No. 18-73400

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Petitioners,

v.

DAVID BERNHARDT, SECRETARY OF THE INTERIOR, et al.,

Respondents,

and

HILCORP ALASKA LLC,

Intervenor.

Petition for Review

RESPONDENTS' OPPOSITION TO MOTION TO ADMIT EXTRA-RECORD EVIDENCE

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
JAMES A. MAYSONETT
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 305-0216
james.a.maysonett@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY iii

INTRODUCTION 1

ARGUMENT 4

I. This Court's review is limited to the administrative record, and the exceptions to that rule are narrow. 4

II. These studies do not fall within this exception to the record review rule because they do not address a "relevant factor." 5

III. These studies do not show that FLIR surveys are ineffective, and the Court should not try to decide a scientific debate. 10

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

Cases

ASARCO, Inc. v. EPA,
616 F.2d 1153 (9th Cir. 1980) 4, 5, 8, 11

Camp v. Pitts,
411 U.S. 138 (1973) 3, 4

Lands Council v. Powell,
395 F.3d 1019 (9th Cir. 2005) 4, 5

National Audubon Society v. U.S. Forest Service,
46 F.3d 1437 (9th Cir. 1993) 8

San Luis & Delta-Mendota Water Authority v. Locke,
776 F.3d 971 (9th Cir. 2014) 4, 5, 11

Statutes

16 U.S.C. § 1371(a)(5)(D) 2

16 U.S.C. § 1536(a)(2) 1

16 U.S.C. § 1536(b)(4) 9

GLOSSARY

Hilcorp	Hilcorp Alaska LLC
BOEM	Bureau of Ocean Energy Management
DPP	Development and Production Plan
The Service	United States Fish and Wildlife Service
ESA	Endangered Species Act
FLIR	Forward-Looking Infrared Cameras
OCSLA	Outer Continental Shelf Lands Act
MMPA	Marine Mammal Protection Act
RPMs	Reasonable and Prudent Measures

INTRODUCTION

This petition for review is a challenge to the Liberty Project, an offshore oil drilling and production facility that intervenor Hilcorp Alaska LLC ("Hilcorp") proposes to build on an artificial island in the Beaufort Sea off Alaska's North Slope. 1 E.R. 9. This opposition addresses petitioners' motion to admit extra-record evidence.

On October 17, 2018, the Bureau of Ocean Energy Management ("BOEM"), exercising its authority under the Outer Continental Shelf Lands Act ("OCSLA"), conditionally approved a development and production plan ("DPP") that will allow Hilcorp to build and operate the Liberty Project. 1 E.R. 1–5. Before it conditionally approved that plan, however, BOEM first consulted with the United States Fish and Wildlife Service (the "Service") to determine what effect this project might have on the polar bear, a species listed as "threatened" under the Endangered Species Act ("ESA"). 1 E.R. 25–26. The Service prepared a biological opinion concluding that BOEM's approval of this plan complies with the requirements of the ESA; that is, it is not likely to jeopardize the continued existence of the polar bear or to adversely modify its designated critical habitat. 1 E.R. 90–92; *see* 16 U.S.C. § 1536(a)(2).

The Service found that noise and human activity associated with the Liberty Project—especially during its initial construction—might disturb some nearby denning polar bears. 1 E.R. 87, 90. But that harm would not be significant to the species, the Service concluded, because this project will affect only an extremely small part of the bear's denning habitat (26 acres out of a

total habitat area of more than 3,600,000 acres), most of the area around the project is not suitable for dens, and the worst effects will be limited to the first two years, when the project is being built and the noise and activity will be most disruptive. 1 E.R. 85.

While the Service concluded that the project is not likely to cause "jeopardy" to the species as a whole, it did find that some individual bears may be harmed. 1 E.R. 87. To help minimize those harms, Hilcorp proposed to implement a "polar bear interaction plan" that, among other things, will require Hilcorp to survey the area for polar bear dens using forward-looking infrared cameras ("FLIR"). 1 E.R. 40. Infrared cameras can detect polar bear dens because they are warmer than the surrounding ice and snow. Under Hilcorp's plan, if polar bear dens are detected in the project area, it would stop work and contact the Service for guidance. 1 E.R. 40.

