Environmental Law & Property Rights

The Sacramento-San Joaquin Delta Litigation: A Brief Summary

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California's Sacramento-San Joaquin Delta serves as a dynamic ecosystem as well as a critical supply of water for millions of people in the Golden State. While these two purposes do not necessarily conflict with each other, recent periods of limited precipitation in Northern California have made it difficult to adequately provide for both environmental and socioeconomic needs.

When either environmental interests or agricultural and municipal water users receive less Delta water than they anticipate, litigation often follows. The latest litigation concerning the Delta and the intersection of human and environmental needs is currently taking place in Fresno before Judge Oliver W. Wanger of the Eastern District of California.

In *The Consolidated Delta Smelt Cases*, water users are challenging the United States Fish and Wildlife Service's ("FWS") conclusions regarding the effects state and federal water projects have on the delta smelt, a threatened species under the federal Endangered Species Act ("ESA").[1] In *The Consolidated Salmonid Cases*, water users have brought a similar challenge against the National Marine Fisheries Service's ("NMFS") conclusions on the effects the projects have on Chinook salmon, green sturgeon, and other federally-protected aquatic species.[2]

In each case, the federal government has issued a biological opinion under the ESA that restricts the amount of water that can be delivered to farmers in the San Joaquin Valley and urban water users in Southern California.[3] According to the government, these restrictions are necessary to protect the endangered fish species from harm resulting from the operation of the state and federal projects' water pumps, which are located in the southern part of the Delta.

The farmers, urban water users, and their respective water districts contend as plaintiffs that the restrictions are illegal for several reasons, including that they violate the ESA's mandate that biological opinions be completed by using the best scientific and commercial data available, that the government failed to consider the economic and technological feasibility of the biological opinions' restrictions, and that the conclusions supporting the restrictions are internally inconsistent. They contend further that the government failed to adequately consider the effects that other factors besides the pumps have on the species. These factors include predation, invasive species, and pollution, among others.

Judge Wanger has recognized the significant impact the federal government's decision to restrict water deliveries has had on communities in the San Joaquin Valley and Southern California: "The stakes are high, the harms to the affected human communities great, and the injuries unacceptable if they can be mitigated."[4] In addition, on December 14, 2010, the court in *The Consolidated Delta Smelt Cases* granted the plaintiffs summary judgment on many of their ESA and Administrative Procedure Act claims, remanding the delta smelt biological opinion back to FWS.[5]

Even before this recent summary judgment ruling, however, the court had rendered conclusions of law with respect to several important issues that may have a significant impact on environmental litigation in the years to come. Three rulings stand out: the court's holding that the biological opinions were implemented in violation of the National Environmental Policy Act ("NEPA"),[6] its decision to balance competing hardships in considering preliminary injunctive relief,[7] and its conclusion that the delta smelt restrictions do not exceed the federal government's Commerce Clause authority.[8] A brief summary of each ruling follows.

I. The Federal Government's Implementation of the Biological Opinions Violates NEPA

Several of the plaintiffs in *The Consolidated Delta Smelt Cases* and *The Consolidated Salmonid Cases* alleged that the biological opinions and the resulting water restrictions did not comply with NEPA. All parties agreed that no NEPA documentation was prepared by federal agencies in charge of issuing (FWS and NFMS) and implementing (United States Bureau of Reclamation) the biological opinions.

NEPA requires federal agencies to prepare an Environmental Impact Statement in order to assess the potential environmental consequences of proposed "major Federal actions significantly affecting the quality of the human environment."[9] Although NEPA is a procedural statute and does not mandate a particular result for an agency action, the Supreme Court has noted that NEPA ensures that agencies "have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[10] A holding that the federal agencies in charge of issuing and implementing the biological opinions are bound by NEPA would thus provide a significant benefit to water users because it would ensure, in the words of a pertinent Ninth Circuit decision, "a democratic decisionmaking structure . . . that is 'almost certain to affect the agency's substantive decision.'"[11]

The court in the Delta litigation first considered whether any federal agency conducted major federal action under NEPA, commenting that the issue of which agency is subject to NEPA "is not a shell game in which the agencies may leave the public to guess which agency has taken major federal action."[12] According

