Natural Resources Defense Council v. Jewell: The Ninth Circuit Reaffirms the Prioritization of Protecting Endangered or Threatened Species over Agency Action

I. OVERVIEW OF THE CASE

An inherent tension lies in the competition for natural resources because the materials necessary for human development are often exploited at the expense of native species that depend on those same materials to sustain their populations. In an effort to protect animal species from loss and alterations to their habitat, section 7(a)(2) of the Endangered Species Act of 1973 (ESA) requires federal agencies to ensure their actions do not adversely affect animals or their habitats.[1] The ESA lists the delta smelt, only found in Suisun Bay and the Sacramento-San Joaquin estuary, as a "'threatened' species" due to its decline by nearly 90% in population from 1973 to 1993.[2] The federal Bureau of Reclamation (Bureau) operates the California Central Valley Project, which diverts water for agricultural and urban uses from the delta smelt's habitat.[3] The United States Fish and Wildlife Service (FWS) named the Central Valley Project, along with other reduced river outflows, the most important "synergistic causes of the delta smelt decline."[4]

The Bureau, in 2004 to 2005, renewed 141 Sacramento River Settlement Contracts (Settlement Contracts) pertaining to forty-year agreements between the Bureau and those who held particular senior water rights and eighteen Delta-Mendota Canal Unit Water Service Contracts (DMC Contracts), which are water supply agreements that provide water users not claiming rights as senior users to draw water from

1. 16 U.S.C. § 1536 (2012).
2. Endangered and Threatened Wildlife and Plants, 58 Fed. Reg. 12,854, 12,855 (Mar. 5, 1993) (codified at 50 C.F.R. pt. 17).
3. Natural Res. Def. Council v. Jewell, 749 F.3d 776, 780 (9th Cir. 2014) (en banc).
4. Endangered and Threatened Wildlife and Plants, 58 Fed. Reg. at 12,859.

the Canal.[5] These contracts were based on the FWS's determination that the Bureau's actions would not harm the delta smelt.[6] In 2008, the FWS reversed its previous opinions and found the Bureau's actions would adversely affect the delta smelt and its habitat.[7] In response, the plaintiffs challenged the legitimacy of forty-one of the renewed contracts that they believed to be the most hazardous to the delta smelt, and they alleged that the Bureau failed to comply with section 7(a)(2) of the ESA when it did not properly consult with the FWS before renewing the contracts in question.[8]

The United States District Court for the Eastern District of California granted summary judgment in favor of the defendants and found the plaintiffs did not have constitutional Article III standing in regard to the DMC Contracts due to their failure to assert a fairly traceable injury.[9] It also found that the plaintiffs did not have standing to challenge the Settlement Contracts because the consultation requirement pursuant to section 7(a)(2) did not apply to those contracts.[10] On appeal, the United States Court of Appeals for the Ninth Circuit remanded the district court's decision when it *held* that the action was not moot due to an intervening action; the plaintiffs had standing to sue premised on a procedural injury; and the Bureau was required to consult under section 7(a)(2) because it had "some discretion" to act in such a way as to benefit the delta smelt. *Natural Resource Defense Council v. Jewell*, 749 F.3d 776, 782-85 (9th Cir. 2014) (en banc).

II. BACKGROUND

At the time of its promulgation, the ESA was the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[11] It explicitly declared federal agencies "shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."[12] The United States Supreme Court noted that Congress made its intent clear when it unambiguously defined the word "'conserve' as meaning 'to use and the use of all *methods and procedures which are necessary* to bring *any endangered species* or threatened species to the point at which

5. *Jewell*, 749 F.3d at 780-81.
6. *Id.* at 781.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Tenn. Valley Auth. v. Hill. 437 U.S. 153, 180 (1978).
12. Endangered Species Act of 1973 § 2(c), 16 U.S.C. § 1531(c)(1) (2012).

the measures provided pursuant to this chapter are no longer necessary.'"[13] This unequivocal intention to protect animal species is also bolstered by the ESA's citizen suit provision, which encourages private parties to intervene in agency actions when they feel the agency is not properly enforcing the Act.[14]

