

# Public Land and Resources Law Review

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Volume 0 *Case Summaries* 2012-2013

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## Grand Canyon Trust v. U.S. Bureau of Reclamation

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### Recommended Citation

Montague, Ada C. (2013) "Grand Canyon Trust v. U.S. Bureau of Reclamation," *Public Land and Resources Law Review*: Vol. 0 , Article 16.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss3/16>

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***Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008 (9th Cir. 2012)**

**Ada C. Montague**

**ABSTRACT**

The decision by the Court of Appeals for the Ninth Circuit in *Grand Canyon Trust* addressed whether it is possible to contest the Bureau of Reclamation’s annual operating plans (AOP) for Glen Canyon Dam. The court ended the attempt to do so in this case by answering in the negative, but did leave open the chance to challenge an AOP that “establishes operating criteria for a dam, or embarks on some significant shift of direction in operating policy[.]”<sup>1</sup> A challenge to the AOP for Glen Canyon will not likely succeed because the operating criteria are already established outside the AOPs, however, that might not be true for other dams.<sup>2</sup> “Also, an AOP for Glen Canyon or another dam could ostensibly implicate the “significant shift” prong for challenge.”<sup>3</sup> The decision does not preclude litigating issues associated with discretionary decisions about the Dam’s management under an Administrative Procedures Act (APA) claim, but does limit attacks based on routine implementation decisions.<sup>4</sup> An Endangered Species Act (ESA) citizen suit claim, on the other hand, may be able to proceed against non-discretionary ESA duties. In the case of challenging a recovery goal as best available science, though, as occurred here, this does not fall under ESA protection duties.<sup>5</sup>

**I. INTRODUCTION**

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<sup>1</sup> *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1022 (9th Cir. 2012), as amended (Sept. 17, 2012); Email from Jeremiah I. Williamson, Assistant Attorney General, Wyoming Attorney General's Office Water and Natural Resources Division, to author, *Law Student at U. of M. Contact Info.* (May 2, 2013, 10:52 a.m. MST).

<sup>2</sup> Email from Jeremiah I. Williamson, Assistant Attorney General, Wyoming Attorney General's Office Water and Natural Resources Division, to author, *Law Student at U. of M. Contact Info.* (May 2, 2013, 10:52 a.m. MST).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

*Grand Canyon Trust* is an appeal of a district court decision granting summary judgment to the Bureau of Reclamation (Reclamation) and Fish and Wildlife Service (FWS). The decision rejected the Grand Canyon Trust's (Trust) claims that the federal agencies violated the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA) in its operation of the Glen Canyon Dam.<sup>6</sup> On appeal, the Ninth Circuit Court (court) held that, the “ESA's formal consultation requirements did not apply to Reclamation's annual operating plans (AOPs); AOPs did not constitute the requisite “major Federal action” in order to trigger NEPA requirements; and the ESA's citizen–suit provision did not provide federal court jurisdiction to review FWS's draft recovery goals for humpback chub.”<sup>7</sup> The court vacated the judgment of the district court in regards to a 2009 Biological Opinion (BiOp) and a 2010 Incidental Take Summary (ITS) because a new 2011 BiOp and ITS mooted the claims related to the 2009 BiOp and 2010 ITS.<sup>8</sup>

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The humpback chub is a small, ESA-protected fish living in the remote canyons of the Colorado River.<sup>9</sup> The Colorado is also the site of the Glen Canyon Dam (Dam), which forms Lake Powell, provides drinking water to 25 million people, affects water users in seven states, and generates three million megawatt hours of electricity.<sup>10</sup> The location and management of the Dam “changed the historical flow and characteristics of the Colorado River below the Dam.”<sup>11</sup>

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<sup>6</sup> *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1022 (9th Cir. 2012), as amended (Sept. 17, 2012).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1016.

<sup>9</sup> *Id.* at 1011.

<sup>10</sup> *Id.* at 1013.

