

2019 WL 13221165

United States District Court, N.D. California.

HOOPA VALLEY TRIBE, Plaintiff,

v.

Wilbur ROSS, et al., Defendants.

Case No. 18-cv-06191-JSW

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Signed July 12, 2019

**ORDER DENYING DEFENDANTS' MOTION TO LIMIT REVIEW TO THE ADMINISTRATIVE RECORD AND
ORDER OF REFERRAL RE DISCOVERY**

Re: Dkt. No. 37

[JEFFREY S. WHITE](#), United States District Judge

*1 Now before the Court for consideration is Defendants' motion to limit review to the administrative record. There are two issues presented by Defendants' motion: (1) should the Court limit review to the administrative record; and (2) if it does not, whether the Court should limit discovery. The parties engaged in mediation after the Court took this motion under submission, and it requested their input on whether a ruling on the motion would facilitate settlement.

The Court has considered the parties' responses, and it concludes that it will not defer a ruling on whether review will be limited to the administrative record. For the reasons set forth in this Order, the Court DENIES the motion to limit review and will permit Plaintiff to submit extra-record evidence. In order to permit the parties to continue their efforts to resolve this case, the Court DENIES, WITHOUT PREJUDICE, the parties' dispute over the limits to be imposed on any discovery, including the depositions contemplated by Plaintiff. The Court REFERS refer any discovery disputes that may arise to a randomly assigned magistrate judge.

BACKGROUND

On June 3, 2019, Plaintiff filed its first amended complaint ("FAC"), the operative pleading in this case. Plaintiff is a "federally-recognized Indian tribe," and "the [salmon] fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Tribe," and the fishery "holds significant commercial and economic value in the Hoopa culture and economies." (FAC ¶ 6.) Under federal regulations, fifty-percent of the available fishery harvest must be allocated

to the tribal fishery. (*Id.* ¶ 7.) Among the species inhabiting the Klamath and Trinity river system are SONCC coho salmon, which is a listed species under the Endangered Species Act (“ESA”). (*See, e.g., id.* ¶¶ 10, 48.)

In 1999, the National Marine Fisheries Service (“NMFS”) published a Supplemental Biological Opinion and Incidental Take Statement (“1999 Supplemental BiOp”) regarding proposed ocean salmon fishing. “The 1999 Supplemental BiOp described a model known as the Fishery Regulation Assessment Model (FRAM) that is used by [the Pacific Management Fishery Council (“PFMC”)] to evaluate proposed fishing plans relative to the PFMC’s management objectives.” (*Id.* ¶¶ 14-15.) The 1999 Supplemental BiOp also included a “Reasonable and Prudent Alternative” (“RPA”), “which required that PFMC fisheries be crafted to achieve an ocean exploitation rate on SONCC coho of no greater than 13%, which includes all harvest related mortality.” (*Id.* ¶ 17.)

Plaintiff alleges that until April 2018, “PFMC and NMFS used the same methodology to annually calculate” catch and release mortality (“CNR mortality”) forecasts and ocean exploitation rates. (*Id.* ¶ 19.) This dispute arises because Plaintiff alleges that the PMFC and NMFS adopted a recommendation to change that methodology. According to Plaintiff, “[r]elying on this changed methodology for the first time ever since publication of the 1999 Supplemental BiOp ... PFMC proceeded to increase the permissible 2018 ocean exploitation rate for Klamath River Fall Chinook,” and decreased the ocean exploitation rate for SONCC coho to 5.5%. (*Id.* ¶¶ 21-28.)

*2 Plaintiff further alleges that using the changed methodology, “the 11.5% ocean exploitation rate that Defendants set for Klamath River Fall Chinook would result in exceedance and violation of the 13% ocean exploitation limit for SONCC coho prescribed by” the 1999 Supplemental BiOp. (*Id.* ¶ 29.) Plaintiff also alleges that in 2019 the Defendants continued to use the new methodology for purposes of calculating incidental take of SONCC coho. (*Id.* ¶¶ 36-42.)

Based on these and other allegations, Plaintiff asserts Defendants violated the ESA because they failed to re-initiate consultation regarding the impacts of ocean salmon fisheries on SONCC coho. (*Id.* ¶¶ 73-82, Prayer for Relief, ¶ A.) Plaintiffs bring this claim pursuant to the citizen suit provision of the ESA, [16 U.S.C. section 1540\(g\)\(1\)](#) and, alternatively, under the Administrative Procedure Act (“APA”). (*Id.* ¶ 2.)

ANALYSIS

“The APA provides judicial review for ‘final agency action for which there is no other adequate remedy in a court.’” [Washington Toxics Coalition v. E.P.A.](#), 413 F.3d 1024, 1034 (9th Cir. 2005). When a court considers a claim under the APA, a court may, *inter alia*, “compel agency action unlawfully withheld or unreasonably delayed [and] hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(a)(1)-(2)(A). In an APA case, the scope of a court’s review generally is confined to the administrative record. *See, e.g.,* 5 U.S.C. § 706; [Camp v. Pitts](#), 411 U.S. 138, 142 (1973).

Under the ESA, “any person may commence a civil suit on [their] own behalf – to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.” [16 U.S.C. § 1540\(g\)\(1\)\(A\)](#). Because the ESA’s citizen suit provision provides a party with an “adequate remedy,” a plaintiff’s “suit[] to compel agencies to comply with the substantive provisions of the ESA arise[s] under the ESA’s citizen suit provision, and not the APA.” [Washington Toxics Coalition](#), 413 F.3d at 1034.¹

The ESA's citizen suit provision does not set forth an internal standard of review. As a result, the Ninth Circuit held that “the APA's ‘arbitrary and capricious, abuse of discretion, or otherwise not in accordance with law’ standard applies.” *Kraayenbrink*, 632 F.3d at 481 (quoting *Village of False Pass v. Clark*, 733 F.2d 605, 609-10 (9th Cir. 1984)); cf. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012). The parties’ dispute arises over the “scope” of review.