Before a federal agency can perform any action in an area where a threatened or endangered species lives or an environmentally important habitat is present, it must determine if its actions "'may affect' a protected species or habitat," or undergo a "formal consultation with the agency that has jurisdiction over the species."[15] Time is a factor in making this determination, as agencies should review their actions as early as possible.[16] If an agency concludes its actions will impact an endangered or threatened species, it must consult with the FWS or the National Marine Fisheries Services (Service) before it can perform such actions.[17] The ESA's section 7(a)(2) mandates a federal agency must ensure its action will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[18] This consultation is intended to allow for experts to weigh in and to determine if other alternatives are available so as to avoid any negative effects upon a species and/or its habitat.[19] The requirement to consult also demonstrates the legislative intent to prioritize endangered or threatened species "over the 'primary missions' of federal agencies."[20]

This prioritization, however, has its limits. Section 7(a)(2)'s consultation requirement is only applicable to actions "in which there is discretionary Federal involvement or control,"[21] and thus, it is only activated when an agency retains "some discretion" to act beneficially toward a protected species.[22] Therefore, the ESA is not triggered when an agency

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13. *Tenn. Valley Auth.*, 437 U.S. at 180 (citing 16 U.S.C. § 1532(2), though the court intended to cite § 1532(3))).

14. *See* Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1078 (9th Cir. 2001) (quoting Bennett v. Spear, 520 U.S. 154, 173 (1997)).

15. Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1126 (9th Cir. 1998).

16. Interagency Cooperation, 50 C.F.R. § 402.14(a) (2013).

17. *Houston*, 146 F.3d at 1126.

18. 16 U.S.C. § 1536(a)(2) (2012).

19. Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 974 (9th Cir. 2003).

20. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978).

21. 50 C.F.R. § 402.03.

22. Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1024 (9th Cir. 2012) (quoting *Houston*, 146 F.3d at 1126).

has no discretion to act.[23] The Ninth Circuit has reasoned that requiring a consultation when an agency has no discretionary authority "would be a meaningless exercise."[24] The only instance where an agency lacks discretion is when it is statutorily mandated to act in such a way that it has lost any discretionary authority, and thus the duty to consult no longer applies.[25] However, formal consultation is also not necessary when an agency finds its actions are not likely to impact the protected species or habitat in a negative manner, and the FWS or the Service supports the agency's finding.[26]

Once it has been determined a consultation is necessary and the process is finished, the FWS or the Service presents the appropriate federal agency with a Biological Opinion, in which the Secretary of the Interior (Secretary) assesses the "nature and extent of [the] effect on the threatened or endangered species."[27] If the Secretary determines the agency action would jeopardize a species or negatively modify its habitat, he "shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2)" that the agency can take "in implementing the agency action."[28] The Supreme Court has broadly interpreted "agency action,"[29] and the Code of Federal Regulations defines the term as:

> [A]ll activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.[30]

The Ninth Circuit has set a minimal standard for determining when an agency's actions provide it with enough discretionary authority that it must formally consult with the FWS or the Service.[31] In *Karuk Tribe of California v. U.S. Forest Service*, the court stated that the relevant inquiry is "whether the agency *could* influence a private activity to benefit a

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23. *Houston*, 146 F.3d at 1125-26 (citing Sierra Club v. Babbitt, 65 F.3d 1502, 1509 (9th Cir. 1995)).
24. *Sierra Club*, 65 F.3d at 1509.
25. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664, 669 (2007).
26. *Houston*, 146 F.3d at 1126.
27. *Id.* at 1125.
28. Endangered Species Act of 1973 § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A) (2012).
29. *Houston*, 146 F.3d at 1125.
30. Interagency Cooperation, 50 C.F.R. § 402.02 (2013).
31. *See* Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1025 (9th Cir. 2012).

listed species, not whether it *must* do so."[32] The Ninth Circuit has also examined the nature of agency action from the perspective of whether it will have "an ongoing and lasting effect and constitute ongoing agency activity, which is likely to adversely affect listed species."[33] It has classified contract renewals[34] and the issuance of permits[35] among those activities that have such an effect.

