WHAT REMAINS OF THE ENDANGERED SPECIES ACT AND WESTERN WATER RIGHTS AFTER *TULARE LAKE BASIN WATER STORAGE DISTRICT V. UNITED STATES*?

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> "Takings cases are invariably tough cases pitting strongly held values, about significant public concerns, against other strongly held values and interests."[1]

INTRODUCTION

"Can [the] government turn off the tap for farmers and other water users to provide more water for endangered fish?"[2] This is a question that both environmentalists and water users are asking throughout the western United States as the Endangered Species Act (ESA) threatens to override long-standing state water rights. Many have suggested how the courts might eventually answer this question and have speculated about the inevitable case that would force a court to do so.[3] However, despite the potential direct legal conflict be-

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1. Hage v. United States, 35 Fed. Cl. 147, 151 (1996).

2. David E. Haddock, *Fair Water Use for All*, CHRISTIAN SCI. MONITOR, June 22, 2001, at 11.

3. *See* Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 737 (2000) ("Whatever one's particular view . . . a prudent observer will recognize that disputes about water are likely to be at the forefront of the controversy over the survival of listed species . . . ."); Marcus J. Lock, *Braving the Waters of Supreme Court Takings Jurisprudence: Will the Fifth Amendment Protect Western Water Rights from Federal Environmental Regulation?*, 4 U. DENV. WATER L. REV. 76, 99 (2000) (evaluating a "simple hypothetical" where an appropriator brings suit claiming that the ESA has taken his water right without just compensation); Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319, 322 (1996) ("The potential for pervasive conflict

tween the ESA and property rights in water, and the prevalence of water rights conflicts in the West, until 2001 no case had directly resolved these conflicts.

The following scenario illustrates these conflicts and is familiar to many in the West. The ESA requires the Bureau of Reclamation ("Bureau") to consult with the National Marine Fisheries Service (NMFS) or the Fish and Wildlife Service (FWS) whenever its actions, such as distributing water to irrigators and thereby lowering the level of water in a stream, may jeopardize the continued existence of an endangered species.[4] If the NMFS or the FWS determines that the action may jeopardize the species, the agency may require the Bureau to limit water distributed to water users in order to protect the endangered species according to the mandates of the ESA. However, such restrictions may deprive water users of some or all of their contractually allotted water.

Although this scenario is becoming more common in the West,[5] there have been relatively few cases where irrigators have argued a Fifth Amendment taking as a result of the man-

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between established water uses and endangered species for western river allocation has been recognized for over a decade."); Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 258 (1990) [hereinafter Sax, *Future of Water Law*] (depicting a property rights dispute arising from the requirement that an appropriator give up rights in order to maintain instream flows).

Many have also commented on the widespread conflict between private rights and environmental regulation. *See* Murray D. Feldman & Michael J. Brennan, *Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property*, 32 LAND & WATER L. REV. 509 (1997); Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297 (1995); Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375 (2000); Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989); Michael A. Yuffee, *Prior Appropriations Water Rights: Does* Lucas *Provide a Takings Action Against Federal Regulation Under the Endangered Species Act?*, 71 WASH. U. L.Q. 1217 (1993).

4. *See infra* Part II.

5. *See, e.g.*, Douglas Jehl, *Rio Grande Choice: Take City's Water or Let Minnow Die*, N.Y. TIMES, Jan. 19, 2003, at 1 (reporting a recent federal district court ruling ordering the release of water to protect the endangered silvery minnow); *Temporary Halt on Columbia Water Permits*, SEATTLE TIMES, Jan. 13, 2002, at B2 (reporting that a county judge issued a temporary moratorium on the issuance of water-rights permits for the Columbia River as a result of federal flow limitations imposed for the protection of fish); *$175 Million Sought for Klamath Basin*, SEATTLE TIMES, Dec. 3, 2001, at B6 (reporting that the Bureau restricted water deliveries to Klamath Basin water users in the spring of 2001 in order to protect fish and bald eagles protected under the ESA); *see also infra* Part VI.A.

dates of the ESA. Even where water users have brought actions against the government and argued for just compensation for their loss of water rights, the courts have declined to find a taking.[6] The courts have held that the language in the contracts between the federal government and the water users exempt the government from liability for the restrictions on water deliveries. As a result, the courts did not reach the issue of whether the actions on the part of the government rose to the level of a compensable taking.[7]

In April 2001, however, a case directly addressing these issues came before the United States Court of Federal Claims and was resolved in favor of the water users. In *Tulare Lake Basin Water Storage District v. United States*,[8] plaintiff water users in California argued that their contractually conferred water rights were taken as a result of the federal government's restrictions on water use as required by the ESA.[9] The court ruled that a physical taking had occurred as a result of the restrictions and granted the plaintiffs summary judgment.[10]

Despite this decision, the fate of the ESA and western water rights is far from resolved. The *Tulare* court reached the issue of whether or not a taking occurred because of the unique factual circumstances surrounding the parties to the water contract and its language. In addition, despite the court's finding of a physical taking, it should have analyzed the claim as a regulatory rather than a physical taking. If the court had analyzed the claim under the Supreme Court's regulatory takings jurisprudence, the court likely would have determined that the government's action did not rise to the level of a compensable taking. Therefore, *Tulare* should not open the door to widespread successful takings claims where water use is restricted under the ESA.

Even though future courts may not follow the approach in *Tulare*, the court nevertheless took an important step in formally addressing the conflict between the ESA and the property rights of water users and providing one way for the conflict to be resolved. Because conflicts between water rights and limitations on water deliveries under the ESA are becoming

6. *See infra* Part IV.B.
7. *See infra* Part IV.B.
8. 49 Fed. Cl. 313 (2001).
9. *Id.* at 314.
10. *Id.* at 319, 324.

more prevalent throughout the West, the case offers a starting point for similar claims. In addition, the case has important implications for the drafting of future water supply contracts. Despite *Tulare*'s importance, however, the decision does not resolve all issues in the conflict between the ESA and the Fifth Amendment in the realm of water rights.

This Note examines the background legal issues and history surrounding this unique conflict and in so doing illustrates *Tulare's* limitations and possible ramifications. Part I examines the history of water development in California to put the conflict into context and illustrate the importance and widespread relevance of this decision. Part II gives an overview of the ESA, providing background regarding the legal issues and illustrating the broad way in which the courts have construed the ESA. Part III lays out the Fifth Amendment constitutional takings jurisprudence. Part IV addresses takings as applied in the water law context and summarizes several cases leading up to *Tulare* in which the courts rejected similar takings claims. Part V details the facts of the *Tulare* case and addresses the court's analysis, concluding that the court erred in analyzing the claim as a physical rather than a regulatory taking. Finally, this Note discusses the importance of the case in light of the continuing conflict between private property rights and the ESA.

