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Natural Resources Defense Council v. Salazar

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Natural Resources Defense Council v. Salazar,
___ F. 3d ___, 2012 WL 2899095 (9th Cir. July 17, 2012).

William Fanning

ABSTRACT

The United States Court of Appeals for the Ninth Circuit determined that the Bureau of Reclamation did not violate the ESA when it renewed water contracts with two water user groups. The Ninth Circuit found that since one contract did not prevent the Bureau from complying with the ESA, the plaintiffs could not causally link the contract with harm to the fish and thus lacked Article III standing to pursue their case. The Court characterized the renewal of the second contract as a mandatory duty inherent in the contract itself. Further, the non-discretionary nature of the contract renewal exempted the Bureau from its obligations under Section 7(a)(2) of the ESA.

I. INTRODUCTION

In *Natural Resources Defense Council v. Salazar*,¹ the United States Bureau of Reclamation (Bureau), a federal water management agency, renewed long-term water supply contracts with two water user groups: the Delta Mendota Canal (DMC) Contractors and the Settlement Contractors.² Environmental advocacy groups sued the Bureau and the water user groups charging these contracts impinged on the habitat of the delta smelt and violated the Endangered Species Act (ESA).³ The court ruled: 1) the issues before the court were not moot, 2) the plaintiffs lacked Article III standing to pursue their claim against the DMC contractors because a contract provision negated the causal element between the Bureau's action and harm to

¹ ___ F.3d ___, 2012 WL 2899095 at *1 (9th Cir. 2012).

² *Id.*

³ *Id.*

the smelt,⁴ and 3) the Bureau did not violate the ESA by approving long-term water contracts with the Settlement Contractors because renewing the contracts was non-discretionary.⁵

II. FACTUAL BACKGROUND

The delta smelt is a small fish endemic to the San Joaquin and Sacramento Rivers Delta Estuary.⁶ Although the fish has no current commercial value, it is considered an indicator species of the overall health of the estuary environment,⁷ and the population has declined markedly in past decades.⁸ In 1993, the United State Fish and Wildlife Service (Service) classified the smelt as endangered under the ESA.⁹ The Bureau, along with the California State Water Project (SWP), operates the Central Valley Project (CVP), a series of dams, reservoirs, and pumping facilities that regulate the water of the San Joaquin and Sacramento Rivers.¹⁰ The plaintiffs claimed that in 2005 the Bureau renewed forty-one long-term water supply contracts without analyzing the effects on the delta smelt.¹¹ Section 7(a)(2) of the ESA states

Each Federal agency: shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.¹²

Under California law, the Bureau had to obtain water rights from the water rights holders to operate the CVP, and as a part of the bargain, it was supposed to resolve issues of seniority among the water rights holders.¹³ In 1964, the Bureau entered into 40-year water delivery

⁴ *Id.* at *4.

⁵ *Id.* at *5.

⁶ *NRDC*, 2012 WL 2899095 at *1.

⁷ UC Davis, Center for Aquatic Biology and Aquaculture, *Delta Smelt: A Little Fish with the Delta Blues*, <http://caba.ucdavis.edu/news/2011/delta-smelt> (last accessed Aug. 8, 2012, 22:28 MST).

⁸ *NRDC*, 2012 WL 2899095 at *1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *3 (quoting 16 U.S.C. § 1536(a)(2)).

¹³ *Id.* at *1.

contracts with the Settlement Contractors.¹⁴ Instead of adjudicating water rights holders' seniority, the Bureau guaranteed the Settlement Contractors a certain amount of "base water" for free and "project water" they could pay to receive.¹⁵ The contracts stipulated the base water could only be reduced by 25% in very dry years.¹⁶ The Bureau made separate long-term water contracts with other water users who obtained water from the Delta-Mendota Canal (DMC Contractors).¹⁷

III. PROCEDURAL BACKGROUND

To prepare for the 2004 renewal of the contracts, the Bureau performed a biological assessment and requested the Service consider whether contract renewals would adversely affect a listed species.¹⁸ In both 2004 and 2005, the Service's biological opinions concluded that renewal was not likely to threaten the delta smelt.¹⁹ In 2005, the Natural Resources Defense Council (NRDC) filed suit alleging the renewal violated Section 7 of the ESA based on the 2004 opinion.²⁰ When the Service issued its 2005 biological opinion, plaintiffs sued again and the district court ruled the opinion was unlawful because it failed to adequately consider critical habitat impacts, did not rely on the best available science, and did not include mandatory mitigation measures to protect the delta smelt.²¹ The court remanded the opinion without vacating the decision and ordered the Bureau and Service to reconsider the effects of the operations on the smelt.²²

¹⁴ NRDC, 2012 WL 2899095 at *2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ NRDC, 2012 WL 2899095 at *3.

