


7-8-2016

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### Recommended Citation

Alexandra Shalom, *Protecting the Delta Smelt: Environmental Organizations Have Standing to Enforce the Endangered Species Act's Consultation Requirement*, 43 B.C. Env'tl. Aff. L. Rev. E. Supp. 55 (2016), <http://lawdigitalcommons.bc.edu/ealr/vol43/iss3/6>

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# PROTECTING THE DELTA SMELT: ENVIRONMENTAL ORGANIZATIONS HAVE STANDING TO ENFORCE THE ENDANGERED SPECIES ACT'S CONSULTATION REQUIREMENT

ALEXANDRA SHALOM\*

**Abstract:** In January 1993, the U.S. Fish & Wild Life Service (“FWS”) added the delta smelt, a small, silvery blue fish, to the Endangered Species Act’s (“ESA”) list of threatened wildlife. Species on the list are entitled to the ESA’s protections. In *Natural Resource Defense Council v. Jewell*, the Natural Resource Defense Council (“NRDC”) brought an action against the Bureau of Reclamation (the “Bureau”) for violating Section 7(a)(2) of the ESA, the consultation requirement, to protect the delta smelt. The consultation provision required the Bureau to consult with the FWS before it renewed contracts that controlled water rights in the delta smelt’s habitat. To use the ESA’s citizen suit provision, a plaintiff must establish Article III standing. The NRDC was able to satisfy all three elements of Article III standing: injury in fact, causation, and available redress. The United States Court of Appeals for the Ninth Circuit found that a non-governmental organization could have Article III standing to challenge a federal agency’s violation of the ESA consultation requirement. This Comment argues that the Ninth Circuit properly reasoned that redress could be available before a listed species suffers actual harm, thereby providing species with protections guaranteed by the ESA.

## INTRODUCTION

The delta smelt is a small, silvery blue fish that is approximately three to four inches in length and lives off of the coast of California.<sup>1</sup> The lifespan of the delta smelt is one year, which makes the small fish a useful tool for measuring local ecological problems caused by artificial water systems.<sup>2</sup> In the past, the high population of delta smelt enabled it to be ex-

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

<sup>1</sup> Jane Kay, *Delta Smelt, Icon of California Water Wars, Is Almost Extinct*, NAT’L GEOGRAPHIC (Apr. 3, 2015), <http://news.nationalgeographic.com/2015/04/150403-smelt-california-bay-delta-extinction-endangered-species-drought-fish/> [<http://perma.cc/D6QR-WPUC>].

<sup>2</sup> *Id.*; *Saving the Delta Smelt*, CTR. FOR BIOLOGICAL DIVERSITY, [http://www.biologicaldiversity.org/species/fish/Delta\\_smelt/](http://www.biologicaldiversity.org/species/fish/Delta_smelt/) [<http://perma.cc/7QTQ-JXTV>].

ploited commercially.<sup>3</sup> Currently, however, the delta smelt is in increasing danger of extinction.<sup>4</sup> The delta smelt resides in rivers, which supply water for the majority of people living in California.<sup>5</sup> Droughts in the state have depleted the state's water resources, leading to a decline in the population of the species.<sup>6</sup> In January 1993, the U.S. Fish & Wildlife Service ("FWS"), a federal agency in charge of administering elements of the Endangered Species Act ("ESA"), added the fish to the list of endangered and threatened wildlife.<sup>7</sup>

Specifically, the delta smelt lives in the region controlled by the Central Valley Project ("CVP").<sup>8</sup> The CVP was originally formed to help the region with water shortages and floods.<sup>9</sup> The CVP has since grown to be a massive multi-purpose project that manages nine million acre-feet of water and controls various activities, such as supplying water and generating electricity.<sup>10</sup> In 1992, the Central Valley Project Improvement Act added the protection and restoration of fish and wildlife to the CVP's responsibilities.<sup>11</sup> The additional purposes of the CVP aligned its mission with that of the ESA as both aim to conserve fish and wildlife.<sup>12</sup> Despite the CVP's efforts to protect fish and wildlife, the delta smelt is still in danger of extinction.<sup>13</sup>

Environmental activist groups, such as the Natural Resource Defense Council ("NRDC"), aim to protect fish and wildlife, including the delta

<sup>3</sup> Kay, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Kate Galbraith, *Threatened Smelt Touches off Battles in California's Endless Water Wars*, N.Y. TIMES (Feb. 14, 2015), [http://www.nytimes.com/2015/02/15/us/threatened-smelt-touches-off-battles-in-californias-endless-water-wars.html?\\_r=0](http://www.nytimes.com/2015/02/15/us/threatened-smelt-touches-off-battles-in-californias-endless-water-wars.html?_r=0) [<http://perma.cc/5QHD-HPCX>].

