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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, DEFENDERS OF WILDLIFE, FRIENDS OF THE EARTH, GREENPEACE USA, AND PACIFIC ENVIRONMENT, Petitioners, vs. RYAN ZINKE, SECRETARY OF THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT; AND U.S. FISH AND WILDLIFE SERVICE, Respondents, and HILCORP ALASKA LLC, Respondent-Intervenor.	No: 18-73400

RESPONDENT-INTERVENOR HILCORP ALASKA LLC'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO ADMIT EXTRA-RECORD EVIDENCE

Petitioners ask the Court to consider three extra-record studies, with which they hope to persuade the Court to second-guess an environmental agency's scientific judgment. The studies do not fall within the Court's narrow exceptions

for consideration of extra-record information, and are offered for an improper purpose. Accordingly, Respondent-Intervenor Hilcorp Alaska LLC (Hilcorp) urges the Court to deny Petitioner's motion and to proceed with its review based solely on the record before the agencies at the time they made the decisions under review.

BACKGROUND

The biological opinion at issue in this appeal (the Liberty Biological Opinion) is the product of a consultation between U.S. Fish and Wildlife Service (USFWS) and the Bureau of Ocean Energy Management (BOEM), pursuant to section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2). It fulfills BOEM's obligation under that statute to consult with USFWS before taking actions that may affect ESA-listed species or their critical habitat, an obligation triggered here by BOEM's consideration of Hilcorp's plan to construct and operate the Liberty Project. *See* I-ER-30.

USFWS concluded in the Liberty Biological Opinion that construction and operation of the Liberty Project is not likely to adversely affect polar bear critical habitat, and in particular that the adverse impacts on terrestrial denning habitat would not be substantial. I-ER-91. Three factors support that conclusion:

- Terrestrial infrastructure would be constructed in areas generally lacking characteristics needed to support polar bear denning;

- Terms and conditions of authorizations issued under the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361, *et seq*., would minimize the level of persistent disturbance; and
- The scale of the potentially affected area would be small relative to the extent of the available terrestrial denning habitat.

I-ER-91.

Petitioners only take issue with the second of these factors – the Liberty Biological Opinion's reliance on terms and conditions of MMPA authorizations to minimize polar bear disturbance. Dkt. 23-1 at 6. They ask the Court to consider three extra-record scientific studies regarding the use of forward-looking infrared (FLIR) to detect the presence of polar bear dens (collectively, "Den Detection Studies"), in support of their argument that the Service did not consider the best available science regarding the effectiveness of FLIR. Dkt. 23-1 at 6. But there are at least three reasons why the Court should deny Petitioners' motion: (a) Petitioners failed to object to the use of FLIR when USFWS adopted rules for incidental take of polar bears under the MMPA; (b) Petitioners' proposed use of the studies in this action fails to satisfy any of the narrow exceptions that would allow the Court to consider extra-record evidence; and (c) Petitioners fail to mention that MMPA incidental take authorizations are themselves subjected to ESA consultation.

ARGUMENT

A. Petitioners had an opportunity to submit their extra-record studies in a previous, related regulatory process.

Petitioners ask the Court to admit the Den Detection Studies in hopes of raising doubts about the effectiveness of FLIR for detecting polar bear dens. Dkt. 23-1 at 5-8. But Petitioners do not disclose that they had a perfect opportunity to raise this objection with USFWS directly when the agency endorsed the use of FLIR in rules adopted under the MMPA. Petitioners failed to capitalize on that opportunity.

The MMPA allows USFWS to adopt rules that authorize the incidental take of small numbers of marine mammals from specified activities conducted in a specific geographic area, for up to five years at a time. 16 U.S.C. § 1371(a)(5); 50 C.F.R. § 18.27. Acting under this authority, the Service has adopted a series of 5-year incidental take regulations (ITRs) authorizing oil and gas activities to incidentally take polar bears in the Beaufort Sea region. *See* I-ER-87 – 88. The currently-effective version of the polar bear ITRs was adopted in 2016. 50 C.F.R. §§ 18.121 – 18.129; 81 Fed. Reg. 52,276 (Aug. 5, 2016).

ITRs adopted under the MMPA set a regulatory framework but do not themselves authorize incidental take. A company must apply for and obtain a letter of authorization (LOA) that is based upon the ITRs but is specific to their activity before engaging in conduct that would result in incidental take under the

MMPA. 50 C.F.R. § 50.18.27(f). The LOA specific to the Liberty Project has not yet been issued. *See* I-ER-93. When issued, it will detail monitoring and mitigation measures as specified in the Polar Bear ITRs. *See* 50 C.F.R. §§ 18.27, 18.124, 18.128.

