BUT NOT A DROP TO DRINK: NINTH CIRCUIT ALLOWS THE U.S. FISH AND WILDLIFE SERVICE TO DOUBLE THE SANTA ANA SUCKER FISH'S HABITAT

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In Bear Valley Mutual Water Company v. Sally Jewell, No. 12-57297 (9th Cir. June 25, 2015), the Ninth Circuit sacrificed a bit more of California's water to the ever thirsty Endangered Species Act.

This time multiple municipalities and water districts challenged a FWS designation that doubled the critical habitat of the Santa Ana sucker fish. The dispute stemmed from 2010 FWS designation that unexpectedly added as critical habitat several thousand acres of land that the FWS had previously excluded in previous proposed and Final Rules. In 2011 – about when in hindsight California's drought began – municipalities and water districts sued for failure to cooperate, an arbitrary and capricious rule, and failure to abide by NEPA. The Ninth Circuit affirmed the district court finding that the ESA statement that the FWS "shall cooperate with State and local agencies" was simply a non-binding policy statement. Further, plaintiffs could not challenge the FWS decision not to exercise its discretion to exclude certain lands. And under Ninth Circuit law, NEPA does not apply to critical habitat designations.

At its core, the opinion underscores the dangers of regulatory complacency. FWS had apparently assured the permittees "that it would not designate MSHCP land unless it first found that the plan was not being implemented." Then it came out with a Final rule that they called a "radical departure from prior precedent and in contravention of assurances provide by the IA . . . ." Neither the Ninth Circuit nor the FWS found the apparent volte face overly problematic. This seems to have left permittees with something that more resembled a promissory estoppel / breach of contract claim than a true regulatory arbitrary and capricious challenge on the substance.