<sup>6</sup> Kay, *supra* note 1.

<sup>7</sup> Endangered Species Act of 1973, 16 U.S.C. § 1537a (2012); 50 C.F.R. § 17.11 (2015); Allysia Finley, *Forget the Missing Rainfall, California. Where's the Delta Smelt?*, WALL ST. J. (Apr. 26, 2015), <http://www.wsj.com/articles/forget-the-missing-rainfall-california-wheres-the-delta-smelt-1430085510>.

<sup>8</sup> Nat. Res. Def. Council v. Jewell, 749 F.3d 776, 780 (9th Cir. 2014).

<sup>9</sup> *Central Valley Project*, BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, [http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Central+Valley+Project](http://www.usbr.gov/projects/Project.jsp?proj_Name=Central+Valley+Project).

<sup>10</sup> *Id.*

<sup>11</sup> Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3406(a), 106 Stat. 4600, 4714 (codified as amended in scattered sections of 16, 25, 43, and 54 U.S.C.); *Jewell*, 749 F.3d at 780.

<sup>12</sup> See 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes."); *Central Valley Project*, *supra* note 9.

<sup>13</sup> 16 U.S.C. § 1531; Kay, *supra* note 1.

smelt.<sup>14</sup> The NRDC is an environmental action group, founded in 1970, with the stated mission of protecting land, air, and water from pollution and corporate greed.<sup>15</sup> The NRDC accomplishes these objectives by holding organizations accountable when they fail to follow the rules of the ESA.<sup>16</sup> In addition to defending the delta smelt, the NRDC efforts have helped to protect other wildlife, including wolves and elephants.<sup>17</sup>

In *Natural Resource Defense Council v. Jewell*, the United States Court of Appeals for the Ninth Circuit found that the NRDC had standing to challenge the Bureau of Reclamation's (the "Bureau") violation of the ESA consultation requirement. The Ninth Circuit properly determined that the NRDC had standing before the delta smelt suffered actual harm. This Comment argues that the court's ruling helped further the purposes of the ESA by allowing for the maximum protection of the species.

## I. FACTS AND PROCEDURAL HISTORY

The NRDC brought an action against the Bureau under Section 7(a)(2) of the ESA.<sup>18</sup> Section 7(a)(2) requires the Bureau to consult with the FWS before renewing contracts for the CVP.<sup>19</sup> In 2004 and 2005, the Bureau began renewing 141 Sacramento River Settlement Contracts (the "Settlement Contracts") and eighteen Delta-Mendota Canal Unit Water Service Contracts (the "DMC Contracts") for the CVP with assurance from a number of FWS opinions that concluded that the delta smelt would not be negatively impacted.<sup>20</sup> The Settlement Contracts control "certain senior water rights" for around 2.2 million acre-feet of water.<sup>21</sup> The DMC Contracts are agreements that control water rights for non-senior users of the Delta-Mendota Canal.<sup>22</sup> Both the Settlement Contracts and the DMC Contracts control water rights in the region where the delta smelt resides.<sup>23</sup> Thus, both sets of

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<sup>14</sup> *Jewell*, 749 F.3d at 779; *About Us*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/about/> [<http://perma.cc/M9RP-FHDL>].

<sup>15</sup> *About us*, *supra* note 14.

<sup>16</sup> *About NRDC: Who We Are*, NAT. RES. DEF. COUNCIL, [http://www.nrdc.org/about/who\\_we\\_are.asp](http://www.nrdc.org/about/who_we_are.asp) [<http://perma.cc/Q6PN-UXV6>].

