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California Sea Urchin Commission v. Bean

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California Sea Urchin Commission v. Bean, 883 F.3d 1173 (9th Cir. 2018)

Thomas Mooney-Myers

In *California Sea Urchin Commission v. Bean*, the Ninth Circuit upheld the Fish and Wildlife Service's decision to end an experimental sea otter colony and translocation program. Commercial fishing groups sought reversal of the decision due to their interest in maintaining the translocation program which reduced otter predation on commercially valuable shellfish. While the Ninth Circuit held the group had standing, it then applied the *Chevron* test and determined the agency's actions were reasonable.

I. INTRODUCTION

California Sea Urchin Commission v. Bean arose out of the United States Fish and Wildlife Service ("Service") decision to end an experimental otter population program in 2013.[1] The California Association of Commercial Urchin Fishermen ("Association") was concerned that the cessation of the otter relocation program would directly lead to a decrease in shellfish harvest in the previously otter-free management zone due to a likely increase in the local otter population.[2] In its complaint, the Association alleged that the Service lacked the delegated authority to end the program.[3]

The Association sought to force the Service to reinstate the terminated program.[4] On remand, the United States District Court for the Central District of California held that while the Association had standing, the Service had, under the *Chevron* test, acted reasonably and had the right to terminate the program.[5] The United States Court of Appeals for the Ninth Circuit reviewed the case *de novo* and affirmed the holdings of the lower court.[6]

II. FACTUAL AND PROCEDURAL BACKGROUND

The California sea otter was hunted for its valuable fur during the 1700s and 1800s and was nearly driven to extinction.[7] It was listed as an endangered species in 1977 under the Endangered Species Act ("ESA") and in 1982 the Service developed a recovery plan.[8] To assist in otter

1. California Sea Urchin Commission v. Bean, 883 F.3d 1174, 1177 (9th Cir. 2018).
2. *Id.* at 1179.
3. *Id.*
4. *Id.*
5. *Id.* at 1174.
6. *Id.*
7. *Id.*
8. *Id.*

recovery, the Service planned to create a new colony away from the parent population that would preserve a stable otter population even if an oil spill or similar event endangered the parent population.[9] In 1986, Congress passed Public Law 99-625, which authorized the Service to implement its otter relocation and management plan.[10] In 1987, the Service approved its final rule for the experimental population program which included five "failure conditions," each serving as a basis for ending the program.[11] The rule outlined the experimental population's goals and range.[12] It further established an otter-free management zone around the experimental population that separated the newly-colonized otters from the parent population.[13] Under the 1987 rule, sea otters found in the management zone would be captured by non-lethal means and released in either the experimental population or parent population, to prevent the two populations from merging.[14] As a protected species, fishermen who "incidentally harmed" sea otters were liable under the ESA and the Marine Mammal Protection Act ("MMPA").[15] However, this incidental take liability was relaxed within the management zone.[16]

In 2012, the Service determined that one of the failure conditions of the 1987 rule had been met and decided to end the program, including the otter-free management zone and the exemption from incidental take liability.[17] The Association's initial challenge was dismissed as untimely based upon the 1987 implementation of the rule, but upon remand the lower court determined the statute of limitations had actually begun running at the time the decision to terminate the program was made, in 2012.[18]

This case arrived before the Ninth Circuit on an appeal of a grant of summary judgment for the Service by the lower court.[19] In the Association's initial complaint it challenged the Service's decision to end the relocation program, seeking declaratory and injunctive relief on the grounds that the Service lacked authority to terminate the program.[20] The Ninth Circuit eventually reversed and remanded the district court's grant of a motion to dismiss on timeliness grounds.[21] Upon remand, the district court granted summary judgment for the Service, finding the Association

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9. *Id.*
10. *Id.*
11. *Id.* at 1178.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1177.
20. *Id.*
21. *Id.*

had standing, but the Service had acted within its statutory authority to end the program.[22] The Association subsequently appealed.[23]

III. ANALYSIS

The Ninth Circuit addressed whether the Association had the necessary standing, if the Service was reasonable in its decision to terminate the program under the *Chevron* test, and the validity of the Association's arguments under the non-delegation doctrine and an MMPA amendment.[24]

A. Standing

In order to establish standing, a plaintiff must demonstrate: (1) it has suffered an "injury in fact" that is (a) concrete and (b) actual or imminent; (2) related to the challenged action; and (3) the harm will likely be reduced by a favorable decision.[25] The Association presented two theories to establish standing: (1) the return of incidental take liability in the management zone increased liability for fishermen; and (2) the increase in otters in the management zone would increase otter consumption of commercially valuable shellfish, reducing the available catch for commercial fishermen.[26]

1. Increased Risk of Liability

The Ninth Circuit rejected the Association's first argument because a potential risk of prosecution did not rise to the level of "concrete and particularized harm."[27] The Ninth Circuit explained that a "genuine threat of imminent prosecution" must exist for an increased risk of prosecution to provide standing.[28]

