Natural Resources Defense Council v. United States Department of the Interior: Defining the Boundaries of Government Discretion under the Endangered Species Act

I. OVERVIEW

The coastal California gnatcatcher is a songbird whose historic range spans from coastal southern California to northern Baja California and whose habitat is comprised of distinctive subassociations of coastal sage scrub.[1] Finding that the gnatcatcher had become "threatened by habitat loss and fragmentation occurring in conjunction with urban and agricultural development," the United States Fish and Wildlife Service (FWS) listed the gnatcatcher as a "threatened species"[2] under the Endangered Species Act (ESA).[3] A species is listed as "endangered" when it is in "danger of extinction throughout all or a significant part of its range,"[4] while a species is listed as "threatened" when it is "likely to become an endangered species within the foreseeable future."[5]

Under Section 4 of the ESA, a critical habitat must be designated for each threatened species "to the maximum extent prudent and determinable."[6] The FWS did not designate a critical habitat for the gnatcatcher on the grounds that it would not be "prudent" within the meaning of Section 4.[7] The Natural Resources Defense Council, the National Audubon Society, and biologist Elisabeth Brown (collectively, the plaintiffs) brought suit in the United States District Court for the Central District of California against the FWS, various FWS officials, the Secretary of the Interior, and the United States Department of the Interior (collectively, the defendants).[8] Plaintiffs challenged the defendants' decision not to assign a critical habitat for the gnatcatcher.[9] Upon cross-motions for summary judgment, the district court denied the plaintiffs' motion and granted summary judgment for the defendants.[10] The Court of Appeals for the Ninth Circuit reversed and remanded, holding that the

1. *See* NRDC v. United States Dep't of the Interior, 113 F.3d 1121, 1123 (9th Cir. 1997).
2. *See id.* (quoting Determination of Threatened Status for the Coastal California Gnatcatcher, 58 Fed. Reg. 16,742 (1993) (codified at 50 C.F.R. pt. 17 (1996))).
3. 16 U.S.C. §§ 1531-44 (1994).
4. 16 U.S.C. § 1532(6) (1994).
5. *Id.* § 1532(20).
6. *Id.* § 1533(a)(3).
7. *See* NRDC v. United States Dep't of the Interior, 113 F.3d 1121, 1123 (9th Cir. 1997).
8. *See id.*
9. *See id.*
10. *See id.*

FWS did not provide a rational basis for declining to designate a critical habitat for the threatened gnatcatcher and therefore was derelict in its statutory duty under Section 4 of the ESA. *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997).

II. BACKGROUND

Congress enacted the ESA in 1973[11] after finding that a number of species of fish, wildlife, and plants in the United States had become extinct due to rapid economic development, which made no allowance for species conservation.[12] The ESA provides a program designed to conserve endangered and threatened species by protecting the ecosystems upon which those species depend.[13]

In *Tennessee Valley Authority v. Hill*, the Supreme Court noted that the ESA is more thorough than any comparable legislation ever enacted by another nation.[14] Illustrating Congress's clear intent to affirmatively preserve endangered species, the Court observed that the ESA requires the implementation of all necessary procedures that will bring an endangered or threatened species back from the brink of extinction to the point where the provisions of the Act are no longer required.[15]

The ESA imposes certain responsibilities on the Secretary of the Interior,[16] who delegates day-to-day authority for implementation of the ESA to the FWS, an agency within the Department of the Interior.[17] The ESA's protection of a species and its habitat is triggered only when the FWS "lists" a species in danger of becoming extinct as either "endangered" or "threatened."[18] Concurrent with making a determination to list a species as endangered or threatened, the Secretary is required "to

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11. Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

12. *See* 16 U.S.C. § 1531(a)(1) (1994).

13. *See id.* § 1531(b).

14. 437 U.S. 153, 180 (1978).

