Nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660 and 11-16662

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,
Plaintiffs-Appellees & Cross-Appellants

and

STEWART & JASPER ORCHARDS, *et al.*,

Plaintiffs-Appellees & Cross-Appellants

CALIFORNIA DEPARTMENT OF WATER RESOURCES,

Plaintiffs-Appellees & Cross-Appellants,

v.

SALLY JEWELL, as Secretary of the Department of the Interior, *et al.*,

Defendants-Appellants & Cross-Appellees

and

NATURAL RESOURCES DEFENSE COUNCIL and THE BAY INSTITUTE,

Intervenor-Defendants-Appellants & Cross-Appellees

On Appeal From The United States District Court, For the Eastern District of California, Case No. 1:09-cv-00407-LJO-DLB

JOINT MOTION FOR STAY OF MANDATE PENDING PETITION FOR CERTIORARI BY SAN LUIS AND DELTA-MENDOTA WATER AUTHORITY, WESTLANDS WATER DISTRICT, KERN COUNTY WATER AGENCY, COALITION FOR A SUSTAINABLE DELTA, STATE WATER CONTRACTORS, AND METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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I. INTRODUCTION

The San Luis & Delta-Mendota Water Authority and Westlands Water District ("Federal Contractors"), along with Kern County Water Agency, Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California ("State Contractors"), move for a stay of mandate pursuant to Federal Rule of Appellate Procedure 41(d). Appellees intend to petition for a writ of certiorari in the Supreme Court, and seek a stay of the mandate pending filing of their petition.

This Court has recognized the "enormous practical implications" of its decision, which affects the availability of water to provide for "millions of acres of land and tens of millions of people." *San Luis & Delta-Mendota Water Authority v. Jewell*, No. 11-15871, slip. op. ("Op.") at 25, 52 (9th Cir. 2014). As Judge Arnold's dissent demonstrated, while the importance of the decision is undeniable, its correctness is open to question. In fact, the petitions for rehearing en banc demonstrated that this Court's decision is in conflict with the decisions of the Supreme Court and several other courts of appeals. While this Court obviously is under no obligation to conform its decisions to the law of other circuits, the resulting circuit conflicts on questions of broad doctrinal and practical importance provide a substantial basis for certiorari in the Supreme Court.

At the same time, granting a brief stay will not substantially prejudice the appellants, because during the pendency of the stay the Central Valley Project ("CVP") and State Water Project ("SWP") will continue to operate subject to the delta smelt biological opinion ("BiOp") upheld by the Court. On the other hand, denying a stay could result in substantial delays in the development of a lawful replacement BiOp should the Supreme Court grant certiorari and reverse this Court's decision. Under these circumstances, there is good cause to stay the mandate to preserve the status quo for a brief period while Appellees seek further review.

II. ARGUMENT

"A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." Fed. R. App. P. 41(d)(2)(A). To obtain a stay, the movant "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." *Id*. However, "a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). Those standards are easily met here.[1]

[1] Prior to filing, Appellees contacted attorneys for the other named parties regarding this motion. Defendants-Appellants and Intervenor-Defendants responded that they opposed this motion. Plaintiff-Appellee the California Department of Water Resources responded that it did not oppose this motion.

A. The Petition For Certiorari Will Present Substantial Questions

This Court's decision presents at least two sets of substantial questions that warrant Supreme Court review.[2] Both were extensively briefed before the panel and in the petitions for rehearing en banc, and hence Appellees only briefly describe them here.

1. The Court's Decision Is In Conflict With Supreme Court Precedent And Other Circuits Regarding The ESA's Requirement To Use The "Best Scientific And Commercial Data Available"

The Endangered Species Act ("ESA") requires the Secretary to "use the best scientific and commercial data available" when preparing a biological opinion, including in assessing the impact of the proposed activity and formulating possible alternatives. 16 U.S.C. § 1536(a)(2). The Supreme Court has recognized that the requirement's "obvious purpose" is to "ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise" and to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-177 (1997). The requirement to use the best available data thus ensures that the Secretary's formulation of a biological opinion is founded on the best available scientific information.