To assess whether the threat of prosecution would be considered "genuine," the Ninth Circuit considered three factors: (1) whether the Association had a concrete plan to violate the law in question; (2) whether the authority capable of prosecuting the law had communicated a threat or warning of impending proceedings; and (3) whether or not there was a history of past prosecution of enforcement of the relevant statute.[29] Even though the Association offered declarations from members of the fishing industry, the Ninth Circuit held that these declarations did not demonstrate

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22. *Id.*
23. *Id.*
24. *Id.* at 1177, 1184-1185.
25. *Id.* at 1180.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* (quoting Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 773 (9th Cir. 2006)).

a genuine threat of prosecution.[30] The Service had not issued any warnings or threats, and there was no history of prosecution for incidental takes of southern sea otters.[31]

The Association also argued that it had standing due to a threat of prosecution because they were the objects of regulation,[32] citing *LA Haven Hospice Inc. v. Sebelius*[33] and *Abbot Labs v. Gardner*.[34] The Ninth Circuit held the Association sought too broad an application of those cited cases.[35] The Ninth Circuit further found that the changes in regulations for the management zone did not require any change in the fishing practices of the Association, thereby not conveying standing.[36]

2. Increased Otter Predation of Commercially Valuable Shellfish

The Association also provided testimony on the significant impact sea otters had on shellfish populations throughout the management zone.[37] The Ninth Circuit held this to be a concrete and particularized harm providing the Association with standing to pursue its claims.[38] The Service argued this did not convey standing because it could not fully exclude sea otters, but the Ninth Circuit held that in order to demonstrate standing the Association did not need to "show that the requested relief will inevitably alleviate the harm complained of."[39] Ultimately, it was held that the Association's second theory was sufficient to convey standing.[40]

B. Chevron Test

The Ninth Circuit then turned to the deferential two-step *Chevron* test to determine if the Service's interpretation of Public Law 9-625 was reasonable.[41] Step one of the *Chevron* test assesses whether Congress has spoken directly to its interpretation of the issue at hand.[42] If Congress has not spoken to the issue directly, step two addresses whether the agency's interpretation is reasonable.[43] Step two of the *Chevron* test is usually extremely deferential to the interpretation of the agency in question.[44]

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30. *Id.* at 1181.
31. *Id.*
32. *Id.*
33. 638 F.3d 644, 655 (9th Cir. 2011).
34. 387 U.S. 136, 154 (1967).
35. *Id.* at 1181.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1182.
41. *Id.*
42. *Id.* (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 867, 842-44 (1984)).
43. *Id.* at 1180.
44. *Id.*

In the court's analysis under step one, the Association argued the statutory language of Public Law 99-625 was clear and unambiguous, citing language that the translocation plan "shall include" a management zone, and the Secretary "shall implement" the plan.[45] The Association argued this mandatory language required the Service to maintain the program until Congress expressly decides otherwise.[46] The Service responded that the statute gave it discretion to develop and implement a plan and must give it corresponding discretion to terminate that plan.[47]

The Ninth Circuit rejected the Association's arguments because the statute did not expressly forbid or allow the Service to terminate the program.[48] Application of step two of the *Chevron* test held that in light of the goals of the ESA, it was reasonable for the Service to interpret the statute as conveying the authority to terminate the program.[49] The Ninth Circuit also reasoned that the experimental nature of the program made it reasonable to expect that the program would not run indefinitely.[50] The court further reasoned that under the Association's interpretation, the Service would be required to continue the program even if no otters remained in the experimental population area.[51] The Ninth Circuit then affirmed the district court's holding, finding no reason to consider the Service's actions unreasonable.[52]

C. Non-Delegation Doctrine

The Association also presented a constitutional challenge to the Service's decision to terminate the experimental population program, citing the non-delegation doctrine.[53] The non-delegation doctrine is founded upon the principle that Congress cannot delegate its legislative authority to agencies and must provide an "intelligible principal" upon which to base their regulations.[54] The Ninth Circuit rejected the Association's non-delegation argument because the intelligible principle within a statute "can still be somewhat vague without offending the Constitution[,]" and further held the statute provided substantial guidance to the Service, and "there [was] no serious constitutional question to avoid[.]"[55]

45. *Id.* at 1182, 1183.
46. *Id.* at 1183.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1184.
54. *Id.*
55. *Id.* at 1185.

D. Marine Mammal Protection Act

The Association also argued that a 1994 amendment to the MMPA supported its argument of an unreasonable interpretation by the Service of Public Law 99-625.[56] The MMPA amendment relaxed restrictions on incidental takes, but the rescission of the 1987 rule would make sea otters subject to the baseline MMPA rules.[57] The Association asserted those MMPA rules were less lenient regarding incidental takes.[58] The Association argued this would not be allowed under the statutory scheme, because it would conflict with Public Law 99-625.[59] The Ninth Circuit found this argument unconvincing, quoting language in the amendment stating it "shall not be deemed to amend or repeal" Public Law 99-625.[60]

IV. CONCLUSION

The holdings of this case demonstrate a strong and continued practice of deferential treatment toward agencies by ways of the *Chevron* test. The holding of this case regarding timeliness better allow plaintiffs to challenge implementation of older rules. However, a lesser bar to timeliness still does not overcome the continued low bar agencies must meet to comply with step two of the *Chevron* test.

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*