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Ninth Circuit Says Critical Habitat Designation Is Not Mandatory For Species Listed Before 1982

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Center for Biological Diversity v. U.S. Fish and Wildlife Service

The Ninth Circuit Court of Appeals recently held that the designation of critical habitat for a species listed under the Endangered Species Act (ESA) prior to the 1982 amendments is within the discretion of the United States Fish and Wildlife Service and subject to arbitrary and capricious review under the Administrative Procedures Act. The opinion also suggests that the revision of critical habitat for a species for which critical habitat has already been designated is discretionary as well. The court's decision has significant implications for the management of and critical habitat requirements for the approximately 272 species listed in the United States before the 1982 critical habitat amendments to the ESA.

At issue was the Service's decision not to designate critical habitat for the unarmored threespine stickleback, a small freshwater fish listed as endangered in 1970. In 1980, the Service had proposed to designate three stream zones in California as critical habitat for the stickleback, but the habitat was never designated. In 2002, after the Center for Biological Diversity sued to force a designation, the Service made its final determination that critical habitat for the stickleback should not be designated. The Center for Biological Diversity challenged this decision, claiming that designation of critical habitat was mandated by the ESA.

A unanimous panel held that the ESA does not mandate the designation of critical habitat for species listed prior to the 1982 critical habitat amendments, which added this provision to the ESA:

> The [Service] . . . to the maximum extent prudent and determinable . . . shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.

16 U.S.C. § 1533(a)(3)(A). In the amending legislation, Congress clarified that for species listed before the amendment was enacted, the "regulations proposing revisions to critical habitat," rather than those "proposing the designation of critical habitat," should apply. Pub. L. No. 97-304, 96 Stat. 1411 § 2(b)(2) (1982).

The Ninth Circuit therefore concluded that the mandatory designation duty did not apply to the stickleback. Rather, the Service's decision to designate critical habitat was governed by the provision that the Service "may" revise critical habitat designations "from time-to-time . . . as appropriate." 16 U.S.C. § 1533(a)(3)(A). Thus, the designation of critical habitat for a pre-1982 listed species is discretionary with the Service. The reasoning applied by the Court further suggests that a Service decision to revise previously designated critical habitat is also within the agency's discretion. Applying the arbitrary and capricious standard of review to the Service's discretionary stickleback decision, the Ninth Circuit ruled that the Service had considered the relevant factors and made a reasoned decision not to designate critical habitat.

The Ninth Circuit's decision breaks new ground in the critical habitat designation duty line of cases. Previously, courts had almost uniformly held that the designation of critical habitat within the twelve-month statutory period following a species listing is mandated by the ESA and have ordered such designations. See, e.g., *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186, 1192 (10th Cir. 1999). But after this Ninth Circuit decision, those advocating for the designation of critical habitat may meet with less success in directing Service resources to the designation of critical habitat for pre-1982 listed species.

In *Center for Biological Diversity*, the Ninth Circuit also recognized the practical limitations on the Service's responsibility in issuing an Incidental Take Statement (ITS). ESA implementing regulations require that an ITS be issued only for "otherwise lawful activities" meeting all State and federal legal requirements. 50 C.F.R. § 402.02. The Center for Biological Diversity argued that this requirement placed an affirmative duty on the Service to ensure compliance by the action agency with all State and federal laws. Rejecting this argument, the Court held that the Service need not ensure compliance, although an ITS does not relieve the action agency of its independent obligation to comply with State and federal laws. The regulation does not require actual compliance with other laws, and the Service has never acted to ensure compliance with State and federal law before issuing an ITS.