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to the court, Reclamation's implementation of each biological opinion was major federal action because it substantially altered the status quo of the water projects' delivery operations. As the court noted, water delivery operations must be materially changed to restrict project water flows to protect smelt, salmon, and other species analyzed in the biological opinions.[13]

The second issue for the plaintiffs' NEPA claim was whether Reclamation's implementation of the biological opinions resulted in significant environmental impacts. Throughout the litigation, the court has held in the affirmative, relying on the harm implementation of the biological opinions has brought to humans. The adverse human environmental impacts include destruction of permanent crops, fallowed lands, increased groundwater consumption, land subsidence, reduction of air quality, destruction of family and entity farming businesses, and social disruption and dislocation (such as increased property crime and intra-family crimes of violence, adverse effects on schools, and increased unemployment leading to hunger and homelessness).[14]

In light of these significant impacts and the lack of NEPA analyses for each biological opinion, the court concluded that the plaintiffs were entitled to summary judgment against Reclamation for the agency's failure to perform any NEPA review prior to provisionally adopting and implementing the biological opinions.[15] The court later emphasized the importance of NEPA compliance when considering restriction of water deliveries for the purported benefit of endangered species: "Federal Defendants completely abdicated their responsibility to consider alternative remedies in formulating [a]ctions that would not only protect the species, but would also minimize the adverse impact on humans and the human environment."[16] Judge Wanger expressed further concern that, although the government considered the effects water deliveries have on species, the burden of the other causes of the species' decline (including pollution and invasive species) "is allocated to the water supply, without the required analysis whether alternatives, less harmful to humans and the human environment, exist. Although this allocation of resources ultimately is the prerogative of the agency, NEPA nevertheless required a hard look."[17]

Reclamation's failure to comply with NEPA was one reason why the court later granted the plaintiffs preliminary injunctive relief over implementation of the biological opinions, as discussed below.

II. Judge Wanger Distinguishes *TVA v. Hill* and Grants the Plaintiffs Preliminary Injunctive Relief

In late 2009 and early 2010, implementation of the delta smelt and salmonid biological opinions prevented significant amounts of water from being delivered to the plaintiffs. With the final resolution of the Delta litigation still months away, the plaintiffs moved for preliminary injunctive relief.

Preliminary injunctive relief requires that the plaintiff demonstrate 1) a likelihood of success on the merits, 2) irreparable harm, 3) that the balance of hardships tips in the plaintiff's favor, and 4) that injunctive relief is in the public interest.[18] The NEPA claim discussed above demonstrated success on the merits, and the court likewise held that plaintiffs were likely to succeed on some of their ESA claims as well. Further, irreparable harm was clear in that plaintiffs were losing water that would have been delivered to them but for the implementation of the biological opinions.[19]

But the plaintiffs were also required to show that the balance of hardships tipped in their favor and that the public interest favored injunctive relief. Despite the benefit that an increased water supply would provide to the plaintiffs, these were difficult showings to make because the water restrictions were intended to protect endangered species. For example, in *TVA v. Hill*, the Supreme Court enjoined a federal dam project that would have eradicated the snail darter species, holding that Congress struck the balance in favor of affording species the highest of priorities.[20] In so doing, the Court declared that Congress' intent in enacting the ESA was to "halt and reverse the trend toward species extinction, whatever the cost."[21]

The plaintiffs faced a significant hurdle in that prior decisions involving the water projects in the Delta litigation found that *TVA* forecloses a court's traditional equitable discretion to consider economic hardship when balancing competing injuries.[22] Ninth Circuit precedent on preliminary injunctive relief in cases involving endangered species was also not favorable.[23]

Nonetheless, Judge Wanger found that a balance of hardships was appropriate in light of the significant harm to human welfare that was occurring under the implementation of the biological opinions.[24] The court reasoned that while *TVA* "concerned the competing economic interest in the operation of a hydro-electric project and prohibited federal courts from balancing the loss of funds spent on that project against the loss of an endangered species," no case addressed "whether the ESA precludes balancing of harms to humans and the human environment under the circumstances presented here."[25] According to the court, "Congress has not nor does *TVA v. Hill* elevate species protection over the health and safety of humans."[26] More precisely, the argument that *TVA v. Hill* "precludes equitable weighing of Plaintiffs' interests is not supported by that case, as evidence of harm to the human environment in the form of social dislocation, unemployment, and other threats to human welfare were not present in *Hill*. They are in this case."[27]

