

ESA Puts Wildlife 1st In Fight Over Calif.'s Scarce Water

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As California's drought reaches historic levels, experts say conservation advocates have a major advantage over agricultural interests and municipalities in the impending battle for dwindling water resources, thanks to the Endangered Species Act's clear obligations for providing wildlife with resources necessary to survive.

Last year was the state's driest in a century of recorded history, and 2014 isn't looking much better. Gov. Jerry Brown declared a state of emergency last month, and the state has experienced drinking water shortages and wildfires. Without enough water to keep everyone happy, state officials will likely soon find themselves in court defending any action they take, no matter how well-intentioned.

California's water allocation decisions will have to survive the scrutiny of the 40-year-old Endangered Species Act, which King & Spalding LLP counsel Lewis B. Jones called an "extremely powerful tool" for environmental groups trying to assure their interests receive a sufficient amount of water.

"Unlike most statutes, it's generally thought of in fairly absolute terms," Jones said. "The language and commands in the statute are unyielding."

The U.S. Supreme Court ruled in 1978 that the ESA was intended to "halt and reverse the trend toward species extinction, whatever the cost," and environmental advocates have utilized the law to successfully challenge construction and development projects. The law doesn't change in drought conditions, putting the state in a difficult position as it tries to meet all its demands.

One of the biggest problems for California is that when the ESA is interpreted literally, it creates situations that just don't work during a historic water shortage, Jones said.

"In order to do what some folks say needs to be done, you're going to have to cripple the economy and the livelihood of thousands of people," he said.

The law also requires federal and state agencies to consult with other government experts when they make a decision that could affect an endangered species, which Pillsbury Winthrop Shaw Pittman LLP partner Wayne M. Whitlock said creates another avenue for wildlife defenders to challenge California's water allocation decisions.

California is already embroiled in a high-stakes water battle before the Ninth Circuit. Environmental groups are challenging dozens of the state's of 25- and 40-year water supply contracts, arguing federal officials failed to perform adequate reviews under the ESA for the agreements' impact on delta smelt, a small, slender-bodied fish.

A Ninth Circuit panel dismissed the suit brought by the Natural Resources Defense Council and other groups in July 2012, but the full court agreed in March to rehear the case en banc after the environmental groups argued the July decision conflicted with precedent holding that ESA consultation is necessary when government agencies make changes to benefit a protected species.

The Endangered Species Act also recently helped wildlife advocates in Texas seeking to block new permits allowing water to be diverted from river systems to municipalities, when U.S. District Judge Janis Graham Jack ruled in March that the state's water management practices had caused the deaths of endangered whooping cranes. However, a Fifth Circuit panel has suspended that ruling while it reviews the case.

Similar cases should start popping up soon in California, as the state juggles the needs of cities and farmers with its obligations under the ESA. The drought is putting a strain on all these areas, Jeffer Mangels Butler & Mitchell LLP partner Jon Welner said.

“Regardless of what they decide to do, this could lead to litigation from any or all of these separate interests,” Welner said. “The director of the Department of Water Resources is not in an enviable position these days.”

Even if they make a decision intending to provide short-term benefits for wildlife covered by the ESA, conservation groups could come in and accuse the state of compromising the long-term livelihood of endangered species.

“They are in a no-win situation,” Welner said. “They will be making decisions that will be second-guessed by all of the interests.”

Although water allocation problems aren't new for California, Welner said the drought is making those problems much more urgent. Congress has even weighed in, with the U.S. House of Representatives on Thursday passing emergency drought legislation intended to protect and secure private property and water rights for farmers and municipalities.

California's governor has criticized the bill, calling it an “unwelcome and divisive intrusion” into the state's attempts to manage the crisis. The legislation would override state laws and protections and unnecessarily place certain water interests above others, Brown said.

President Barack Obama has sided with the governor, saying he would veto the bill if it were to reach his desk. But even if the federal government were to rally behind an alternative measure that had California's support, the minimal rainfall could still lead to lawsuits.

“Congress can make laws, but they can't make water,” Welner said.

The governor has directed state agencies to use less water, hire more firefighters, prepare for a drinking-water

shortage and expand its water conservation public awareness campaign. Those actions should help avoid a flow of litigation in the short-term, but it won't likely be a lasting solution, as the state's snowpack is estimated at a mere 12 percent of normal levels.

“According to the predictions that I've seen, conservation won't be enough to really have water for all the needs out there,” Whitlock said.