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Center for Biological Diversity v. Jewell

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Center for Biological Diversity v. Jewell, ___ F. Supp. 2d ___, 2017 U.S. Dist. LEXIS 89355, 2017 WL 2438327 (D. Ariz. Mar. 29, 2017)

Lowell J. Chandler

The ESA protects threatened or endangered species, and species likely to become threatened or endangered within the foreseeable future, throughout all or a significant portion of their range. In *Center for Biological Diversity v. Jewell*, the United States District Court for the District of Arizona overturned a Fish and Wildlife Service policy defining the significant portion of range language in the ESA. The policy interpretation limited ESA protections to apply *only* when a species faced risk of extinction throughout its entire range. The court deemed this policy impermissible because it effectively rendered the significant portion of range language meaningless. The court held that the Service's significant portion of range policy was contrary to the conservation goals of the ESA and that the Service's 2011 Final Pygmy Owl Rule was invalid, resulting in violations of the ESA and the APA.

I. INTRODUCTION

Center for Biological Diversity and Defenders of Wildlife (collectively "Plaintiffs") challenged two separate actions by the United States Fish and Wildlife Service ("Service"), claiming violations of the Endangered Species Act ("ESA") and the Administrative Procedures Act ("APA").¹ Plaintiffs first challenged the Service's interpretation of the phrase "significant portion of its range" ("SPR") under the ESA's definition of endangered or threatened species.² Plaintiffs claimed that the Service's final policy defining SPR ("2014 Final SPR Policy") was an improper interpretation of the ESA's SPR language.³ Plaintiffs argued that the interpretation undermined the ESA's conservation objectives by limiting the definition of SPR to the point that it was unavailing.⁴ Second, Plaintiffs challenged the Service's rejection of their petition to list the cactus ferruginous pygmy owl ("pygmy owl") as an endangered or threatened species under the ESA in its 2011 final 12-month finding on the pygmy owl ("2011 Final Pygmy Owl Rule").⁵ Plaintiffs claimed that by relying on an improper interpretation of SPR in its 2011 Final Pygmy Owl Rule, the Service violated the ESA and the APA.⁶

The United States District Court for the District of Arizona granted summary judgment in favor of the Plaintiffs' claims. The court found that the Service's 2014 Final SPR Policy was a violation of the ESA

1. *Center for Biological Diversity v. Jewell*, ___ F. Supp. 2d ___, 2017 U.S. Dist. LEXIS 89355, 2017 WL 2438327, at *1 (D. Ariz. Mar. 29, 2017).

2. *Id.*

3. *Id.* at *3.

4. *Id.* at *8.

5. *Id.* at *1.

6. *Id.*

and APA because it rendered the SPR language of the ESA “meaningless.”⁷ Under the court’s ruling, a species that is imperiled in a significant portion of its range, regardless of the risk posed to the entire species, will be eligible for ESA protection throughout not only the SPR where it is threatened, but its entire range. Additionally, the court ordered the Service to reconsider its finding in its 2011 Final Pygmy Owl Rule because it applied an impermissible interpretation of SPR.⁸

II. FACTUAL AND PROCEDURAL BACKGROUND

Under the ESA, SPR is used in both the definitions of endangered species and threatened species.⁹ A species is considered endangered if it “is in danger of extinction throughout all or a significant portion of its range.”¹⁰ A species is determined to be threatened if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”¹¹ While the SPR language is integral to ESA listing determinations, the ESA fails to define its meaning.¹² Due to this failure, the phrase is defined by the Service through administrative rulemaking.¹³ Due to the Service’s frequently changing definition of SPR, the Ninth Circuit has characterized the phrase as “inherently ambiguous.”¹⁴ During the four years (2007 to 2011) between Plaintiffs filing their petition to list the pygmy owl and the Service’s issuance of the final pygmy owl rule, the Service’s SPR definition changed several times.¹⁵

