Aligning itself with four other federal circuits that have addressed the question, the Ninth Circuit has ruled that application of the Endangered Species Act to California's imperiled Delta Smelt doesn't violate the Commerce Clause of the U.S. Constitution.

San Luis & Delta-Mendota Water Authority v. Salazar (http://www.ca9.uscourts.gov/datastore/opinions/2011/03/25/10-15192.pdf) is the latest chapter in the long-running legal battle over whether operation of the massive federal and California state water projects in Central California contravenes the ESA. In particular, the deleterious effects of those projects on the Delta Smelt, a critical "indicator species" that's listed as threatened by federal regulators under the ESA, have been a major reason federal regulators and courts have ordered reductions in water diversions from the California Delta in recent years.

The latest legal stratagem by which California's major water districts seek to fend off these ESA-based reductions in water deliveries from the federal and state water projects is to assert that the ESA's application to the Delta Smelt–which currently lacks commercial value and is found only in California's Delta region–violates the Commerce Clause. And the water community has enlisted a formidable ally to pursue this constitutional challenge on its behalf: the Pacific Legal Foundation.

Nevertheless, a unanimous panel of the Ninth Circuit rejected PLF's and the water districts' Commerce Clause argument. After finding that the water contractors had legal standing to bring their constitutional challenge, and that the claim was ripe for adjudication, the court turned to the merits. Relying heavily on the Supreme Court's 2005 decision in *Gonzales v. Raich* (upholding Congress' power under the Commerce Clause to prohibit cultivation and possession of marijuana even if the cultivation and possession are wholly intrastate), the Ninth Circuit held that the ESA "bears a substantial relation to commerce."

Critically, the court found that as long as the ESA itself bears a substantial relation to interstate commerce, the "de minimus character" of particular applications of that statute "is of no consequence." Stated differently, the fact that the Delta Smelt inhabits only California and has no present commercial value does not make regulation to protect the species under the ESA violative of the Commerce Clause. Instead, the Ninth Circuit focused more broadly on how the ESA–applied generally–implicates national economic concerns.

In so doing, the Ninth Circuit has aligned itself with the 4th, 5th, 11th and D.C. Circuit Courts of Appeals, which have similarly rejected Commerce Clause-based challenges to the ESA. To date, no federal circuit has ruled to the contrary.

Nevertheless, it seems likely that the water contractors and PLF will seek U.S. Supreme Court review of the Ninth Circuit ruling. PLF in particular has been looking for a Supreme Court test case to assert its claim that the ESA violates the Commerce Clause. It's far from certain that the Supreme Court will take the case–especially given the lack of a circuit split on the legal question involved–but if it does the water contractors and PLF may well find a more receptive audience for its legal theory than the Ninth Circuit proved to be.

(Full disclosure notice: last year I participated in a debate with PLF lead counsel Damien Schiff over the question of whether the ESA's application to the Delta Smelt violates the Commerce Clause. I'm delighted (though not terribly surprised) that the Ninth Circuit agrees with me that it does not.)