²¹ *Id.*

²² *Id.*

The plaintiffs filed a second complaint alleging the Bureau violated its duties under Section 7(a)(2) of the ESA because it renewed contracts with the DMC water users based on a flawed biological opinion.²³ The district court granted defendant's motion for summary judgment and held the plaintiff's lacked standing to challenge the DMC contracts.²⁴ The court also held that the Bureau's contracts with the Settlement Contractors were not discretionary, exempting them from ESA § 7(a)(2) compliance.²⁵ In 2008, the Service found the CVP and SWP operations were likely to threaten the delta smelt and identified "reasonable and prudent" measures to avoid such jeopardy.²⁶

IV. ANALYSIS

The court reviewed summary judgment, mootness, and standing *de novo*.²⁷ The defendants argued the issuance of the 2008 biological opinion, which superseded the faulty 2005 opinion, eliminated the "case or controversy" requirement for federal jurisdiction making this appeal moot.²⁸ Generally, a superseding biological opinion moots a challenge to a previous biological opinion.²⁹ Here, since a court found parts of the 2008 opinion unlawful,³⁰ and the adjudicating court was unclear about the impact of the contracts on CVP's operations, the issues were justiciable.³¹

A. The plaintiffs lack standing because the contract allows for protection of the fish.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *NRDC*, 2012 WL 2899095 at *3.

²⁷ *Id.* at *3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855 (E.D.Cal.2010).

³¹ *NRDC*, 2012 WL 2899095 at *4.

The Ninth Circuit Court of Appeals found the plaintiffs lacked standing even under the less rigorous standard of a procedural rather than a substantive ESA violation.³² The plaintiffs showed a concrete injury-in-fact, but the court did not think the injury traceable to the contract renewal nor in need of redress.³³ The shortage provision, allowing the Bureau to take whatever actions necessary to comply with the ESA, including not delivering water to the DMC contractors, negated the causal link between the contract and injury to the smelt.³⁴ Essentially, if the contract did not prevent compliance with the law, then the court assumed the Bureau will comply and there will be no injury and nothing to redress.³⁵

B. The Bureau is not subject to ESA scrutiny when renewing non-discretionary contracts.

The Ninth Circuit held the Bureau’s renewal of the Settlement Contracts was not subject to Section 7(a)(2) of the ESA because renewal was not “discretionary action.”³⁶ Section 7 (a)(2) only applies to federal actions “in which there is discretionary Federal involvement or control.”³⁷ The Bureau must operate the CVP under both California water law and the Reclamation Act of 1902.³⁸ The California Water Resources Control Board’s rules predicated the Bureau’s right to operate the CVP on it addressing the seniority issues among water rights holders.³⁹ The Bureau accomplished this by creating the “base water” and “project water” designations under the Central Valley Project Improvement Act.⁴⁰ These obligations saddled the Bureau with a

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at *5.

³⁷ *NRDC*, 2012 WL 2899095 at *5 (citing *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

mandatory duty to not only deliver the base water supply but also renew the contracts upon request.⁴¹

C. Dissent

The dissent argued that the plaintiffs should be granted standing because they alleged a procedural injury that *could* be remedied by requiring the Bureau's ESA compliance.⁴²

Furthermore, the shortage provision only *allows* the Bureau to comply with the ESA, but does not *ensure* it will do so.⁴³ Regarding the Settlement Contractors, the dissent examined the

contract language closely and concluded the Bureau's hands were much freer than it admitted.⁴⁴

The Bureau could have declined to renew the contracts or negotiated terms protective of the delta smelt and its habitat.⁴⁵

V. CONCLUSION

The majority in *Natural Resources Defense Council v. Salazar* used contract analysis to limit the Bureau's obligations under the ESA. The dissent made a compelling argument that the contracts outlined the minimum required of federal agencies, but real compliance would consider what is best for the fish. Practitioners of environmental law should take note of any case in which standing is limited and a federal agency's discretion is more narrowly defined.

⁴¹ *Id.*

⁴² *Id.* at *7.

⁴³ *NRDC*, 2012 WL 2899095 at *7.

⁴⁴ *Id.* at *10.

⁴⁵ *Id.* at *8.