I. HISTORY OF CALIFORNIA WATER DEVELOPMENT AND THE CENTRAL VALLEY PROJECT

The factual scenario and outcome of *Tulare* were shaped by the complex and tumultuous history of water development in California and the West. The complexities of water development in California do not arise from a lack of water, but rather an uneven distribution of water throughout the state that results in unique problems of supply and demand.[11] The state has numerous rivers, lakes, and streams, as well as abundant winter precipitation.[12] Despite this abundant supply of water, over seventy percent of the total stream flow is north of Sacramento, while eighty percent of the demand for water lies in the

11. United States v. State Water Res. Control Bd., 182 Cal. App. 3d 82, 98–100 (1986) (including a detailed history of water development in California).

12. *Id.* at 98.

southern areas of the state.[13] In addition, the semi-arid climate results in precipitation during the winter and early spring, when the demand is lowest, and low rainfall during the summer and fall, when demand is at its highest.[14]

To address this dilemma, the California Legislature in 1933 adopted a plan that allowed for water to be transported from the Sacramento and San Joaquin Rivers to Southern California, thus supplying water to the more arid region of the state.[15] This plan called for construction of several dams and various other water transfer systems, known collectively as the Central Valley Project (CVP).[16] The federal government, through the Bureau, financed and built the massive project.[17] Construction began in 1937 after authorization by the Secretary of Interior brought the project under federal reclamation laws.[18] With this authorization came twenty million dollars in

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13. *Id.*

14. *Id.*

15. Nathan Baker, *Water, Water Everywhere, and at Last a Drop for Salmon?* NRDC v. Houston *Heralds New Prospects Under Section 7 of the Endangered Species Act*, 29 ENVTL. L. 607, 624 (1999); *see also* James P. Morris, *Who Controls the Waters? Incorporating Environmental and Social Values in Water Resource Planning*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 117, 129 (2000) ("The project was designed to control flooding on Sacramento Valley farmland, improve navigability along the Sacramento River, prevent salt-water intrusion into the Delta, as well as capture, store and transport water supplies to dry farmland in the San Joaquin Valley."). It has done just that. The CVP and the State Water Project (SWP) have "permanently altered much of California's landscape while turning California into the leading agricultural producer in the nation. California accounts for about ten percent of the nation's total agricultural production. Half of California's production comes from the San Joaquin Valley, the southern half of California's great Central Valley." Philip Garone, *The Tragedy at Kesterson Reservoir: A Case Study in Environmental History and a Lesson in Ecological Complexity*, 22 ENVIRONS ENVTL. L. & POL'Y J., Spring 1999, at 110–11.

16. *State Water Res. Control Bd.*, 182 Cal. App. 3d at 98.

17. The CVP has an agricultural service area of 2.6 million acres, making it the largest federal water reclamation project in the nation. Moore, *supra* note 3, at 340. "The CVP consists of more than 20 dams and 500 miles of canals. It diverts over 90% of the project's water out of area rivers for use in irrigated agriculture." Baker, *supra* note 15, at 623 n.110.

18. *State Water Res. Control Bd.*, 182 Cal. App. 3d at 98, 106. The federal government took control of the project because of its size and the lack of public funding as a result of the Depression. Morris, *supra* note 15, at 129. The Supreme Court has described the CVP as follows:

> [The Central Valley Project] was born in the minds of far-seeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind. Failing in its efforts to finance such a giant undertaking, California almost a quarter of a century ago petitioned the

federal funding.[19] By the 1950s, the CVP included "three dams in the Sacramento Valley, two dams in the San Joaquin Valley, four principal canal systems transporting more than three million acre-feet[20] of water annually, and hydroelectric facilities generating enough power to move the water and sell surplus to pay for the project."[21] Today, the Bureau operates these dams under the Reclamation Act[22] and provides water to users in California, who are predominantly irrigators.[23] Under Section 8 of the Reclamation Act, which requires the Bureau to comply with state laws,[24] the Bureau acquired state water rights for the CVP for both diversion and storage.[25]

After World War II, California continued its commitment to the development of a comprehensive statewide water plan by authorizing the State Water Project (SWP).[26] The SWP began

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> United States to join in the enterprise. The Congress approved and adopted the project, pursuant to repeated requests of the State, and thus far has expended nearly half a billion dollars.

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 280 (1958).

19. Baker, *supra* note 15, at 623. The monetary support by the federal government was essential for getting the project completed, as development was occurring during the height of the Depression. *Id.*

20. Although water is measured in many different ways,

> the basic unit of storage capacity measurement or consumption is the "acre-foot." One acre-foot is enough water to cover one acre of land to a depth of one foot, and is equivalent to 325,851 gallons. This is about enough water to supply the domestic needs of five people for one year at a rate of 180 gallons per person per day.

A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 6 (5th ed. 2002).

21. Morris, *supra* note 15, at 129.

22. Reclamation Act of 1902, 43 U.S.C. §§ 371–616yyy (2000).

23. Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 364 (1997) [hereinafter Benson, *Whose Water Is It?*]. Approximately eighty-five percent of the thirty million acre-feet of water delivered by the Bureau to users in the seventeen western states annually is delivered for irrigation, with a majority delivered to irrigators in California and the Northwest. *Id.*

24. 43 U.S.C. § 383.

25. United States v. State Water Res. Control Bd., 182 Cal. App. 3d 82, 106 (1986). These rights were issued by permit in 1958 and 1961. *Id.*

26. *Id.* at 99–100. The SWP is an ambitious state water project with many purposes:

> [T]he project was designed to, and has been operated to simultaneously regulate river flows for flood control, to deliver water for municipal and agricultural uses, to provide drainage for irrigation water, to generate electricity, to move water supplies and to control salinity levels in the Delta.

operating in 1967[27] under the management of the California Department of Water Resources (DWR).[28] The CVP and the SWP share a coordinated pumping system, pumping water from the Sacramento-San Joaquin Delta through a series of canals to Southern California.[29] Like the Bureau, the DWR obtained water rights through the state permit system from the State Water Resources Control Board (SWRCB),[30] the state agency with final authority over the control, appropriation, use, and distribution of state waters.[31]

Beginning in the 1940s, the Bureau began contracting with both irrigators and water districts in the Central Valley for dispersal of the water supplied by the CVP.[32] The contracts were long-term, in most instances forty years, and the contract holders could renew at the end of the contract period.[33] The

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Morris, *supra* note 15, at 130.

27. *State Water Res. Control Bd.*, 182 Cal. App. 3d at 99–100.

28. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (2001).

29. *Id.* at 314–15.

30. These appropriative rights were issued through the permit process by the SWRCB in 1967. *State Water Res. Control Bd.*, 182 Cal. App. 3d at 106. For more on appropriative rights, see *infra* Part IV.A.