The court determined further that preliminary injunctive relief was in the public interest due to the same human hardships discussed in its NEPA analysis, including the destruction of permanent crops, fallowed lands, reduced groundwater supplies, and destruction of family and entity farming businesses.[28] As Judge Wanger wrote in his preliminary injunction decision, "[n]o party has suggested that humans and their environment are less deserving of protection than the species. Until Defendant Agencies have complied with the law, some injunctive relief . . . may be appropriate, so long as it will not further jeopardize the species or their habitat."[29]

After the issuance of the preliminary injunction decision, the parties in the Delta litigation entered into a temporary agreement that provided certain water flow levels for the state and federal projects while providing specific conditions under which those flows could be decreased in order to protect species as necessary.[30]

III. Court Upholds Delta Smelt Restrictions Under Commerce Clause

The plaintiffs in *Stewart & Jasper Orchards v. Salazar*, one of the lawsuits in *The Consolidated Delta Smelt Cases*, have alleged that the Fish and Wildlife Service's delta smelt water restrictions exceed the scope of the federal government's commerce power.[31] The Commerce Clause, of course, authorizes Congress to "regulate Commerce . . . among the several states."[32] This authority includes the power to regulate activities that substantially affect interstate commerce.[33]

Under the Supreme Court's decisions in *United States v. Lopez*[34] and *United States v. Morrison*,[35] courts must consider four factors in order to determine whether an activity substantially affects interstate commerce such that it is subject to federal regulation. The first factor is whether the activity is economic in nature. Second, courts look for a "jurisdictional element" in the authorizing statute that helps ensure on a case-by-case basis that the federal regulation is one of an activity that substantially affects interstate commerce. Third, courts examine the legislative history of the statute to locate any express congressional findings that demonstrate Congress' belief that the activity being regulated under the Commerce Clause substantially affects interstate commerce. The final factor is whether the connection between a regulated activity and the activity's effect upon interstate commerce is attenuated.[36] In addition, the Supreme Court held in *Gonzales v. Raich* that the regulation of a local, noncommercial activity satisfies the "substantial effects" test if it is done pursuant to "a statute the regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative interstate market."[37]

According to the plaintiffs in *Stewart & Jasper*, the delta smelt's status as a noncommercial, intrastate fish—the smelt has no commercial value and is found only in California—demonstrates that smelt-based water restrictions are not a regulation of interstate commerce or of an activity that substantially affects interstate commerce.

No court has invalidated federal regulation of a noncommercial, intrastate species on Commerce Clause grounds. However, the five circuit courts that have considered this issue have offered different rationales for upholding federal authority over noncommercial, intrastate species.[38]

For example, in *Rancho Viejo v. Norton*, the D.C. Circuit considered a Commerce Clause challenge to the application of the ESA to the arroyo toad and found a substantial effect on interstate commerce based on Rancho Viejo's "planned commercial development, not on the arroyo toad that it threatens."[39] Thus, under the D.C. Circuit's reading of the "substantial effects" test, whether an activity is economic in nature under the first *Lopez* and *Morrison* factor is determined by looking at the activity affected by a regulation (in *Rancho Viejo*, the ESA affected the construction of a housing development), not the activity regulated by the express terms of a statute (the ESA does not regulate commercial development generally but prohibits activities which result in the taking of endangered species like the arroyo toad).[40]

The Fifth Circuit rejected this approach in *GDF Realty Invs. Ltd. v. Norton*, which concerned the ESA take provision's constitutionality as applied to six species of subterranean invertebrates found only in two counties in Texas.[41] In *GDF Realty*, the district court had held that the regulated activity in the "substantial effects" test was a commercial development, just as the D.C. Circuit had concluded in *Rancho Viejo*. But the Fifth Circuit rejected this rationale, noting that Congress, through the ESA, "is not directly regulating commercial development. To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors."[42] As the court explained, "[n]either the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in regulated activity will have some connection to interstate commerce."[43]

Nonetheless, the Fifth Circuit offered a different approach for sustaining the regulation of Cave Species takes: "[The] ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes."[44]

