

Appellate ESA Decisions May Prompt More Emphasis on Economic Considerations

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Last month's 168-page, split decision by a panel of the U.S. Court of Appeals for the Ninth Circuit in *San Luis & Delta-Mendota Water Authority v. Jewell*, 2014 BL 70239, 78 ERC 1045 (9th Cir. Mar. 13, 2014) (*San Luis*), marked yet another chapter in the "continuing war over protection of the delta smelt," a three-inch fish listed as threatened under the Endangered Species Act (ESA) (50 DEN A-1, 3/14/14). On May 12, the plaintiffs in the case, the San Luis & Delta Mendota Water Authority, which supplies water to domestic and agricultural users in central California, moved to obtain review en banc.

Whether the next review is provided by a larger panel of the Ninth Circuit or by the U.S. Supreme Court, this case could prove to be a watershed in ESA jurisprudence: a refutation or refinement of Supreme Court Chief Justice Warren Burger's characterization of the ESA, in the seminal 1978 *Tennessee Valley Authority v. Hill* decision, that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*" and "to *give endangered species priority over the 'primary missions'* of federal agencies."

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Authors

David B. Weinberg
Senior Counsel
202.719.7102
dweinberg@wiley.law

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