No. 09-17661

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL et al.,
Plaintiffs-Appellants,

v.

KENNETH SALAZAR, et al.,
Defendants-Appellees,

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, et al.,
Defendants-Intervenors-Appellees,

ANDERSON-COTTONWOOD IRRIGATION DISTRICT, et al.,
Defendants-Appellees,

GLENN-COLUSA IRRIGATION DISTRICT, et al.,
Defendant-Intervenors-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Honorable Oliver W. Wanger, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-INTERVENORS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation (PLF), a nonprofit corporation organized under the laws of California, hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, public interest organization that provides a voice in the courts for Americans who believe in limited government, private property rights, and individual freedom. Thousands of individuals, organizations, and associations support PLF's efforts nationwide.

This litigation is one case among many concerning the delta smelt, a threatened species under the Endangered Species Act. The delta smelt species has caused thousands of Californians significant hardship in recent years in the form of reduced water deliveries. PLF believes that delta smelt-based water cutbacks are an example of the harsh, unintended consequences that accompany an inflexible and improperly expansive approach toward the Endangered Species Act.

These consequences will very likely be worsened if Plaintiffs-Appellants Natural Resources Defense Council, *et al*. (NRDC), prevail in their appeal. But, for several reasons, the district correctly declined to apply Section 7 of the Endangered Species Act to the renewal of water service contracts and water rights settlement contracts for water districts and agencies throughout California.

On appeal, NRDC seeks to overturn the district court's judgment by articulating an incorrect standard as to when Section 7 applies. Furthermore, NRDC ignores the limited role the Bureau of Reclamation plays in renewing contracts and providing water supplies to Californians and others under the Reclamation Act.

For the reasons explained below, however, NRDC's approach should be rejected, and the district court's judgment should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 7 of the Endangered Species Act requires federal agencies to consult with the United States Fish and Wildlife Service or the National Marine Fisheries Service in order to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). The Section 7 consultation requirement, however, "come[s] into play only when an action results from the exercise of agency discretion." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (upholding 50 C.F.R. § 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.")).

Whether an agency has discretion to take a particular action must be determined by examining the legal authority for the agency action. Where agency action is mandated, the agency must complete the action, and Section 7 consultation is inappropriate. *See Home Builders*, 551 U.S. at 666 (Section 7 consultation not required for "mandatory agency directives").

Yet Plaintiffs-Appellants NRDC, *et al.*, would have this Court impermissibly look beyond an action agency's underlying authority in determining whether Section 7 consultation is necessary. According to NRDC, "whether an agency must consult does not turn on the degree of discretion the agency exercises regarding the action in question, but whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat." Plaintiffs-Appellants' Opening Brief at 46.

To the contrary, an agency's Section 7 consultation obligation (or lack thereof) is a function only of the legal authority for the agency's action–the protection of endangered species plays no role in the threshold issue of whether the agency action is mandatory or discretionary. Moreover, the United States does not own the water that is the subject of the water contracts at issue, and thus the Bureau of Reclamation lacks discretionary authority over this water by means of choosing not to renew the water supply contracts.

ARGUMENT

I

AN AGENCY ACTION'S EFFECT ON SPECIES HAS NO BEARING ON WHETHER THE AGENCY HAS DISCRETION TO TAKE THAT ACTION

In determining whether the Bureau of Reclamation has discretion to renew the contracts at issue in this case, this Court must avoid considering the renewal's effects

on the delta smelt. This is because an agency action's effects on endangered species are relevant only if, as a threshold matter, the action is not mandatory.

The Supreme Court's Endangered Species Act jurisprudence demonstrates that whether an agency has discretion to complete an action is to be determined solely by the legal authority for the action. For example, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*TVA*), the Court considered the applicability of Section 7 to TVA's construction of a dam by narrowly examining the circumstances which gave rise to the dam's construction. *See TVA*, 437 U.S. at 189-93. As the Court later explained, the construction of the dam was a discretionary action not because of the construction's effects on the endangered snail darter, but because "Congress did not *mandate* that the TVA put the dam into operation." *Home Builders*, 551 U.S. at 670 (discussing *TVA*, 437 U.S. at 189-93). Even had the Secretary of the Interior not declared the snail darter an endangered species, TVA would still not have been obligated to construct the dam. *See Home Builders*, 551 U.S. at 670 n.9. There was discretion to complete the dam based on the fact that Congress "simply did not *require* the agency to use any of the generally appropriated funds to complete the Tellico Dam project." *Id.* (citing *TVA*, 437 U.S. at 189-93).