[2] Appellees have not yet finally determined what issues to raise, and at least some appellees will raise additional questions. But Appellees plan to include at least the issues discussed in this motion.

In this case, it is essentially undisputed that in developing the BiOp, the Secretary disregarded "the best scientific and commercial data available." The district court concluded that the flow rates set by the U.S. Fish and Wildlife Service ("FWS") on the basis of raw salvage data rather than normalized salvage data were contrary to "standard accepted scientific methodology." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 889 (E.D. Cal. 2010). The Court, however sustained the BiOp despite this failing, holding that this was "within the FWS's discretion" because it led to a more "conservative" result, Op. at 56, intended to "protect the maximum absolute number of individual smelt." *Id.* at 60.

That ruling conflicts with Supreme Court precedent. The Supreme Court has made it clear that the requirement to use the "best scientific and commercial data available" is a mandatory obligation rather than a matter of discretion. *Bennett v. Spear*, 520 U.S. at 172. Consequently:

> the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. (brackets and emphasis in original). The Court's panel decision conflicts with the text of the ESA and Supreme Court precedent by holding that FWS could disregard the best scientific data available if doing so led to the more

"conservative" result the agency favored. Op. at 61. Even assuming FWS has discretion to adopt a "conservative" approach to setting flow limits, the statute is clear that it must exercise that discretion on the basis of the best available scientific data—it cannot, as the panel held, rely upon invalid data simply because that supported a purportedly more conservative result.

In addition, this Court put itself in conflict with the law of other circuits when it held that FWS's failure to use the best available data was excused because absolute precision is impossible and because the agency also relied on other data in setting flow rates. Op. at 64-71. The First Circuit directly rejected that proposition in *Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency*, 684 F.2d 1041, 1055 (1st Cir. 1982). In that case, the court found that the Environmental Protection Agency violated the best available scientific data requirement by failing to conduct real time simulation studies in considering a proposal to build an oil refinery in the habitat of endangered whales and eagles. There, as here, the Government argued that its decision was supported by other kinds of scientific evidence. But unlike this case, the First Circuit held that this was irrelevant: because the real time simulations "represent as yet untapped sources of 'best scientific and commercial data,'" the EPA was obligated to review them. *Id.* "It may very well be," the court acknowledged, "that, after conducting real time simulation studies and any other tests and studies which are

suggested by the best available science and technology, the most informed judgment of risk of a major oil spill will still have a large component of estimate, its quantitative element being incapable of precise verification." *Id.* But that was no excuse for ignoring the best scientific evidence that is available. The court explained that "at least the EPA will have done all that was practicable prior to approving a project," as required by the statute. *Id.* Other circuits likewise have recognized that agencies must, without exception, "seek out and consider *all* existing scientific evidence relevant to the decision at hand. They cannot ignore existing data." *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004) (emphasis added; citation omitted); *see also Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1265 (11th Cir. 2009) (explaining that "the Service is required to seek out and consider all existing data"); *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (same); *Ecology Center v. U.S. Forest Serv.*, 451 F.3d 1183, 1194-95 n.4 (10th Cir. 2006) (same).

2. The Court's Decision Is In Conflict With Other Circuits Regarding The ESA's Requirement To Consider The Economic And Technical Feasibility Of Alternative Actions

The decision in this case also created an important circuit conflict over the procedural and substantive requirements for issuing "reasonable and prudent alternatives" ("RPAs") that, as a practical matter, often govern the operation of

agency projects that may affect endangered species, such as the water projects at issue here.

The ESA provides that if a biological opinion determines that the agency action under review will jeopardize a listed species or adversely modify its critical habitat, the Secretary "shall suggest those *reasonable and prudent* alternatives" that "can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A) (emphasis added).