The polar bear ITRs specify the information that must support a request for a LOA, including a site-specific plan to monitor and mitigate the effects of the activity on polar bears. 50 C.F.R. § 50.18.124(c)(2). They also require those engaged in activities in known or suspected polar bear denning habitat to "make efforts to locate occupied polar bear dens within and near areas of operation, utilizing appropriate tools, such as forward-looking infrared (FLIR) imagery and/or polar bear scent-trained dogs." 50 C.F.R. § 18.128. When the Liberty Biological Opinion refers to mitigation measures "such as use of infra-red thermal technology," I-ER-88, it is referring to this ITR requirement.

The efficacy of this regulatory requirement is precisely the target of Petitioner's motion: they ask the Court to accept the Den Detection Studies as evidence of the ineffectiveness of FLIR. Dkt. 23-1 at 7. But Petitioners did not make that case to USFWS when they had the opportunity to do so during the ITR rulemaking.

The agency put the proposed polar bear ITRs out for public comment, 81 Fed. Reg. 36,664 (June 7, 2016), and responded to the public comments it

received. 81 Fed. Reg. 52,276, 52,308-314 (Aug. 5, 2016). Petitioner Center for Biological Diversity submitted 24 pages of comments on the proposed polar bear ITR and attached 86 studies to those comments. Docket ID: FWS-R7-ES-2016-0060-0010, available at www.regulations.gov. They did not mention polar bear den detection technology, nor did they submit the three studies they now ask the Court to consider. *Id.*

If Petitioners believed that the best available science showed FLIR to be ineffective for polar bear den detection, as they now assert, they had an opportunity to present these studies and make that argument to USFWS during that public comment period. Having failed to do so, their collateral attack on the ITRs has no place in this appeal, nor do the Den Detection Studies. Judicial review is limited to "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973).

B. The Den Detection Studies do not fall within the exceptions for consideration of extra record evidence.

In accordance with section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2), "[t]he task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 743-44, (1985). But Petitioners contend, wrongly, that the Den Detection Studies fall

within one of the Ninth Circuit's three "narrow exceptions to this general rule." *Lands Council v. Powell,* 379 F.3d 738, 747 (9th Cir. 2004).

As the Court has explained, these "limited" exceptions "operate to identify and plug holes in the administrative record" and are "narrowly construed and applied." *Id.* Without this constrained scope, "it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Id.* at 748; *see also Asarco, Inc. v. E.P.A.,* 616 F.2d 1153, 1159 (9th Cir.1980) ("When a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency.")

Petitioners incorrectly assert that the Den Detection Studies fall within the *Lands Council* exception allowing admission of evidence when such evidence is necessary to determine whether the agency has considered all relevant factors and has explained its decision. Dkt. 23-1 at 6. The Court recently observed that this "relevant factors" exception "is the most difficult to apply." *San Luis & Delta-Mendota Water Authority v. Locke,* 776 F.3d 971, 993 (9th Cir. 2014). The Court explained that while the exception allows a court to develop "a background against which it can evaluate the integrity of the agency's analysis," the reviewing court "may not look to this evidence as a basis for questioning the agency's scientific analyses or conclusions," or use it "to determine the correctness or wisdom of the

agency's decision." *Id., quoting Asarco,* 616 F.2d at 1160. Petitioners' motion should be denied, as they offer the Den Detection Studies for just such an improper purpose.

In the Liberty Biological Opinion, USFWS took into account the following measures to minimize impacts to ESA-listed species:

> Hilcorp will implement a polar bear interaction plan, which includes commitments to survey potential denning habitat for maternal dens *using forward-looking infrared (FLIR), or similar technology for aerial surveillance in areas of operation that occur near polar bear denning habitat as determined by USFWS each year* to avoid active dens (Hilcorp notes they meet with USFWS every fall to discuss Hilcorp areas of operation on the Slope that need FLIRing for polar bear dens. Depending on the routes of the Liberty ice roads, USFWS may or may not require FLIRing if it's a low-probability denning area. For example, USFWS does not require/expect FLIRing of the Northstar ice road/trail route). Protection, agency reporting, and a stop-work orders [sic] would occur in the event of the discovery of previously unidentified polar bear dens, unless an alternative action is approved by the USFWS.

I-ER-40 (emphasis added).

