

Definition of “Agency Action” under the Endangered Species Act to be Reheard by Ninth Circuit

In July 2012, a three-judge panel of the Ninth Circuit ruled in [Natural Resources Defense Council v. Salazar, 686 F.3d 1092 \(9th Cir. 2012\)](#), that the decision by the U.S. Bureau of Reclamation to renew a series of water service contracts in connection with the Central Valley Project did not constitute "agency action" under the Endangered Species Act. The panel therefore ruled there was no duty to engage in formal consultations with the U.S. Fish & Wildlife Service over potential impacts to the delta smelt, a listed fish species. (See our [July 25, 2012 post](#) for a discussion of the court's opinion.) On March 5, 2013, the Ninth Circuit agreed to rehear the case en banc, which means the July 2012 decision may not be cited as precedent. Oral argument on rehearing is scheduled to take place in June 2013. The panel's July 2012 decision – that the Bureau lacked discretionary authority in renewing the water contracts – seemed to conflict squarely with the Ninth Circuit's prior en banc ruling in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012). In *Karuk*, the court held – in a contentious 7-4 decision – that the Forest Service took an affirmative, discretionary act, which triggered consultation under the ESA, when it decided not to require a detailed plan of operations for small-scale recreational mining activities allowed to proceed under a Notice of Intent. (See our [June 12, 2012 post](#) for further details on the *Karuk* decision.) In light of the two differing rulings, and now the Ninth Circuit's decision to rehear *NRDC v. Salazar* en banc, the key question of what constitutes discretionary "agency action" for purposes of requiring ESA consultation is in a dramatic state of flux. Stay tuned to Perkins Coie's *California Land Use & Development Law Report* for the latest developments in this emerging area of the law. *Natural Resources Defense Council v. Salazar* (9th Cir. Case No. 09-17661).

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