The Secretary has promulgated a regulation defining "reasonable and prudent alternatives" as:

> alternative actions identified during formal consultation [1] that can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [3] that is *economically and technologically feasible*, and [4] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat."

50 C.F.R. § 402.02 (emphasis added).

The BiOp in this case requires modifying the water projects' longstanding operations, with the consequence that water deliveries are significantly curtailed. The state and federal agencies that administer the CVP and SWP raised concerns regarding the economic and technological feasibility of the BiOp's proposed RPAs. But FWS deemed its harsh alternatives to be "reasonable and prudent"

without ever addressing the actual feasibility of the alternatives. The district court accordingly held that on remand FWS was required to provide:

> some exposition in the record of why the agency concluded (if it did so at all) that all four regulatory requirements for a valid RPA were satisfied. The RPA Actions manifestly interdict the water supply for domestic human consumption and agricultural use for over twenty million people who depend on the Projects for their water supply. "Trust us" is not acceptable. FWS has shown no inclination to fully and honestly address water supply needs beyond the species despite the fact that its own regulation requires such consideration.

SLDMWA, 760 F. Supp. 2d at 957.

The panel majority reversed, holding as a matter of law that a biological opinion is never required to address the economic and technological feasibility of alternatives to the agency action. Op. at 113. The majority reasoned that the regulation in question "is a definitional section; it is defining what constitutes an RPA" and therefore, FWS is not required to provide an explanation of feasibility "when it lays out an RPA." *Id.* at 113, 114.

In the alternative, the majority held that even if the APA did require the FWS to consider the economic and technological feasibility of the RPA, that requirement was met here because feasibility "is nearly self-evident" in this case. *Id.* at 117-118. The panel reached that conclusion, however, only by defining the feasibility requirement to preclude any consideration of the economic effect on third parties—in this case, the tens of millions of municipal, industrial, and

agricultural users of CVP and SWP water. Op. at 116. Rather, according to the majority, the requirement addresses only whether the "proposed *alternative*"— here, reducing water flow—"is financially and technologically possible" for the *agency*, in contrast to "whether restricting [water flow] will affect its *consumers*." *Id*. at 116-17 (second and third emphasis added). After so limiting the feasibility requirement, the majority concluded that the RPAs must be feasible because "the RPAs do not require major changes affecting Reclamation's ability—financially or technologically—to comply with the RPAs." *Id*. at 118.

Both the Court's procedural ruling (*i.e.*, that FWS need not address feasibility in its BiOp) and its substantive interpretation of the regulation (*i.e.*, that RPAs need only be feasible for the agency) conflict with the Fourth Circuit's ruling in *Dow AgroSciences v. National Marine Fisheries Service*, 707 F.3d 462 (4th Cir. 2013) (hereafter, "*Dow*").

a. Procedural Ruling

The Fourth Circuit in *Dow* rejected the Secretary's assertion that "the economic feasibility requirement [is] simply a limitation that the reasonable and prudent alternative be economically possible, *without any need for discussion*" in the biological opinion. 707 F.3d at 474 (emphasis altered). The Fourth Circuit explained that without discussion of economic feasibility, it is "impossible for us to review whether the recommendation satisfied the regulation and therefore was the

product of reasoned decision-making." *Id*. at 475. The court accordingly deemed the agency's failure to discuss economic and technological feasibility an independent "basis for our conclusion that the BiOp was arbitrary and capricious." *Id*.

The majority in this case sought to distinguish *Dow* in a footnote, stating: "[w]e do not read *Dow* to require the FWS to address economic and technological feasibility as a procedural matter. As we read *Dow*, the court was concerned that the FWS had imposed an especially onerous requirement without any thought for whether it was feasible." Op. at 114. The panel's suggestion that *Dow* required an explanation only because of the character of the particular RPAs in that case cannot be squared with *Dow*'s straightforward text, which explained that the absence of any discussion of feasibility in the BiOp precluded any meaningful judicial review of the RPA's compliance with the feasibility requirement. 707 F.3d at 475. That, of course, would be true of any BiOp that failed to address the feasibility of an RPA, however onerous or modest.

b. Substantive Interpretation

The Fourth Circuit's decision in *Dow* also cannot be reconciled with this Court's substantive interpretation of the regulations as requiring that an RPA need only be "economically and technologically feasible" for the agency, excluding any consideration of its consequences for third parties. Op. at 116-18.

