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Heather Welles

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What’s a Smelt Worth?: The Endangered Species Act and the Commerce Clause in the Bay-Delta

INTRODUCTION

In San Luis & Delta-Mendota Water Authority v. Salazar, the Ninth Circuit joined four other federal circuits in rejecting a Commerce Clause challenge to the Endangered Species Act (ESA). The Supreme Court subsequently denied certiorari, an unsurprising result considering the circuits’ uniformity in rejecting Commerce Clause challenges to the ESA. However, the case demonstrates some confusion in regard to the correct reading of the ESA and also emphasized the potential challenges courts may face in aggregating activity under the Clause.

I. CASE BACKGROUND

The subject of San Luis is the delta smelt, a small fish endemic to California with no present commercial value. The U.S. Fish and Wildlife Service (FWS) listed the smelt as threatened in 1993, and the fish has since been the subject of considerable litigation. In 2008, FWS issued a Biological Opinion (BiOp) pursuant to ESA section 7(a)(2), which covered the Bureau of Reclamation and California Department of Water Resources’ operation of the Central Valley Project and the State Water Project in the Sacramento-San

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2. San Luis, 638 F.3d at 1167.

3. § 1532(20) (“The term ‘threatened species’ means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”).

4. San Luis, 638 F.3d at 1167. The court noted that, in 2010, FWS stated that the smelt should be listed as endangered but that the government would not seek the change in light of “higher-priority listings.” Id.


6. § 1536(a)(2). See infra notes 18–22 and accompanying text for an explanation of BiOp development.
These large water supply projects have been a significant part of an ongoing political and legal controversy regarding the Bay-Delta’s ecological health and water diversions.8

Agricultural irrigators (“growers”) from California’s Central Valley sued the Department of the Interior,9 arguing that the application of ESA sections 7(a)(2) and 9 to the delta smelt was unconstitutional under the Commerce Clause because of the smelt’s intrastate, noncommercial nature.10 The Ninth Circuit struck down their challenge, holding that, although the growers had constitutional standing to bring the claim, the Commerce Clause challenge failed because smelt taking is regulated under a comprehensive regulatory scheme—the ESA—that “bears a substantial relation to commerce” under the Supreme Court’s articulated standards.11

II. THE ENDANGERED SPECIES ACT

The Endangered Species Act12 provides for the protection of endangered13 and threatened species in two ways that are of particular relevance in San Luis.

Section 9 prohibits the taking of any listed species14 by any person.15 A taking is broadly defined and includes harassing, harming, trapping, capturing, or killing listed species.16 A taking may also include habitat modification if the modification results in harm to the species.17

Section 7 requires federal agencies, in consultation with FWS, to ensure that “any action authorized, funded, or carried out by such agency . . . is not

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7. San Luis, 638 F.3d at 1168.

8. A discussion of Bay-Delta governance and litigation is beyond the scope of this In Brief. For more information, see Paul Stanton Kibel, The Public Trust Navigates California’s Bay Delta, 51 NAT. RESOURCES J. 35, 58–64 (2011); Patrick Wright, Fixing the Delta: The Called Bay-Delta Program and Water Policy under the Davis Administration, 31 GOLDEN GATE U. L. REV. 331 (2001).


10. San Luis, 638 F.3d at 1168.

11. Id. at 1169, 1173–77 (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005)).


13. Id. § 1532(6) (“The term ‘endangered species’ means any species which is in danger of extinction throughout all or a significant portion of its range,” aside from certain dangerous pests.). This In Brief will refer to endangered and threatened species as “listed species” as appropriate.

14. Professors Doremus and Tarlock note that, although FWS has the flexibility under section 1533(d) to issue species-specific regulations for threatened species (rather than the complete ban on “takings” under section 1538(a)(1) for endangered species), FWS “typically relies on a general regulation applying the full force of section 9 to threatened species” rather than tailoring specific regulations. HOLLY DOREMUS & A. DAN TARLOCK, WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS 91 n.15 (2008); 50 C.F.R. § 17.31(a) (2011).

15. 16 U.S.C. § 1538(a)(1). This includes private and governmental actors. See id. § 1532(13).