31. *Tulare*, 49 Fed. Cl. at 315. The SWRCB is an integral part of the control of water resources in California:

> In 1945, the State Water Resources Control Board ("SWRCB") was created to assert state control over the functions of studying and coordinating all water development. In evaluating the feasibility of water resources projects, the Board considered all possible beneficial uses that could be fulfilled by the project and utilized benefit-cost analysis to determine which projects to fund. To fulfill its multi-purpose mandate, the SWRCB published a comprehensive inventory of California's water resources and a detailed accounting of the State's projected water demands. Creation of the Department of Water Resources ("DWR") in 1956 culminated the state's institutional restructuring for multi-purpose planning. DWR assumed the functions of fifty-two formerly independent state agencies (including the SWRCB) responsible for some aspect of water planning and development. This was an unprecedented consolidation of water resources planning, development and management under a single agency. It was under the wide-ranging power of the new DWR that California was able to construct and manage the massive State Water Project, as it had been unable to do several decades earlier with the Central Valley Project.

Morris, *supra* note 15, at 131.

32. Baker, *supra* note 15, at 625. The majority of project water, eighty-five percent, is used for irrigation, while the remaining amount is used for municipal, industrial, and other miscellaneous uses. Benson, *Whose Water Is It?*, *supra* note 23, at 371.

33. Baker, *supra* note 15, at 625.

Central Valley Project Improvement Act (CVPIA) has since limited the duration of the contracts to twenty-five years.[34] Generally, the Bureau contracts with irrigation districts, which in turn distribute water to irrigators.[35] In *Ickes v. Fox*, however, the Supreme Court held that the water users are the true beneficiaries of the project water.[36] The Court stated that:

> Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.[37]

The government therefore is just "a carrier and distributor of the water" and the water users as beneficiaries of the water contracts have property rights to receive the project water.[38]

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34. *Id.* at 626 n.140. The CVPIA prohibited renewal of existing contracts until the Secretary of Interior evaluated the environmental impact statements regarding the CVP operations under the National Environmental Protection Act (NEPA). Pub. L. No. 102-575, § 3404(c), 106 Stat. 4600, 4708 (1992). For more information regarding the CVPIA, see generally Douglas E. Noll, *Analysis of Central Valley Project Improvement Act,* 3 SAN JOAQUIN AGRIC. L. REV. 3, 3–5 (1993) (discussing the purposes and legal ramifications of the CVPIA); Lisa L. Nguyen, O'Neill v. United States: *Endangered Species Act and Central Valley Project Improvement Act Can Invoke Contract Clause That Limits Liability Due to Water Shortages*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 201, 208–10 (1996) (including an overview of the CVPIA). Under the CVPIA, water must be managed under the CVP to "protect and enhance California's environment." Noll, *supra,* at 4. The Act makes utilizing water for environmental purposes equal to both agricultural and municipal uses. *Id.*

35. Benson, *Whose Water Is It?*, *supra* note 23, at 384. Irrigation districts were formed out of hundreds of local water suppliers in order to "achieve efficiency and economy in the capture and management of water resources." Morris, *supra* note 15, at 130. Legislation allowed these districts to form in order to "capture and manage water resources by purchasing, transporting, purifying and distributing water supplies for domestic and irrigation uses." *Id.*

36. Ickes v. Fox, 300 U.S. 82, 95 (1937).

37. *Id.* at 94–95.

38. *Id.* at 95; *see* Benson, *Whose Water Is It?*, *supra* note 23, at 384, 394. These rights differ dramatically based on the various reclamation contracts, with terms significantly dependent on both the project and district involved. *Id.* at 393. Although the terms of these contracts vary, some terms, such as the provision that relieves the federal government from liability for failure to deliver water for

Construction and operation of the CVP has had drastic effects on the habitat and existence of many fish species. The Friant Dam near Fresno, California is an integral part of the CVP and illustrates the effects of the Bureau's projects on the environment.[39] Just two years after construction of the Friant Dam, the salmon that once thrived below the dam had been completely eradicated.[40] The CVP has caused similar effects throughout the Central Valley; the massive project diverts large quantities of water from rivers and streams, blocks access to freshwater habitat, traps fish in diversion structures, and causes lethal fluctuations in water temperature.[41]

A few of the ways in which salmon and other species may be protected from these negative effects include "reductions in the quantity of water to be delivered under the contracts, flow augmentation, reservoir drawdowns, [moratoria on issuing water rights], mandatory irrigation conservation, diversion of specified amounts of water for instream and out-of-stream wildlife needs, and installation of screens at diversion intakes."[42] California has recognized the detrimental effects of water improvement projects and promulgated the CVPIA to

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any cause, are often present in reclamation contracts. *Id.* at 394; *see also infra* Part IV.B.

39. Baker, *supra* note 15, at 624.

40. *Id.*

41. *Id. See generally* Noll, *supra* note 34, at 5–7 (discussing the environmental effects of the CVP). The legislative history of the CVPIA illustrates these effects:

> Water development, most recently the CVP, has played a major role directly and indirectly in changing the California environment from what it once was .... Federal and state water development certainly excaberated [*sic*] the adverse impacts of earlier human activities, and the combined toll is profound .... Because of conversion to agricultural production, Central Valley wetlands have been reduced to about four percent of their original 4.5 million acres. Riparian wetlands have declined to less than two percent of the original acreage.... A conservative estimate is that 100,000 acres of wetlands have been lost in the Central Valley since 1944 due to construction and operation of the CVP.... In average water years, 8 million Sacramento River salmon are diverted into the central and south Delta areas and more than half of these die as a direct result. By one estimate, 60–80 percent of all Sacramento River juvenile salmon never make it past the delta. Up to 95 percent of the entire San Joaquin River basin salmon production is lost to the pumps.

Westlands Water Dist. v. United States Dep't of Interior, 850 F. Supp. 1388, 1418 (E.D. Cal. 1994) (quoting Central Valley Project Reform Act, H.R. REP. NO. 102-576, pt. 1, at 17–19 (1992).

42. Baker, *supra* note 15, at 632.

implement some of these protectionist measures. The CVPIA requires the Bureau to provide 800,000 acre-feet, or approximately ten percent, of CVP water each year for environmental purposes, including "wildlife refuges, instream uses in Central Valley rivers and streams, and instream flows in the Trinity River in northwest California."[43] The ESA has been instrumental in protection of the species as well, requiring many of the above protections as part of its mandates.

The history of water reclamation in California illustrates the complexity of water issues in the West. Through the CVP, the Bureau and the State of California have together coordinated a massive reclamation project that affects both water users and wildlife. Water users throughout California have come to rely on the benefits of reclamation, and they clearly have a strong claim to the water under their contracts. Nevertheless, environmental regulation through statutes such as the ESA has come to play an increasingly important role in the certainty of water rights in the West and the protection of species.

II. THE ENDANGERED SPECIES ACT

A critical new player in the development of water in the West entered the scene when the ESA became law in 1973.[44] Congress enacted the ESA to protect and conserve endangered and threatened species and the ecosystems on which they depend.[45] Congress's intent in enacting the ESA was to provide a "comprehensive, multi-dimensional program" for the conservation of endangered species.[46] The result of Congress's efforts is a strong statute that extends beyond regulation of federal actions to restrain private conduct as well.[47]

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43. *Id.* at 629 n.166.

44. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. § 1531–1544 (1994)). Substantial amendments were added in both 1978 and 1982. Bricker & Filippi, *supra* note 3, at 741.