The Ninth Circuit has also demonstrated a tendency to favor the need for formal consultation.[36] For example, in *Natural Resources Defense Council v. Houston*, the court held that the California Bureau of Reclamation (California Bureau) was minimally obligated to request a formal consultation despite the Service's finding a formal consultation was not necessary.[37] The Court reasoned that the California Bureau had the responsibility to guarantee its actions would not jeopardize an endangered species, and even though the Service concluded that the California Bureau did not have to formally consult with it, it should have consulted with the Service regardless because it disagreed with the California Bureau's finding its actions would not negatively affect the species in question.[38] Thus, any time an agency or service determines a proposed action has "any chance of affecting listed species or critical habitat—even if it is later determined that the actions are 'not likely' to do so—. . . at least some consultation under the ESA" is required.[39]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit first evaluated the defendants' argument that the appeal was moot due to intervening events.[40] The defendants argued that after the district court's invalidation of the FWS's 2004 and 2005 Biological Opinions that the Bureau's proposed plans for California's Central Valley Project would not adversely affect the delta smelt, the Bureau underwent a new consultation, which produced the FWS's revised opinion in 2008.[41] The Ninth Circuit concluded that the

32. *Id.*
33. Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 977 (9th Cir. 2003).
34. *See Houston*, 146 F.3d at 1128.
35. *Turtle Island Restoration Network*, 340 F.3d at 977.
36. *See Houston*, 146 F.3d at 1127.
37. *Id.*
38. *Id.*
39. Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1027 (9th Cir. 2012).
40. Natural Res. Def. Council v. Jewell, 749 F.3d 776, 781 (9th Cir. 2014).
41. *Id.*

2008 opinion failed to give the plaintiffs the desired relief, and thus the appeal was not moot.[42]

When the FWS issued the opinion, it advised the Bureau to modify its Proposed Operations Criteria and Plan (Plan) that it had drafted in the early 2000s and found a "reasonable and prudent alternative" that could prevent harming the delta smelt.[43] The court pointed out that the opinion "merely assesses the general effects of the Bureau's Plan," and thus, it did not serve as a consultation relating to the Bureau's renewal of the relevant contracts and how the renewal would affect the delta smelt.[44] Despite the fact that the contracts were renewed on the premise of now-invalidated opinions, the Bureau had yet to consult with the FWS about the possible impact of the contracts nor had it tried to alter the contracts to integrate the 2008 opinion.[45] The plaintiffs' desired relief, an injunction that would require the Bureau to consult with the FWS and modify the contracts to incorporate the FWS's evaluation, was still available.[46]

Once the court established that it could grant the plaintiffs their desired relief, it moved on to the question of whether the plaintiffs had standing. The plaintiffs premised their allegation that the Bureau violated section 7(a)(2) due to its failure to properly consult with the FWS about potentially jeopardizing the delta smelt and its renewal of the DMC Contracts "in reliance on what it knew, or should have known, to be a faulty analysis by the FWS."[47] On appeal, the court invalidated the district court's belief that the shortage provision of the DMC Contracts absolved the Bureau of liability as a result of a shortage in the water supply, and as such, voided the plaintiffs' standing.[48] The Ninth Circuit reasoned that because the plaintiffs are alleging a procedural injury, they only have to demonstrate that if the Bureau were to properly consult with the FWS, the DMC Contracts "*could* better protect [their] concrete interest in the delta smelt than the contracts do currently."[49]

The court looked to the plain meaning of the provision when it determined it was permissive and only relieved the United States of liability arising from a water shortage that would result from "'actions taken . . . to meet legal obligations.'"[50] It found that even if it were to

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42. *Id.* at 782.
43. *Id.* at 780, 782.
44. *Id.* at 782.
45. *Id.*
46. *Id.*
47. *Id.* at 783.
48. *Id.*
49. *Id.* (citing Defenders of Wildlife v. EPA, 420 F.3d 946, 957 (9th Cir. 2005)).
50. *Id.*

construe the provision as requiring the Bureau to act beneficially toward the delta smelt, the shortage provision only addressed the quantity of water that could be contracted to water users, and thus, it did not ensure the delta smelt's protection.[51] The court reasoned that the Bureau could have written the contracts to allow for the delta smelt's protection, and because consultation and redrafting of the contracts *could* include such protections, the plaintiffs had procedural standing in regard to the DMC Contracts.[52]