The Eleventh Circuit issued a similar decision in *Alabama-Tombigbee Rivers Coal. v. Kempthorne*.[45] According to the court in *Tombigbee*, the ESA is a market regulatory scheme under *Raich* based on Congress' concern with the trade in endangered species as well as the potential commercial benefits that come with the preservation of biodiversity.[46] As the court saw it, "pharmaceuticals, agriculture, fishing, hunting, and wildlife tourism . . . fundamentally depend on a diverse stock of wildlife, and the Endangered Species Act is designed to safeguard that stock."[47]

Judge Wanger relied heavily on *Tombigbee* in upholding the delta smelt restrictions against the *Stewart & Jasper* plaintiffs' Commerce Clause challenge, opining that "[t]he parallels between *Alabama-Tombigbee* and the [delta smelt] case are myriad, and the distinctions immaterial."[48] While Congress had multiple motivations for passing the ESA, including ethical and aesthetic considerations, the court held that the ESA is an economic regulatory scheme, given its "strong underpinnings in market regulation."[49] Echoing *ATRC*, the court left FWS's delta smelt restrictions in place: "Congress had a rational basis for believing that requiring federal agencies to evaluate the impacts of planned activities on all threatened or endangered species, regardless of their geographic range, was the most effective way to protect the commercial benefits of biodiversity."[50]

The biodiversity rationale, however, is not without its flaws. As Judge Sentelle of the D.C. Circuit has explained, "[a] creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce."[51] But if such speculation could defeat a Commerce Clause challenge, "Congress could [not] be prohibited from regulating any action that might conceivably affect the number or continued existence of any item whatsoever," and congressional power would have "no stopping point."[52]

In light of these criticisms, and with the circuit courts having "applied different, and, sometimes, clearly contradictory

rationales in order to justify federal regulation of endangered species,"[53] the issue of whether the federal government may regulate noncommercial, intrastate species under the Commerce Clause is far from settled. The *Stewart & Jasper* plaintiffs have appealed Judge Wanger's Commerce Clause decision to the Ninth Circuit, asking the court to strike down the delta smelt regulations by holding that the ESA is not a market regulatory scheme.[54] Briefing in the Ninth Circuit appeal was completed this fall, with oral argument expected to occur in 2011.[55]

Conclusion

The plaintiffs in the Delta litigation have obtained significant victories in their challenge to the federal government's Endangered Species Act biological opinions. The court's NEPA ruling and decision to apply traditional equitable standards in considering injunctive relief led to more water for users in the San Joaquin Valley and Southern California and gave the plaintiffs hope for further relief as the litigation progressed. Indeed, the plaintiffs ultimately prevailed on many of their claims in *The Delta Smelt Consolidated Cases*, as determined by the court's recent summary judgment decision. The court's summary judgment decision in *The Consolidated Salmonid Cases* is expected to occur in early 2011.

Endnotes

1 *See* The Consolidated Delta Smelt Cases, No. 1:09-cv-407 OWW DLB (E.D. Cal.).

2 *See* The Consolidated Salmonid Cases, No. 1:09-cv-1053 OWW DLB (E.D. Cal.).

3 While *The Consolidated Delta Smelt Cases* and *The Consolidated Salmonid Cases* are separate cases involving distinct biological opinions issued under the Endangered Species Act, the cases parallel each other with regard to certain legal issues. These issues include the federal government's obligations under the National Environmental Policy Act for the restriction of water deliveries under each biological opinion, as well as the standard for preliminary injunctive relief under the Endangered Species Act. Because the Eastern District of California's treatment of both of these issues is similar in each case, and as a courtesy to the reader, much of the summary below cites to the relevant parts of *The Consolidated Delta Smelt Cases* as a means to describe the Delta litigation generally, instead of discussing each case individually.

4 The Consolidated Delta Smelt Cases, No. 1:09-cv-407, 2010 U.S. Dist. LEXIS 62006, at *148 (E.D. Cal. May 27, 2010).

5 *See* The Consolidated Delta Smelt Cases, 2010 U.S. Dist. LEXIS 132819.

6 *See* The Consolidated Delta Smelt Cases, 686 F.Supp.2d 1026 (E.D. Cal. 2009); The Consolidated Salmonid Cases, 688 F.Supp.2d 1013 (E.D. Cal. 2010).

7 *See* The Consolidated Delta Smelt Cases, No. 1:09-cv-407, 2010 U.S. Dist. LEXIS 62006 (E.D. Cal. May 27, 2010); The Consolidated Salmonid Cases, No. 1:09-cv-1053, 2010 U.S. Dist. LEXIS 54937 (E.D. Cal. May 18, 2010).

