

Natural Resources Defense Council v. Jewell, U.S. Court of Appeals for the Ninth Circuit, 4/16/2014 decision

- Concerns renewal of Sacramento River Settlement Contracts, a sub-group of U.S. Bureau of Reclamation (USBR) Central Valley Project (CVP) contracts, the endangered Delta smelt, and ESA Sec. 7 agency consultation with the U.S. Fish and Wildlife Service (USFWS)

Case has been presented before the DSC Board previously

Different from last month's Consolidated Delta Smelt case decision (also from 9th Circuit)

- Concerned the nature of the 2008 BiOp itself, its adequacy and best available science
 - o Not the renewal of water contracts

Procedural History:

- 2008: Plaintiffs filed a Third Amended Complaint in on-going litigation begun in 2004
- 2009: decision by U.S. District Court for the Eastern District of California (Judge Wanger)
 - o Affirmed USBR's position: Sec. 7 consultation not triggered due to inadequate discretion
 - o NRDC appealed
- 2012: 9th Circuit panel affirmed Wanger's decision; NRDC moved for an en banc hearing
- Heard en banc, by the full 11-judge panel of the 9th Circuit in Sept. 2013
 - o Reversed Wanger's decision in unanimous 11-0 decision
 - o Now on remand back to U.S. District Court

Factual History:

- Sacramento River Settlement Contractors were holders of senior water rights to the Sacramento River prior to the construction of the USBR's Central Valley Project and Shasta Dam
- 1964: In exchange for the pre-existing water rights, USBR granted the parties long-term contracts to CVP water
 - o 100% of contracted allotment to be delivered
 - o 75% of allotment to be delivered in a critical dry year, as determined by inflow into Lake Shasta (less than 3.2 million AF)
 - o 2.2 million AF of water
 - o Operational stability of CVP
- Delta smelt: 1993- threatened listing; 2010- endangered listing
- 2004: USBR prepared biological assessments that concluded that renewal of the Contracts would not adversely affect the Delta smelt
 - o Requested additional information from USFWS
 - o FWS responded with letters in which it concurred with USBR's determination that renewing the Contracts was not likely to adversely affect the Delta smelt
 - Reasoning borrowed from 2004 and 2005 Opinions that were subsequently invalidated
- 2004-2005: Contracts renewed

- 2008 FWS Biological Opinion: Bureau's Operations and Criteria Plan (OCAP) would jeopardize the Delta smelt and adversely modify its critical habitat

Issue:

- Whether USBR was required to engage in ESA consultation with USFWS about the Delta smelt in renewing the Sacramento River Settlement Contracts?

Holding:

- Yes, because USBR retained "some discretion" to act in a manner that would benefit the Delta smelt.
- Technical issues of mootness and standing
 - o Issuance of 2008 BiOp that invalidated the 2005 BiOp did not render the action moot

Reasoning:

- Technical issues: Complaint is not moot and NRDC had standing
 - o 2008 BiOp does not provide Plaintiffs with the relief they seek
 - Does not represent a consultation with USFWS because *USBR never re-consulted with USFWS* regarding effects of renewing contracts or incorporation of protections proposed in 2008 BiOp
 - o Plaintiffs seek an injunction requiring re-consultation with USFWS and renegotiation of challenged contracts based on USFWS' assessment
 - That relief still available by a court
- Discretion:
 - o While there is no duty to consult for actions that an agency is *required* to undertake by statute, Sec. 7(a)(2) consultation is required so long as the federal agency has "some discretion" to take action for the benefit of a protected species.
 - o District Court said Article 9(a) of the original Settlement Contracts "substantially constrained" USBR's discretion to negotiate renewals
 - Wrong standard
 - Whether an agency must consult does not turn on the *degree of discretion*, but whether there is *any discretion* to act
 - Article 9 applies only to the quantity and allocation of water
 - Not renegotiation of contractual terms that do not directly concern water quantity and allocation
 - Not all USBR discretion stripped
 - To better protect smelt, revise contracts' pricing scheme or delivery schedule
 - o Article 2: "renewals *may* be made for successive periods of 40 years"