

Court Overturns Biological Opinion That Relied On Unenforceable Conservation Measures

The Ninth Circuit has overturned a Biological Opinion issued by the U.S. Fish & Wildlife Service for the Ruby Pipeline Project, a proposed natural gas pipeline that would extend nearly 700 miles from Wyoming to Oregon, encompassing almost 2,300 acres of federal land and crossing 209 rivers and streams. The Biological Opinion relied on a series of protective measures outlined in a "Conservation Action Plan" in finding that the project would not jeopardize any endangered or threatened fish species. But, according to the court, the Fish & Wildlife Service violated the Endangered Species Act because it did not make the conservation measures enforceable under the Act. ([Center for Biological Diversity v. U.S. Bureau of Land Management](#) (9th Cir., Oct. 22, 2012)). The project sponsor had voluntarily agreed to implement the protective measures described in the Conservation Action Plan; however, the measures were not incorporated into the requirements of the Biological Opinion. Rather, the Biological Opinion considered the measures as "cumulative" effects that were separate from the project and against which the project's impacts were measured. In ruling this approach unlawful, the court explained that while the measures were enforceable under commitments made to the Federal Energy Regulatory Commission and the Bureau of Land Management (which had approved the project), the measures were *not enforceable* under the provisions of the Endangered Species Act. This was more than a mere technical distinction, the court found. For example, if the project sponsor failed to implement the measures, there was no requirement to reinitiate the ESA consultation process in order to reexamine, and if necessary revise, the Biological Opinion. Equally important, the court said, because the measures were not made mandatory under the Biological Opinion, failure to implement them would not create any exposure for the project under the ESA to a citizen lawsuit or the imposition of civil or criminal penalties. Instead, enforcement of the measures would lie solely within the discretion of FERC and BLM, who operate under distinct statutory mandates that are not centered on the protection of species. As the court explained: "Congress did not contemplate leaving the federal government's protection of endangered and threatened species to mechanisms other than those specified by the ESA, the statute designed to accomplish that protection. Rather, it entrusted the federal government's protection of listed species and critical habitat to the Act's own provisions and to the Fish & Wildlife Service, the agency with expertise and resources devoted to that purpose." The thrust of the court's decision is that the federal agencies and project sponsor were trying to have it both ways, in contravention of the Endangered Species Act. By relying on the conservation measures, they were able to claim that the project's impact on protected species would be adequately mitigated. But by not including the measures as binding requirements of the Biological Opinion, they insulated the project from the ESA's enforcement scheme. The case thus establishes an important rule: a Biological Opinion may rely on conservation measures to make a "no jeopardy" finding *only* if the measures are included as part of the project such that they are subject to the ESA's consultation and enforcement provisions.

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