<sup>17</sup> *NRDC Victories 2014: The Change We Make Together*, NAT. RES. DEF. COUNCIL, <http://www.nrdc.org/about/victories.asp> [<http://perma.cc/DSN2-HU6L>].

<sup>18</sup> 16 U.S.C. § 1536; *Jewell*, 749 F.3d at 781.

<sup>19</sup> 16 U.S.C. §§ 1536–1537a.

<sup>20</sup> *Jewell*, 749 F.3d at 780–81.

<sup>21</sup> *Id.* at 780; *Sacramento River Settlement Contractors Contract Renewal Effort*, BUREAU OF RECLAMATION, U.S. DEP'T OF INTERIOR, <http://www.usbr.gov/mp/cvpia/3404c/srsc/> [<http://perma.cc/SC8V-LYFU>].

<sup>22</sup> *Jewell*, 749 F.3d at 780.

<sup>23</sup> *Id.*

contracts are subject to requirements under the ESA to protect the threatened delta smelt and its critical habitat.<sup>24</sup>

The Bureau renewed the Settlement Contracts and the DMC Contracts based on a series of letters issued by the FWS, which summarized its 2004 and 2005 opinions.<sup>25</sup> Both FWS opinions concluded that the Bureau's plan would not harm the delta smelt or its critical habitat.<sup>26</sup> The FWS only includes recommendations for reasonable and prudent alternatives when it determines that an action would harm a species or its critical habitat.<sup>27</sup> Thus, the FWS's opinions did not include recommendations for reasonable and prudent alternatives.<sup>28</sup> The United States District Court for the Eastern District of California later invalidated both FWS opinions.<sup>29</sup> The FWS issued a third opinion in 2008 that concluded that the Bureau's plan to renew the Settlement Contracts and the DMC Contracts would, in fact, jeopardize the delta smelt and adversely modify its critical habitat.<sup>30</sup> Accordingly, the Bureau was required to have a full consultation with the FWS to satisfy Section 7(a)(2) of the ESA.<sup>31</sup> The FWS opinion issued in 2008 was not an official consultation because it only assessed the general impact of the Bureau's plan.<sup>32</sup>

In 2008, the NRDC challenged the validity of the Settlement Contracts and the DMC Contracts in federal district court.<sup>33</sup> The NRDC argued that the Bureau violated the ESA by failing to sufficiently consult with the FWS.<sup>34</sup> The District Court for the Eastern District of California granted summary judgment in favor of the Bureau for both sets of contracts.<sup>35</sup>

The court held that the NRDC's consultation claim was invalid for the DMC contracts because the NRDC could not establish that it had Article III standing under the U.S. Constitution.<sup>36</sup> The court found that the NRDC was unable to establish that the Bureau's alleged violation caused harm to the delta smelt because the Bureau was shielded by the shortage provision in

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<sup>24</sup> See 16 U.S.C. § 1536(a)(2); *Jewell*, 749 F.3d at 780–81; 50 C.F.R. § 402.14(a) (2015).

<sup>25</sup> *Jewell*, 749 F.3d at 781.

<sup>26</sup> *Id.*

<sup>27</sup> See 16 U.S.C. 1536(b)(4); *Jewell*, 749 F.3d at 781.

<sup>28</sup> See 16 U.S.C. 1536(b)(4); *Jewell*, 749 F.3d at 781.

<sup>29</sup> *Jewell*, 749 F.3d at 781.

<sup>30</sup> *Id.*

<sup>31</sup> 16 U.S.C. § 1536(a)(2); *Jewell*, 749 F.3d at 781; 50 C.F.R. § 402.14(a) (2015).

<sup>32</sup> *Jewell*, 749 F.3d at 782; 50 C.F.R. §§ 402.02, 402.14 (defining a formal consultation to include a written request, a ninety-day investigation, and a biological opinion that states whether the action and its impact will jeopardize the listed species or critical habitat).

<sup>33</sup> *Jewell*, 749 F.3d at 781.

<sup>34</sup> *Id.* at 781–82.

<sup>35</sup> *Id.* at 781.