As Federal Defendants acknowledged in a Rule 28(j) letter when *Dow* was decided, *Dow* also held "that economic feasibility should be based on costs to end users (the public at large)." ECF No. 110. The RPAs before the Fourth Circuit required the EPA to impose restrictions on use of certain pesticides as a condition of their registration, which was an obviously "feasible" act for the agency. *Dow*, 707 F.3d at 473. But the Fourth Circuit, in conflict with the panel in this case, found the Secretary was instead required to address "the possible economic *consequences* of such a requirement." *Id.* at 474 (emphasis added); *see also id.* at 475 ("Such a broad prohibition readily calls for some analysis of its economic and technical feasibility.").

3. The Conflicts Between This Court's Decision And The Decisions Of The Supreme Court And Other Circuits Create A Substantial Question For Supreme Court Review

The best scientific evidence requirement and the RPA's feasibility requirement are two of the most essential mandates of the ESA. Any circuit conflict over such critical provisions of such a consequential federal law would warrant Supreme Court review. Here, the need and prospect for review are further heightened by the enormous practical consequences flowing from the unsettled state of the law and the decision in this particular case. The panel recognized this case's high stakes for California's citizens and their economy. The broad amicus support for the petitions for rehearing en banc further demonstrates that the

implications of the Court's decision extend well beyond the allocation of California's water supply. There can be little doubt, therefore, that the impending petitions will present the Supreme Court a "substantial question" for its review. Fed. R. App. P. 41(d)(2)(A).

B. Good Cause Supports A Stay Of The Mandate

There also is good cause to grant a stay of the mandate pending filing of a petition for writ of certiorari.

Were the Supreme Court to reinstate the district court's judgment, a new BiOp would be required. This Court has recognized such an undertaking requires a substantial investment of time, and that finalization of a lawful BiOp in this case has already been delayed many years. *See* Op. 42, 50-53. Since the district court's decision, the parties have been working diligently and cooperatively to develop a replacement for a BiOp that even this Court recognized had serious flaws. *See, e.g., id.* at 50-53, 56, 62-63 & n.24, 82-83. Immediate issuance of the mandate risks putting a premature end to that process. A stay, on the other hand, would make it substantially more likely that if the Supreme Court granted review and required a new BiOp, one would be ready within a reasonable time after the Court's decision.

To be sure, that would require FWS and others to continue to engage in a process that may ultimately be unnecessary. But any claim of inequity is tempered

by the fact that the only reason the replacement BiOp is still being developed is that the FWS asked for, and Appellees did not oppose, significant extensions of time to comply with the district court's mandates. *See, e.g.* Order re Mot. to Extend Remand Schedule, 1:09-CV-00407, Doc. 1116 (March 5, 2014).

At the same time, there is no prejudice from a stay of the mandate. The CVP and SWP have been and will continue to be operated pursuant to the BiOp, because the district court remanded the BiOp without vacatur. *See* Amended Judgment, 1:09-CV-00407, Doc. 884 (May 18, 2011).

Under these circumstances, there is good cause to maintain the status quo and stay the mandate.

III. CONCLUSION

The Federal and State Contractors have demonstrated that their petition for a writ of certiorari will present substantial questions, and that there is good cause for issuing a stay of the mandate. The petition for a writ of certiorari will not be frivolous nor submitted for purposes of delay. Because the requirements for a stay of the mandate have been satisfied, Appellees respectfully request that this Court issue a stay of the mandate pending resolution of any petition for a writ of certiorari that may be filed in this case.

Dated: July 29, 2014

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