In response to a Ninth Circuit decision that found a prior Service definition of SPR impermissible, the Solicitor of the Department of Interior issued a Memorandum Opinion (“2007 M-Opinion”) analyzing the SPR in March 2007.¹⁶ The Service then issued a Draft Guidance document (“2007 Draft Guidance”) interpreting SPR as areas that “contribute meaningfully to the conservation of a listable entity based on its contribution to the resiliency, redundancy, and representation of the entity.”¹⁷ This interpretation effectively allowed for a species at risk in a SPR to be listed under the ESA *only* in that SPR, not its entire range.¹⁸ Subsequently, Plaintiffs filed a petition to list the pygmy owl as an endangered or threatened species in the Sonoran Desert Ecoregion.¹⁹

7. *Id.* at *8-9.

8. *Id.*

9. *Id.* at *1 (citing 16 U.S.C. §§ 1532(6), (20) (2017)).

10. *Id.* (citing 16 U.S.C. § 1532(6)).

11. *Id.* (citing 16 U.S.C. § 1532(20)).

12. *Id.* at *3.

13. *Id.*

14. *Id.* (citing *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141 (9th Cir. 2001)).

15. *Id.* at *3-6.

16. *Id.*

17. *Id.*

18. *Id.* at *4-5.

19. *Id.* at *4.

In response, the Service issued a draft 12-month finding on the pygmy owl (“2009 Draft Pygmy Owl Rule”) in July 2009, concluding the “listing of the pygmy owl within a significant portion of its range, namely the Sonoran Desert Ecoregion, was warranted under the ESA”²⁰ The Service reached this conclusion by applying the SPR interpretation from the 2007 Draft Guidance and adding language to its definition of SPR that stated “such that [the portion of range] los[t] ‘would result in a decrease in the ability to conserve the species.’”²¹

However, in 2011, as a result of two 2010 court decisions that rejected the 2007 M-Opinion’s conclusion that an imperiled species should only be listed in the SPR where it faces threats, the Service developed a new SPR draft interpretation.²² In December 2011, the Service published a notice of its Draft SPR Policy (“2011 Draft SPR Policy”), which concluded that a portion of range is only significant “if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction.”²³ The Service declared that until the 2011 Draft SPR Policy was finalized and published, it would be “nonbinding guidance in making individual listing determinations”²⁴

Two months prior to the publication of the December 2011 Draft SPR Policy, the Service issued its 2011 Final Pygmy Owl Rule, concluding that listing the species was unwarranted.²⁵ The Service relied on the unpublished 2011 Draft SPR Policy, not the 2007 Draft Guidance interpretation used in the 2009 Draft Pygmy Owl Rule, which determined that listing was warranted.²⁶ In the 2011 Final Pygmy Owl Rule, the Service acknowledged that the Sonoran Desert Ecoregion “represents an important portion” of range; however, they concluded since the pygmy owl could survive elsewhere, the ecoregion was not an SPR.²⁷ In July 2014, the Service published its 2014 Final SPR Policy.²⁸ The 2014 Final SPR Policy established that a portion of range is significant if “the species is not currently endangered or threatened throughout [all] its range, but the portion’s contribution. . . is so important that, without the [portions] members. . . the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.”²⁹

III. ANALYSIS

20. *Id.*

21. *Id.*

22. *Id.* at *5 (citing *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010); *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253, 2010 WL 3895682 (D. Ariz. Sept. 30, 2010)).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at *6.