<sup>36</sup> *Id.*

the DMC contract.<sup>37</sup> Under the shortage provision, the Bureau is not liable for harm that occurs when it is in compliance with the legal obligations of the contract.<sup>38</sup> Specifically, the shortage provision states:

If there is a Condition of Shortage [of water] because of errors in physical operations of the Project, drought, other physical causes beyond the control of the Contracting Officer or actions taken by the Contracting Officer to meet legal obligations then . . . no liability shall accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising therefrom.<sup>39</sup>

The district court determined that the Bureau was legally obligated to renew the DMC contracts, disallowing any negotiation of terms that would better protect the delta smelt.<sup>40</sup> Thus, the injury to the delta smelt was not traceable to the Bureau's action of renewing the DMC contracts because the shortage provision precluded its liability.<sup>41</sup> The court did not engage in an analysis as to whether the delta smelt suffered harm.<sup>42</sup>

The district court, however, found that the NRDC did have standing to challenge the Settlement Contracts.<sup>43</sup> Ultimately, the court held that there was no violation of the ESA's Section 7(a)(2) consultation requirement.<sup>44</sup> The court determined that an official consultation was not required because the Bureau did not have enough discretion to modify the terms of the contract to better protect the delta smelt.<sup>45</sup> The NRDC subsequently appealed the district court's ruling.<sup>46</sup>

## II. LEGAL BACKGROUND

In 1973, President Richard Nixon signed the Endangered Species Act ("ESA") into law and explained that the ESA would "[provide] the Federal Government with needed authority to protect an irreplaceable part of our national heritage—threatened wildlife."<sup>47</sup> The purpose of the ESA is to en-

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<sup>37</sup> *Id.* at 782.

<sup>38</sup> *Id.* at 783.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 782.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Endangered Species Act of 1973, 16 U.S.C. § 1531 (2012); *Richard Nixon: Statement on Signing the Endangered Species Act of 1973*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=4090> [<http://perma.cc/A9N8-4HQ6>].

sure steps are taken to conserve endangered and threatened species and their critical habitats.<sup>48</sup> Accordingly, the ESA requires all federal agencies, including the Bureau of Reclamation (the “Bureau”), to make sure that none of their actions are likely to harm any threatened or endangered species or their critical habitats.<sup>49</sup>

The delta smelt’s classification as a threatened species provides the fish with certain protections under the ESA.<sup>50</sup> One safeguard in particular is the ESA requirement that federal agencies consult with the U.S. Fish & Wildlife Service (“FWS”) prior to taking any action that may affect a listed species or a critical habitat.<sup>51</sup> The consultation determines whether the agency action will jeopardize the continued existence of a listed species or adversely modify its critical habitat.<sup>52</sup> Moreover, the FWS is required to produce a biological opinion that states whether the agency action will harm the listed species.<sup>53</sup> If the FWS concludes the agency’s action would have negative consequences for the listed species, it will suggest reasonable and prudent alternatives to promote the conservation of the listed species.<sup>54</sup>

Environmental groups and citizens can bring actions against federal agencies that fail to properly consult under the ESA.<sup>55</sup> To do so, the plaintiff must have Article III standing under the U.S. Constitution as well as statutory standing under the ESA.<sup>56</sup> In *Lujan v. Defenders of Wildlife*, the Supreme Court of the United States held that environmental organizations lacked Article III standing to challenge federal regulations that extended the scope of the ESA.<sup>57</sup> The Court laid out a three-part test for establishing standing under Article III.<sup>58</sup> First, an environmental organization must prove that they suffered an injury in fact.<sup>59</sup> Second, the plaintiff must prove causation by demonstrating the injury was connected to the defendant’s actions.<sup>60</sup> Finally, the plaintiff must show that a decision in its favor would provide redress for the injury suffered.<sup>61</sup> The Court held that the Defenders

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<sup>48</sup> 16 U.S.C. § 1531(b).

<sup>49</sup> *Id.* § 1536(a)(2).

<sup>50</sup> *Id.* § 1531(c); 50 C.F.R. § 17.11 (2015).

<sup>51</sup> 16 U.S.C. § 1531(c).

<sup>52</sup> *Id.* § 1536(b)(3)(A); 50 C.F.R. § 402.14(h).