15. *Id.* The Supreme Court in *Tennessee Valley Authority* enjoined construction of the nearly-completed, multi-million dollar Tellico Dam because the resulting reservoir would destroy the critical habitat of the endangered snail darter. *Id.* In response to the perceived severity of the *Tennessee Valley Authority* decision, Congress amended the ESA to provide a safety-valve in the form of a special committee which can override Section 7, which prohibits the government from jeopardizing any endangered species. *See* 16 U.S.C. §§ 1536(e), (h) (1994). This safety valve is triggered if there are no reasonable alternatives to the agency action, the benefits clearly outweigh those of compliance with the statute, and the action is in the public interest and has at least regional significance. *See id.*

16. *See* 16 U.S.C. § 1533 (1994).

17. Interagency Cooperation-Endangered Species Act of 1973, as amended, 50 C.F.R. § 402.01(b) (1996).

18. *See* 16 U.S.C. § 1533(a)(1) (1994).

the maximum extent prudent and determinable" to issue regulations that designate a critical habitat for the listed species.[19] The ESA's definition of "critical habitat" refers to geographic areas that are "(I) essential to the conservation of the species and (II) which may require special management considerations or protection. . . ."[20] Even though more extensive habitat may be essential to maintain the species over the long term, any habitat not currently occupied by the species may not be designated as critical unless the Secretary determines that these areas are vital to the conservation of the species.[21]

In assessing what areas constitute critical habitat, Congress expressly authorized the Secretary to determine whether the benefits of excluding a particular area from the critical habitat outweigh the benefits of including the area in the designation.[22] However, the Secretary may not exclude an area from the critical habitat if, "based on the best scientific and commercial data available," such an exclusion would cause the species to become extinct.[23] Because the ESA itself does not explicitly define the term "prudent," the FWS has developed its own two-prong definition of what is *not* prudent. According to the regulations, critical habitat designation is not prudent if it would further threaten the species or if it would not benefit the species.[24] This statutory exception is referred to as the "imprudence exception."[25] The imprudence exception gives the Secretary some discretion when designating a critical habitat, but the legislative history of the ESA indicates that the Secretary may only fail to do so under rare circumstances.[26]

The designation of critical habitat triggers the consultation requirement of ESA Section 7, which provides that federal agencies consult with the Secretary to ensure that actions authorized, funded, or

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19. *Id.* § 1533(a)(3)(A).
20. *Id.* § 1532(5)(A)(i).
21. *See id.* § 1532(5)(A)(ii).
22. *See id.* § 1533(b)(2).
23. *Id.*
24. *See* 50 C.F.R. §§ 424.12(a)(1)(i)-(ii) (1996):

> A designation of critical habitat is not prudent when one or both of the following situations exist: (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (ii) Such designation of critical habitat would not be beneficial to the species.

25. *See* NRDC v. United States Dep't of the Interior, 113 F.3d 1121, 1126 (9th Cir. 1997).
26. *See* Endangered Species Act Amendments of 1978, H.R. Rep. No. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 ("The committee intends that in most situations the Secretary will . . . designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.").

carried out by federal agencies do not harm critical habitat.[27] The ESA also reaches the private sector through Section 9, which makes it unlawful for any person to "take" any species listed as endangered or threatened.[28] "Taking" is broadly defined to encompass any effort to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any listed species.[29] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court held that the Secretary's expansive definition of "harm" was reasonable given the ordinary understanding of the word "harm" and the ESA's broad legislative purpose of reversing the trend toward extinction.[30]

Since the ESA is implemented by federal agencies, the actions of the Secretary of the Interior and his delegates are reviewed in accordance with the Administrative Procedure Act (APA).[31] Administrative decisions must be upheld by the reviewing court unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[32]

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court instructed courts reviewing agency decisions to examine whether the agency considered the relevant factors and whether there was a clear error in the agency's judgment.[33] In *Fund for Animals v. Babbitt*, the standard of review was further defined, requiring consideration of whether the agency acted within the scope of its authority and whether the agency explained its decision based on the facts in the record and in consideration of all relevant factors.[34] In *Resources Ltd., Inc. v. Robertson*, the Ninth Circuit further mandated that agencies articulate a rational connection between the facts supplied in the record and the final decision made.[35]