Similarly, the Court in *Home Builders* relied only on the Environmental Protection Agency's Clean Water Act directives in holding that Section 7 did not apply to the agency's transfer of Clean Water Act permitting authority to the State of

Arizona, because the agency did not have discretion to transfer the statute's permitting authority under Section 402(b) of the Act. *Home Builders*, 551 U.S. at 663-64 (analyzing 33 U.S.C. § 1342(b)). Recognizing that "[a]gency discretion presumes that an agency can exercise 'judgment' in connection with a particular action," the Court concluded that the Environmental Protection Agency was powerless to judge whether Clean Water Act authority *should* be transferred once the statutory criteria of Section 402(b) had been satisfied. *Home Builders*, 551 U.S. at 668 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)). Accordingly, because Arizona had satisfied Section 402(b)'s statutory criteria, the agency was required to transfer Clean Water Act permitting authority to Arizona and was precluded from "consider[ing] [under Section 7] the protection of threatened or endangered species as an end in itself when evaluating [the] transfer application." *Home Builders*, 551 U.S. at 671. In fact, the Court itself paid little attention to the transfer's effect on the cactus ferruginous pygmy-owl and the Pima pineapple cactus, mentioning the endangered species at issue only once in the opinion. *See id*. at 653.

NRDC, however, suggests that protection of endangered species is significant to the threshold issue of whether an agency action is mandatory or discretionary because the ESA "requires agencies to 'afford[ ] endangered species the 'highest of priorities.'" Plaintiffs-Appellants' Opening Brief at 47 (quoting *Washington Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1032 (9th Cir. 2005) (quoting *TVA*, 437

U.S. at 174)). However, *Home Builders* demonstrates that *TVA*'s suggestion that "endangered species [are] to be afforded the highest of priorities," 437 U.S. at 174, is not a rule of general applicability. *See Home Builders*, 551 U.S. at 669-70. If this language from *TVA* were applicable to whether an agency action is mandatory or discretionary, the question presented in *Home Builders* should have been an easy one, and the Court should have required the Environmental Protection Agency to engage in Section 7 consultation in order to afford endangered species "the highest of priorities." Yet this did not happen, with only Justice Breyer pointing to this language in dissent in *Home Builders*. *See Home Builders*, 551 U.S. at 699 (Breyer, J., dissenting) ("[W]e have held that the Endangered Species Act changed the regulatory landscape, 'indicat[ing] beyond doubt that Congress intended endangered species to be afforded the *highest* of priorities.' ") (quoting *TVA*, 437 U.S. at 174).

Thus, whether an agency action is mandatory or discretionary is not governed by *TVA*'s "highest of priorities" language. Instead, as the above cases demonstrate, this inquiry must be determined independent of the action's effects on endangered species. Only when the agency action is discretionary must an agency examine whether "the discretionary control retained by the federal agency [has] the ability to inure to the benefit of a protected species." *Turtle Island Restoration Network v.*

NMFS, 340 F.3d 969, 974 (9th Cir. 2003) (citing *EPIC v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001)).

NRDC's standard for Section 7 consultation, however, ignores the fundamental first step of this two-part inquiry by arguing that the "degree of discretion the agency exercises regarding the action in question" is not to be considered. *See* Plaintiffs-Appellants' Opening Brief at 46. Therefore, this Court should not adopt the standard for Section 7 consultation put forth by NRDC.