<sup>53</sup> 16 U.S.C. § 1536(c).

<sup>54</sup> *Id.* § 1536(b)(4).

<sup>55</sup> *Id.* § 1540(g).

<sup>56</sup> *See* U.S. CONST. art. III, § 2; *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

<sup>57</sup> 504 U.S. 555, 578 (1992).

<sup>58</sup> *Id.* at 560.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 561.

of Wildlife failed to show these three factors.<sup>62</sup> Thus, the Court found that the Defenders of Wildlife lacked standing to bring its claim.<sup>63</sup>

In *Defenders of Wildlife v. U.S. Environmental Protection Agency*, the United States Court of Appeals for the Ninth Circuit found that the environmental organization had standing to challenge the EPA's transfer decision.<sup>64</sup> In this case, the issue was whether or not the EPA could transfer control of the Clean Water Act's pollution permitting program to Arizona's state government without implementing suggestions from an ESA consultation.<sup>65</sup> The EPA engaged in an ESA consultation with the FWS, which concluded that the transfer would cause harm to listed species including the southwester willow flycatcher, Pima pineapple cactus, Huachuca water umbel, and cactus ferruginous pygmy owl, and their critical habitats.<sup>66</sup> The EPA, however, approved the transfer claiming that it did not need to take into account the results of the consultation because the consultation requirement only applies to federal agencies.<sup>67</sup> Thus, the consultation was not binding on Arizona.<sup>68</sup> Several environmental groups then challenged the transfer decision on the grounds that it violated the ESA.<sup>69</sup> First, the petitioners alleged that the listed species and their critical habitats would be harmed if the defendant went through with its proposed action.<sup>70</sup> The court found that the petitioners' allegations satisfied the harm requirement of Article III.<sup>71</sup> Although the listed species had not yet suffered harm, the court explained that the petitioners "must only show that they have a procedural right that, if exercised *could* protect their concrete interests."<sup>72</sup> The Ninth Circuit also found that if the EPA's action of transferring the program were permitted, the alleged harm would be connected to that federal action.<sup>73</sup> Third, the injuries are redressable through injunctive relief, which would halt the transfer.<sup>74</sup>

In *Bennett v. Spear*, the Supreme Court of the United States examined the citizen suit provision of the ESA.<sup>75</sup> In this case, the Bureau consulted with the FWS regarding the impact of the Klamath Irrigation Project's proposed use of reservoir water on two listed species, the Lost River Sucker

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<sup>62</sup> *Id.* at 578.

<sup>63</sup> *Id.*

<sup>64</sup> 420 F.3d 946, 956 (9th Cir. 2005).

<sup>65</sup> Clean Water Act, 33 U.S.C. § 1342 (b) (2012); *Defs. of Wildlife*, 420 F.3d at 950.

<sup>66</sup> *Defs. of Wildlife*, 420 F.3d at 952.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 953.

<sup>69</sup> *Id.* at 955.

<sup>70</sup> *Id.* at 957.

<sup>71</sup> *Id.* at 956.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 520 U.S. 154, 157 (1997).



and the Shortnose Sucker Fish.<sup>76</sup> The Klamath Irrigation Project is a series of lakes, rivers, dams, and irrigation canals located in California and Oregon.<sup>77</sup> The FWS concluded that the Bureau's proposed use would negatively impact the fish and the Bureau later informed the FWS that it was complying with the recommendations.<sup>78</sup> Ranch operators and irrigation districts that received water from the Klamath Irrigation Project sued the Bureau for failing to comply with the FWS's recommendations contained in its opinion produced as a result of the required ESA consultation.<sup>79</sup> To satisfy Article III standing, a petitioner must meet the requirements of the ESA's citizen suit provision, which allows petitioners to bring a claim enforcing the ESA consultation requirement.<sup>80</sup> The citizen suit provision of the ESA provides, "Any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof."<sup>81</sup> The United States District Court for the District of Oregon found that the petitioners did not have standing.<sup>82</sup> The court held that the petitioners' economic interests in the Klamath Project were not within the zone of interests of the ESA.<sup>83</sup> On review, the Supreme Court of the United States reasoned that the "zone of interest test" is not required under the ESA because the language of the ESA's citizen suit provision is clearer than other citizen suit provisions.<sup>84</sup> This determination expanded the scope of potential plaintiffs who could establish statutory standing and bring a suit under the ESA.<sup>85</sup> Thus, the Court found that the petitioners had standing and met the ESA's citizen suit provision requirements.<sup>86</sup>