Defendants argue that the APA's scope and standard of review are inextricably entwined and contend that the Court should apply the well-established rule in APA cases that the scope of review is limited to the administrative record. “[I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held.” *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Defendants argue that the Ninth Circuit reaffirmed this principle in *Karuk Tribe*, when it stated that the plaintiff's ESA claim made it a “record review case.” 681 F.3d at 1017; see also *In San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 602-03 (9th Cir. 2014).

*3 Plaintiff argues that because claims brought pursuant to the ESA's citizen-suit provision are not governed by the APA, the scope of review is not limited to the administrative record. In *Washington Toxics Coalition*, the Ninth Circuit noted that the district court considered extra-record evidence, which the intervenor-defendants argued was error. However, the Ninth Circuit affirmed and held the APA did not apply to claims brought pursuant to the ESA's citizen-suit provision. 431 F.3d at 1030, 1034. In *Kraayenbrink*, the Ninth Circuit stated that “because the ESA provides a citizen suit remedy – the APA does not apply” and “under *Washington Toxics Coalition* we may consider evidence outside the administrative record for the limited purpose of reviewing” the plaintiff's ESA claim. 632 F.3d at 497.

Plaintiff argues that the Ninth Circuit's decisions in *Washington Toxics Coalition* and *Kraayenbrink* are controlling and that *Karuk Tribe* did not silently overrule these two decisions. The parties previously raised these in two other cases pending in this District, *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017) and *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017). In those cases, as here, the plaintiffs asserted defendants failed to reinstate consultation with the plaintiffs after a violation of an incidental take statement. *Yurok Tribe*, 231 F. Supp. 3d at 455-56; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1111-12. The court determined that the claims against the Bureau could be asserted under the ESA's citizen suit provision but that the claims against the NMFS could only be brought under the APA. *Yurok Tribe*, 231 F. Supp. 3d at 455; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1111.

The court determined that the ESA claim was not limited to the administrative record and relied on *Washington Toxics Coalition* and *Kraayenbrink* to reach that conclusion. *Yurok Tribe*, 231 F. Supp. 3d at 467-69; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1123-25. The court also rejected the defendants’ argument that those cases “were no longer good law in light of *Karuk Tribe*[,]” reasoning that the Ninth Circuit's statement that the case was a record review case was not a holding. The court further noted that there was “no indication that the Ninth Circuit intended this statement to overrule the reasoning” in *Washington Toxics Coalition* or *Kraayenbrink*, which were “neither cited nor discussed in *Karuk Tribe*.” *Yurok Tribe*, 231 F. Supp. 3d at 468; *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1124.

The district court in *Ellis v. Housenger* also relied on *Washington Toxics Coalition* and *Kraayenbrink* and concluded that a court is not limited to the administrative record when considering claims under the ESA's citizen suit provision. That court also rejected the argument that *Karuk Tribe* overruled *Washington Toxics Coalition* and *Kraayenbrink*. See No. 13-cv-1266-MMC, 2015 WL 3660079, at *3-*4 (N.D. Cal. June 12, 2015). Other district courts within the Ninth Circuit have reached similar conclusions. See, e.g., *Conservation Congress v. U.S. Forest Serv.*, No. 16-cv-00864-MCE-AC, 2017 WL 4340254, at

*2 (E.D. Cal. Sept. 29, 2017) (finding unpersuasive the argument that *Kraayenbrink* “must be read to simply allow supplementation under the already recognized exceptions to the record review rule,” and concluding *Kraayenbrink*’s language permitting extra record review to be controlling); *Northwest Coalition for Alternatives to Pesticides v. E.P.A.*, 920 F. Supp. 2d 1168, 1173-75 (W.D. Wash. 2013); see also *id.* at 1175 n.8 (citing cases finding that extra record evidence permissible). The Court finds the reasoning of these cases persuasive, and it concludes that *Washington Toxics Coalition* and *Kraayenbrink* remain controlling authority.

*4 Accordingly, the Court DENIES Defendant’s motion to limit review to the administrative record.² As set forth above, the Court DENIES, WITHOUT PREJUDICE, Defendants’ request to prospectively limit certain forms of discovery, including the depositions referenced in the parties’ briefs, and REFERS any future discovery disputes to a randomly assigned Magistrate Judge.

If the parties are unable to resolve their dispute in mediation, they shall meet and confer, as that term is defined in the Northern District Civil Local Rules, to discuss what, if any, extra record evidence the parties believe is appropriate, including the type of discovery that would be required to obtain that evidence. If the parties cannot resolve their disputes during the meet and confer process, they shall present that dispute to the Magistrate Judge assigned to this case in accordance that judge’s procedures.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 13221165

Footnotes

- ¹ If a plaintiff cannot bring an ESA claim under the ESA’s citizen-suit provision, a court would review the claim under the APA. See *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011) (“*Kraayenbrink*”).
- ² The Court’s ruling should not be construed to preclude any party from objecting to extra-record evidence on a ground other than the assertion that Plaintiff’s claim is governed by the APA, rather than the ESA’s citizen-suit provision. Cf. *Ellis*, 2015 WL 3660079, at *4 n.8.