Published on *The National Law Review* https://natlawreview.com

Application of Sections 7 and 9 of the Endangered Species Act to California Delta Smelt Does Not Violate Commerce Clause

Article By:

S. Keith Garner

Michael R. Leake

In *Stewart & Jasper Orchards v. Salazar*, the Court of Appeals affirmed the district court judgment that the application of **Sections 7 and 9 of the Endangered Species Act ("ESA")** to the California delta smelt does not violate the Commerce Clause in the United States Constitution.

The delta smelt is a small fish, 60-70 millimeters in length, that is undisputedly endemic to California. Though once inhabiting all of California's San Francisco Bay/Sacramento-San Joaquin Delta Estuary, its range has diminished. The delta smelt presently has no commercial value, but it was commercially harvested in the past.

The **United States Fish and Wildlife Service** listed the delta smelt as a threatened species in 1993 under the ESA. In 2008, the Service, acting under Section 7 of the **ESA (16 U.S.C. § 1536(a)(2))**, issued a **Biological Opinion to the Bureau of Reclamation.** The Biological Opinion concerned the Bureau's and the **California Department of Water Resource's** operation of the Central Valley Project and the State Water Project, two of the world's largest water diversion projects. The Biological Opinion concluded that "the coordinated operations of the water projects as proposed, are likely to jeopardize the continued existence of the delta smelt" and "adversely modify delta smelt habitat." The Biological Opinion included a "Reasonable and Prudent Alternative," as well as an "Incidental Take Statement." The Reasonable and Prudent Alternative consisted of various components designed to reduce entrainment and other "taking" of smelt during critical times of the year by controlling water flows to and in the delta.

Several growers ("Growers") sued the Service claiming that their orchards "experienced substantially reduced water deliveries as a result of the Service's decision to act on behalf of the delta smelt." Among other claims, the growers alleged that – as applied to the delta smelt – the Service's application of ESA Section 7 and power to enforce the "no-take provision" in ESA Section 9 were unconstitutional under the Commerce Clause. The growers claimed that, since "the delta smelt is a purely intrastate species and because it has no commercial value, Section 7(a)(2) and 9 of the ESA . . . as applied to [the operation] of the Central Valley Project and the State Water Project,

are invalid exercises of constitutional authority [under the Commerce Clause]."

The district court denied the Growers' motion for summary judgment and granted the Service's and certain interveners' cross-motions for summary judgment on the basis that (1) growers did not have Article III standing, (2) their claim was not ripe, and (3) application of ESA Sections 7 and 9 to the operations of the water projects was a valid exercise of Congress' power under the Commerce Clause. With respect to the issue of standing, the district court first noted that while the growers' complaint challenged Sections "7(a)(2) and 9" of the ESA, the motion for summary judgment "focuses exclusively on the theory that the application of Section 9's take prohibition to the smelt exceeds Congress' authority under the Commerce Clause." Nevertheless, the district court concluded, "there is no dispute that Plaintiffs have standing to bring a Section 7 claim." But the court determined the Growers did not have standing to bring a Section 9 claim. It reasoned, "[g]iven that there is no threat of imminent Section 9 enforcement in this case, there is no causal connection between Plaintiffs' injury and the conduct complained of, namely Section 9's application to the coordinated operation of the project." The district court similarly decided that the ESA Section 9 claim is not ripe: "Plaintiffs point to no concrete plans on the part of project operators to violate the ESA, no communication of a specific warning or threat to initiate enforcement proceedings, nor any history of past prosecution or enforcement against the project operators."

The Court of Appeals disagreed with the district court's conclusion that the Growers did not have standing to bring the ESA Section 9 claim and that such claim was not ripe. In supporting its position, the Court of Appeals reasoned that the direct cause of the Growers' injury was the Bureau's reduction of water flow. But the Service's power to enforce the no-take provision of ESA Section 9 was an indirect cause since that power has coerced the Bureau to comply with the Biological Opinion by reducing water flow, which in turn had and will continue to cause the Growers to suffer hardship.

Finally, the Court of Appeals upheld the district court's finding that the application of ESA Sections 7 and 9 to the California delta smelt **does not violate the Commerce Clause in the United States Constitutio**n. The appellate court noted that Congress has the power to regulate purely intrastate activity as long as the activity is being regulated under a general regulatory scheme that bears a substantial relationship to interstate commerce. Pursuant to ***Gonzales v. Raich***, 545 U.S. 1, 17 (2005), when a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application) in determining whether the statute relates to "commerce or any sort of economic enterprise." See ***United States v. Lopez*****,** 514 U.S. at 561 (1995); ***United States v. Morrison*****,** 529 U.S. at 610 (2000).

In concluding its analysis, the Court of Appeals observed as follows, "The Supreme Court has never required that a statute be a 'comprehensive economic regulatory scheme' or a 'comprehensive regulatory scheme for economic activity' in order to pass muster under the Commerce Clause. Indeed, it has never used those terms. The only requirement – which was expressly detailed in *Raich* - is that the 'comprehensive regulatory scheme' have a 'substantial relation to commerce.' *See Raich*, 545 U.S. 17. The statute need not be a purely economic or commercial statute, as the Growers would have us believe. We conclude that the ESA is 'substantial[ly] relat[ed]' to interstate commerce and, thus, the Growers' as-applied challenge to ESA §§ 7 and 9 fails."

Copyright © 2025, Sheppard Mullin Richter & Hampton LLP.

Source URL:https://natlawreview.com/article/application-sections-7-and-9-endangered-species-act-to-california-delta-smelt-does-not-viola