45. 16 U.S.C. § 1531(b) (2000). The purposes as set forth in § 1531(b) are:

> [T]o provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

46. Nguyen, *supra* note 34, at 206.

47. *Id.*

The ESA protects endangered and threatened species through listing of species, designation of critical habitat, agency consultation, and a prohibition against "taking." The ESA gives the Secretary[48] authority to list species as either endangered[49] or threatened.[50] Once listed, the species benefits from the various protections of the ESA. Under Section 7 of the ESA,[51] federal agencies are required to consult with either the FWS or NMFS to ensure that federal actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical."[52]

If a listed species may be present in the area of the proposed action, the agency must consult with the FWS or NMFS,[53] which will then complete "a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action."[54] Based on the outcome of the biological assessment, the FWS or NMFS determines whether a formal consultation is required based on possible jeopardy to a listed species.[55] Upon formal consultation, the FWS or NMFS prepares a biological opinion setting forth the opinion, the information upon which it is based, and the effects the action will have on the listed species or its habitat.[56] If it is determined that the agency action will result in jeopardy or adverse modification, the FWS or NMFS

48. "The term 'Secretary' means, except as otherwise . . . provided, the Secretary of the Interior or the Secretary of Commerce . . . ." 16 U.S.C. § 1532(15).

49. § 1532(6). "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . . ." *Id.*

50. § 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." *Id.*

51. When speaking of the ESA, convention is to cite the original section numbers rather than the sections as listed in the United States Code. Therefore § 1536 is referred to as "Section 7" even though it appears as the sixth section of the ESA.

52. § 1536(a)(2).

53. The Secretary of Interior, and therefore the FSW, administers the listing process for all non-marine plants and animals, while the Secretary of Commerce, which heads the NMFS, is responsible for listing of marine species. *See* KATHRYN A. KOHM, BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE 16 (1991).

54. 16 U.S.C. § 1536(c)(1).

55. § 1536(a)(3).

56. § 1536(b)(3)(A).

specifies "reasonable and prudent measures . . . necessary or appropriate to minimize such impact" and "set[s] forth the terms and conditions" with which the federal agency must comply.[57] The agency must implement the recommended measures to proceed in compliance with the ESA.

Section 9 of the ESA makes it unlawful for any person to "take" an endangered species.[58] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[59] Although by its language Section 9 applies only to endangered species, the FWS has by regulation extended the same protections to threatened species, with some exceptions.[60] The term "take" includes in its definition "harm," and this provision has been broadly construed and enforced.[61] Encompassed in the term "harm" is "any action that significantly modifies a listed species's habitat, when such modification results in the death or injury of a member of the listed species by impairing 'essential behavioral patterns.'"[62]

Courts have consistently construed the ESA and the regulations promulgated under it broadly, thus making the ESA a powerful and controversial statute.[63] The United States Supreme Court strictly construed the language of Section 7 in *Tennessee Valley Authority v. Hill*, where the Court ruled that

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57. § 1536(b)(4)(C)(ii), (iv).

58. § 1538.

59. § 1532(19).

60. 50 C.F.R. § 17.31(a) (2001).

61. Bricker & Filippi, *supra* note 3, at 742; *see generally* Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (1995).

62. Bricker & Filippi, *supra* note 3, at 742 (quoting 50 C.F.R. § 222.102 (2000) (defining "take")); *see also* 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3 (defining "harm" as applied to non-marine species).

63. *See* Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984) (holding that the ESA requires the Secretary to "use programs under his control for conservation purposes where threatened or endangered species are involved" and therefore the Secretary's decision to give the fish priority regarding use of the project water was correct); Sierra Club v. Clark, 577 F. Supp. 783, 789 (D. Minn. 1984), *rev'd in part, aff'd in part*, 755 F.2d 608 (8th Cir. 1984) (holding that "the Secretary clearly has an affirmative duty to bring the wolf population to a point where the protections of the Act are no longer needed," and imposing on the Secretary the duty to do more than merely manage populations, but to conserve); Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 170 (D.D.C. 1977) ("[T]he Fish and Wildlife Service . . . must do far more than merely avoid the elimination of protected species. It must bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so.").

the ESA prohibited completion of a hundred million dollar dam because the action would have jeopardized the continued existence of the snail darter, a listed species, by destroying its last remaining habitat.[64] After looking at the legislative history of the ESA, the Court determined it was Congress's explicit intent to make saving endangered species the highest priority, without regard to economic factors.[65] The Court stated that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[66]

Despite Congress's amendments in 1978 in response to *Hill*,[67] the Supreme Court once again recognized the broad reach of the ESA and reaffirmed *Hill* in *Babbit v. Sweet Home Chapter of Communities for a Greater Oregon*.[68] The Court upheld the regulations promulgated by the Secretary defining the statute's prohibition on takings under Section 9 to include "'significant habitat modification or degradation that actually kills or injures wildlife.'"[69] Once again the Court recognized that the plain meaning of the text and the purpose behind the statute supported broad protection of both listed species and their habitat.[70]

In *Hill* and *Sweet Home*, the Supreme Court recognized that the ESA is clear in its purpose and broad in its application. As a result, courts have continued to read the ESA as a far-reaching act.[71] Despite the Supreme Court's broad inter-

64. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

65. *Id.* at 185.

66. *Id.* at 184.

67. In 1978, Congress passed amendments to the ESA that substantially affected the listing process. KOHM, *supra* note 53, at 16. These amendments required that a critical habitat listing accompany the listing of a species and that economic factors be considered during this designation of habitat. *Id.* These changes bogged down the process, and not a single species was added to the list in the first year of the Reagan Administration. *Id.* In 1982, Congress relaxed the procedures, providing that the Secretary can issue a preliminary finding and species listings can progress without a designation of critical habitat. *Id.*

68. Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 699 (1995); *see also* Nguyen, *supra* note 34, at 207.

69. *Sweet Home*, 515 U.S. at 708 (quoting 50 C.F.R. § 17.3 (1994)).

70. *Id.* at 697–99.

71. In *United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992), the district court concluded that the Glenn-Colusa Irrigation District was "taking winter-run salmon in violation of section 9 of the Endangered Species Act." *Id.* at 1135. The court permanently "enjoin[ed] the District from pumping water from the Sacramento River . . . during the winter-run chinook salmon's peak migration downstream season of July 15 through November 30

pretation of the ESA in recent cases—or maybe because of it—the ESA has been the source of much debate and controversy.[72] Central to this debate is the issue of property rights—a "perennial lightning rod"[73]—because of the potential for the ESA to greatly restrict the use of private property. Many opponents of the ESA believe its mandates are far too strict because of the absolute language that requires protection of all endangered species, whatever the cost to private landowners.[74]

III. MODERN TAKINGS JURISPRUDENCE

The resulting tension between the ESA and private property rights[75] has added fuel to the already growing property rights movement[76] and the Supreme Court's "attention to clari-

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each year." *Id.* For additional discussion of recent cases in which the ESA was used to protect endangered species despite impacts on water rights, see Sean O'Connor, Comment, *The Rio Grande Silvery Minnow and the Endangered Species Act*, 73 U. COLO. L. REV. 673, 715–18 (2002).