Under this deferential standard of review, an agency's scientific or technical experience with regard to the issue in question must be recognized by the reviewing court.[36] Thus, courts reviewing agency

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27. *See* 16 U.S.C. § 1536(a)(2) (1994).
28. *Id.* §§ 1538(a)(1)(B)-(D).
29. *Id.* § 1532(19).
30. 515 U.S. 687, 697 (1995). The Secretary of the Interior defined "harm" by regulation to encompass "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1996).
31. 5 U.S.C. §§ 551-583, 701-706 (1994).
32. *Id.* § 706(2)(A).
33. 401 U.S. 402, 416 (1971) ("Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.").
34. 903 F. Supp. 96, 105 (D.D.C. 1995).
35. 35 F.3d 1300, 1304 (9th Cir. 1993) (quoting Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990)).
36. *See Fund for Animals*, 903 F. Supp. at 105 (citations omitted); *see also* Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 378 (1989) ("When specialists express

decisions are bound by the rebuttable presumption of the validity of agency actions[37] and are limited to the administrative record.[38]

The deference a court must accord an agency's scientific or technical expertise, however, is not completely unlimited. As a rule, a court may not supplant an agency's judgment with its own.[39] Nevertheless, the ESA requires that each agency "use the best scientific and commercial data available" when properly formulating its judgment.[40] In *Bennett v. Spear*, the Supreme Court recently explained that the purpose of this requirement is to prevent the ESA from being implemented indiscriminately, "on the basis of speculation or surmise."[41] This does not mean, however, that the statute's best available data standard requires the agency to rely only on conclusive evidence. In fact, the Ninth Circuit held that an agency's decision may be based on analyses that are nondispositive and still survive judicial scrutiny under the APA.[42] This interpretation is consistent with Congress's intent to "require the FWS to take preventive measures before a species is 'conclusively' headed for extinction."[43] But as the Ninth Circuit has enunciated, if the agency fails to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made," regardless of whether the facts are conclusive, the court may set the decision aside.[44]

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conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").

37. *See* Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 678-79 (D.D.C. 1997) (citing Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc)).

38. *See* Camp v. Pitts, 411 U.S. 138, 142 (1973) ("In applying [the appropriate] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

39. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

40. 16 U.S.C. § 1536(a)(2) (1994).

41. 117 S. Ct. 1154, 1168 (1997) (explaining that the purpose of the requirement is to "advance the ESA's overall goal of species preservation, . . . [and] to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives").

42. *See* Fund for Animals v. Babbitt, 903 F. Supp. 96, 115 (D.D.C. 1995) (citing Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)).

43. Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 680 (D.D.C. 1997) ("The purpose of creating a separate designation for species which are 'threatened,' in addition to species which are 'endangered,' was to try to 'regulate these animals before danger becomes imminent while long-range action is begun.'") (quoting S. Rep. No. 307, 93d Cong., 1st Sess. 3 (1973), *reprinted in* LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, *as amended* in 1976, 1977, 1978, 1979, and 1980, at 302).

44. Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993) (quoting Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990)).

III. THE COURT'S DECISION

It was against this statutory background that the plaintiffs in the noted case claimed the defendants violated the ESA by failing to designate critical habitat for the gnatcatcher. Even though the FWS found that habitat loss posed "a significant threat" to the gnatcatcher, it concluded that designating a critical habitat for the species would not be "prudent" under either prong of its regulatory definition.[45] Considering the first prong, the FWS claimed that publication of the gnatcatcher's critical habitat would make the species more vulnerable to deliberate destruction by landowners, thereby increasing the threat to the species.[46] Secondly, because the majority of gnatcatcher habitat is comprised of privately owned lands that are not subject to Section 7's consultation requirement, the FWS concluded that critical habitat designation would not "appreciably benefit" the species.[47]

The plaintiffs contended on appeal that the district court erred in granting summary judgment because the Agency decision did not meet the standard of review under the APA.[48] The defendants contended that the case should be dismissed on jurisdictional grounds because the plaintiffs' challenge was moot;[49] alternatively, they contended that the district court decision should be affirmed.[50]