16. Id. § 1532(19).

17. 50 C.F.R. § 17.3 (“Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”).
likely to jeopardize the continued existence” of any listed species.\textsuperscript{18} Following consultation, FWS provides the agency with a written report (a BiOp) analyzing the proposed action’s impact on any listed species.\textsuperscript{19} If the FWS finds that the action will jeopardize a listed species’ continued survival (a “jeopardy finding”), the BiOp must include “reasonable and prudent alternatives” (RPAs) that FWS believes will fulfill the essential purpose of the proposed action without violating the ESA.\textsuperscript{20} The BiOp must also contain an “incidental take statement” describing the extent of any expected take incidental to operation of the project.\textsuperscript{21} The statement insulates the action agency and other relevant entities (like the growers) from liability under section 9 if they follow the RPA.\textsuperscript{22} Although BiOps are not technically binding on acting agencies,\textsuperscript{23} if the agency chooses not to follow the RPA, it exposes itself to citizen suits and loses insulation from section 9 liability for any taking.\textsuperscript{24}

In \textit{San Luis}, the FWS found that the proposed operation of the project was likely to jeopardize the smelt’s continued existence.\textsuperscript{25} Its BiOp therefore included an RPA requiring controlled water flow in the delta to reduce smelt entrainment,\textsuperscript{26} which the Bureau of Reclamation followed.\textsuperscript{27} The growers claimed that the Bureau’s compliance “substantially reduced” water deliveries

\textsuperscript{18} 16 U.S.C. § 1536(a)(2).
\textsuperscript{20} § 1536(b)(3)(A); San Luis, 638 F.3d at 1167–68.
\textsuperscript{21} § 1536(b)(4). Note that FWS will provide an incidental take statement under two conditions: (1) a finding of “no jeopardy,” and, (2) a finding of jeopardy with accompanying RPAs that the action agency must follow to avoid that jeopardy.
\textsuperscript{22} \textit{Id.}; San Luis, 638 F.3d at 1168; DOREMUS \& TARLOCK, supra note 14, at 93–94. If the FWS issues a jeopardy finding and the agency chooses not to follow the RPA, it can avoid potential liability under section 9 only through a supermajority vote of a cabinet-level committee known as the “God Squad.” This permission has been granted only once, and was never used. See \textit{id.} at 92; Jared des Rosiers, \textit{The Exemption Process under the Endangered Species Act: How the God Squad Works and Why}, 66 NOTRE DAME L. REV. 825 (1991).
\textsuperscript{24} See \textit{In re Delta Smelt Consol. Cases}, 663 F. Supp. 2d 922, 928 (E.D. Cal. 2009) (“If [the Bureau of] Reclamation fails to assume and implement the RPA and terms and conditions . . . of the Incidental Take Statement . . . the protective coverage of [ESA] Section [7(a)(2)] may lapse.” (quoting BiOp at 286)); see also \textit{San Luis}, 638 F.3d at 1170 (discussing the Supreme Court’s finding that BiOps are coercive) (citing Bennett v. Spear, 520 U.S. 154, 169–71 (1997)).
\textsuperscript{25} San Luis, 638 F.3d at 1168.
\textsuperscript{26} “Entrainment” is the incorporation of fish into the projects’ water flow, which tends to result in injuries and death. See Lenny F. Grimaldo, \textit{Factors Affecting Fish Entrainment into Massive Water Diversions in a Tidal Freshwater Estuary: Can Fish Losses Be Managed?}, 29 N. AM. J. FISHERIES MGMT. 1253 (2009).
\textsuperscript{27} \textit{San Luis}, 638 F.3d at 1168.
to their almond, pistachio, and walnut orchards. This injury served as the source of the growers’ Commerce Clause challenge.

III. ARTICLE III STANDING

The Ninth Circuit ruled that the growers satisfied constitutional standing requirements to challenge FWS’s application of ESA section 9 to the smelt, allowing the court to then reach the merits of the Commerce Clause challenge. Despite the fact that the court misread the ESA by conflating the duties in sections 7 and 9, the Supreme Court’s holding in Bennett v. Spear that incidental take statements are coercive upon action agencies under section 9 ultimately supports this outcome.

The Ninth Circuit rejected the district court’s determination that the lack of “imminent section 9 enforcement” meant there was “no causal connection” between the reduced deliveries and the application of section 9 to the project, nullifying any potential coercive effect. Instead, the court held that the growers had standing “because the Service’s coercive power to enforce [section 9] caused the Bureau to reduce water flows, which injured the [g]rowers.” Despite the fact that it viewed the growers’ original section 7 challenge as before it, the court relied on the Supreme Court’s ruling in Bennett to hold

28. Id. The ESA mandates the reduction in water deliveries if they are necessary to avoid jeopardy to the species under the BiOp, notwithstanding delivery contracts. See O’Neill v. United States, 50 F.3d 677 (9th Cir. 1995); DoRemus & Tarlock, supra note 14, at 98.

