Defenders of Wildlife v. Norton: "Extinction" Under the Endangered Species Act Construed Favorably to Conservation Efforts

I. OVERVIEW

The flat-tailed horned lizard is a "small, cryptically colored iguanid lizard."[1] It occupies "sandy, desert flatlands with sparse vegetation and low plant species diversity" in parts of southeastern California, western Arizona and northwestern Mexico.[2]

The flat-tailed horned lizard was first considered for Endangered Species Act (ESA) protection in 1982.[3] After several years of bureaucratic shuffling and procedural investigation, the lizard was finally proposed by the Secretary of the Interior (Secretary) as a threatened species in 1993.[4] After several years of public hearings and a brief legislative pause on the listing process under the ESA,[5] no final decision was made concerning the lizard and a public comment period was again conducted in 1997.[6] On May 8, 1997, in response to a suit filed by the Defenders of Wildlife, the United States District Court for the District of Arizona ordered a final decision to be made on the fate of the lizard within sixty days.[7]

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1. Proposed Rules of the Department of the Interior, 58 Fed. Reg. 62,624, 62,625 (Nov. 29, 1993).
2. *Id.*
3. Proposed Rules of the Department of the Interior, 62 Fed. Reg. 37,852, 37,854 (July 15, 1997).
4. *Id.*
5. *See* Defenders of Wildlife v. Norton, 258 F.3d 1136, 1139 (9th Cir. 2001) ("The passage of Public Law No. 104-6, 109 Stat. 73 (1995), in April 1995 interrupted progress on the lizard and other species awaiting listing decisions . . . . The moratorium remained in effect until April 26, 1996 when President Clinton signed an executive waiver allowing the Secretary to once again list species for protection.").
6. Proposed Rules of the Department of the Interior, 62 Fed. Reg. at 37,854.
7. *Id.*

Soon after the district court order, a combination of federal and state agencies implemented a Conservation Agreement (CA) designed to protect the lizard.[8] The CA was developed by the Federal Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service, and state and local agencies.[9] The signatories agreed to voluntarily reduce threats to the lizard, attempt to stabilize the species' populations, and maintain its ecosystems.[10]

A fundamental part of the CA was the designation of five "management areas" (MAs) that would be "subject to protective measures, including the monitoring of lizard populations, limitation of habitat disturbance including off-highway vehicle use, and acquisition of private inholdings."[11] Some of the measures adopted in the CA had already been in place and implemented by one or another of the signatory departments but many were new.[12]

On July 15, 1997, Secretary Gail Norton issued her final decision (Notice) concerning the listing of the flat-tailed horned lizard for federal protection under the ESA.[13] She concluded that the lizard should be denied federal protection under the ESA.[14] As the United States Court of Appeals for the Ninth Circuit states, the Secretary based her decision on three factors: "(1) that population trend data did not conclusively demonstrate significant population declines; (2) that some of the threats to the lizard's habitat had grown less serious since the proposed rule was issued; and (3) that the recently devised 'conservation agreement would ensure further reductions in threats.'"[15] Secretary Norton also gave great weight to the fact that the lizard existed on large tracts of private land that had no impending threats of habitat destruction.[16]

The Defenders of Wildlife, together with concerned groups and individuals, challenged the Secretary's action in the United States District Court for the Southern District of California.[17] The district court granted

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8. *See Norton*, 258 F.3d at 1139.

9. *See id.* at 1139 n.5 ("The participating parties included . . . [t]he United States Bureau of Reclamation, the United States Marine Corps., the United States Navy, the Arizona Game and Fish Department, and the California Department of Parks and Recreation.").

10. *Id.* at 1139-40.

11. *Id.* at 1140.

12. *Id.*

13. Proposed Rules of the Department of the Interior, 62 Fed. Reg. 37,852 (July 15, 1997).

14. *Id.*

15. *Norton*, 258 F.3d at 1140.

16. *See* Proposed Rules of the Department of the Interior, 62 Fed. Reg. at 37,860.

17. *See Norton*, 258 F.3d at 1136 (listing the other plaintiff-appellants as the Tucson Herpetological Society, the Horned Lizard Conservation Society, the Sierra Club, the Desert

the Secretary's motion for summary judgment and dismissed plaintiffs' action on the grounds that the Secretary's decision was within her discretion and made pursuant to statutorily appropriate processes.[18] Plaintiffs appealed the district court's decision to the Ninth Circuit. *Defenders of Wildlife v. Norton, Secretary of the Department of the Interior*, 258 F.3d 1136 (9th Cir. 2001).