The Ninth Circuit first addressed the justiciability of FWS's failure to designate critical habitat as a threshold jurisdictional issue even though it was not raised at trial.[51] The plaintiffs initially challenged the FWS's general failure to designate a critical habitat for the gnatcatcher as well as the FWS's failure to protect specific gnatcatcher sites that had been disrupted by the construction of a tollroad.[52] Once the tollroad had been substantially completed, all claims relating to its construction were mooted.[53] Consequently, the defendants argued that the Ninth Circuit lacked jurisdiction because the plaintiffs' surviving challenge of the FWS's general plan for gnatcatcher protection was not ripe for judicial review.[54] The Ninth Circuit disagreed with this contention by noting that

45. *See* NRDC v. United States Dep't of the Interior, 113 F.3d 1121, 1123 (9th Cir. 1997).
46. *See id.*
47. See id. (quoting 58 Fed. Reg. 16,742, 16,756 (1993)).
48. *See id.* at 1123, 1127.
49. *See id.* at 1123.
50. *See id.*
51. *Id.* at 1124.
52. *See id.*
53. *See id.*
54. *See id.*

a plaintiff may properly challenge an "overall plan" of habitat protection in an environmental protection claim.[55]

The court then turned to the central issue: Whether the FWS's failure to designate a critical habitat should be deemed arbitrary, capricious, or an abuse of discretion under the APA.[56] The court answered in the affirmative, concluding that the FWS's final listing of the gnatcatcher as a threatened species without a concurrent designation of critical habitat failed to show that the FWS adequately considered the relevant factors and "'articulated a rational connection between the facts found and the choice made' as required under *Resources Ltd*."[57]

The FWS's first reason for declining to designate a critical habitat was based on the first prong of the regulatory definition which provides that designation is imprudent if it would actually "increase the degree of threat to the species."[58] In its final listing, the FWS cited eleven cases of habitat destruction by landowners, only two of which occurred after the landowners had been notified of the presence of gnatcatchers in the area.[59] The FWS concluded that critical habitat designation would publicize additional gnatcatcher sites, thereby making the species more likely to become vulnerable to future instances of deliberate habitat destruction.[60]

The court found fault with the FWS's application of the "increased threat" rationale because it failed to utilize the "benefits balancing test" that Congress expressly required when critical habitat is designated.[61] The court found no rational basis for the FWS's conclusion that landowners would be more likely to destroy and less likely to protect the designated sites when there were only eleven cases of habitat destruction out of 400,000 acres of gnatcatcher habitat.[62] There was no indication that the FWS ever weighed the benefits of designation against the risks of designation, and thus the court concluded that the FWS did not properly consider all of the relevant factors.[63]

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55. *Id.* (quoting Seattle Audubon Soc'y v. Espy., 998 F.2d 699, 703 (9th Cir. 1993)).

56. *Id.* at 1124-25.

57. *Id.* at 1126 (citing Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993)).

58. *See* 58 Fed. Reg. 16,742, 16,756 (1993) (quoting 50 C.F.R. § 424.12(a)(1)(i) (1996)).

59. *See id.*

60. *See id.*

61. *NRDC*, 113 F.3d at 1126; *see also* 16 U.S.C. § 1533(b)(2) (1994) (The Secretary may only exclude portions of habitat from critical habitat designation "if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.").

62. *Id.* at 1125.

63. *Id.* (citing Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993)).

The second reason the FWS did not designate a critical habitat was because designation "would not appreciably benefit the species."[64] The FWS concluded that designation would not benefit the species because the majority of gnatcatchers are found on private lands to which the consultation requirement of section 7 would not apply.[65] Consequently, in its final listing, the FWS indicated that designation could only be construed as beneficial to the species and hence prudent if Section 7 could be applied to "the *majority* of land-use activities occurring within the critical habitat."[66] The court disagreed with the FWS's expansive construction of the "no benefit" prong as encompassing every case wherein designation would not affect the majority of land-use activities.[67] The court noted that the legislative history indicates that Congress clearly intended that the imprudence exception be applicable only under rare or extraordinary circumstances.[68]