II

THE BUREAU OF RECLAMATION'S DISCRETION TO RENEW CENTRAL VALLEY PROJECT WATER SUPPLY CONTRACTS IS CONSTRAINED BECAUSE THE UNITED STATES DOES NOT OWN THE WATER STORED AND PROVIDED BY THE PROJECT

When considering whether the Bureau of Reclamation has discretion to renew the water delivery contracts at issue in this case, this Court should be mindful of who owns the water rights that are the subject of the contracts. After all, the principal benefit of property ownership is the significant discretion to control the property, including entering into contracts to make effective use of the property. *See* William Blackstone, 2 *Commentaries* *447 ("Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner." (emphasis omitted)).

In reclamation cases such as this, the user owns the water rights and not the federal government. The Supreme Court made this clear in *Ickes v. Fox*, 300 U.S. 82 (1937), which concerned whether the United States was an indispensable party in a lawsuit brought by land owners within a reclamation project against the Secretary of Interior. The land owners sought to enjoin the Secretary of Interior and require the Secretary to comply with its water delivery obligations under the Reclamation Act, 32 Stat. 388. *See id*. at 87-97.

While the United States claimed that it was an indispensable party because it was "the owner of the water-rights," *id.* at. 96, the Court held otherwise:

> Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works.

Id. at 94-95. The Court continued by noting that the government, rather than being the owner of reclamation water and having the discretion to deliver the water wherever it pleased, was instead "simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." *Id*. at 95. The actual owners of the reclamation water, the Court concluded, were the land

owners and the water districts they served. *See id*. ("As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights* appurtenant thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.").

Since the *Ickes* decision, the principle that the federal government does not own the water it manages in its operation of reclamation projects has been reaffirmed by the Supreme Court and is now a fundamental rule of reclamation law. *See*, *e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 613-15 (1945) (quoting *Ickes*, 300 U.S. at 94-95)), and *California v. United States*, 438 U.S. 645 (1978) (same). It is evident, then, that the Bureau of Reclamation's discretion to renew water delivery contracts is substantially constrained by its status as a mere "custodian" of the water it manages. *See Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 58 (D.C. Cir. 2003). Central Valley Project water is property of the water districts and the water users they serve, subject to the requirements of state law. *See California v. United States*, 438 U.S. at 664 (Reclamation Act "provided that state water law would control in the appropriation and later distribution of the water."). But the Bureau of Reclamation cannot effectively become the owner of this water by choosing not to renew water supply contracts with these districts. *Cf. Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1360 (Fed. Cir. 2009) (holding United States liable for breach of contract for failure to deliver water to water districts and municipal water users and

noting that "[t]he issue here is not the fundamentals of rights vis-a-vis the United States and the State of California regarding its water, but the obligations, once the water is under the control of the United States, between Reclamation and the Districts pursuant to their contracts").

Stated another way, since the United States does not own the water or water rights it provides by way of federal reclamation contracts, it follows that the Bureau of Reclamation lacks discretion to not renew such contracts and limit the amount of water to those who in fact own the water or water rights. The district court's opinion is in accord with this narrow (but important) role the Bureau of Reclamation plays in the distribution of water through its operation of the Central Valley Project. *See Natural Res. Def. Council v. Kempthorne*, 621 F. Supp. 2d 954, 976 (E.D. Cal. 2009) ("Under certain circumstances, a prior agreement, permit, or management decision that predates the listing of a species may constrain a federal agency's ability to take action on behalf of that listed species, absolving the agency from the requirement of consultation.") (citing *Defenders of Wildlife*, 257 F. Supp. 2d at 69) (other citations omitted). Accordingly, the lower court decision should be affirmed.

CONCLUSION

Contrary to NRDC's position, whether a federal agency must engage in Section 7 consultation under the Endangered Species Act *does* "turn on the degree of discretion the agency exercises regarding the action in question." Plaintiffs-

Appellants' Opening Brief at 46. Further, as the water provided by the Bureau of Reclamation under the water supply contracts at issue is not owned by the United States, the agency lacks discretion to effectively take ownership of the water by choosing not to renew the water supply contracts.

The district court's judgment should be affirmed.

DATED: December 15, 2010.

Respectfully submitted,

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