72. *See generally* Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 369–72 (1994).

73. *Id.* at 369.

74. *See generally id.* at 369–70.

75. *See generally id.*; *see also, e.g.*, Christy v. Hodel, 857 F.2d 1324, 1335 (9th Cir. 1988) (where a rancher shot a grizzly bear for killing his sheep and then was assessed a fine for his "take" of the threatened species, no regulatory taking resulted and loss of sheep was merely the "incidental . . . result" of reasonable regulation).

76. The contention over property rights has been labeled the "civil rights issue of the 1990s." Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, *in* LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 24 (Bruce Yandle ed., 1995). Roger and Nancie Marzulla represented the plaintiffs in *Tulare* and are co-founders of Defenders Property Rights, a group that advocates for private property rights. Michael Milstein, *Lawsuit Against Government Seeks up to $1 Billion in Klamath Basin Fight*, THE OREGONIAN, Aug. 25, 2001, at D1. Nancie Marzulla explains the movement as follows:

> Although rooted in the agrarian land-based Sagebrush Rebellion of the 1970s, the property rights battle has now become a fight for freedom and individual rights, with property recognized as more than just land. Just as segregation led to the civil rights movement of the 1960s, government intrusion on property rights—largely in the name of protecting the environment—has sparked a new crusade to protect an individual's right to use and own all forms of and interests in private property.

Marzulla, *supra*, at 24. For more on the property rights movement, see the collection of essays in LET THE PEOPLE BE THE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT (John D. Echeverria & Raymond B. Eby eds., 1995).

On the ESA and the property rights movement, see Shi-Ling Hsu, *The Potential and the Pitfalls of Habitat Conservation Planning Under the Endangered Species Act*, 29 ENVTL. L. REP. 10,592 (1999); Randall D. Snodgrass, *The Endangered*

fying private property safeguards in the Fifth Amendment's Takings Clause."[77] Under the Fifth and Fourteenth Amendments, the Constitution expressly prohibits the taking of private property without just compensation.[78] Despite the Supreme Court's continuing struggle to articulate and clarify the private property guarantees of the Fifth Amendment, the analysis of takings claims remains difficult for courts and attorneys alike.[79] Nevertheless, there are two clear grounds upon which a takings claim can proceed under current takings jurisprudence: 1) physical takings; and 2) regulatory takings.[80]

A. Physical Takings

The Supreme Court has recognized that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[81] Therefore, where there is a "permanent physical occupation" of property, courts will require compensation.[82] This right to compensation for a physical taking was recognized by a unanimous Supreme Court as early as 1871 in *Pumpelly v. Green Bay Co.*, in which the Court stated that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[83] In 1878, the Court again affirmed that where there is a

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Species Act: A Commitment Worth Keeping, *in* LET THE PEOPLE BE THE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT, *supra*, at 278.

77. Meltz, *supra* note 72, at 370.

78. The Fifth Amendment to the United States Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

79. Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 70 (1999).

80. Sax, *Future of Water Law*, *supra* note 3, at 262.

81. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (internal citation omitted).

82. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

83. 80 U.S. (13 Wall.) 166, 181 (1871).

"physical invasion" of private property and a "practical ouster of [an owner's] possession," a physical taking results.[84]

The Supreme Court continues to consistently recognize that where the government physically takes possession of a property interest, compensation is required. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court "affirm[ed] the traditional rule that a permanent physical occupation of property is a taking."[85] In *Loretto*, a cable television company installed cable on the plaintiff's property pursuant to New York law.[86] This constituted a physical taking because "[t]he installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall."[87] As the Supreme Court has stated, where there is a physical invasion of property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."[88]

B. Regulatory Takings

Whereas a physical taking "requires courts to apply a clear rule . . . [a regulatory taking] necessarily entails complex factual assessments of the purposes and economic effects of government actions."[89] Although "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," the Court has found some regulations so restrictive that compensation is required.[90] The genesis of the Supreme Court's modern regulatory takings jurisprudence can be traced to Justice Holmes's famous opinion in *Pennsylvania Coal Co. v. Mahon*.[91] In *Penn Coal*, Holmes articulated that "while prop-

84. Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878).
85. *Loretto*, 458 U.S. at 441.
86. *Id.* at 422–24.
87. *Id.* at 438.
88. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
89. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002) (quoting Yee v. Escondido, 503 U.S. 519, 523 (1992)).
90. Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
91. *Id.* at 415.

erty may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[92]

Although the Court has "eschewed any 'set formula' for determining how far is too far,"[93] the Court in *Lucas v. South Carolina Coastal Council* recognized that a categorical taking will result "where regulation denies all economically beneficial or productive use" of an owner's property.[94] Therefore where a regulation leaves property economically valueless, the government must compensate the owner.[95] Compensation will not be required, however, if the government can show that the regulations only result in limitations that already "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[96] The Court in *Lucas* explained that:

> A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[97]

Thus, the government need not compensate a nuclear power plant owner when improvements to the land are required because the owner discovers the plant is located along an earthquake fault.[98] "The use of these properties [in this instance] for what are now expressly prohibited purposes was *always* unlawful . . . ."[99]

Despite the fact that this type of regulatory taking seems very simple in its application, the Court in *Lucas* recognized that "the rhetorical force of our . . . rule is greater than its precision."[100] Although the rule requires compensation for property that has been rendered completely economically valueless by government regulation, the Court did not clearly define

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92. *Id.*
93. *Lucas*, 505 U.S. at 1015.
94. *Id.*
95. *Id.*
96. *Id.* at 1029.
97. *Id.*
98. *Id.*
99. *Id.* at 1030.
100. *Id.* at 1016 n.7.

what "property interest" would be used to determine the value of the property.[101] Issues regarding the "denominator," or what should be considered the "total parcel," have resulted in inconsistent results, as admitted by the Court.[102]

The Supreme Court recently addressed the issue of the denominator and temporary takings in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[103] Landowners claimed that temporary moratoria on development of their property resulted in a regulatory taking under *Lucas*.[104] The moratoria had prohibited development on the land for thirty-two months.[105] The Court expressly refused to extend the holding of *Lucas* beyond "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted."[106] The emphasis on the word *no* by the Court refers to the requirement that a court must focus on the "parcel as a whole" when determining if a regulatory taking has resulted.[107] The Court had previously stated that

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole* . . . .[108]

In *Tahoe-Sierra*, the Supreme Court once again rejected an approach that would break up the parcel into individual pieces or look at the effects on the property for just a brief period of time to determine how much the property has been deprived of value.[109] Under the Supreme Court's holding, one must view the interest in its entirety—"a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use,

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101. *Id.*
102. *Id.*
103. 535 U.S. 302, 323 (2002).
104. *Id.* at 1470.
105. *Id.* at 1489.
106. *Lucas*, 505 U.S. at 1017.
107. Penn Cent. Transp. Corp. v. City of New York, 438 U.S. 104, 130–31 (1978).
108. *Id.* (emphasis added).
109. *Tahoe-Sierra*, 122 S. Ct. at 1484.