The Service acknowledged Hilcorp's polar bear interaction plan, but did not include it as a "term and condition" of the biological opinion because the Service did not authorize any "take" of polar bears in that opinion. 1 E.R. 92–93. Instead, the Service deferred the specific terms and conditions of this project to the "letters of authorization" that the agency will have to prepare under the Marine Mammal Protection Act ("MMPA"), which also protects polar bears and protects them even more stringently than the ESA. Id.; *see* 16 U.S.C. § 1371(a)(5)(D) (allowing permits for "take" of marine mammals only if it will have a "negligible impact" and will not have an "unmitigable adverse

impact.").[1] Those letters of authorization have not been completed. Without them, Hilcorp cannot build or operate this project because BOEM conditioned its approval of the development and production plan on Hilcorp first obtaining those letters of authorization. Moreover, without that MMPA authorization, Hilcorp cannot lawfully "take" polar bears.

The petitioners have challenged BOEM's approval of the Liberty DPP and the Service's biological opinion. The Court's review of those agency decisions is generally limited to the administrative records before the agencies at the time those decisions were made. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142 (1973). Despite that rule, the petitioners now move the Court to admit three extra-record scientific studies as evidence. Petitioners' Motion to Admit Extra-Record Evidence (Apr. 15, 2019) ("Mot."). The petitioners argue that the Court should consider those studies because, according to the petitioners, the Service relied on FLIR surveys to ensure that this project would avoid "jeopardy," and the studies show that FLIR surveys are not effective at detecting polar bear dens. Mot. at 2.

The fundamental premise of the petitioners' motion—that the Service's "no jeopardy" and "no adverse modification" conclusions are predicated on detecting polar bear dens with FLIR surveys—is wrong. The Service did not reason that Hilcorp must find and protect nearby polar bear dens to avoid

---

[1] The petitioners argue that the ESA required the Service to include such terms and conditions in its biological opinion, and that it was unlawful for the Service to defer them to the MMPA letters of authorization. That argument is wrong, and we will address it in our brief on the merits of this case.

"jeopardy"; instead, it reasoned that this project would affect such a small area that only a very few bears would be disturbed, and even if those bears were driven from their dens, the resulting harm would not jeopardize the polar bear population as a whole. 1 E.R. 90–91. Because the effectiveness of FLIR surveys played no role in the Service's jeopardy analysis, the Court does not need to look outside the administrative record to determine whether FLIR surveys are effective. The petitioners have failed to justify the use of extra-record evidence, and the Court should deny their motion.

ARGUMENT

I. This Court's review is limited to the administrative record, and the exceptions to that rule are narrow.

In general, a court reviewing agency action must limit its review to the administrative record. *Camp v. Pitts*, 411 U.S. at 142; *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014); *ASARCO, Inc. v. EPA*, 616 F.2d 1153, 1158–59 (9th Cir. 1980). There are exceptions to that rule, but they are "limited" and must be "narrowly construed and applied." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). The petitioners bear "the burden of demonstrating that a relevant exception applies." *San Luis & Delta-Mendota Water Authority*, 776 F.3d at 993.

Here, the petitioners invoke the exception that allows the Court to consider extra-record evidence when necessary to determine "whether the agency has considered all relevant factors." *See id.* at 992. This exception, the Court has observed, is "the most difficult to apply." *Id.* at 993.

The petitioners argue that the Service failed to consider whether FLIR surveys are effective at detecting polar bear dens; they are essentially asking the Court to weigh the scientific evidence for itself so that it can reach its own conclusions about the effectiveness of FLIR surveys. Because the evidence that the petitioners have submitted purports to be "relevant to the substantive merits of the agency action," it "raises fundamentally different concerns," *ASARCO, Inc.*, 616 F.2d at 1160, and presents "serious" risks, *Lands Council v. Powell*, 395 F.3d at 1030. Whenever a court considers this kind of substantive extra-record evidence, "it inevitably leads the reviewing court to substitute its judgment for that of the agency." *ASARCO, Inc.*, 616 F.2d at 1160. The court then "effectively conducts a de novo review of the agency's action rather than limiting itself to the deferential procedural review that the [Administrative Procedure Act's] arbitrary or capricious standard permits." *San Luis & Delta-Mendota Water Authority*, 776 F.3d at 992. To avoid that result, the law never permits the courts "to use extra-record evidence to judge the wisdom of the agency's action" or to question "the agency's scientific analyses or conclusions." *Id.* at 993.

II. These studies do not fall within this exception to the record review rule because they do not address a "relevant factor."