29. *Id.*

The court reviewed the Plaintiff's challenges under the APA's "arbitrary and capricious" standard.³⁰ Because the SPR language is not defined in the ESA, it is ambiguous.³¹ Therefore, the court must "determine the degree of deference owed to the Service's interpretation of the SPR language."³²

Relying on *Chervron U.S.A., Inc. v. Natural Resources Defense Council*, the court applied *Chevron* deference to the Service's SPR language interpretation.³³ Under *Chevron*, an agency's interpretation is valid if it is "reasonable."³⁴ An agency's interpretation may be unreasonable if it "'ignores the plain language of the statute,' renders statutory language 'superfluous,' or 'frustrate[s] the policy Congress sought to implement' in the statute."³⁵

Following Ninth Circuit precedent, the court found that the Service's 2014 Final SPR Policy was unreasonable, and therefore the policy and the 2011 Final Pygmy Owl Rule violated the APA and the ESA.³⁶

A. *The Challenge to the Final 2014 SPR Policy*

Plaintiffs argued the Service's interpretation of the ESA's SPR language failed to provide "an independent basis for listing [a species]," as required by the ESA.³⁷ The court agreed, finding that the Service's 2014 Final SPR Policy was impermissible because it rendered "key statutory language meaningless and redundant [to] achieve a goal at odds with the purposes of the statute."³⁸

The court found that, under the Service's 2014 Final SPR Policy, three conditions needed to be satisfied for a portion of range to qualify as an SPR:

"(1) the species is neither endangered nor threatened throughout all of its range, (2) the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be endangered or threatened

30. *Id.*

31. *Id.* at *6.

32. *Id.* at *3, *6 (citing *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1141 (9th Cir. 2007)).

33. *Id.* at *3, 6 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

34. *Id.* at *3 (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 586-87 (2000)).

35. *Id.* (quoting *Pac. Nw. Generating Coop v. Dep't of Energy*, 580 F.3d 792, 806, 812 (9th Cir. 2009)).

36. *Id.* at *6-8.

37. *Id.* at *6.

38. *Id.* at *8 (citing *Natural Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 881 (9th Cir. 2005)).

throughout all of its range, and (3) the species is endangered or threatened in that portion of its range.”³⁹

The court concluded it was impossible to satisfy all three conditions simultaneously because “whenever conditions (2) and (3) [were] satisfied, a species should properly be determined to be endangered or threatened throughout all of its range.”⁴⁰ Further, the court opined that “if a portion of a species’ range [was] so vital that its loss would render the entire species endangered or threatened . . . ,” then “[t]hreats . . . in such a vital portion of its range should necessarily be imputed to the species overall.”⁴¹

The court found the 2014 Final SPR Policy interpretation resulted in giving “as little substantive effect as possible to the SPR language of the ESA [to] avoid providing range-wide protection to a species based on threats in a portion of the species’ range.” Therefore, the court ruled that the 2014 Final SPR Policy violated the ESA and the APA.⁴²

B. The Challenge to the 2011 Final Pygmy Owl Rule

Plaintiffs also argued that the Service violated the APA in its 2011 Final Pygmy Owl Rule because it applied the 2011 Draft SPR Policy instead of the 2014 Final SPR Policy.⁴³ On this issue, the court found that determining deference was irrelevant since the “SPR interpretation set forth in [the 2011 Draft SPR Policy] suffer[ed] from the same fundamental defect as the SPR interpretation set forth in the [2014] Final SPR Policy.”⁴⁴ Therefore, the court held that because the Service applied an impermissible interpretation of the SPR language to conclude that the Sonoran Desert Ecoregion was not a “significant portion of the pygmy owl’s . . . range,” the 2011 Final Pygmy Owl Rule violated the APA and ESA.⁴⁵

IV. CONCLUSION

Center for Biological Diversity v. Jewell is a major decision, not only for the pygmy owl, but for all species that are endangered or threatened in significant portions of their range. Had the court found the Service’s 2014 Final SPR Policy valid, it would be difficult to achieve range-wide ESA protections for a species imperiled in vital portions of their range, if threats did not lead to a risk of extinction to the entire species. Now, it is likely that if a species is imperiled in an SPR, the species will be eligible for ESA protection throughout its entire range, not only the SPR area. The court’s holding is an important decision in the ongoing

39. *Id.* at *7.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at *9.

debate over a proper SPR definition, and will provide persuasive precedent in anticipated future disputes.