No. 26-1899

In the United States Court of Appeals for the Ninth Circuit

NATIONAL WILDLIFE FEDERATION, et al.,
Plaintiffs-Appellees,
and
STATE OF OREGON, et al.,
Intervenors-Plaintiffs,
v.
NATIONAL MARINE FISHERIES SERVICE, et al.,
Defendants-Appellants.

On Appeal from the U.S. District Court, District of Oregon
No. 3:01-cv-00640-SI, Honorable Michael H. Simon, District Court Judge

BRIEF OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' MOTION FOR A STAY PENDING APPEAL

April 8, 2026

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Rural Electric Cooperative Association ("NRECA") states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

/s/ Michael B. Schon
Michael B. Schon

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INTEREST OF AMICUS CURIAE

The National Rural Electric Cooperative Association ("NRECA") is the national trade association for nearly 900 not-for-profit electric cooperatives and public power districts.[1] Electric cooperatives serve 56% of the nation's landmass and provide reliable and affordable electricity to over 42 million rural Americans. Electric cooperatives serve many rural and impoverished areas, including 92% of the nation's persistent poverty counties. Increases in energy generation costs, regulatory compliance, and operations are shouldered by the rural Americans NRECA's members serve, in the form of increased electricity rates. Cooperatives have no shareholders and are independently owned and governed by the very people they serve.

Fifty-five electric cooperatives and the communities they serve across eight states depend upon the affordable and reliable electricity generated by

[1] No party's counsel authored this brief in whole or in part. No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

the Bonneville Power Administration ("BPA") via the Columbia River hydropower system. BPA sources nearly 90% of its power supply from the Columbia River's federal dams.[2] Increases in BPA's operational and environmental compliance costs and disruptions in power supply will increase costs of electricity and threaten some of the most cost-sensitive regions in the nation. Indeed, the United States predicts that the injunction will increase electricity rates by 6% and significantly increase the risk of blackouts in the region. Mot. for Stay at 10-11. NRECA therefore has a substantial interest in this case.

[2] *See* Bonneville Power Admin., Bonneville Power Administration Facts (2024), https://perma.cc/X3XY-2VJU.

INTRODUCTION

In the 1930s, Congress authorized the Columbia River hydropower system to ensure affordable, reliable electricity for the Pacific Northwest.[3] This system of 31 federally-owned dams and multipurpose projects on the Columbia River and its tributaries produces electricity equivalent to powering eight cities the size of Seattle.[4] It keeps the lights on for much of the Pacific Northwest and provides about one third of the region's electricity.[5]

To achieve this purpose while protecting fish and wildlife, controlling floods, and sustaining cultural resources, Congress entrusted system management to three federal agencies: BPA, the Army Corps of Engineers, and the Bureau of Reclamation. Congress authorized a specific process through the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA") to ensure these complex, interconnected operations comply with environmental and species protection requirements.

For 25 years, Appellees have challenged biological opinion after biological opinion, regardless of administration, and despite consequential

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[3] *See, e.g.*, Bonneville Project Act of 1937, 50 Stat. 731 (1937).

[4] *See* CRS Operations EIS, Executive Summary 4 (July 2020), https://perma.cc/MGV5-SSRT.

[5] Federal Columbia River Power System, U.S. Bureau of Reclamation (Nov. 21, 2025), https://perma.cc/TC4T-BJVX.

improvements in species survival rates.[6] Nothing short of dam breaching will satisfy them, even though Congress mandated the dams and Congress alone controls their fate.

This case presents a question this litigation has not previously resolved: Does the District Court have authority to design and impose its own hydropower operations plan? Of course not. What operational changes will actually protect fish, by how much, and at what cost to the system's other congressionally mandated functions are precisely the scientific and technical questions that Section 7 consultation answers. Congress charged the agencies, not courts, to answer them.

The District Court's error is threefold. First, the ESA does not authorize a court to design or impose a new hydropower operations plan. Second, the proper remedy is correction by the agencies, not judicial substitution. Third, the parameters the Court imposed have never been analyzed for effects on listed species, evaluated for compliance with the other statutory mandates governing these dams, or subjected to the administrative processes Congress required. The injunction is not tailored to any identified harm. It is tailored to Appellees' requests and interests in dam breaching. The District Court approved mandates that may undermine a system powering 4.9 million

[6] *E.g.*, CRS Operations Environmental Impact Statement Record of Decision 61 (Sept. 2020), https://perma.cc/HSD6-W53J.

homes[7]—relief that could never be granted on the merits of the underlying APA and ESA claims. This Court should stay the injunction so that Appellants may challenge the District Court's circumvention of the ESA through an improper invocation of equitable authority.

