



En Banc Ninth Circuit Holds ESA Consultation Requirement Applies to Renewal of Long-Term Water Contracts

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In a unanimous decision, eleven active judges on the United States Court of Appeals for the Ninth Circuit held that the duty to consult under section 7(a)(2) of the Endangered Species Act (ESA) when a federal agency action may affect a listed species or designated critical habitat of such species applies to the decision of the Bureau of Reclamation (Bureau) to renew long-term contracts to provide water to non-Federal parties. The decision, which reversed prior decisions by a three-judge Ninth Circuit panel and federal district court, effectively requires the Bureau to consult with the U.S. Fish and Wildlife Service (Service) regarding the effects of contract renewals on the threatened delta smelt and to renegotiate the contracts following such consultation.

The decision has potentially far-reaching implications in California because it suggests that even those who hold long-term contracts with the United States for the provision of water or senior water rights under state law must comply with the Endangered Species Act.

The Bureau operates the Central Valley Project, which consists of a large-scale series of reservoirs, dams, canals, and associated waterworks, in California. In the 1960s, the Bureau entered into numerous long-term (40-year) contracts to provide water to public and private parties, including certain parties with senior water rights under California law. In the early 2000s, the Bureau began renewing the contracts. At that time, the Bureau sought and obtained concurrence from the Service with its determination that renewing the contracts was not likely to adversely affect the delta smelt. In 2008, environmental plaintiffs challenged the validity of certain renewed contracts arguing the Bureau failed to adequately consult under section 7(a)(2) of the ESA.

The district court held plaintiffs lack standing to challenge certain contracts (referred to as the Delta Mendota Canal (or DMC) Contracts) and held that the consultation requirement does not apply with respect to other contracts (referred to as the Settlement Contracts). In a 2-1 decision, a three-judge panel of the Ninth Circuit affirmed the district court's decision. The en banc court reversed.

Whereas the lower court held that the DMC Contracts include a provision that provides the fullest possible protection to delta smelt so that plaintiffs cannot demonstrate injury necessary to establish standing, the Ninth Circuit disagreed. The en banc court held that the pertinent contractual provision is permissive – allowing the Bureau to take action to meet applicable legal obligations – but does not require the Bureau to act to protect delta smelt. The court went on to state a number of ways the DMC Contracts could have been structured to benefit delta smelt.

With respect to the Settlement Contractors, the lower court held the Bureau's discretion is substantially constrained. Absent discretion, an action agency need not consult under section 7(a)(2) because it lacks the authority to take action to benefit listed species. But the court of appeals held that the Settlement Contracts do not strip the Bureau of all discretion to benefit the delta smelt. The court noted that the original contracts held that "renewals *may* be made..." Even assuming that the Bureau has no discretion to renew and cannot renegotiate with respect to the quantities and allocation of water, the en banc court held that the Bureau could renegotiate other contract terms, for example, regarding pricing or the timing of deliveries.