### III. ANALYSIS

In *Natural Resources Defense Council v. Jewell*, the United States Court of Appeals for the Ninth Circuit properly found that the Natural Resource Defense Council ("NRDC") had standing to enforce the Endangered Species Act's ("ESA") consultation requirement against the Bureau of Rec-

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<sup>76</sup> *Id.* at 154, 159.

<sup>77</sup> *Id.* at 158.

<sup>78</sup> *Id.* at 159.

<sup>79</sup> *Id.*

<sup>80</sup> See U.S. CONST. art. III, § 2; 16 U.S.C. § 1540(g) (2012); *Bennett*, 520 U.S. at 162.

<sup>81</sup> 16 U.S.C. § 1540(g).

<sup>82</sup> *Bennett*, 520 U.S. at 160–61.

<sup>83</sup> *Id.* at 161.

<sup>84</sup> *Id.* at 166.

<sup>85</sup> See *id.* at 165.

<sup>86</sup> *Id.* at 164.

lamation (the “Bureau”).<sup>87</sup> This finding allows non-governmental organizations to help ensure that federal agencies follow the ESA consultation requirement before an agency action physically harms a species or its critical habitat.<sup>88</sup>

In *Jewell*, the Ninth Circuit determined that the NRDC established all three prongs of the test for Article III standing under the U.S. Constitution.<sup>89</sup> The three requirements to establish Article III standing are injury in fact, causation, and available redress.<sup>90</sup> The Bureau’s procedural violation was a sufficient injury to satisfy the first standing requirement, injury in fact.<sup>91</sup> The circuit court found that the second Article III requirement, causation, was satisfied as well.<sup>92</sup> In contrast to the district court’s finding, the appellate court determined that the shortage provision did not cut the chain of causation for the violation of the ESA consultation requirement.<sup>93</sup> Third, the court concluded that redress was likely to be effective because injunctive relief could protect the delta smelt from the Bureau’s actions.<sup>94</sup>

The United States District Court for the Eastern District of California improperly found that the NRDC did not have Article III standing to enforce the ESA consultation requirement for the Delta-Mendota Canal Unit Water Service Contracts (the “DMC Contracts”) because the NRDC was unable to establish the second factor of causation.<sup>95</sup> The court determined that the shortage provision in the DMC contracts protected the Bureau from liability for harm that would arise from the agreements.<sup>96</sup> The court reasoned that the Bureau was obligated to renew the DMC contracts.<sup>97</sup> Therefore, the court found that the Bureau was not liable for violating the ESA consultation requirement or for any subsequent harm to the delta smelt.<sup>98</sup>

In contrast, the Ninth Circuit determined that the shortage provision did not absolve the Bureau from all liability.<sup>99</sup> Instead, the circuit court found that the Bureau was still subject to the ESA’s consultation require-

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<sup>87</sup> See Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2012); Nat. Res. Def. Council v. Jewell, 749 F.3d 776, 784–85 (9th Cir. 2014).

<sup>88</sup> See 16 U.S.C. § 1540(g); Defs. of Wildlife v. U.S. Envtl. Prot. Agency, 420 F.3d 946, 957 (9th Cir. 2005).

<sup>89</sup> *Jewell*, 749 F.3d at 782–84.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 783.

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 782.

<sup>95</sup> *See id.*

<sup>96</sup> *See id.* at 781.

<sup>97</sup> *See id.* at 783.

<sup>98</sup> *See id.* at 781.