The FWS determined that approximately 80,000 acres of the entire 400,000 acres of gnatcatcher habitat are publicly owned and therefore are subject to section 7's requirements.[69] Additionally, the court noted that if the use of the remaining 320,000 acres of privately owned lands requires only federal agency authorization or action, then they are also subject to section 7's requirements.[70] Given the unambiguous intent of Congress[71] and the court's conclusion that designation could benefit a substantial section of the gnatcatcher's habitat, the Ninth Circuit held that the FWS's "no benefit [to the majority of the species] argument fail[ed] to 'articulate[] a rational connection between the facts found and the choice made' as required [by] *Resources Ltd*."[72]

Finally, the Ninth Circuit dismissed the defendants' contention that the California Natural Communities Conservation Program (NCCP), the state-run "comprehensive habitat management program," would be a "far

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64. *Id.* (citing 58 Fed. Reg. at 16,756).

65. *See id.* (citing 58 Fed. Reg. at 16,756).

66. *Id.* at 1125-26 (emphasis added) (citing 58 Fed. Reg. at 16,756).

67. *Id.* at 1126.

68. *Id.*; *see also* Enos v. Marsh, 769 F.2d 1363, 1371 (9th Cir. 1985) (holding that the Secretary "may only fail to designate a critical habitat under rare circumstances"); Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 626 (W.D. Wash. 1991) ("This legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances.").

69. *See NRDC*, 113 F.3d at 1126 (citing 58 Fed. Reg. at 16,743).

70. *Id.* (citing 16 U.S.C. § 1536(a)(2) (1994)).

71. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

72. *NRDC*, 113 F.3d at 1125 (quoting Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993)).

superior" regulatory scheme for protecting gnatcatcher habitat.[73] Because regulation by the NCCP was not included in the FWS's proposed or final listings, the argument was not properly before the court for consideration.[74]

IV. ANALYSIS

The Ninth Circuit's analysis and subsequent rejection of the FWS's decision not to designate a critical habitat for the gnatcatcher is consistent with prior jurisprudence reviewing the scope of agency actions under the APA. The court properly set aside the FWS's decision because the agency's conclusions were either unsupported or contradicted by the overwhelming record evidence. While the FWS has concluded that prohibited takings, such as vandalism and collection, are legitimate reasons for nondesignation of a species under the "increased threat" prong of the imprudence exception,[75] the administrative record must adequately explain or justify the decision based on these factors.[76]

In the administrative record, the FWS devoted nearly thirty pages to discussion of the gnatcatcher's significant population decline in the United States which was attributed to widespread habitat destruction occurring in conjunction with urban and agricultural development.[77] Additionally, the FWS conceded that there are no regulatory mechanisms in place to ensure protection for the coastal California gnatcatcher or its habitat.[78] The FWS supported this conclusion by citing eleven cases in which landowners destroyed gnatcatcher sites as evidence that the existing regulatory scheme has proven an ineffective deterrent to the destruction of gnatcatcher habitat.[79] After this lengthy discussion, the FWS concluded that designation was not prudent because these eleven cases involved deliberate habitat destruction.[80] As the Ninth Circuit observed, the FWS acknowledged but failed to properly consider the "relevant factor" that nine of the eleven cases of habitat destruction occurred *prior* to regulatory agency review and hence prior to designation.[81] In other words, designation did not increase the threat to

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73. *Id.* at 1126.

74. *See id.* (citing Olin Corp. v. FTC, 986 F.2d 1295, 1305 n.9 (9th Cir. 1993)). The *Olin* court declined to review the potential justification for FTC ruling because "the Commission did not explicitly consider this argument in its opinion." *Id.* at 1126-27.

75. *See* 50 C.F.R. § 424.12(a)(1) (1996).

76. *See generally NRDC*, 113 F.3d at 1125.

77. *See* 58 Fed. Reg. 16,742 (1993).

78. *See id.* at 16,752.

79. *See id.* at 16,753.

80. *See id.* at 16,756.

