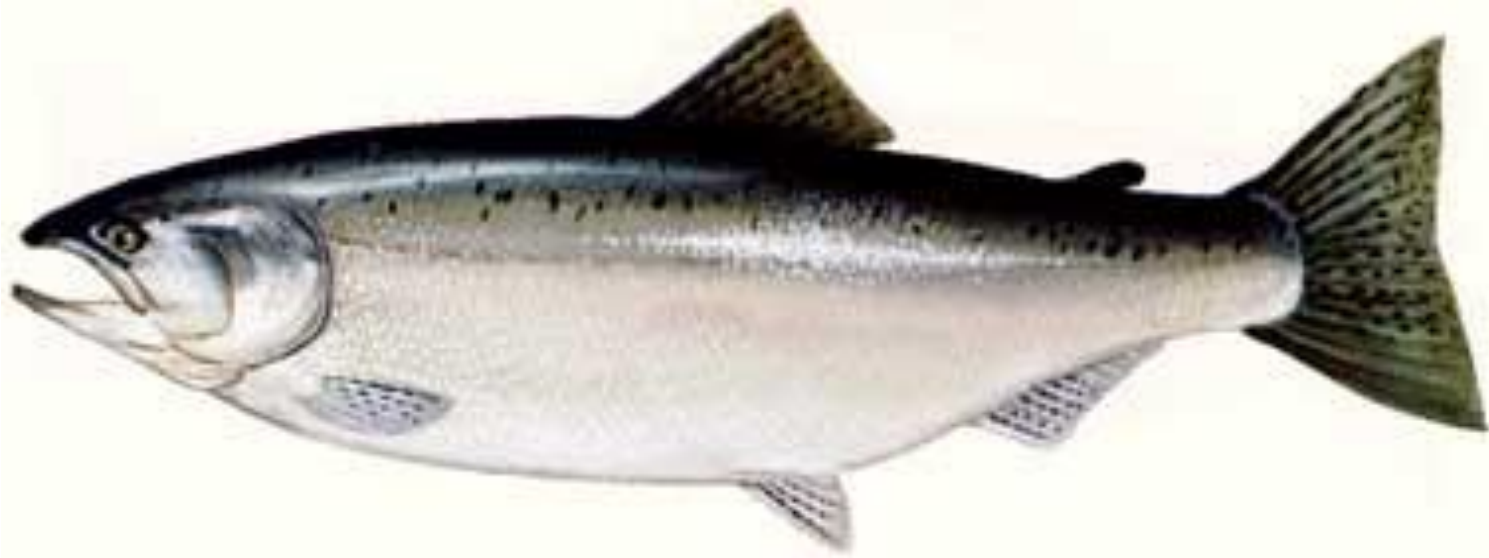
RULING

- Ruling on MSJ was issued on December 14, 2010
- Judge Wanger granted motion for MSJ in part and denied it in part
- BiOp was remanded to FWS for further consideration in accordance with the decision and the requirements of law

X2 Injunction Hearing

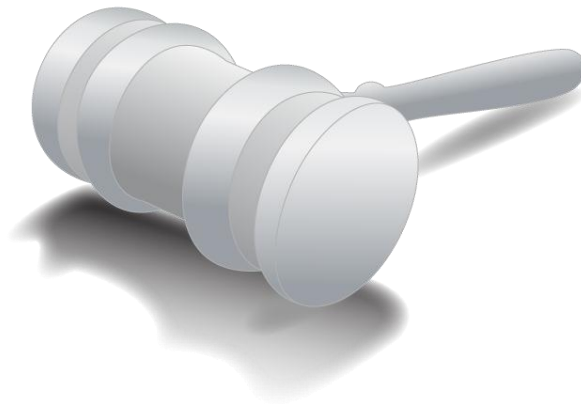
- Plaintiffs brought motion for injunction. Hearing was held on July 26th – 29th 2011
- Challenged X2 on best available science grounds
- Potential for water supply impact

Salmon Case



Salmon Case

- Plaintiffs brought motion for summary judgment
- On April 16th, 2008 Judge Wanger granted motion in part
- Ordered NMFS to prepare a new BiOp




NEW 2009 BiOp



Next Steps

- Motion for Summary Judgment hearing was held in December 2010
- Preliminary Injunction Hearing in March 2011
- MSJ ruling expected soon



“The law alone cannot afford protection to all the competing interests at stake in these cases.”