29. San Luis, 638 F.3d at 1169.

30. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). To establish Article III standing under Lujan, a plaintiff must “have suffered an injury in fact,” which constitutes “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical”; there must be “a causal connection between the injury and the conduct complained of”; and “it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.” Id. The Supreme Court held in Bennett that BiOps are sufficiently coercive to establish a “causal connection” to the injury under Lujan. Bennett v. Spear, 520 U.S. 154, 170–71 (1997).

31. See id.

32. In rejecting FWS’s argument that the BiOp’s coercive effect is established by section 7 rather than section 9, the Ninth Circuit reasoned that “the core purpose of [section 7] is to ‘impose an affirmative duty to prevent violation of section 9 upon federal agencies.’” San Luis, 638 F.3d at 1171 (quoting Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife, 273 F.3d 1229, 1238 (9th Cir. 2001)). However, section 7 does more than prevent takings—it prevents jeopardy, a much more serious consequence. The court failed to recognize this independent coercive effect, incorrectly interpreting the statute in doing so. See id. at 1172 n.6 (“And, even if ESA § 7 is not invalidated [by the Commerce Clause challenge], the Bureau would have no reason to comply with the no-jeopardy provision . . . if an agency is permitted to ‘take’ a particular species, then it would certainly be permitted to ‘jeopardize the existence’ of that species.”).

33. See Bennett, 520 U.S. at 169–71.

34. In re Delta Smelt Consol. Cases, 663 F. Supp. 2d at 930–31. The district court held that the growers had effectively abandoned their section 7 claim by focusing their motion for summary judgment purely on section 9. Id. at 929.

35. San Luis, 638 F.3d at 1169 (citing Bennett, 520 U.S. at 169).

36. Id. at 1174 n.7. In district court, the growers initially presented challenges to the application of section 7 and section 9 to the smelt, but ultimately focused on their section 9 claim. See In re Delta Smelt Consol. Cases, 663 F. Supp. 2d 922, 929 (E.D. Cal. 2009). The plaintiff growers maintained this
that “the determinative or coercive effect of a Biological Opinion stems directly from the Service’s power to enforce the no-take provision in [section 9],” with section 7 playing only a minor role.\footnote{Id. at 1170–71; see also Bennett, 520 U.S. at 170 (noting that the action agency “runs a substantial risk if its (inexpert) reasons” for rejecting the BiOp’s mandated actions “turn out to be wrong” because “the Biological Opinion’s Incidental Take Statement constitutes a permit authorizing the action agency to ‘take’ the endangered or threatened species so long as it respects the Service’s ‘terms and conditions.’ The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril . . . for ‘any person’ who knowingly ‘takes’ and endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”).}

Professor Holly Doremus argues that the BiOp’s chief coercive effect on the Bureau here results from section 7,\footnote{Holly Doremus, Right on the Commerce Clause, Wrong on the ESA, LEGAL PLANET (Mar. 31, 2011); http://legalplanet.wordpress.com/2011/03/31/right-on-the-commerce-clause-wrong-on-the-esa/} which imputes to federal agencies an affirmative duty not to jeopardize the continued existence of any threatened species.\footnote{See 16 U.S.C. § 1536(a)(2) (2006).}

FWS’s jeopardy finding put the Bureau on notice that its planned actions in the Bay-Delta would violate section 7(a)(2) in addition to any potential liability it might have under section 9.\footnote{See id.; In re Delta Smelt Consol. Cases, 663 F. Supp. 2d 922, 928 (E.D. Cal. 2009).}

Thus, if the Bureau’s affirmative duty to prevent jeopardy under section 7(a)(2) is more significant than section 9’s prohibition against taking, section 7(a)(2)’s coercion subsumes section 9’s because the Bureau would have to reduce water deliveries (and thereby injure the growers) to comply with section 7 regardless of the effect of section 9.\footnote{See Doremus, supra note 38.}

This would make section 7 the proper source for the standing analysis. Because jeopardizing a species’ very existence is a more serious result than taking individual members, this reasoning has intuitive appeal.