Finally, the court addressed the district court's holding that the Bureau was not obligated to consult under section 7(a)(2) because article 9(a) of the Settlement Contracts "'substantially constrained'" the Bureau during the renegotiating of these contracts.[53] The court reversed this finding because it believed the lower court used the wrong legal standard.[54] It concluded that the Bureau did in fact have "'some discretion'" to act beneficially for the delta smelt, and thus, this discretion prompted section 7(a)(2)'s consultation requirement.[55] In making this determination, the court examined the language of the Settlement Contracts.[56]

First, the court reasoned that there was no language in the Settlement Contracts that required the Bureau to renew them.[57] Article 2 of the original Settlement Contracts states, "[R]enewals *may* be made for successive periods not to exceed forty (40) years each."[58] The term "may" is permissive, and as such, does not obligate the Bureau to renew the Settlement Contracts.[59] The court also considered the possibility that even if the Bureau were required to renew the Settlement Contracts, article 9(a) merely limited the availability of water and how it should be allocated.[60] Thus, there was nothing to prevent the Bureau from adopting measures to act for the benefit of the delta smelt, which means the Bureau maintained "'some discretion,'" and therefore, it had to consult subject to section 7(a)(2) before it could renew the Settlement Contracts.[61]

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51. *Id.*
52. *Id.* at 783-84.
53. *Id.* at 784.
54. *Id.*
55. *Id.* (citing Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1024 (9th Cir. 2012) (quoting Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998))).
56. *Id.* at 785.
57. *Id.*
58. *Id.* (internal quotation marks omitted).
59. *Id.*
60. *Id.*
61. *Id.*

IV. ANALYSIS

The Ninth Circuit's reasoning and ultimate decision is consistent with prior jurisprudence and the legislative intent behind the ESA's section 7(a)(2). The court methodically evaluated each argument on appeal. When it determined the injunction the plaintiffs sought was available to them, the court assessed the claim for mootness via the application of the United States Constitution's Article III "case-or-controversy" standard.[62]

The court applied the guideline that limits federal courts to addressing questions that can "affect the rights of litigants in the case before them."[63] Thus, if a court can provide the parties with "*any* effective relief," the action is not moot.[64] In addition to the requirement relief be available to the parties, the controversy must be "present" and "live" throughout the litigation process.[65] In implementing these principles, the court was correct to find the desired relief remained available to the plaintiffs.[66]

The Ninth Circuit continued to follow standards set forth from the Supreme Court when it focused on the question of whether the plaintiffs had standing. The Supreme Court has provided that Article III standing requires a plaintiff must show (1) he has suffered from a "concrete, particularized, . . . and actual or imminent" injury; (2) this injury is "fairly traceable" to the defendant's conduct; and (3) his injury is "likely" to be "redressed by a favorable decision."[67] However, those who base their challenge on a procedural injury need to only show that "they have a procedural right that, if exercised, *could* protect their concrete interests and that those interests fall within the zone of interests protected by the statute at issue."[68] The Ninth Circuit has held that any alleged violations of section 7(a)(2)'s requirement for consultation is a procedural injury.[69] Thus, the court was consistent with precedent when it held the plaintiffs only had to show that the Bureau's compliance with this requirement

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62. *Id.* at 781 (citing DeFunis v. Odegarrd, 416 U.S. 312, 316 (1974) (per curiam)).

63. North Carolina v. Rice, 404 U.S. 244, 246 (1971) (per curiam) (citing Oil Workers Unions v. Missouri, 361 U.S. 363, 367 (1960)).

64. Forest Guardians v. Johanns, 450 F.3d 455, 461 (9th Cir. 2006) (citing Nw. Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)).

65. Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997) (citing Am. Tunaboat Ass'n v. Brown, 67 F.3d 1404, 1407 (9th Cir. 1995)).

66. *See Jewell*, 749 F.3d at 782.

67. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted).

68. Defenders of Wildlife v. EPA, 420 F.3d 946, 957 (9th Cir. 2005), *rev'd in part on other grounds by* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S 644 (2007).

69. Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1079 (9th Cir. 2001).

"*could*" protect their "concrete interest" to establish a procedural injury that provided the plaintiffs with standing.[70]

The court based its standing argument on its reading of the shortage provision of the DMC Contracts when it found the contracts could have granted the delta smelt greater protection.[71] It examined the provision in the same way the Supreme Court and the Ninth Circuit have looked to the plain meaning of statutes to determine their effect.[72] In *National Ass'n of Home Builders v. Defenders of Wildlife*, the Supreme Court examined the word "shall" in the context of the Clean Water Act to decipher its meaning, and after looking to precedent and the dictionary, it concluded the term connoted a mandatory obligation.[73] The Court similarly viewed the language of the ESA's section 7(a)(2) as imperative due to its use of "shall."[74] The court in the noted case also employed this technique in reading the Settlement Contracts to find the Bureau did in fact have discretion to act for the benefit of the delta smelt.[75] In both the DMC and Settlement Contracts, the court determined the language was permissive and as such, gave the Bureau discretionary authority to act as opposed to mandating a particular course of action.[76]

The court also aligned its finding that renewing contracts is an "agency action" with Congress's intent for the term to be construed broadly.[77] Furthermore, it fulfilled the Ninth Circuit's two-step inquiry in *Karuk Tribe of California v. U.S. Forest Service* dictating that the activity must be one the "federal agency affirmatively authorized, funded or carried out" and that the agency must have "some discretion to influence or change the activity for the benefit of a protected species."[78] The Ninth Circuit also has explicitly held that "negotiating and executing contracts is 'agency action.'"[79] In *Houston*, the Ninth Circuit held that the federal reclamation laws provided the government with discretionary authority because it allowed it to allocate water rights based on the availability of water and then provided the Secretary could establish the rates for each

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70. *See Jewell*, 749 F.3d at 783.

71. *Id.*

72. *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661-62 (2007); Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 975 (9th Cir. 2003).

73. *Nat'l Ass'n of Home Builders*, 551 U.S. at 661-62.

74. *Id.*

75. *Jewell*, 749 F.3d at 785.

76. *Id.* at 783-85.

77. *See* Karuk Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1020 (9th Cir. 2012) (quoting Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054-55 (9th Cir. 1994)).

78. *Id.* at 1021.

79. Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125 (9th Cir. 1998).

allocated share.[80] Like these federal reclamation laws, the Settlement Contracts also provided the Bureau with discretion to allot water rights to users based on the quantity and availability of the water supply and because of this authority, it had "some discretion" to act for the benefit of the delta smelt.[81]

The Ninth Circuit has widely adopted the "some discretion" standard,[82] and the noted case continues to uphold it. The court was right to conclude the lower court's "substantially constrained" standard was erroneous.[83] Additionally, the court was correct to find the contract renewals were considered an agency action due to their "lasting effect" and the likelihood this effect would negatively affect the delta smelt.[84] Overall, the noted case's decision placed a greater priority on protecting a threatened species than on agency actions, which is in keeping with the legislative intent of section 7 of the ESA.[85]

V. CONCLUSION

Throughout its decision-making process, the court reviewed the claims in a manner consistent with past jurisprudence. It relied on the legal standards the Supreme Court promulgated and the Ninth Circuit subsequently adopted, and it used traditional canons of interpretation to evaluate the meaning of the applicable provisions in the DMC and Settlement Contracts. The noted case's decision will continue to perpetuate the protection of endangered or threatened species and critical habitat and reaffirmed the statutory power of the ESA.

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80. *Id.* at 1126.
81. *See* Natural Res. Def. Council v. Jewell, 749 F.3d 776, 784-85 (9th Cir. 2014).
82. *Karuk Tribe of Cal.*, 681 F.3d at 1024; *Houston*, 146 F.3d at 1126.
83. *See Jewell*, 749 F.3d at 784.
84. *See id.* at 785.
85. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978).

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