The petitioners argue that these studies should be admitted because they show that "the measures underlying the Service's determination" that this project "will not jeopardize polar bears"—namely, the use of FLIR surveys to avoid polar bear dens—"are ineffective." Mot. at 5. This argument stumbles,

right out of the gate, because the petitioners have misunderstood the Service's analysis: the Service's "no jeopardy" conclusion was based on the small footprint of this project and its limited potential effects, not on an assumption that FLIR surveys would prevent jeopardy. 1 E.R. 90–91.

The Service's analysis is not hard to follow. Reviewing the facts, the Service found that this project will affect "an extremely small subset" of the polar bear's available habitat (26 acres out of a total habitat of more than 3,600,000 acres). 1 E.R. 85. In addition, only a "small proportion" of the habitat around the project is suitable for denning at all, and polar bears den at "low densities" in this area. 1 E.R. 79. The "direct effects" of the project will largely be limited to the construction phase, and, while noise and human activity from construction may disturb some denning polar bears, those effects will be "negligible" farther than one mile from the project. 1 E.R. 87. This "disturbance," in short, "would impact a small geographic area and the majority of disturbance would not persist beyond the construction period." 1 E.R. 89.

Based on those facts, the Service reached a "no jeopardy" conclusion: it found that, while a "small number of polar bears" may be "adversely affected through disturbance," those adverse effects will "impact only small numbers of individuals" and are not expected to have "population-level impacts." 1 E.R. 90 (stating that "the proposed action is not likely to jeopardize the continued existence of polar bears"). Similarly, the Service concluded that this action will not "adversely modify" the bear's designated critical habitat

because "the scale of the potentially affected area would be small relative to the extent of available terrestrial denning habitat such that the function of the unit as a whole would not be compromised." 1 E.R. 91.

Thus, contrary to the petitioners' argument, the Service never concluded that this project could avoid "jeopardy" or "adverse modification" only by finding polar bear dens with FLIR surveys and avoiding them. Instead, the Service repeatedly acknowledged the possibility that this project could disturb a very small number of polar bears denning in the immediate area. *See, e.g.*, 1 E.R. 87 (noting that "[s]everal activities at the Liberty DPP could disturb polar bears" and "could conceivably affect the fecundity of females disturbed while searching for a den site, or could potentially affect the outcome of a den established near a source of disturbance"); 1 E.R. 90 (noting that a "small number of polar bears" may be "adversely affected through disturbance"). But the Service concluded that the number of bears that might be disturbed is so small, and the footprint of the project is so small, that it is not likely to cause "jeopardy" or "adverse modification." 1 E.R. 90.

In fact, the use of FLIR surveys is only mentioned a handful of times in the biological opinion. 1 E.R. 40, 79, 88. The Service acknowledged, without comment, that Hilcorp's polar bear interaction plan included a commitment "to survey potential denning habitat for maternal dens using forward-looking infrared (FLIR) or similar technology for aerial surveillance." 1 E.R. 40, 79. The Service also noted that some "take" authorizations issued under the MMPA have been conditioned on the "use of infra-red thermal technology or

trained dogs to determine presence or absence of dens in suitable denning habitat," although the Service expressed no opinion on whether such a condition would be necessary or appropriate here. 1 E.R. 88.

The bottom line is that the Service never assumed that FLIR surveys would or would not be effective at detecting polar bear dens near the Liberty project; the issue was simply not relevant. And because it was not relevant, the petitioners' motion to submit additional, extra-record evidence on the effectiveness of those surveys should be denied.

The petitioners cite *Earth Island Institute v. U.S. Forest Service*, 442, F.3d 1147 (9th Cir. 1996), but that decision does not support their motion. Mot. at 8–9. In that case, the plaintiffs introduced extra-record scientific studies that addressed (and undermined) the central justification for the agency's decision. *Id*. at 1160–67. The Court admitted those studies on the grounds that they were necessary to "determine whether the agency has considered all relevant factors." *Id*. at 1162. Here, in contrast, the studies offered by the petitioners do not address a "relevant factor" because the Service did not rely on FLIR surveys to justify its "no jeopardy" and "no adverse modification" conclusions.

Similarly, in *National Audubon Society v. U.S. Forest Service*, 46 F.3d 1437, 1448 (9th Cir. 1993), the Court admitted extra-record material where the plaintiff alleged that the agency had "neglected to mention a serious environmental consequence." But here, the Service did not "neglect to mention" the possibility that this project might disturb nearby denning polar

bears. To the contrary, it repeatedly acknowledged that possibility, and thus *National Audubon Society* has no application.