because the property will recover value as soon as the prohibition is lifted."[110]

Where regulations do not result in a total elimination of the value of an owner's property, a taking may still result, thereby requiring compensation.[111] In this situation, the Supreme Court analyzes whether a taking has occurred based on several factors articulated in *Penn Central Transportation Co. v. City of New York*.[112] In *Penn Central*, New York's landmark commission designated Grand Central Terminal a landmark, resulting in restrictions on the owner's ability to add additional floors to the top of the building.[113] The Supreme Court refused to find that a physical taking of the air space above the property had occurred, holding that the denominator must be defined by the entire parcel.[114] Nevertheless, the Court did hold that a regulatory taking may result based on the impact of the regulation on the use of the property. Although the Court held that a taking of the owner's property did not occur in *Penn Central*, the Court set forth several factors for future courts to consider when analyzing a potential regulatory taking.[115]

Whereas under *Lucas* courts must apply a categorical approach by determining whether the regulation leaves the property economically valueless, the analysis under *Penn Central* is a multi-factored analysis that is very fact-driven. These factors include the "regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[116] The level of economic impact is particularly important, and the greater the impact the more likely a taking will result.[117] However, in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust* the Supreme Court stated "that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."[118]

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110. *Id.*
111. *Id.*
112. 438 U.S. at 124.
113. *Id.* at 109–10.
114. *Id.* at 130.
115. *Id.* at 124.
116. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (O'Connor, J., concurring).
117. John D. Echeverria, *A Turning of the Tide: The* Tahoe-Sierra *Regulatory Takings Decision*, 32 ENVTL. L. REP. 11,235, 11 ,246 (2002).
118. 508 U.S. 602, 645 (1993).

Regarding the reasonableness of an owner's investment backed expectations, Justice O'Connor in her concurrence in *Palazzolo v. Rhode Island* stated that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."[119] In analyzing the character prong of the analysis, it is important to look at the purpose of the Takings Clause: to "prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[120] Therefore, in determining whether a taking has resulted under the *Penn Central* multi-factor analysis, "the question at bottom is upon whom the loss of the changes desired should fall."[121]

IV. TAKINGS IN THE WATER LAW CONTEXT

The Supreme Court's takings jurisprudence also can be applied to water rights. However, although water rights are property rights under the Constitution, and thus subject to protection from takings, there are many different limitations inherent in the water right that make the takings analysis more complex. These limitations have led courts to reject takings claims in the cases leading up to *Tulare*.

A. Takings and the Law of Water Rights

Water rights do not hold any special protected status under the Constitution; they can be regulated just like any other type of property right and are protected under the Fifth Amendment.[122] The takings jurisprudence applied to land can also be applied to the taking of water rights. However, water rights are unique. Although water law varies according to the individual laws of each state, generalizations about water rights can be made. By definition, water rights are subject to public claims, including the public trust doctrine; water rights are "limited to beneficial and non-wasteful uses"; and water

119. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).
120. *Id.* at 618 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
121. Penn. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
122. Sax, *Future of Water Law*, *supra* note 3, at 260.

rights are granted by permit and therefore are limited by their very definition.[123]

Although private property rights in water can be formed, generally "private ownership of stream water while in its natural environment does not exist." [124] Water rights have always been subject to the limitations of both a "servitude and a trust in favor of the public."[125] "There is a tradition that recognizes a pre-existing right of the State in the flow of its rivers."[126] Courts in California have specifically addressed the implications of these limitations on the private water right and have strongly supported the public's pre-existing right to water.[127]

In *National Audubon Society v. Superior Court of Alpine County*, the California Supreme Court stated that the public trust "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[128] The doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[129] The court concluded that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[130] In addition, this duty extends to supervision of the use of appropriated water to assure that it is being used in the public interest.[131] Therefore, a limitation is implied in each water right to conform to the state's public trust responsibilities.[132] In *United States v. State Water Resources Control Board*, the California Supreme Court held that the state's public trust duties extend to protection of fish and wildlife.[133]

Despite these strong public interests, "private rights to abstract and use such waters—under State supervision and con-

123. *Id.*
124. 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 443 (1971).
125. Sax, *Future of Water Law*, *supra* note 3, at 269.
126. *Id.*
127. *Id.*
128. 658 P.2d 709, 724 (Cal. 1983).
129. *Id.* at 727.
130. *Id.* at 728.
131. *Id.*
132. *Id.*
133. 227 Cal. Rptr. 161, 166 (1986).

trol in the exercise of its police powers—do exist, and they are property rights."[134] Therefore "what is meant by a water right is the right to *use* the water—to divert it from its natural course."[135] In 1853, the California Supreme Court declared that "the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use."[136] In California, the statutes have codified these principles, declaring that "[a]ll water within the State is the property of the people of the State, but the right to the use of the water may be acquired by appropriation in the manner provided by law."[137] Once water rights are acquired, they become vested property rights protected under the Fifth Amendment.[138]

California has a hybrid water rights system that combines both riparian and appropriation rights.[139] The contractual water rights in *Tulare* were appropriative rights, subject to the doctrine of prior appropriation.[140] "The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators."[141] To attain an appropriative right to water, a person must actually divert the water with the intention to put it to a reasonable and beneficial use. In California, state statutes limit water rights to "such water as shall be reasonably required for the beneficial use to be served, and such right

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134. 1 HUTCHINS, *supra* note 124, at 443.

135. *State Water Res. Control Bd.*, 227 Cal. Rptr. at 167 (emphasis added).

136. Eddy v. Simpson, 3 Cal. 249, 252 (1853) (emphasis added).

137. CAL. WATER CODE § 102 (West 1971). Other states in the West have similar language declaring the waters of the state to be property of the people. *See, e.g.*, COLO. CONST. art. 16, § 5 ("The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.").

138. *State Water Res. Control Bd.*, 227 Cal. Rptr. at 168; *see also* Ivanhoe Irrigation Dist. v. All Parties and Persons, 306 P.2d 824, 839 (Cal. 1957), *rev'd by* 357 U.S. 275 (1958) (holding that vested water rights "may not be destroyed or infringed upon without due process of law or without just compensation").

139. *Id.*

> The riparian doctrine confers upon the owner of land the right to divert the water flowing by his land for use upon his land, without regard to the extent of such use or priority in time. All riparians on a stream system are vested with a common ownership such that in times of water shortage all riparians must reduce their usage proportionately.

Id.

140. *Id.* at 169–71.