The Ninth Circuit, however, reasoned that the section 9 takings prohibition is “arguably . . . [a] separate duty” from section 7 and “at least a substantial factor motivating agencies to comply” with BiOps.\footnote{San Luis, 638 F.3d at 1171–72.}

Thus, the court held, the growers could achieve Article III standing independently under section 9.\footnote{San Luis, 638 F.3d at 1171 (internal quotations omitted); see also Bennett, 520 U.S. at 169 (1997).}

Despite the fact that the court failed to address the section 7 issue, the Supreme Court’s reasoning in Bennett nevertheless seems to support the Ninth Circuit’s reliance on section 9 as a coercive mechanism regardless of the potentially more significant affirmative duty that section 7 imposes.\footnote{See supra note 32.}

\section*{IV. The Commerce Clause Challenge}

The Ninth Circuit relied on the three cases that constitute the current paradigm of Commerce Clause jurisprudence: United States v. Lopez, United

\begin{itemize}
\item \textbf{United States v. Lopez} (1995)
\item \textbf{United States v. Chaco Canyon Conservation Association} (1990)
\item \textbf{United States v. Guest} (1968)
\end{itemize}
States v. Morrison, and the most recent case, Gonzales v. Raich. Significantly limiting Congress’s power under the Commerce Clause for the first time since the 1930s, Lopez established that the Clause allows Congress to regulate three categories of activity: “channels of interstate commerce,” “instrumentalities of interstate commerce,” and “activities that have a ‘substantial effect’ on interstate commerce.” As in the other post-Lopez ESA challenges, the Ninth Circuit determined that the law’s constitutionality rested on its “substantial effects” on interstate commerce.

Lopez and Morrison both struck down statutes found to be wholly unrelated to commerce. In contrast, Raich upheld Commerce Clause authority over “individual applications of a concededly valid statutory scheme” related to commerce, the Controlled Substances Act (CSA), that were not themselves directly commercial. The Court held that medical marijuana grown in the plaintiffs’ California homes properly fell under the regulatory scheme devised by the CSA; thus, application of the CSA to the activity did not violate the Commerce Clause. It reasoned that, “when a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.”

In applying these holdings, other circuits have struggled to determine whether the activity constituting the taking, the effect of the particular takings at issue, or the aggregate effects of all ESA takings should be considered the regulated activity in an ESA/Commerce Clause analysis. In San Luis, the Ninth Circuit sided with those that aggregated the effect of all takings, stating that the ESA “barely bears a substantial relation to commerce” because its aggregated effect “implicates economic concerns” such as commercial activities that lead

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46. Lopez, 514 U.S. at 558–59; Mank, supra note 45, at 392-93.

47. See San Luis, 638 F.3d at 1174.

48. See Raich, 545 U.S. at 23.

49. Id.

50. See id. at 32–33.

51. Id. at 17 (citing Lopez, 514 U.S. at 558) (internal quotations omitted).

52. Compare the D.C. Circuit in Rancho Viejo, L.L.C. v. Norton, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (holding that the federal government through the ESA seeks to regulate “takings, not toads,” and thus regulates the construction of Rancho Viejo’s housing development, which has a clear effect on interstate commerce, rather than the takings themselves), with the Fourth Circuit in Gibbs v. Babbitt, 214 F.3d 483, 493 (4th Cir. 2000) (holding that “[b]ecause the taking of red wolves can be seen as economic activity . . . the individual takings may be aggregated for the purpose of Commerce Clause analysis”), and the Fifth Circuit in GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 633 (5th Cir. 2003) (holding that the relevant legal question under the Commerce Clause is “whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect” on interstate commerce). However, the D.C. Circuit analyzed its previous Commerce Clause challenge to the ESA under the aggregation paradigm. See Nat’l Ass’n of Home Builders v. Babbitt, 130 F.3d 1041, 1046 (D.C. Cir. 1997).
to species’ endangered status, the regulation of commerce in endangered species, and the protection of genetic diversity and the potential future commercial value of a species.53 Thus, the fact that the delta smelt is an intrastate species with no current commercial value is “of no consequence,” so long as its taking is “part of an economic class of activities that have a substantial effect on interstate commerce” through the aggregation of the effects of the ESA itself.54 Because the court determined that the ESA constitutes a “comprehensive regulatory scheme” that has “substantial relation to commerce” under Raich, it “refuse[d] to excise individual components of that larger scheme” by denying the ESA’s applicability to intrastate species.55 Although the circuits are still split on the rationale, the full aggregation method is the majority approach.56