8 *See* The Consolidated Delta Smelt Cases, 663 F.Supp.2d 922 (E.D. Cal. 2009).

9 42 U.S.C. § 4332(C).

10 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

11 Or. Natural Desert Ass'n. v. BLM, 531 F.3d 1114, 1120 (9th Cir. 2008) (quoting *Methow Valley*, 490 U.S. at 350).

12 The Consolidated Delta Smelt Cases, 686 F.Supp.2d at 1044.

13 *Id*. at 1049.

14 *Id*. at 1044.

15 The Consolidated Delta Smelt Cases, 686 F.Supp.2d at 1051.

16 The Consolidated Delta Smelt Cases, 2010 U.S. Dist. LEXIS 62006 at *145.

17 *Id*.

18 *See* Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 374 (2008).

19 *See* The Consolidated Delta Smelt Cases, 2010 U.S. Dist. LEXIS 62006 at *95 ("Every acre-foot of pumping foregone during critical time periods is an acre-foot that does not reach the San Luis Reservoir where it can be stored for future delivery to users during times of peak demand in the water year.").

20 TVA v. Hill, 437 U.S. 153, 194 (1978).

21 *Id*. at 184.

22 Earlier in the Delta litigation, for example, Judge Wanger denied the plaintiffs' request for a temporary restraining order of the delta smelt biological opinion, holding that "*TVA v. Hill* and related Ninth Circuit authorities foreclose the district court's traditional discretion to balance equities under the ESA." The Consolidated Delta Smelt Cases, 693 F. Supp. 2d 1145, 1150 (E.D.Cal. 2010).

23 *See, e.g.*, Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987) ("In Congress's view . . . the balance of hardships and the public interest tip heavily in favor of endangered species. We may not use equity's scales to strike a different balance.") (citing *TVA*, 437 U.S. at 187-88).

24 *See* The Consolidated Delta Smelt Cases, 2010 U.S. Dist. LEXIS 62006 at *141-43.

25 *Id*. at *142.

26 *Id*.

27 *Id*. at *146.

28 *Id*. at *144.

29 *Id*. at *148-49.

30 *See* Press Release, U.S. Department of the Interior, Interior, California, Water Users, and Environmental Groups Reach Agreement on CVP Operational Plan Protections for Imperiled Delta Smelt (June 23, 2010), *available at* http://www.doi.gov/news/pressreleases/Interior-California-Water-Users-and-Environmental-Groups-Reach-Agreement-on-CVP-Operational-Plan-Protections-for-Imperiled-Delta-Smelt.cfm.

31 *See* The Consolidated Delta Smelt Cases, 663 F.Supp.2d at 925.

32 U.S. Const. art. I, § 8.

33 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 559 (1995).

34 514 U.S. 549 (1995).

35 529 U.S. 598 (2000).

36 *See Morrison*, 529 U.S. at 610-612.

37 Gonzales v. Raich, 545 U.S. 1, 26 (2005).

38 *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003); Ala.-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007).

39 *Ranch Viejo*, 323 F.3d at 1072.

40 *See* 16 U.S.C. § 1538(a)(1)(B) ("It is unlawful for any person subject to the jurisdiction of the United States . . . to take any [endangered or threatened] species within the United States.").

41 *See GDF Realty*, 326 F.3d at 624.

42 *Id*. at 634.

43 *Id*.

44 *Id*. at 640.

45 477 F.3d 1250 (11th Cir. 2007).

46 *See id*. at 1274.

47 *Id*.

48 The Delta Smelt Consolidated Cases, 663 F.Supp.2d at 945.

49 *Id*. at 947.

50 *Id*. at 948.

51 *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting).

52 *Id*.

53 Bradford C. Mank, *After* Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. Colo. L. Rev. 375, 378 (2007).

54 The *Stewart & Jasper* plaintiffs' Ninth Circuit opening brief may be downloaded at http://plf.typepad.com/files/july152010deltasmeltopeningbrief.pdf.

55 The opening, answering, and reply briefs in the *Stewart & Jasper* plaintiffs' Commerce Clause appeal may be downloaded at: http://community.pacificlegal.org/Page.aspx?pid=900.