<sup>11</sup> *Id.*

Sediment that would normally be carried down the Colorado now becomes trapped behind the Dam, negatively impacting fish habitat downstream.<sup>12</sup>

The Colorado River Basin Project Act of 1968 (CRBPA) required the Secretary of the Interior (Secretary) to adopt management plans establishing criteria for the long-term operation of the Dam and to provide annual operating plans (AOPs) describing actual and projected operation under current management.<sup>13</sup> In addition, in 1992, Congress passed the Grand Canyon Protection Act (GCPA), requiring the Dam be managed “‘to protect [and] mitigate adverse impacts’ on the environment.”<sup>14</sup> The GCPA also required that AOPs include public input.<sup>15</sup>

Reclamation completed a final environmental impact statement (FEIS) for dam operation in 1995, detailing two management strategies: a modified low fluctuating flow (MLFF) option, and a seasonally-adjusted steady flow (SASF) option.<sup>16</sup> Under MLFF, water releases from the Dam would fluctuate in response to electricity demands.<sup>17</sup> SASF, on the other hand, would more closely follow the Colorado’s pre-dam natural flow, with increased flows in the spring, and reduced flows in the summer and fall.<sup>18</sup> In 1996, the Secretary selected the MLFF system.<sup>19</sup>

Per the ESA, Reclamation consulted with FWS in developing the management options.<sup>20</sup> FWS, in turn, issued a BiOp in 1994, that concluded the MLFF system would “‘jeopardize[] the humpback chub and adversely modif[y] its critical habitat.”<sup>21</sup> FWS concluded that adopting an

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Grand Canyon Trust*, 691 F.3d at 1013 (quoting Pub. L. No. 102–575, § 1802(a) (October 30, 1992)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1013–1014.

<sup>17</sup> *Id.* at 1014.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Grand Canyon Trust*, 651 F.3d at 1014.

<sup>21</sup> *Id.*

adaptive management plan (AMP) to study the impact of flows on the listed chub would address the Dam's negative impact to the fish.<sup>22</sup>

In response to findings through the AMP process, Reclamation adopted an Experimental Plan in 2008 (2008 Plan). The 2008 Plan modified the MLFF system, adding a one-time high water release in March 2008 to replenish sediment in the Colorado below the Dam and “steady flows” in the fall for the next four years.<sup>23</sup> Reclamation formally consulted with FWS during the NEPA process leading up to the 2008 Plan. FWS reversed its 1994 BiOp position and found the dam's operation under the 2008 Plan, and MLFF operation generally, would not jeopardize the chub or adversely modify or destroy its critical habitat.<sup>24</sup> Thereafter, the Trust filed suit, alleging that ESA consultation is required prior to issuance of each AOP, that NEPA requires Reclamation to prepare an EA or EIS for each AOP, and that FWS's 2008 BiOp violated the ESA.<sup>25</sup> The district court concluded that AOPs are not “agency actions” subject to the requirements of the ESA or “major federal actions” triggering NEPA compliance.<sup>26</sup> However, the district court found that FWS's 2008 BiOp lacked a reasoned basis for its conclusion that the MLFF was not adverse to the chub's critical habitat and did not contain a discussion of the MLFF's effects on the chub's recovery.<sup>27</sup> The district court remanded the 2008 BiOp to FWS for reconsideration.<sup>28</sup>

In response, FWS issued a 2009 BiOp consisting of the 2008 BiOp and a Supplement containing draft 2009 Recovery Goals for the chub, including an ITS detailing how many humpback chub could be legally “taken” under MLFF operations.<sup>29</sup> The Trust again filed suit

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Grand Canyon Trust*, 651 F.3d at 1014.

<sup>26</sup> *Id.* at 1014–1015.

<sup>27</sup> *Id.* at 1015.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

asserting the 2009 BiOp and ITS violated the ESA and NEPA.<sup>30</sup> The district court awarded summary judgment to FWS on the issue of the 2009 BiOp, finding it was not a “major federal action,” but awarded summary judgment to the Trust on the issue of the 2009 ITS.<sup>31</sup> The court concluded that the 2009 ITS was insufficient because FWS did not “explain why the take of young chub could not be quantified, did not provide a causal link between the adult-based surrogate used and the take of young chub, and did not provide a rational explanation why no additional reasonable and prudent measures were necessary.”<sup>32</sup> FWS responded with a 2010 ITS, which the Trust, again, contested.<sup>33</sup> The opinion of the court does not detail what changes were made to the 2010 ITS, but does explain the district court concluded that the 2010 ITS remedied the issues previously identified.<sup>34</sup> The Trust appealed, raising six issues:

(1) whether the 2009 BiOp is unlawful under the ESA; (2) whether the court has jurisdiction to review the 2009 Recovery Goals; (3) whether Reclamation violates the ESA by relying on the 2009 BiOp; (4) whether FWS's 2010 ITS is unlawful; (5) whether Reclamation violates the ESA by relying on the 2010 ITS; and (6) whether Reclamation must comply with the ESA and with NEPA procedures before issuing an AOP.<sup>35</sup>

### **III. ANALYSIS**

The court swiftly dispensed with the Trust’s claims regarding the BiOps and ITSs because FWS had entered a new BiOp and ITS in 2011, mooted claims based on the earlier documents. It then moved to the remaining issues.<sup>36</sup>

