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Western Watersheds Project v. Ashe

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I. ABSTRACT

In June of 2013, Western Watersheds Project sued the Director of the United States Fish and Wildlife Service over the agency's decision not to list the Pygmy Rabbit as an endangered or threatened species under the Endangered Species Act. The United States District Court for the District of Idaho upheld the agency's determination as reasonable and worthy of judicial deference despite the lack of scientific research surrounding the species because the ESA does not require the FWS to conduct its own scientific inquires to comply with the statute. Going forward, this decision appears to ease the FWS's burden in defending their decisions, as well as possibly diminishing the level of protection the ESA provides for the United States' most unstudied species.

II. INTRODUCTION

In this case, Western Watersheds Project argued that the United States Fish and Wildlife Service's (FWS) decision to not list the Pygmy Rabbit should have been overturned as an arbitrary and capricious abuse of agency discretion. Watersheds claimed that FWS failed to comply with listing requirements and procedures of the Endangered Species Act (ESA). More specifically, plaintiffs contended that because the listing decision did not define the "foreseeable future" of the Pygmy Rabbit, as required by Section 4 of the ESA, their determination that the species did not warrant listing constituted reversible error.¹ Supported by a thorough administrative record, the Idaho District Court ruled in favor of the defendants and defendant interveners.² Relying heavily on the language of the listing decision itself, the court held that because only minimal or no scientific evidence exists about the population trends and cycles of

¹ *Western Watersheds Project v. Ashe*, ___ F. Supp. 2d___, 2013 WL 2433370, 2013 U.S. Dist. LEXIS 79804 (D. Idaho Jun. 4, 2013). [*Hereinafter* "Western Watersheds"]

² *Id.* at 24.

the Pygmy Rabbit, FWS's decision not to define this term did not constitute error of such a magnitude as to necessitate deviation from deeply entrenched judicial deference over federal agency actions.³

III. BACKGROUND

Western Watersheds Project initiated this lawsuit in order to challenge FWS's decision to deny ESA protection to the Pygmy Rabbit. This action represents the most recent of the four rounds of litigation these parties and this issue have experienced.⁴ In November of 2001, FWS created an emergency rule protecting the part of the Pygmy Rabbit population that lived in the Columbia Basin.⁵ In doing so, FWS acknowledged that it was concerned over the declining population of the rabbits across all of its historic habitat range.⁶ This discrepancy led the plaintiffs to file their original listing petition in April of 2003. When that petition went unanswered, Watersheds sued FWS to enforce compliance with the ESA.⁷

The two parties reached a settlement agreement wherein FWS agreed to answer Western Watersheds listing petition. However, FWS responded to the plaintiff's petition by determining that their concerns lacked the scientific merit to warrant protection of the species under the ESA.⁸ Western Watersheds then sued FWS, seeking judicial review of the agency's determination. On review, the Idaho District Court reversed FWS's findings as arbitrary and capricious because they had imposed a higher standard on the plaintiff's petition than required by the ESA's provisions.⁹ In January of 2007, FWS published its new, court-ordered, 90-day listing publication, which concluded that the rabbit may in fact warrant protection under the ESA, but failed to issue the statutorily required 12-month Finding, resulting in yet another round of

³ *Id.*

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Western Watersheds*, at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

litigation.¹⁰ Ultimately, FWS entered a settlement agreement with Western Watersheds, in which they agreed to put forth a full 12-month publication no later than September 24th of 2010. The listing decision at issue in this case was published on September 30th of 2010, concluding that the Pygmy Rabbit did not warrant protection under the ESA.¹¹ Plaintiffs filed this action to obtain judicial review of the agency's determination in its most recent decision.

IV. ANALYSIS

A. Jurisdiction

While the legal arguments at the heart of this litigation are founded in the statutory requirements imposed by the ESA and the application of judicial deference, the court found it necessary to address a dispositive jurisdictional issue as a preliminary matter. Specifically, in its opposition to the plaintiff's substantive contentions, FWS argued that the district court lacked subject matter jurisdiction because when Western Watersheds produced the requisite Notice of Intent to Sue (NOI), they did not mention the "foreseeable future," or "cumulative threats" arguments with enough specificity to confer jurisdiction to the court on the supposedly omitted issues.¹² However, the court held that its jurisdictional authority was based not in the citizen suit provision of the ESA, but in the grant of judicial review over federal agencies' discretionary actions provided by the Administrative Procedures Act (APA).¹³

B. Foreseeable Future

The language of the ESA provides that a species is threatened when it is "likely to become an endangered species within its foreseeable future throughout all or a significant portion of its range."¹⁴ The heart of the plaintiff's argument rests around this mandate. They contended that the FWS's failure to define the foreseeable future regarding the rabbits in

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.* at 7.

¹³ *Western Watersheds*, at 7.

¹⁴ *Id.* at 9.

question made their entire decision not to protect them an arbitrary and capricious abuse of agency discretion.¹⁵

In response to this argument, the court applied the well-known *Chevron* “two step” test, determining that the term “foreseeable future” was itself inherently ambiguous, thus forcing the court to defer to the agency’s interpretation unless its found to be unreasonable.¹⁶ Ultimately, the court decided that the dearth of scientific data surrounding the threats to the rabbits and their habitat did not allow the FWS to extrapolate population trends into the future, or in other words to define the requisite term “foreseeable future.”¹⁷ As such, the court reasoned that even in the absence of that definition, FWS had not abused its discretion because they complied with the “best available data” requirement of the ESA.¹⁸

Ultimately, the court held that “in the absence of available evidence, the ESA does not require an agency to conduct its own studies to determine whether to list a species as endangered or threatened.”¹⁹ The court distinguished the situation at hand from cases cited in the plaintiff’s briefs by again highlighting the lack of reliable scientific information and expert opinions available to FWS at the time of their decision.²⁰ In its final line of analysis on this issue, the court summed up its reasoning conclusively in saying, “given congress’ mandate that listing decisions be based ‘solely on the basis of the best scientific and commercial data available,’ the Service’s inability to define ‘foreseeable future’ in this case cannot be considered arbitrary and capricious.”²¹

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 11.

¹⁹ *Western Watersheds*, at 11.

²⁰ *Id.* at 14-15.

²¹ *Id.* at 16.

C. Significant Portion of Range Analysis

In a subsidiary argument, Western Watersheds argued that FWS abused its discretion in the Listing Decision in question by abandoning its historic test for determining whether a species needs protection “throughout all or a significant portion of its range.”²² This argument was based on the fact that the terminology used in FWS’s analysis deviated from that used in past publications. However, the court quickly disposed of this argument stating that, “although the Listing Decision omitted the terms ‘resiliency,’ ‘redundancy,’ and ‘representation,’ it did not substantially alter the significant portion of the range analysis.” As such, the court held that FWS had provided a reasoned explanation for its decision, and as a principle of administrative deference, would not second-guess that conclusion.²³ However, it is worth noting that the court also supported its holding by alternatively explaining that the “3-R Test” in question was not a derivative of the ESA itself, or an implementing regulation and thus was not a substantive rule that the court could enforce.²⁴

V. CONCLUSION

This case is a strong example of federal courts applying principles of administrative deference to agency determinations. Uniquely here, the court applies judicial deference to a Listing Decision made in the absence of scientific information about a species and its future. This precedent could potentially have pervasive influence over other situations concerning lesser-known species and the potential for them to gain federal protection under the ESA.

²² *Id.* at 17.

²³ *Id.* at 21.

²⁴ *Id.*