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Natural Res. Def. Council v. Jewell, 749 F.3d 776 (9th Cir. 2014)

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Natural Res. Def. Council v. Jewell, 749 F.3d 776 (9th Cir. 2014)

it was “close to the functional equivalent” of a quiet title action.

The court turned next to Patent Owners’ three counterarguments. Patent Owners first alleged that *Coeur d’Alene* was no longer good law, and that the court should have applied the Supreme Court’s recent “straightforward inquiry” analysis in *Verizon Maryland, Inc. v. Public Service Commission of Maryland* to determine whether the *Ex parte Young* doctrine exempted their action from the Eleventh Amendment prohibition. In *Verizon*, the Court directed lower courts to conduct a direct assessment of whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. While the court acknowledged the tension between the “straightforward inquiry” and the holding in *Coeur d’Alene*, it held that *Coeur d’Alene* remained binding. In so concluding, the court noted that *Verizon* did not overturn *Coeur d’Alene* and that a more recent Supreme Court decision affirmed *Coeur d’Alene*’s core holding on the issue.

Patent Owners next alleged that their case was the exact opposite factual situation of *Coeur d’Alene*. Patent Owners argued that the Tribe in *Coeur d’Alene* sought to divest Idaho’s longstanding title, whereas Alaska sought to divest the Patent Owners’ alleged longstanding title in this case. The court rejected Patent Owners’ argument and held that the *Coeur d’Alene* decision relied on the principle that submerged lands beneath navigable waters are tied in a unique way to sovereignty, regardless of the length of the state’s claim to title.

Lastly, Patent Owners alleged that their case differed from *Coeur d’Alene* because the Tribe had independent sovereign authority such that its ownership of the land would effectively diminish Idaho’s regulatory authority. Patent Owners argued that, because they lacked independent sovereign authority, their ownership of the streambeds in question would not threaten Alaska’s regulatory power. However, the court held that the identity of the Tribe was not dispositive in *Coeur d’Alene*, as the Supreme Court in that case had already made its decision when it raised the further impacts to state sovereignty. In so concluding, the court noted that, like the land in *Coeur d’Alene*, the streambeds in this case had a unique legal status and state ownership was necessary for sovereignty.

Accordingly, the court affirmed the district court’s dismissal of Patent Owners’ claim.

Daphne Hamilton

Natural Res. Def. Council v. Jewell, 749 F.3d 776 (9th Cir. 2014) (holding that, because the Bureau of Reclamation had some discretion in renewing water contracts in a way that would benefit the threatened delta smelt, section 7(a)(2) of the Endangered Species Act required the agency to consult with the Fish and Wildlife Service prior to renewing the contracts).

In 2008 the Natural Resources Defense Council and the Metropolitan Water District of Southern California (collectively, “environmental groups” or “groups”) filed a complaint in the United States District Court for the Eastern District of California (“district court”) alleging that the Bureau of Reclamation (“Bureau”) violated section 7(a)(2) of the Endangered Species Act (“ESA”). The environmental groups argued that the Bureau failed to consult with the Fish and Wildlife Service (“FWS”) regarding the impact of various water contracts on the delta smelt, a threatened species living in the California River

Delta. The environmental groups asked the district court to invalidate the forty-one contracts they deemed most harmful to the delta smelt.

The Bureau manages California's Central Valley Project ("Project"), which diverts water from the California River Delta through a number of long-term contracts dating from the 1960s. In 2004 two sets of these contracts, the Bureau's Delta-Mendota Canal Unit Water Service Contracts ("DMC Contracts") and Sacramento River Settlement Contracts ("Settlement Contracts") (collectively, "the Contracts"), had expired or were nearing expiration. In compliance with section 7(a)(2) of the ESA, the Bureau consulted with the FWS regarding its proposed Operations and Criteria Plan ("Plan") to renew the Contracts. In 2004 and 2005 the FWS issued separate biological opinions finding that the Plan would not jeopardize the delta smelt. The district court later invalidated both opinions, and the Bureau did not appeal.