It is exactly these measures, which reflect USFWS's scientific evaluation and judgement as to their effectiveness in preventing impacts on polar bears from the Hilcorp project, that Petitioners allege will be ineffective, based on their preferred studies of FLIR---the Den Detection Studies. Dkt. 31-1 at 6. Indeed, Petitioners contend that the Den Detection Studies, not the dozens of scientific studies cited in the Liberty Biological Opinion, are "the best available science" for determining the efficacy of such mitigation measures. Dkt. 31-1 at 7. The Ninth

Circuit has made it clear that the administrative record may not be reopened by a reviewing court "as a forum . . . to debate the merits of [a biological opinion]". *San Luis & Delta-Mendola Water Authority,* 776 F.3d at 993 (citations omitted).

The Den Detection Studies do not "fit well-within" "relevant factors" exception as Petitioners assert. Dkt. 31-1 at 9. Consideration of extra-record evidence is particularly limited in the context of judicial review of biological opinions. The Court has observed that the "ESA consultation process is not a rulemaking proceeding, but a request from one agency for the expertise of a second agency." *San Luis & Delta-Mendola Water Authority v. Jewell,* 747 F.3d 581, 604 (9th Cir. 2014). "Considering evidence outside the record would render the extraordinarily complex consultation process . . . meaningless." *Id.* at 603, *quoting Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife,* 273 F.3d 1229, 1245 (9th Cir. 2001).

Petitioners' assertion that USFWS did not use the best scientific information available because it did not rely on three specific studies offered as extra-record evidence, Dkt. 23-1 at 5, is exactly the sort of direct challenge to the scientific expertise of the USFWS that has been rejected by this Court. The reviewing court "may not look to this evidence as a basis for questioning the agency's scientific analyses or conclusions," or use it "to determine the correctness or wisdom of the agency's decision." *San Luis & Delta-Mendota Water Authority,* 776 F.3d at 993.

Consideration of these studies in the review of the Liberty Biological Opinion would inappropriately expand the scope of judicial review.

C. Petitioners' motion ignores the ESA consultations conducted for the MMPA requirements that they criticize.

Petitioners' object to the Liberty Biological Opinion relying upon terms of MMPA approvals, Dkt 23-1 at 6, but ignore the separate ESA consultation process that occurs regarding the decisions USFWS makes under the MMPA. They also fail to mention that BOEM has required Hilcorp to obtain an LOA from USFWS prior to commencing operations, thus conditioning development of the Liberty Project on completion of that further MMPA process, including an overlay of further ESA consultation. I-ER-1.

Polar bears are protected by both the ESA and the MMPA. *See* I-ER-50. USFWS implements these overlapping protections by sequencing its application of the two statutes. The agency first considers whether a proposed action meets the requirements for incidental take under the MMPA. *See* I-ER-87 – 88; 16 U.S.C. § 1371(a)(5). And when its MMPA decision may affect an ESA-listed species, as here with polar bears, USFWS also conducts an internal ESA section 7(a)(2) consultation regarding the potential impact of an MMPA approval. *See* I-ER-88; 16 U.S.C. 1536(a)(2).

Moreover, the two-step MMPA process (ITRs followed by LOAs) results in two rounds of ESA consultation. USFWS completed an ESA consultation prior to

issuance of the 2016 polar bear ITRs. *See* I-ER-80, 88. Thus, the MMPA requirement that efforts to locate polar bear dens use appropriate tools like FLIR, 50 C.F.R. § 18.128(b)(1), not only went through public notice and comment, but also was subjected to the ESA consultation process. Then, when USFWS issues the LOA for the Liberty Project, it will once again be obliged to revisit whether the LOA satisfies the requirements of ESA section 7(a)(2). *See* I-ER-88.

Petitioners' contention that USFWS has not met its ESA obligation to consider the best available science is misplaced. Their arguments, and the extra-record studies they ask the Court to consider in support of those arguments, are nothing more than an improper collateral attack on the ESA consultation that USFWS conducted for the polar bear ITRs, and a preemptive (and premature) attack on the future ESA consultation regarding the Liberty Project's LOA.

CONCLUSION

For the foregoing reasons, Petitioners' motion should be denied, and review of the agency's final action should proceed solely on the administrative record.

Respectfully submitted this 25th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2019, I electronically filed the foregoing **RESPONSE OF RESPONDENT-INTERVENOR HILCORP ALASKA LLC IN OPPOSITION TO PETITIONERS' MOTION TO ADMIT EXTRA-RECORD EVIDENCE** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system which will send notification of such filing to counsel for the Petitioners.

Date: April 25, 2019

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