II. BACKGROUND

In response to a growing socio-environmental consciousness and a rising rate of species extinctions, Congress adopted the Endangered Species Act of 1973.[19] The ESA states that species of "fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[20] The ESA provides for the protection of species by minimizing the damaging impact on those species from economic, social, and industrial development and from hunting.[21] Congress stated that the purpose of the ESA was to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species."[22] Thus Congress envisioned a two-part conservation scheme under the ESA: one directed specifically at the conservation of the ecosystem and one directed at the preservation of the species itself.[23]

The listing of a species for protection under the ESA is an administrative procedure that begins with an "interested person" filing a petition with the Department of the Interior.[24] The Secretary makes a determination as to "whether the petition presents substantial scientific or commercial information" to show if the species may be worthy of listing.[25] If the Secretary so decides, an administrative process of

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Protective Council, the Biodiversity Legal Foundation, Dale Turner, Wendy Hodges, & Francis Allan Muth).

18. *See id.* at 1140.

19. *See* David P. Berschaur, *Is the "Endangered Species Act" Endangered?*, 21 SW. U.L. REV. 991 (1992).

20. 16 U.S.C. § 1531(a)(3) (1994).

21. *See* Berschaur, *supra* note 19, at 992.

22. 16 U.S.C. § 1531(b).

23. *See* Berschaur, *supra* note 19, at 992-93 ("Although the Act does not define or protect 'ecosystems,' it does provide for habitat acquisition and defines endangered or threatened species in terms of habitat . . . .").

24. 16 U.S.C. § 1533(b)(3)(a); *see also* Berschaur, *supra* note 19, at 993.

25. 16 U.S.C. § 1533(b)(3)(a).

investigation ensues involving "notice and comment rule-making procedures."[26]

This administrative process is designed to gather information to determine, according to a series of statutory guidelines,[27] whether or not the species that is the subject of the petition is "endangered" or "threatened" as defined by the ESA itself.[28] An endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range."[29] A threatened species is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[30] In making his or her decision, the Secretary must decide "solely on the basis of the best scientific and commercial data available to him [and] taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation."[31]

III. THE COURT'S DECISION

Essentially, plaintiffs-appellants contend that the scientific data available to the Secretary at the time of her determination shows that the lizard is, for purposes of the ESA, endangered.[32] Plaintiffs-appellants claim that as many as five of the statutory factors to be used in the determination are satisfied.[33] The Secretary responds to this contention with two arguments: (1) although the lizard may be threatened on private land, there is adequate habitat on public land to preserve the species, and (2) the recent CA will add protections and preserve the lizard population.[34]

The essential conflict in reasoning between the plaintiffs-appellants and defendants-appellees centers on the lizard's population on private as opposed to public lands.[35] Plaintiffs-appellants focus on the loss of

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26. Berschaur, *supra* note 19, at 994.

27. 16 U.S.C. § 1533(a)(1)-(a)(1)(E) ("The Secretary shall . . . determine whether any species is an endangered species or a threatened species because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.").

28. *Id.* § 1533(b)(1)(B).

29. *Id.* § 1532(6).

30. *Id.* § 1532(20).

31. *Id.* § 1533(b)(1)(A).

32. *See* Defenders of Wildlife v. Norton, 258 F.3d 1136, 1140 (9th Cir. 2001).

33. *Id.*

34. *Id.*

35. *Id.* at 1140-41.

habitat on private lands while the Secretary relies on conservation efforts on public lands to support her contention that the lizard is not in need of federal protection under the ESA.[36] The Ninth Circuit believes the solution to the conflict lies in determining which of the parties' different suggested definitions of "in danger of extinction throughout all or a significant portion of its range"[37] should guide determinations under the ESA.[38]

The ESA states that a species should be classified as endangered if it is "in danger of extinction throughout all or a significant portion of its range."[39] The Ninth Circuit cites no cases of precedence and, apparently, 16 U.S.C.A. § 1532(6) has never been defined by any court. The Ninth Circuit begins with a general finding that the statute is, on its face, ambiguous.[40] Because "extinction" means, generally, that an entire species has died out, the language of § 1532(6) is "something of an oxymoron" and is used "in a manner in some tension with ordinary usage."[41] Both plaintiffs-appellants and defendant-appellees propose explanations for the odd language of the statute.