141. *Id.* at 168.

does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."[142] Therefore, all water use must be both "reasonable and for a beneficial purpose."[143]

Although initially water rights in California were acquired through diversion and use, the statutory scheme established in 1914 requires application to the SWRCB for a permit authorizing the use of a specific quantity of water.[144] The appropriative rights are governed by the terms and conditions of the permit as determined by the SWRCB.[145] If a permit holder violates "any of the terms or conditions or fails to apply the water to a beneficial purpose, the [SWRCB] may revoke the permit or license."[146] The SWRCB is required by statute to assure that appropriation of water resources is in the public interest.[147]

Water rights may thus have less constitutional protection than other types of property rights due to the special nature of the rights and limitations on their use. As Professor Tarlock and others have recognized, "appropriative water rights have always been less firm and more subject to adjustment than their characterization of absolute property rights assumes."[148]

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142. CAL. WATER CODE § 100 states:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

143. *State Water Res. Control Bd.*, 227 Cal. Rptr. at 171.

144. *Id.* at 168.

145. *Id.* at 170.

146. *Id.* at 169.

147. CAL. WATER CODE § 1253; *see also* § 105, which states:

> It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.

148. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 786 (2001). "The law of western water rights . . . has

Although the nature of water rights will affect the constitutional takings analysis, nevertheless courts apply the constitutional analysis for takings of other types of property in the context of water rights.[149]

B. *Limited Water Deliveries and Unsuccessful Takings Claims Prior to* Tulare

In the years leading up to *Tulare*, several water users brought suit against the federal government claiming that various restrictions on their use of contractually-conferred water rights resulted in Fifth Amendment takings. In each case, the courts held that the contracts precluded Fifth Amendment takings claims.

In *Peterson v. United States Department of Interior*, several water districts argued that a provision in the Reclamation Reform Act of 1982 was unconstitutional because it interfered with their contractual rights to receive and distribute water to irrigators in their districts.[150] The provision, known as the "hammer clause,"[151] gives the water districts the option either to amend their contracts to reflect the requirements of the Reclamation Reform Act—which imposes a 960-acre limitation on lands to receive subsidized water—or to pay "full cost" for the water deliveries.[152] The districts claimed that application of

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always been a *risk allocation* scheme rather than a system of relatively absolute property rights." *Id.* at 785 (emphasis added).

149. *See* Sax, *Future of Water Law*, *supra* note 3, at 260–62.

150. 899 F.2d 799, 800–01 (9th Cir. 1990).

151. The Reclamation Act of 1902 originally provided "that reclamation water could not go to any lands in common ownership in excess of 160 acres." *Id.* at 805. The reclamation laws and the water service contracts did not contain any language regarding leasing lands. *Id.* As a result, water districts purchased excess water that was then provided to farms that met the 160-acre limitation but whose owners also operated leased lands of several thousand acres. *Id.* This created a "leasing loophole" to the reclamation law. *Id.* The Reclamation Reform Act (RRA) was passed to address this misuse of leasing. *Id.* at 806. Section 203(b) of the RRA, known as the "hammer clause," "gives the Water Districts the option of amending pre-existing contracts to conform to the RRA's new provisions, the most important of which are: the increased 960-acre limitation and the decreased subsidy for reclamation water." *Id.* Water districts were able to decline to exercise the option and continue to receive water at the contract price for lands that were under the 160-acre limit, but then were required to pay the unsubsidized full cost for water delivered to leased lands in excess of the 160-acre limitation. *Id.* at 806–07. It is this "hammer clause" that the water districts objected to as violating the due process and takings clauses of the Fifth Amendment. *Id.* at 807.

152. *Id.* at 801.

this requirement to their existing water contracts with the federal government resulted in a taking of their contractual rights under the Fifth Amendment.[153] The Ninth Circuit ruled that the water districts did not have "a constitutionally protected property interest in the delivery of subsidized water to leased tracts of any size."[154] Even though the water contracts did not expressly prohibit delivery to leased tracts, the court found that to imply such a right would violate "the spirit, if not the letter, of the reclamation laws which authorized such contracts."[155] Because the court did not find a "vested property right to buy reclamation water for delivery to leased lands," the hammer clause requirements did not effect a Fifth Amendment taking.[156] Key to the court's finding was that the vested property right argued for—a right to deliver water to farms of any size—directly undermined the purposes of the Reclamation Act, which were "the dismantling of large landholdings in the West and the redistribution of that land to families."[157]

In *Westlands Water District v. United States Department of Interior*, the court looked to the language of the water contracts to determine whether the government could be held liable for water shortages.[158] Various water districts held contracts with the Bureau for CVP water.[159] In 1992, the Bureau announced that it would not allocate any water because of a severe drought.[160] The water districts brought an action to challenge the restrictions, arguing that the limited water deliveries violated the terms of their contracts for a certain quantity of water.[161] The court, in considering the 1963 Westlands Contract, focused on a provision in the contract that excused the government from liability due to water shortages regardless of the cause.[162] Article II(a) of the Westlands Contract stated: "In any year in which there may occur a shortage from *any cause*, the United States reserves the right to apportion the available water supply among the District and others entitled under the

153. *Id.* at 801–02.
154. *Id.* at 807–13.
155. *Id.* at 810.
156. *Id.* at 813.
157. *Id.* at 811.
158. 805 F. Supp. 1503 (E.D. Cal. 1992).
159. *Id.* at 1504.
160. *Id.* at 1505.
161. *Id.* at 1511.
162. *Id.* at 1511–12.

then existing contracts to receive water from the San Luis Unit . . . ."[163] Based on this language, the court determined the Bureau could not be held liable for its apportionment of water, despite the fact that it failed to provide the contractual quantity of water.[164]

The same contract clause was litigated a second time in *Barcellos & Wolfsen, Inc. v. Westlands Water District*.[165] Westlands Water District entered into a water service contract with the federal government in which the Bureau agreed to distribute 900,000 acre-feet of CVP water per year.[166] When the Bureau announced its intention to distribute only half its usual allocation of water in order to comply with the ESA and the CVPIA, landowners and water users brought suit as third party beneficiaries of the water contract.[167] Although the United States did recognize a contractual duty to deliver the water, the government argued that both the ESA and the CVPIA made it impossible to comply with the contract requirements, and that the contract therefore absolved them of liability by its terms.[168] The district's reclamation contract provided that "*in no event shall any liability accrue against the United States* . . . for any damage, direct or indirect, *arising from a shortage on account* of errors in operation, drought or *any other causes*."[169] The court determined that the clause was valid and that compliance with the ESA and the CVPIA created legitimate shortages under the contract's language.[170] The court stated that express language of the contract "negates any absolute contract right . . . to the unqualified delivery of irrigation water."[171] As a result, the court found that the Bureau was not liable for delivering the water for environmental purposes rather than to the users. The court did recognize a limitation on the reach of the clause's language—the district could chal-

163. *Id.* at 1512 (emphasis added).
164. *Id.* at 1512–13. *See generally* Benson, *Whose Water Is It?*, *supra* note 23, at 399.
165. 849 F. Supp. 717 (E.D. Cal. 1993).
166. *Id.* at 720.
167. *Id.*
168. *Id.* at 721–22.
169. *Id.* at 722 (citation omitted).
170. *Id.* at 724.
171. *Id.*

lenge the shortage by showing that the cause of the shortage was either "unlawful or unreasonable under the contract."[172]