ARGUMENT

I. The District Court Lacked Authority to Design and Impose a New Operations Plan.

A. The ESA assigns operational authority and species protection to agencies, not courts.

Congress empowered expert agencies, not the judiciary, to ensure species protection. The ESA's mandatory consultation process assigns specific roles to specific actors. When federal actions may affect listed species, the agency responsible for the action ("action agency") must consult with expert wildlife agencies ("consulting agency"), who evaluate the proposed action using the best scientific data to ensure federal actions are "not likely to jeopardize the continued existence" of endangered or threatened species. 16 U.S.C. § 1536(a)-(c). This consultation process is the "heart of the ESA," *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011), and calls for a "systematic determination of the effects" of a

[7] Columbia River Dams, Elmhurst Mutual Power & Light (Jan. 1, 2025), https://perma.cc/G4UZ-KHQB.

project on species, *Conner v. Burford*, 848 F.2d 1441, 1457 n.40 (9th Cir. 1988) (internal citation omitted).

The process unfolds in sequence. The action agency initiates formal consultation with the National Marine Fisheries Service ("NMFS") or the U.S. Fish and Wildlife Service. 16 U.S.C. § 1536(a)(2), (c)(1). The consulting agency then uses "the best scientific and commercial data available" to assess jeopardy and, if necessary, identify reasonable and prudent alternatives, *id.* §§ 1536(a)(2), 1536(b)(3)(A); and if the action will not cause jeopardy but will result in "incidental tak[e]," the consulting agency issues an incidental take statement. *Id.* § 1536(b)(4). NMFS fulfilled that process in full, producing nearly 1,500 pages of analysis concluding the proposed action would not jeopardize listed species. Fed. Defs.' Opp'n to PI Mot. 48-59 (ECF 2569).

A court's disagreement with the adequacy of that analysis is not a license to design an alternative operational regime. The APA does not authorize courts to substitute their own substantive judgment for the agencies'.

The District Court bypassed this entire process. The operational parameters imposed have not been proposed by action agencies or evaluated by NMFS for effects on listed species—let alone for their ramifications on regional power supply. Section 7 consultation is not optional and cannot be transferred. The ESA makes clear it belongs to "[f]ederal agenc[ies]." 16 U.S.C. § 1536(a)-(c). Consultation's purpose is "to obtain *the expert opinion of wildlife agencies* to determine whether the action is likely to jeopardize a listed

species . . . and, if so, [for those experts] to identify reasonable and prudent alternatives." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (emphasis added). A court's role is limited to *reviewing* agency action, enjoining "violation[s]" of the mandatory consultation process, and "enforce[ing]" the ESA's procedural process. 16 U.S.C. § 1540(g)(1). And when, as here, an agency makes predictive and scientific judgments about listed species impacts, the court "must be at its most deferential." *See Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado*, 605 U.S. 168, 182 (2025) (internal quotation marks omitted) ("*Seven County*").

Instead, the District Court became the de facto action agency—designing operational parameters—and the de facto consulting agency—determining whether those operations avoid jeopardy. But courts cannot "exercise an essentially administrative function." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 67 (2004) (APA does not contemplate "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with [broad statutory mandates]"); *cf. San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1007 (9th Cir. 2014) ("Congress delegated this type of balancing" to "administrative agencies when it passed the APA and ESA"). Courts may not impose operational parameters that lack the scientific analysis, administrative record, and interagency coordination Section 7 requires.

II. Even if the District Court Identified a Defect in the Biological Opinion, the Remedy Must Preserve Agency Operational Discretion.

NRECA does not concede that current operations cause irreparable harm to listed species or Appellees. But even assuming the District Court were correct, that finding does not dictate what remedy is appropriate. The leap from "harm is occurring" to specific operational parameters requires precisely the scientific and technical analysis that Section 7 consultation is designed to provide and that courts are not equipped to conduct.

A. Separation-of-powers principles mandate that agencies develop the necessary science-driven measures.

To be sure, this Court has upheld prior injunctions in this case. However, it explained that injunctive relief in ESA cases must be narrowly tailored to the irreparable harm identified. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 823 (9th Cir. 2018). Prior injunctions in this litigation upheld on that basis are difficult to reconcile with *Seven County*'s instruction that courts must be at their "most deferential" when agencies make scientific judgments. 605 U.S. at 182. But even accepting those previous instances of judicial intervention in complex agency operations, this injunction cannot survive. Appellees demanded immediate, comprehensive changes across the hydropower system, which the District Court revised based on its own analysis, without the extended timeframe or scientific record that prior decisions required. Instead, the District Court substituted its judgments for the agencies'.

Expert agencies, not courts, must conduct the technical analyses necessary for ESA compliance while balancing the multiple statutory mandates governing these dams. *See Greenpeace, Am. Oceans Campaign v. Nat'l Marine Fisheries Serv.*, 237 F. Supp. 2d 1181, 1187 (W.D. Wash. 2002) (when evaluating "[c]hallenges to biological opinions," courts "defer to an agency's technical or scientific expertise"); *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009) ("We are not authorized to substitute our judgment for the agency's as long as its conclusions are rational."). The Supreme Court consistently holds that courts "must defer" to agencies when such judgments are involved. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989); *see Seven County*, 605 U.S. at 182.