The petitioners raise one other issue. In general, when the Service reaches a "no jeopardy" conclusion, it includes an "incidental take statement" in its biological opinion, which authorizes the "take" of individual animals which would otherwise be prohibited by the ESA, and it then identifies "reasonable and prudent measures" ("RPMs") and "terms and conditions" necessary to minimize such incidental take. 16 U.S.C. § 1536(b)(4). Here, this project still requires authorization under the MMPA, and the Service deferred the identification of mitigation measures to the MMPA process because the MMPA is even more protective than the ESA. 1 E.R. 93.[2] And so the Service did not authorize any incidental take in this biological opinion and, having not authorized take, did not identify RPMs or "terms and conditions" to minimize that take.

As the petitioners note, one of the several reasons that the Service gave for its "no adverse modification" conclusion was the fact that the "terms and conditions associated with authorizations under the MMPA would minimize the level of persistent disturbance." Petitioners' Opening Brief at 47 (citing 1 E.R. 91). The petitioners infer that those MMPA "terms and conditions"—which have not been written yet—will include FLIR surveys. But that

---

[2] Despite the petitioners' objections, the Service's decision to defer the identification of these mitigation measures to the MMPA authorizations was both lawful and protective of the polar bears, as we will explain when we brief that issue on the merits.

argument fails because the Service did not assume that FLIR surveys would be required under the MMPA; to the contrary, the Service noted that many other mitigation measures are used under the MMPA, that FLIR surveys are only required on a "case-by-case basis," and that such surveys are sometimes done with trained dogs instead. 1 E.R. 88. Thus, the petitioners' motion should be denied because the effectiveness of FLIR surveys is simply not relevant to the Service's reasoning in this biological opinion.

III. These studies do not show that FLIR surveys are ineffective, and the Court should not try to decide a scientific debate.

The petitioners contend that these studies demonstrate that FLIR surveys "are not effective at protecting polar bears because of their low rate of den detection." Mot. at 7. As we have already discussed, that would be irrelevant, even if it were true, because the Service did not rely on FLIR surveys here to avoid jeopardy.

But the petitioners' descriptions of these studies are not accurate. Like any tool, FLIR surveys have their limitations and are not infallible, and these studies identify some of those limitations. They are not effective at identifying polar bear dens on sea ice, for example. Mot. Exh. B at 14. And various atmospheric factors—like high winds—can interfere with them. Mot. Exh. C. at 1.

Each of these studies, however, also re-affirms that FLIR surveys are effective (producing "detection rates approaching 90 percent") and are an important tool in managing the impacts of human activities on polar bears.

Mot. Exh. A at 1 ("Data suggested that FLIR surveys conducted during optimal conditions for detection can produce detection rates approaching 90 percent and thus can be an important management and mitigation tool."); *see also* Mot. Exh. A at 6–7 (concluding that "FLIR imaging has an important place in the management of human activities that could adversely affect polar bears denning on land" even though it is "not 100 percent effective."); Mot. Exh. B at 15 (same); Mot. Exh. C. at 7 ("We think that by following these recommendations [for the conduct of successful FLIR surveys], polar bear den detection will be optimized, and thus will potential negative impacts associated with the interactions of denning polar bears and industry be avoided"). Thus, even if these studies were relevant, they would not support the petitioners' allegations.

All of this highlights another reason why the petitioners' motion should be denied—because they are trying to have extra-record evidence admitted to challenge the Service's scientific analyses and conclusions, and the law does not allow that. *See San Luis & Delta-Mendota Water Authority*, 776 F.3d at 993. If the Court admits these studies, it will necessarily have to reach its own conclusions about the effectiveness of FLIR surveys, which will "inevitably" lead the Court to "substitute its judgment for that of the agency." *ASARCO, Inc.*, 616 F.2d at 1160. The Court should not allow itself to be drawn into an improper debate about the effectiveness of this scientific tool, and the petitioners' motion should be denied.

CONCLUSION

The petitioners' motion to admit extra-record evidence should be denied.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General

/s/ James A. Maysonett

JAMES A. MAYSONETT
Attorney, Appellate Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 305-0216
james.a.maysonett@usdoj.gov

May 17, 2019
90-13-8-15632

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that:

(1) This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and 9th Cir. R. 27-1 because, according to Microsoft Word, this motion contains 2,909 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

(2) This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5)-(6), and 9th Cir. R. 27-1, because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font size and Calisto MT type style.

/s/ James A. Maysonett

_____

JAMES A. MAYSONETT