The court next considered the agency’s discretion and held it was not required to enter ESA consultation before preparing an AOP, because AOPs do not involve discretionary agency

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<sup>30</sup> *Id.*

<sup>31</sup> *Grand Canyon Trust*, 651 F.3d at 1015.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1016.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1017.

action.<sup>37</sup> The court held there was no discretion involved because the AOP was required by statute, and it did not involve a decision that could accrue to the benefit or detriment of the chub since the AOPs were merely descriptive documents detailing predetermined decisions about the dam's past and future operation.<sup>38</sup> It also held that Congress did not contemplate that ESA consultation would be required for AOPs.<sup>39</sup> The Court stated, "the 'agency action,' for the purposes of the ESA, with which the Trust truly takes issue was the selection of MLFF as one of the operating criteria, rather than the agency's routine reporting in each AOP."<sup>40</sup> Furthermore, Reclamation did complete the required ESA consultation prior to the decision in which it adopted the MLFF.<sup>41</sup>

Second, the court held that an EA or EIS is not necessary for each AOP because the issuance of an AOP does not amount to a "major federal action" for which NEPA compliance is required.<sup>42</sup> Reclamation cannot materially change the operation of the Dam simply by declaring such a change necessary in an AOP.<sup>43</sup> The Court clarified that "[t]he time for an agency to give a hard look at environmental consequences, and the opportunity for serious NEPA litigation on whether alternatives were adequately considered, should come ... where an agency establishes operating criteria for a dam, or embarks on some significant shift of direction in operating policy, not merely when there is routine and required annual reporting."<sup>44</sup> On the above two claims, the court was "heavily influenced by the pragmatic consideration that if AOP's were subject to ESA

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<sup>37</sup> *Id.*.

<sup>38</sup> *Id.* at 1018.

<sup>39</sup> *Id.* at 1020.

<sup>40</sup> *Id.* at 1021.

<sup>41</sup> *Grand Canyon Trust*, 651 F.3d at 1021.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1022.

<sup>44</sup> *Id.*

and NEPA challenges, those challenges could never be fully litigated before being rendered moot by a new AOP.”<sup>45</sup>

Finally, the court reviewed the district court’s decision that it did not have jurisdiction under either the APA or the ESA citizen suit provision to review the 2009 recovery goals.<sup>46</sup> The APA jurisdictional question was whether the district court could review the draft 2009 Recovery Goals, which the court found was moot since they were replaced by the new 2010 documentation.<sup>47</sup> As to the ESA citizen suit provision, the court highlighted that, it is to be used to provide review of an agency decision when the Secretary fails to follow a nondiscretionary procedural step of the ESA.<sup>48</sup> The court agreed that, “because the FWS used the draft 2009 Recovery Goals as best available science, a discretionary use,” the district court did indeed lack jurisdiction to consider them under the ESA citizen suit provision.”<sup>49</sup>

#### IV. CONCLUSION

*Grand Canyon Trust* clarifies that: (1) only discretionary agency actions may be contested under the ESA consultation requirement; (2) only “major agency actions” require NEPA review; and (3) only non-discretionary ESA duties are subject to ESA citizen suits. The Trust must find other avenues to contest how Glen Canyon Dam is operated and otherwise address associated concerns about the endangered humpback chub. In addition, because the BiOp claim was outside the court’s jurisdiction under the ESA citizen suit provision, it is still an open question whether an agency can legally rely on draft recovery goals to supplement a deficient BiOp.

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<sup>45</sup> Email from Jeremiah I. Williamson, Assistant Attorney General, Wyoming Attorney General’s Office Water and Natural Resources Division, to author, *Law Student at U. of M. Contact Info.* (May 2, 2013, 10:52 a.m. MST).

<sup>46</sup> *Grand Canyon Trust*, 691 F.3d at 1022.

<sup>47</sup> *Grand Canyon Trust*, 691 F.3d at 1023.

<sup>48</sup> *Id.* (quoting 16 U.S.C. § 1540(g)(1)(C)).

<sup>49</sup> *Id.* at 1023.

However, it might be a dead issue because no court will have jurisdiction to review it, at least not under an analogous procedural posture.<sup>50</sup>

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<sup>50</sup> Email from Jeremiah I. Williamson, Assistant Attorney General, Wyoming Attorney General's Office Water and Natural Resources Division, to author, *Law Student at U. of M. Contact Info.* (May 2, 2013, 10:52 a.m. MST).