The District Court of Oregon has previously recognized "it is clearly beyond a court's authority to order that any specific conservation measure . . . be undertaken" under Section 7. *Defs. of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1174 (D. Or. 2005). That recognition reflects a broader principle: when Congress has assigned a complex balancing task to expert agencies, courts cannot substitute their own judgment for the agencies'. The judicial role is to ensure "the status quo will be maintained during the consultation process" when endangered species are threatened—guaranteeing that the Executive and Legislative Branches, not courts, wrestle with operational solutions. *Conner*, 848 F.2d at 1455 n.34.

Deferring to agencies also preserves their role in implementing multiple statutory mandates simultaneously: the Flood Control Act, the Bonneville

Power Act, the Northwest Power Act, the Rivers and Harbors Acts, treaty obligations, and water-supply contracts in addition to the ESA. The injunction addresses only species preservation and ignores every other statutory regime the agencies are delicately balancing. But the ESA must be read "against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed [too] broadly." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007). Courts therefore cannot mandate operations under one statute without the agency having evaluated compliance with others.

B. *Tennessee Valley Authority* reinforces the limits on judicial authority under the ESA.

Appellees cited *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ("*TVA*") to argue Appellants must "halt and reverse the trend toward species extinction, whatever the cost." Oregon's PI Mot. 32 (ECF 2530). *TVA* actually illustrates why the injunction is unlawful.

In *TVA*, no one disputed that completing the Tellico Dam would "either eradicate the known population of snail darters" or "destroy their critical habitat." 437 U.S. at 171. The remedy—halting dam completion—followed directly from that undisputed factual predicate. The Supreme Court expressly disclaimed any "expert knowledge" on endangered species and acknowledged it lacked a "mandate from the people to strike a balance of equities" or "shape a remedy that accords with some modicum of common sense." *Id.* at 194 (internal quotation marks and citation omitted).

The lesson of *TVA* is not that courts may dictate complex operational regimes whenever species are at risk. It is that even when harm is certain and undisputed, courts operate at the edge of their competence and authority in fashioning highly technical species-protection remedies. Here, the harm is disputed, the causal relationship between specific operational parameters and species outcomes is contested, and the awarded remedy has never been evaluated by the agencies Congress charged with doing so. If the Supreme Court in *TVA* was humble about its capacity to weigh these questions when the facts were clear, the District Court should be far humbler when the facts are not clear.

The District Court owed NMFS the highest degree of deference. *Seven County*, 605 U.S. at 182-83. The systemic consequences of the contrary rule are severe: if courts may design river operations based on preliminary records and disputed science, every ESA consultation becomes an invitation for judicial micromanagement. Agencies lose the ability to make informed operational decisions, and power consumers face whiplash as competing district courts impose conflicting mandates.

III. The Court-Imposed Operational Parameters Independently Conflict with the Administrative Procedure Act.

Even if the District Court could step into the shoes of the agencies, the imposed operational parameters should not be allowed to proceed because they would not survive APA scrutiny. The remedy in this case should not involve action that would be unlawful if taken by the agency.

It is a "simple but fundamental rule of administrative law" that agency actions must be supported by an administrative record. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"). "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("*Chenery I*"). This prevents courts from invading "the domain which Congress has set aside exclusively for the administrative agency." *Chenery II*, 332 U.S. at 196. There is no administrative record supporting the operational parameters ordered by the Court. The injunction transforms the judiciary into an unaccountable administrator—making technical decisions about flow rates, spill volumes, and reservoir elevations without the scientific analysis, public participation, or statutory balancing Congress mandated.

The imposed measures would also be considered unlawfully arbitrary and capricious if they were chosen by the government. An agency acts arbitrarily when it "entirely fail[s] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The injunction suffers precisely this defect. The imposed measures have not been analyzed for biological effects on listed species. They have not been analyzed for compliance with NEPA, the Flood Control Act, the Northwest Power Act, the Bonneville Project Act, tribal treaty obligations, or other federal mandates governing these dams—requirements

that remain in effect because the ESA does not "override otherwise mandatory statutory duties." *Nat'l Ass'n of Home Builders*, 551 U.S. at 669.

The irony is telling: if the responsible agencies themselves attempted to implement this operational regime without Section 7 consultation, without an administrative record, and without consideration of other statutory mandates, Appellees would immediately sue for arbitrary and capricious action. And they would win. A court-imposed regime that would be unlawful if imposed by an agency is equally problematic.

CONCLUSION

This Court should stay the injunction.

Dated: April 8, 2026

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CERTIFICATE OF SERVICE

I certify that on April 8, 2026, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

I certify that this brief: (1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,612 words, excluding the parts of the brief exempted by Rule 32(f); and (2) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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