<sup>99</sup> *Id.* at 783–84.

ment.<sup>100</sup> The shortage provision would only absolve the Bureau from liability if the physical operations of the project, drought, or other causes beyond the Bureau's control result in water shortages.<sup>101</sup> Further, the shortage provision would not absolve the Bureau from harm that results from any other part of the DMC contracts.<sup>102</sup> Moreover, the Bureau's action of renewing the DMC contracts required it to engage in an ESA consultation with the U.S. Fish & Wildlife Service ("FWS").<sup>103</sup> Thus, the shortage provision did not necessarily protect the Bureau from violating the ESA consultation requirement or for any subsequent harm to the delta smelt.<sup>104</sup> The Bureau's failure to consult with the FWS, thus, constituted a procedural violation.<sup>105</sup> Accordingly, the NRDC had standing to bring a suit.<sup>106</sup>

The Ninth Circuit also determined that the NRDC established that redressability, the third prong of Article III standing, was satisfied because the available redress would likely remedy the alleged injury.<sup>107</sup> The court did not require the NRDC to demonstrate that the delta smelt would certainly be physically harmed.<sup>108</sup> Instead, the Ninth Circuit required the NRDC to demonstrate that an ESA consultation *could* accomplish the joint goal of the NRDC and the ESA of protecting the delta smelt.<sup>109</sup>

Courts should be able find Article III standing when petitioners bring a suit under the citizen suit provision of the ESA.<sup>110</sup> Asking citizens and environmental groups to prove that an agency action will definitely harm a species or its critical habitat would be unreasonable.<sup>111</sup> The FWS must conduct a full study pursuant to the ESA consultation requirement to determine the likely consequences of an agency action.<sup>112</sup> If citizens and environmental groups were required to do their own consultation merely to demonstrate Article III standing, then the ESA consultation would be moot.<sup>113</sup> Further, if the NRDC were not permitted to bring this suit until the Bureau's action harmed the delta smelt, the fish would be extinct and there would be no re-

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 783.

<sup>102</sup> *See id.*

<sup>103</sup> *See* 16 U.S.C. § 1536(a)(2) (2012); *Jewell*, 749 F.3d at 784.

<sup>104</sup> *See Jewell*, 749 F.3d at 783.

<sup>105</sup> *Id.* at 784.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 782.

<sup>108</sup> *See id.* at 783.

<sup>109</sup> *Id.*

<sup>110</sup> *See* 16 U.S.C. § 1540(g) (2012).

<sup>111</sup> *See Jewell*, 749 F.3d at 783; *Def. of Wildlife v. U.S. Envtl. Prot. Agency*, 420 F.3d 946, 957 (9th Cir. 2005).

<sup>112</sup> *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14 (2015).

<sup>113</sup> *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

dress available.<sup>114</sup> Forcing the consultation to occur while an agency is contemplating an action is, thus, the only appropriate means of obtaining redress and protecting the delta smelt.<sup>115</sup> Therefore, the Ninth Circuit properly found that the NRDC had Article III standing despite not clearly demonstrating imminent harm to the delta smelt.<sup>116</sup>

### CONCLUSION

To best protect threatened and endangered species such as the delta smelt, the United States Court of Appeals for the Ninth Circuit properly found that the Natural Resource Defense Council (“NRDC”) had Article III standing. The Endangered Species Act’s (“ESA”) interest in protecting threatened and endangered species provides a broad citizen suit provision. Environmental organizations’ interests are often aligned with the underlying purposes of the ESA. Thus, environmental organizations should be granted standing to help enforce the ESA consultation requirement before a listed species or its critical habitat are harmed. The only appropriate redress is consultation, which can prevent harm or injury to a listed species by agency action.

Additionally, the Delta-Mendota Canal Unit Water Service Contracts’ shortage provision does not absolve the Bureau of Reclamation (the “Bureau”) from complying with the ESA consultation requirement. The narrowly written shortage provision only protects the Bureau from a very specific type of liability, which does not include the procedural violation of failing to consult with the U.S. Fish & Wildlife Service. It is therefore vital that the Ninth Circuit found that the NRDC had standing to help protect the delta smelt by enforcing the ESA consultation requirement.

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<sup>114</sup> See *Jewell*, 749 F.3d at 782; Galbraith, *supra* note 5.

<sup>115</sup> See *Jewell*, 749 F.3d at 783–84; *Defs. of Wildlife*, 420 F.3d at 957.

<sup>116</sup> See *Jewell*, 749 F.3d at 784.