81. *NRDC*, 113 F.3d at 1125 (citing 58 Fed. Reg. at 16,753).

the species in the majority of the cited cases. Instead, the FWS based its decision on the speculation that designating critical habitat "*would likely* make the species more vulnerable to [prohibited takings] activities."[82] This type of speculation is specifically prohibited by the Supreme Court's holding in *Bennett v. Spear*.[83] Moreover, the FWS's cursory conclusion fails to articulate a rational connection between the facts found—rapid habitat loss, lack of alternative regulatory mechanisms, and consequent decline of species population—and the choice made—no protection of critical habitat—which is prohibited by *Resources Ltd*.[84]

Finally, the court's conclusion that a determination of whether a designation would be prudent must include weighing the benefits against its risks is also consistent with prior jurisprudence, despite the arguments in the dissenting opinion. The dissent concluded that case law does not support the 'benefits balancing test' but only requires that the agency follow a "rational decision making process."[85] The basis for this conclusion is that the term "outweigh" is used both in a statutory provision that does not address the prudence exception and in the Federal Register, neither of which mandate that the FWS conduct an explicit balancing test.[86] However, it seems apparent from a plain reading of the statute that the balancing test of Section 1533(b)(2) does apply to the prudence requirement of Section 1533(a)(3), and vice versa.[87] Even though courts have held that the two provisions give the Secretary some discretion not to designate a critical habitat, the legislative history is a reminder that the Secretary may decide not to designate a critical habitat for an endangered species only when it would be in the best interest of the species not to do so.[88] Determining whether critical habitat designation would be in the best interest of the species necessarily implies a balancing of the benefits against the risks. Because the FWS subjected itself to this

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82. *Id.* (emphasis added).

83. 117 S. Ct. 1154, 1168 (1997); *see supra* note 41 and accompanying text.

84. 35 F.3d 1300, 1304 (9th Cir. 1993).

85. *NRDC*, 113 F.3d at 1128 (O'Scannlain, J., dissenting).

86. *See id.*

87. 16 U.S.C. § 1533(a)(3) (1994) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . ."); *see also* 16 U.S.C. § 1533(b)(2) (1994) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section . . . .").

88. *See* Enos v. Marsh, 769 F.2d 1363, 1371 (9th Cir. 1985). The Ninth Circuit agreed with the plaintiff's contention that the legislative history of the ESA indicates "that the Secretary may only fail to designate a critical habitat under rare circumstances," or when not determinable. *Id.* (quoting H. Rep. No. 95-1625, 9th Cong., 2d Sess. 16-17, *reprinted in* 1979 U.S.C.C.A.N. 9453, 9466-67).

balancing test in its own regulations there is additional evidence that more than just a rational decision-making process is required.[89]

Finally, in applying the *Resources Ltd.* standard of review, the majority was required to decide whether the agency considered the relevant factors and whether the agency articulated a "rational connection between the facts found and the choice made."[90] The "relevant factor" question is analogous to the balancing test, while the "rational connection" question is the clear equivalent of the requirement that the agency follow a rational decisionmaking process.

V. CONCLUSION

In an age when many species are rapidly becoming extinct and even more populations are being threatened, the ESA's most influential method of enforcement, critical habitat designation and protection, cannot be robbed of its force by unsupported and arbitrary agency decisions. The Ninth Circuit's decision reinforces the protective roles of the APA and ESA respectively. The APA protects against an agency's abuse of discretion in administering the ESA, and the ESA protects the best interest of listed species. The FWS's determination of what is in the best interest of a species must be carefully analyzed by reviewing courts because a conclusion that is unsupported or based on speculation cannot ensure species protection and could conceivably result in species decline if speculative events are not realized. Such an outcome is clearly contrary to the congressional intent behind the ESA.

NRDC v. United States Department of the Interior is valuable precedent because it takes an important step toward reversing the trend of species extinction by fortifying the critical habitat provision and by preventing an agency's unsupported conclusions from passing unchallenged into law.

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89. *See* 50 C.F.R. §§ 424.12(a)(1)(i)-(ii) (1996).

90. *NRDC*, 113 F.3d at 1126 (quoting Resources Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993)).