Section 7 Consultation Court Cases – January 7, 2023

Year	Court	Case Name	Subjects or Areas of Consultation Discussed	Notes
1978	United States Supreme Court	**Tennessee Valley Authority v. Hill**, 437 U.S. 153, 98 S. Ct. 2279 (1978)	The relationship between a jeopardy opinion and a project (Tellico Dam) that was almost completed before the Endangered Species Act was passed by Congress.	This was the first Supreme Court case regarding the Endangered Species Act. The issues examined had direct bearing on extensive amendments by congress to section 7 of the Act including creation of the Endangered Species Committee ("God Squad") in Section 7(e).
1992	United States Supreme Court	**Lujan v. Defenders of Wildlife**, 112 S. Ct. 2130 (1992)	The language in the 1986 regulations regarding limiting Section 7's scope to actions in the United States or on the high seas.	The Court never really took up the issue. It decided the plaintiffs lacked 'standing'.
1995	United States Supreme Court	**Babbitt v. Sweet Home Chapter of Communities for a Great Oregon** 515 US 687, 115 S. Ct. 2407, 132 L.Ed.2d 597 (1995).	The appropriateness of the inclusion of habitat modification in the 1981 regulatory definition of harm, a form of take.	
1996	United States Supreme Court	**Bennett v. Spear** 520 U.S. 154 (1997).	The breadth of the "citizen suit" provision in section 11 of the ESA.	The court's finding in this case led to a substantial increase in the use of the citizen suit provisions for section 7 consultations relied on by action agencies.
2007	United States Supreme Court	**National Association of Home Builders v. Defenders of Wildlife**, 551 U.S. 644, 644-645 (2007).	Whether section 7 consultation applies only to discretionary agency actions.	
2018	United States Supreme Court	**Weyerhaeuser Co. v. U.S. Fish and Wildlife Service,** 139 S. Ct. 361 (2018)	Two main questions. Is critical habitat designation subject to judicial review? and What are the required characteristics of habitat	

			proposed for critical habitat designation?	
1976	5th Circuit	**National Wildlife Federation v. William T. Coleman, Secretary of Transportation**, 529 F.2d 359 (1976)	Indirect effects (development) and how a biological opinion should influence an action agencies decision on a proposed action.	This was a Jeopardy opinion and occurred before the 1978 amendments to the Act, before the 1978 regulations on consultation and obviously before the 1986 regulations on consultation that most practitioners are familiar with.
1981	9th Circuit	**Palila v. Hawaii Department of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), aff'd, 639 F.2nd 495** (1981)	Issue revolved around the 1975 regulatory definition of harm (as a form of take) and its relationship to habitat destruction.	Shortly after this case the Fish and Wildlife Service revised the definition of harm. See the Federal Register Notice Vol. 46, No: 213 November 4, 1981, 54748-5470.
1985	10th Circuit	**Riverside Irrigation District v. U.S. Army Corps of Engineers,** (1985)	The consultation issue revolved around the concept of direct and indirect effects.	
1988	9th Circuit	**Conner v. Burford,** 848 F.2d 1441 (9th Cir. 1988), cert. denied, 109 S. Ct. 1121 (1989),	Whether the Fish and Wildlife Service had erred when consulting only on portions of an oil/gas leasing action.	This case is mentioned in the 1998 handbook.
2001	9th Circuit	**Arizona Cattle Growers' Association v U.S. Fish and Wildlife Service**, 273 F.3d 1229 (2001)	Determinations that incidental take is reasonably certain to occur and whether the rationale in the biological opinion showed the connection between the project's effects and the anticipated incidental take. It also explored, more generally, the relationship between incidental take under sect 7 and take under section 9.	This case is an important one for practitioners to review when formulating an effects analysis and incidental take statement.

2004	9th Circuit	**Gifford Pinchot Task Force v. USFWS,** 378 F2d 1059 (2004)	The 1986 regulatory definition of destruction or adverse modification.	The court found the regulatory definition to be invalid. The definition was replaced in 2016 and revised in 2019.
2007	District Court, Oregon	**Oregon Natural Resources Council v. Allen**, 476 F.3d 1031 (2007)	How incidental take in an incidental take statement must be described. It also discusses surrogates and Congress's preference for using specific numbers of individuals.	Very important case to review when putting together an incidental take statement as part of a biological opinion.
2009	11th Circuit	**Miccosukee Tribe of Indians of Florida v. U.S.**, 566 F.3d 1257 (2009)	The sufficiency of the incidental take statement.	Good information on incidental take statements aside, probably most interesting point in case was a review of the history and purpose of Congress' 1979 phrase "benefit of the doubt".
2012	9th Circuit	**Center for Biological Diversity v. Salazar,** 695 F.3d 893 (2012)	A case relating to polar bears, incidental take and a section 4(d) rule.	Very interesting discussion regarding incidental take statement's treatment of take whether prohibited or not by a 4(d) rule.
2013	District Court, Montana	**Native Ecosystems Council and Alliance for the Wild Rockies v. U.S Forest Service and Fish and Wildlife Service** (2013)	Issue revolved around the intent of species lists and the appropriate standards for them.	Found that "may be present" is a broad and low threshold.
2015	9th Circuit	**Cottonwood Environmental Law Center v. U.S. Forest Service**, 789 F.3d 1075, 1080 (2015).	The case related to the requirement for reinitiation of consultation on a forest plan after lynx critical habitat was designated.	Important case and one which had large ramifications for existing plan level consultations. See the 2019 regulation revisions' federal register notice for some history and regulation language revision related to the case.
2015	D.C. Circuit	**Sierra Club v. United States Army Corps of**	Case revolved around the relationship between a biological opinion's incidental take statement	Sometimes referred to as "Flannigan Pipeline Case".

		Engineers, 803 F.3d 31 (2015)	and the National Environmental Policy Act (NEPA) for an action agency.	
2015	9th Circuit	**Sierra Club, Center for Biological Diversity, Def. of Wildlife, North Sky River Energy v. BLM, et al.** 786 F.3d 1219 (2015)	Whether or not a road associated with a wind project should be considered in section 7 consultation.	Interesting discussion. Practitioners should note that the case precedes the 2019 revisions to regulatory language.
2016	9th Circuit	**Center for Biological Diversity v. Bureau of Land Management,** 833 F.3d 1136 (2016)	Whether incidental take (and requirement for an incidental take statement) applies to plants.	The Court confirmed the Fish and Wildlife Service's longstanding interpretation that incidental take applies only to fish and wildlife, not plants.
2016	D. C. District	**Mayo v. Jarvis,** 177 f. Supp. 3d 91 (2016)	Case involved several issues.	Issue of most note to practitioners is the use of an amendment to a biological opinion to close out a reinitiated consultation.
2017	9th Circuit	**Defenders of Wildlife v. Zinke,** 856 F.3d 1248 (2017)	Whether modifying connectivity between two critical habitat units should be destruction and adverse modification of critical habitat.	Interesting in that the court found that since critical habitat had not been altered (part of the definition) the Fish and Wildlife Service's opinion that the change to the non-designated critical habitat in between the units did not constitute destruction or adverse modification of critical habitat was a reasonable interpretation.