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July 25, 2012

The Ninth Circuit Interprets "Agency Action" under the Endangered Species Act - Again

On July 17, 2012, a three-judge panel of the Ninth Circuit ruled in *Natural Resources Defense Council v. Salazar* that the U.S. Bureau of Reclamation's renewal of water delivery contracts with senior priority water rights holders was not "agency action" under section 7 of the Endangered Species Act. The panel held that because the Bureau lacked discretion over whether to approve the renewals, there was no duty to consult with the U.S. Fish & Wildlife Service regarding the potential impacts on the delta smelt, an threatened fish species. The panel's decision is described below, although it may not be cited as precedent, because [the Ninth Circuit decided on March 5, 2013, to rehear the case en banc](#). If it stands on rehearing, the panel's decision in *NRDC v. Salazar* would be a strong counterbalance to the Ninth Circuit's June 1, 2012, opinion in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012) ([the subject of our June 12th posting](#)), which adopted an expansive definition of "agency action" under the ESA. In addition to addressing the "agency action" issue, the panel decided that environmental plaintiffs groups lacked standing to challenge the Bureau's decision to renew other water service contracts. The panel reasoned there was no "causal connection" between the renewal of these contracts and possible harm to the delta smelt, as the Bureau retained the authority to protect fish by reducing water deliveries during drought years. The case is being watched closely for how the decision on rehearing will affect the continuing dispute over water deliveries and delta smelt protection in California's Central Valley, which has lasted the better part of decade. **Background** The Bureau operates the Central Valley Project, one of the world's largest water storage and transport systems, which consists of a network of dams, reservoirs, and pumping facilities that provides water for the irrigation of about one-third of California's farmland. The CVP is managed in coordination with the State Water Project, a companion system operated by the California Department of Water Resources that provides drinking water for 25 million Californians. This federal-state cooperation began in the 1930s when, due to state budgetary constraints, the Bureau assumed control of the CVP. At that time, the Bureau had to obtain water rights under California law in order to operate the CVP. Preexisting water rights owners claimed priority rights to available water. As part of a settlement agreement, the Bureau and those senior water rights owners entered into a series of 40-year water delivery contracts, the "Settlement Contracts". In addition, the Bureau entered into a series of long-term contracts to deliver water from the CVP to a coalition of non-priority users. This dispute arose as a result of the Bureau's renewal in 2004 to 2005 of both sets of contracts. Environmental groups challenged the renewals, alleging that the Bureau violated section 7 of the ESA by failing to consult with the U.S. Fish and Wildlife Service regarding the potential impacts to the delta smelt. In upholding the district court, a panel of three Ninth Circuit judges ruled against the plaintiffs and in favor of the Bureau and its contractors. **No "Agency Action"** With respect to the Settlement Contracts, the three-judge panel ruled there was no "agency action" triggering the duty to consult under section 7 of the ESA. The court first noted that section 7 applies only when "there is discretionary Federal involvement or control." The court found there was no such federal discretion, since under section 8 of the Reclamation Act of 1902, the Bureau was obligated to operate the CVP in conformity with California water law regarding priority use and appropriation. Under California law, senior appropriators with water rights that pre-date the Bureau's involvement in the CVP have priority claims to water over the Bureau. As a result, the Bureau lacked discretion and was required to renew the contracts. The court stated: "The Bureau's hands are tied historically by those asserting senior water rights in the CVP. The Bureau was required to acknowledge such rights in order to operate the CVP, which it did by entering the Settlement Contracts." The court concluded that this substantially constrained the Bureau's discretion to reduce water diversions for the benefit of the delta smelt or for any other reason. As with several other environmental decisions from the Ninth Circuit this year – including *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012) – there was a vigorous dissent. The dissent argued that the Settlement Contracts were discretionary for two reasons: (1) the Bureau could have simply chosen not to renew the contracts, which would have triggered new settlement negotiations, and (2) the Bureau could have negotiated terms in the renewed contracts that were protective of the delta smelt and their habitat. **No "Causal Connection"** With respect to the other water contracts at issue in the case, the

panel held that the plaintiffs lacked standing to challenge them. The court found there was no causal connection between the contract renewals and the potential harm to the delta smelt. The court reasoned that the contracts contained "shortage" provisions that allowed the Bureau to reduce water deliveries in times of drought in order to protect the delta smelt to achieve compliance with the ESA. The court concluded that because the contracts "expressly allow" for compliance with the ESA, there is no threatened injury and thus "there is nothing to redress." The dissent again disagreed, opining that plaintiffs had demonstrated a causal connection, and that just because the contract terms "allow the Bureau to comply with the ESA certainly does not ensure that the Bureau will do so." **Conclusion** *NRDC v. Salazar* is another sharply divided environmental decision from the Ninth Circuit. Only last month, in the *Karuk Tribe* case, the Ninth Circuit adopted an expansive view of the ESA's definition of "agency action." There, the court ruled (in a 7-4 en banc decision) that the U.S. Forest Service made an affirmative, discretionary action that triggered section 7 consultation by not requiring a more in-depth agency review of a Notice of Intent to conduct recreational mining activities that were already authorized by federal law. Here, by contrast, the court adopted a much narrower reading of what constitutes "agency action" under the ESA, finding that no consultation was required for the Bureau's decision to renew its water delivery contracts. Future cases will undoubtedly continue to grapple with these issues, in this rapidly evolving area of law.