The Secretary argues that the language should be interpreted to mean that a species is endangered for the purposes of the ESA if it "faces threats in enough key portions of its range that the *entire species* is in danger of extinction, or will be within the foreseeable future."[42] The Ninth Circuit interprets this to mean that the Secretary "assumes that a species is in danger of extinction in a 'significant portion of its range' only if it is in danger of extinction everywhere."[43] This is unacceptable to the court as the statute itself makes a distinction between the ideas that a species may be threatened with extinction in all or only in a particular portion of its range.[44]

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36. *Id.*; *see also* Proposed Rules of the Department of the Interior, 62 Fed. Reg. 37,852, 37,858 (July 15, 1997) ("Because of the large amount of flat-tailed horned lizard habitat located on public lands within the United States and the reduction of threats on these lands due to changing land-use patterns and conservation efforts of public agencies, threats due to habitat modification and loss do not warrant listing of the species at this time.").

37. 16 U.S.C. § 1532(6).

38. *Norton*, 258 F.3d at 1140-41.

39. 16 U.S.C. § 1532(6).

40. *Norton*, 258 F.3d at 1141.

41. *Id.* ("According to the Oxford English Dictionary, 'extinct' means 'has died out or come to an end . . . . Of a family, class of persons, a race of species of animals or plants: Having no living representative.'").

42. *Id.*

43. *Id.*

44. *Id.* at 1142.

In interpreting a statute, a court follows a "'natural reading . . . which would give effect to all of [the statute's] provisions.'"[45] The Ninth Circuit rejected the Secretary's proposed interpretation as a redundant and ineffective reading of the provision.[46]

The plaintiffs-appellants offer their own interpretation of the provision. Plaintiffs argue that a better way to determine whether or not a species is endangered is by taking a quantitative approach.[47] Plaintiffs contend that "the projected loss of 82% of the lizard's habitat in this case constitutes 'a substantial portion of its range.'"[48] To support its argument, plaintiffs cite to instances of other species that have been classified as endangered or threatened after the loss of smaller amounts of habitat, specifically, the steelhead trout,[49] the coho salmon,[50] and the Coachella Valley fringe-toed lizard[51] as specific examples.[52] Plaintiffs argue, in effect, that there should be a bright-line rule implemented so that when a species loses a particular, pre-determined percentage of its habitat (plaintiffs do not suggest a specific percentage) it automatically should qualify for protection under the ESA.

The Ninth Circuit rejected this interpretation of the statute for several reasons, the first being that a percentage-based interpretation is simply illogical because a species might have a very wide range and could suffer the loss of a high percentage of it without the species itself being threatened.[53] A species population distributed over a wide range might suffer the loss of a high percentage of its historical habitat but not lose the areas where its population is most dense and therefore most critical to its survival as a species.[54] Further, the court points out, if Congress had intended the use of a threshold percentage to be used in

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45. *Id.* (quoting United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 549 (1996)).

46. *See id.*

47. *See id.* at 1143.

48. *Id.*

49. *See* Fed'n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1170 (N.D. Cal. 2000) (finding that even though sixty-four percent of its range was protected, the steelhead trout still qualified for federal protections under the ESA).

50. *See* ONRC v. Daley, 6 F. Supp. 2d 1139, 1157 (D. Or. 1998) (finding that even though thirty-five percent of its range was already federally protected under another program, the coho salmon qualified for federal ESA protections).

51. *See* Proposed Rules of the Department of the Interior, 45 Fed. Reg. 63,812, 63,817-18 (Sept. 25, 1980) (finding that even though half of its historical range was still intact, the Coachella Valley fringe-toed lizard qualified as a threatened species under the ESA).

52. *Norton*, 258 F.3d at 1143.

53. *Id.*

54. *Id.* at 1143 n.9 ("Such an interpretation would fail to protect species in danger of extinction because it might not allow listing of species where areas of range vital to the species' survival-but not the majority of the range-face significant threats.").

determining which species are threatened, it would have included it in the statute itself.[55]

The Ninth Circuit turned to the legislative history of the ESA to determine what interpretation of the statute is appropriate. The court pointed out that the ESA was the third statute enacted to preserve endangered species. The first was the Endangered Species Conservation Act, which described a species as endangered only if it faced global extinction.[56] The second was the Endangered Species Preservation Act, which described an endangered species as one that faced the loss of its entire habitat.[57] Neither statute provides protection for species endangered only in a "significant portion of its range."[58]

The ESA, according to the court, incorporated the "significant portion of its range" language to allow the Secretary more flexibility in making determinations and offering protections in addition to allowing more state and local participation in species protection efforts.[59] To back up this assessment, the court cites the case of the American alligator:

> [T]he range of the [American] alligator stretched from the Mississippi Delta in Louisiana to the Everglades of Florida. Its distribution over that range, however, varied widely. While habitat loss had pushed the species to the verge of extinction in Florida, conservation efforts had resulted in an overabundance of alligators in Louisiana. . . . In order to address problems such as this, the Act [ESA] allows the Secretary to "list an animal as endangered through all or a portion of its range."[60]

The court further quotes the comments of Senator Tunney who described the proper interpretation of "significant portion of its range": "An animal might be endangered in most states but overpopulated in some. . . . In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills. . . ."[61] The court cites several instances of a species being protected in one area or portion of its range and unprotected by the ESA in others.[62]

The Ninth Circuit, examining the legislative history, declares its interpretation of the provision as meaning that "a species can be extinct

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55. *Id.* at 1143.

56. *See* Endangered Species Conservation Act, Pub. L. 91-135 § (3)(a), 83 Stat. 275 (Dec. 5, 1969).

57. *See* Endangered Species Preservation Act, Pub. L. 89-669 § 1(c), 80 Stat. 926 (Oct. 15, 1966).

58. *Norton*, 258 F.3d at 1144.

59. *Id.*

60. *Id.* (quoting 62 Fed. Reg. 25,669 (July 25, 1973)).

61. *Id.* (quoting 62 Fed. Reg. 25,669).

62. *Id.* at 1145.

'throughout . . . a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was."[63] Further, the areas do not have to be within one another's national or state boundary, although they can be.[64] The Secretary is to be given wide discretion in determining exactly what a "significant portion" is but when the area of habitat for a species has become much smaller than it once was, the Secretary must offer an explanation.[65]

As applied to the fact-scenario of the noted case, the Ninth Circuit determines that had Secretary Norton followed the correct standard for determining whether or not a species was endangered for purposes of the ESA, she may very well have determined that the flat-tailed horned lizard qualified.[66] First of all, the areas of lizard habitat on private land may constitute "a significant portion of its range."[67] Second, utilizing the appropriate interpretation of the statute, the lizard may face particularly dire threats in "either California or Arizona, or in major subportions of either state."[68] Furthermore, while the Secretary relies on the promise of the CA to protect the population of lizards, she is not specific as to when and to what extent it will be implemented by the various agencies.[69] Therefore, the Ninth Circuit reverses the district court's granting of defendants' motion to dismiss and remands the case to the Secretary for consideration.[70]

IV. ANALYSIS

The Ninth Circuit has issued a decision that will have far-reaching implications in all future ESA determination processes. For one, the Ninth Circuit states emphatically that in determining whether a species is endangered "throughout . . . a significant portion of its range," the Secretary is to make no distinction between public land and private lands but must consider the range of the species as a whole.[71] Former Secretaries had not distinguished between public and private lands; in

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 1146.
67. *Id.*
68. *Id.*
69. *See id.*
70. *Id.* at 1146-47.
71. *Id.*

fact, the flat-tailed horned lizard itself was first recommended for listing largely in part because of threats it faced on private lands.[72]

The Ninth Circuit, most importantly, upholds the reasonable and historical definition of endangered. The Secretary's suggestion for the definition of endangered for purposes of the ESA essentially forces a species to the brink of extinction before it is eligible for federal protection.[73] The decision forces the Secretary to try to protect a species throughout its range, allowing for federal protection in areas where it is warranted and allowing state and local agencies to monitor the population in areas where federal protection is not warranted.[74] This allows the Secretary to be much more flexible and makes the ESA a more active and dynamic tool in species conservation efforts.

V. CONCLUSION

The Ninth Circuit, in this decision, resists efforts by the Secretary of the Interior to make the standard for federal protection under the ESA much more stringent than it had been historically. The court reaffirms the initial purpose of the ESA and ensures that it will be used actively and strategically to protect species before they reach the utter brink of extinction. The court disallows separate deliberations as to a species' population and range on private and public lands and keeps the definition of endangered for purposes of the ESA looser than the Secretary would have it, allowing for federal protection in some areas of its range without a showing that the species is in danger throughout all of its range. As the Department of the Interior and the administration of the ESA has been recently delivered into environmentally conservative hands, this decision is important to ensure the continued vitality of the statute, pursuant to its legislative and historical goals.

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72. *See* Proposed Rules of the Department of the Interior, 58 Fed. Reg. 62,624 (Nov. 29, 1993).

73. *See Norton*, 258 F.3d at 1141-42.

74. *Id.* at 1145.