The Bureau prepared its own biological assessment during 2004 and 2005. It also concluded that renewing the Contracts would not adversely affect the delta smelt. The Bureau consulted with the FWS through a series of letters, and the FWS concurred with the Bureau's conclusion. Based on the FWS's concurrence, the Bureau renewed 159 of the Contracts. However, in 2008 the FWS issued a revised biological opinion finding that the Plan would jeopardize the delta smelt and adversely modify its critical habitat. Thereafter, the environmental groups filed a complaint challenging the renewed Contracts' validity.

The environmental groups requested the district court to invalidate the forty-one renewed Contracts they deemed most harmful to the delta smelt. The district court found that the environmental groups did not have standing to challenge the DMC Contracts and that the ESA's consultation provision did not apply to the Settlement Contracts. On appeal, the United States Court of Appeals for the Ninth Circuit ("court") considered (i) whether the FWS's 2008 revised biological opinion mooted the case, (ii) whether the environmental groups had standing to challenge the DMC Contracts, and (iii) whether section 7(a)(2) of the ESA required the Bureau to consult with the FWS.

The court first considered whether the 2008 biological opinion mooted the environmental groups' suit. The Bureau argued that the FWS letter correspondence led to the 2008 revised biological opinion, and that the Bureau had therefore fulfilled its consultation obligation. The court held that the 2008 opinion did not moot the appeal because the environmental groups' requested relief—requiring the Bureau to consult the FWS and renegotiate the challenged Contracts based on the FWS assessment—was still available. Significantly, the 2008 revised biological opinion only considered the Plan's general effects, and the letters did not represent a consultation with the FWS concerning the impact of the renewed Contracts themselves. Accordingly, the court held that the environmental groups' claims were not moot.

Second, the court determined that the environmental groups had procedural standing to challenge the DMC Contracts. The district court held that the environmental groups lacked standing because any injury to the delta smelt would not have been traceable to the Bureau's contract renewal process. The district court reasoned that the Bureau could not have negotiated stronger protections for the delta smelt because the DMC Contracts already contained a "shortage provision" that exempted the Bureau from liability for contractual provisions it might violate when acting to meet legal obligations like those in

section 7(a)(2) of the ESA. This provision, the district court found, severed the causal link between the environmental groups' injury and the Bureau's action. The court rejected the district court's reasoning. Under section 7(a)(2) of the ESA, the environmental groups only needed to show that prior consultation between the Bureau and the FWS could have led to DMC Contracts that better protected the groups' interest in the delta smelt. The court held that the shortage provision did not protect the delta smelt to the greatest extent possible because it did not require the Bureau to take protective actions. The court also noted that the shortage provision only concerned the quantity of water made available under the DMC Contracts, and that the Bureau could have contracted to benefit the delta smelt in other ways.

Finally, the court evaluated whether the ESA required the Bureau to consult with the FWS before it renewed the Settlement Contracts. Under section 7(a)(2) of the ESA, a federal agency engaging in a discretionary action must consult with the FWS or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service before taking an action that could affect an endangered or threatened species. The district court found that the consultation provisions in section 7(a)(2) did not apply because provisions in the Settlement Contracts prohibited renegotiating water quantity and allocation during renewals, substantially constraining the Bureau's discretion. However, the court found this rationale unconvincing. The court reasoned that the ESA consultation provision applies wherever an agency retains "some discretion" in taking action to protect a listed species. Here, the court determined that the Bureau had some discretion to aid the delta smelt: nothing required the Bureau to renew the Settlement Contracts, and even if the Bureau was required to renew the Settlement Contracts, it retained discretion to negotiate terms other than water quantity and allocation. The court pointed specifically to the Bureau's ability to renegotiate the Contracts' pricing scheme or the timing of water distribution.

The court therefore held that the Bureau was required to consult with the FWS prior to renewing its Contracts, and accordingly reversed and remanded the district court's decision.

Liz Kutch