CONCLUSION

Because every circuit court to decide the issue has upheld the ESA in the face of a Commerce Clause challenge,57 albeit on varying grounds,58 it is not surprising that the Supreme Court denied the growers certiorari in late 2011.59 However, the divergent reasoning indicates that the appropriate extent of aggregation in a Commerce Clause analysis is a more complicated doctrinal issue than the uniform results to these challenges may suggest. A reading of Commerce Clause jurisprudence that requires the activity at issue to be directly economic (buying and selling products) is overly formalistic and fails to


54. San Luis, 638 F.3d at 1174–75 (rejecting the growers’ argument that the ESA did not satisfy Raich’s “substantial effect” requirement since it is not a “comprehensive economic regulatory scheme”) (internal quotations omitted).

55. Id. at 1175–77 (citing Raich, 545 U.S. at 17, 22). The court noted that prior Supreme Court decisions and its own precedent had “concluded that congressional efforts at protecting endangered and migratory birds are constitutional under the commerce clause.” Id. at 1175 (citing United States v. Bramble, 103 F.3d 1475, 1480 (9th Cir. 1996) (holding the Eagle Protection Act, 16 U.S.C. § 668, valid under the Commerce Clause); Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990) (“The commerce clause power . . . is broad enough to extend [federal] jurisdiction to local waters which may provide habitat to migratory birds and endangered species.”)); see also Andrus v. Allard, 444 U.S. 51, 63 n.19 (1979) (noting that “the . . . assumption that the national commerce power does not reach migratory wildlife is clearly flawed”).

56. See Al-Tombigbee, 477 F.3d at 1271–77; GDF Realty, 326 F.3d at 633; Nat’l Ass’n of Home Builders, 130 F.3d at 1046.

57. See supra note 1.

58. See supra note 52 and accompanying text.

recognize potential cascade effects that are unarguably economic in nature.\(^{60}\) Although the Court has made clear that a line must be drawn, \textit{Raich} made clear that the Court recognizes that economic and noneconomic activity may be closely linked, and indeed even inseparable when conducted under a single regulatory umbrella.\(^{61}\) The ESA represents a broad attempt to regulate human interaction with all endangered species, whether that conduct involves selling the animal itself or merely profiting from the destruction of its habitat.\(^{62}\) Because the ESA’s “aggregate effects” (the effects of all regulated conduct under the Act) are undoubtedly “substantially related to commerce,” the Ninth Circuit’s analytical approach comports with Supreme Court precedent.

Although the court correctly decided the Commerce Clause issue, it misread the ESA in regard to the coercive potential of sections 7 and 9. Although the Supreme Court’s reasoning in \textit{Bennett} supports the position that section 9 has an independent coercive effect,\(^{63}\) the text of the ESA demonstrates that section 7’s prohibition against causing jeopardy is perhaps more significant, since in order to violate section 7’s jeopardy prohibition, the Bureau would necessarily also violate section 9 by taking species members.\(^{64}\) By failing to recognize this distinction, the court incorrectly conflated the two sections, artificially restricting the scope of section 7.

\textit{Heather Welles}

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\(^{60}\) For example, destroying an endangered species eliminates potential medical advances that may be derived from that species. \textit{See} \textit{Al.-Tombigbee}, 477 F.3d at 1273.

\(^{61}\) \textit{See} Gonzalez v. Raich, 545 U.S. 1, 25, 27 (“Unlike those at issue in \textit{Lopez} and \textit{Morrison}, the activities regulated by the CSA are quintessentially economic . . . . One need not have a degree in economics to understand why a nationwide exemption for a vast quantity of marijuana (or other drugs) locally cultivated for personal use . . . may have a substantial impact on the interstate market for this extraordinarily popular substance.”).

\(^{62}\) \textit{See} San Luis & Delta Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1176-77 (9th Cir. 2011) (noting the multiple intersections of the ESA with economic activity); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1072 (D.C. Cir. 2003) (a construction project that destroyed arroyo toad habitat would violate the ESA).

\(^{63}\) \textit{See} Bennett v. Spear, 520 U.S. 154, 170 (1997) (“The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril . . . for ‘any person’ who knowingly ‘takes’ and endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”).

\(^{64}\) 16 U.S.C. §§ 1536(a)(2), 1538(a)(1); \textit{see also} Doremus, supra note 38.

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