The decision in *Barcellos & Wolfsen* was affirmed by the Ninth Circuit in *O'Neill v. United States*.[173] In *O'Neill*, landowners and water users sued the United States for damages arising from shortages in deliveries under their water contract due to the Bureau's compliance with the ESA and CVPIA.[174] Once again, the court ruled that "the contract's liability limitation is unambiguous and that an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of 'any other causes.'"[175] The contract language was found to absolve the government of liability for failing to deliver the full amount of water under the contract because the shortage was caused by the statutory mandates of the ESA and the CVPIA.[176]

Although not all of the above cases dealt with limitations under the ESA, their holdings support the conclusion that where the government must reduce the water delivered due to the mandates of the ESA, and the contract contains the appropriate liability limiting language, the Ninth Circuit will hold that the federal government is absolved from liability for the reduced deliveries.[177] The language in the contracts qualified the plaintiffs' right to water from the federal government, and therefore the plaintiffs could not argue that the federal government took their right to the water. Because the courts in these cases held the government was not liable for the reduced water deliveries, it seemed that a successful takings claim could not be brought against the government. Nevertheless, the *Tulare* court finally reached the takings issue directly.

V. *TULARE LAKE BASIN WATER STORAGE DISTRICT V. UNITED STATES*

The reasoning and results in the cases leading up to *Tulare* suggested that where the federal government restricted users' ability to use water under their contracts with the federal gov-

172. *Id.*
173. 50 F.3d 677 (9th Cir. 1995).
174. *Id.* at 681–82.
175. *Id.* at 684.
176. *Id.* at 689.
177. *See generally* Nguyen, *supra* note 34.

ernment as a result of the mandates of the ESA, a taking under the Fifth Amendment would not result. Because of the interpretation of the contract language in prior cases, it seemed unlikely that a successful takings claim could be brought against the United States. However, in *Tulare* the Court of Federal Claims finally addressed head on the conflict between the Endangered Species Act and private water rights, concluding that the government's restrictions on water use as a result of the mandates of the ESA did cause a taking under the Fifth Amendment.[178]

A. *The Facts and Holdings of* Tulare

In *Tulare*, California water users brought suit against the federal government, claiming that their contractually-conferred water rights were taken in violation of the Fifth Amendment when the federal government imposed restricted deliveries as required by the ESA.[179] The plaintiffs in *Tulare* were water districts with contract rights to both withdraw and use specified quantities of water as part of the operation of the CVP and the SWP in California.[180] The Bureau and the DWR received the required permits from the SWRCB, and then the Bureau and the DWR contracted with county water districts regarding withdrawal and use of the project water.[181] Two of the plaintiffs, Tulare Lake Basin Water Storage District and Kern County Water Agency, had contracts directly with the SWP, the state project administered by the DWR.[182] The three other plaintiffs, Hansen Ranches, Lost Hills Water District, and Wheeler Ridge-Maricopa Water Supply District, had subsidiary contracts with the Tulare and Kern County water districts.[183] The water supply contracts included terms that specifically relieved the state and its agents from liability due to "'any damage, direct or indirect, arising from shortages in the amount of water to be made available for delivery to the [water district]

178. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (2001).
179. *Id.*
180. *Id.* at 315; *see infra* Part I.
181. *Tulare*, 49 Fed. Cl. at 315.
182. *Id.*
183. *Id.*

under this contract caused by drought, operation of area of origin statutes, or any other cause beyond its control.'"[184]

In accordance with the requirements of Section 7 of the ESA, in the early 1990s the NMFS contacted the Bureau and the DWR to discuss potential impacts of the CVP and the SWP on the winter-run chinook salmon, a threatened species directly affected by the Bureau's delivery of water under the projects.[185] The NMFS issued a biological opinion on February 14, 1992, indicating that the proposed operation of both the CVP and SWP was "likely to jeopardize the continued existence of the salmon population."[186] The NMFS included in its findings reasonable and prudent alternatives requiring restrictions on both the time and manner of pumping out of the Sacramento-San Joaquin Delta, such that water that was otherwise available would no longer be distributed to users.[187]

After an additional study the next year, the NFMS found that the winter-run chinook salmon were again at risk; in addition, the FWS concluded that the delta smelt were at risk.[188] Reasonable and prudent alternatives were issued, once again requiring limitations on the water that could be pumped, thereby limiting the water distributed to the users.[189]

The SWRCB addressed NMFS's first biological opinion on March 19, 1992.[190] The SWRCB determined that the requirements under the ESA overrode terms set forth in the permits, and the SWRCB implemented the suggested alternatives.[191] The alternatives restricted "the time and manner in which water could be pumped from the Delta, thereby limiting the water otherwise available to the water distribution systems."[192] The water users brought suit against the federal government, alleg-

184. *Id.* at 320 (quoting para. 18(f) of the water supply contract).

185. *Id.* at 315. The winter-run chinook salmon was listed as a threatened species under the Endangered Species Act in November, 1990. 50 C.F.R. § 17.11 (2001). As a federal agency, the Bureau has "an affirmative duty to ensure that its actions [do] not jeopardize endangered species." NRDC v. Houston, 146 F.3d 1118, 1127 (9th Cir. 1998). The Bureau's negotiation and renewal of dam water service contracts constitutes an "agency action" under the ESA, thus requiring consultation. *Id.* at 1125.

186. *Tulare*, 49 Fed. Cl. at 315.

187. *Id.*

188. *Id.* The delta smelt was subsequently listed as threatened in March, 1993. 50 C.F.R. § 17.11 (2001).

189. *Tulare*, 49 Fed. Cl. at 315–16.

190. *Id.* at 316.

191. *Id.*

192. *Id.*

ing that the restrictions deprived Tulare Lake Basin Water Storage District of 58,820 acre-feet of water between 1992 and 1994 and Kern County Water Agency of at least 319,420 acre-feet.[193] These restrictions resulted in an overall reduction of approximately 0.11 percent and 2.92 percent of the available water, respectively.[194]

The court ruled for the plaintiffs on summary judgment.[195] Although the contracts included terms that limited the state and its agents' liability due to water shortages, the court held that this language protected only the state from liability; the federal government had no such immunity.[196] Holding that the language in the contract did not preclude a takings claim against the federal government enabled the court to reach the issue that prior courts failed to directly address—whether a taking of plaintiffs' water rights had occurred.[197] The court determined that a physical taking had occurred, requiring compensation by the government.[198] The court concluded that "[t]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."[199]

B. Limiting Liability Through Contract Language

Just as the language in the water delivery contracts dictated the outcome in prior cases, the court in *Tulare* reached the issue of whether a taking had occurred only because the language in the contract did not preclude such a finding. The court specifically distinguished *O'Neill*, finding it inapplicable to this case. In *O'Neill*, the contract was between the water districts and the federal government, and the contract language exempted the federal government for shortages for any cause.[200] In *Tulare*, the contract was between the water districts and the state. As a result, the language in the contract limited the state's liability for water shortages rather than the

193. *Id.*

194. Melinda H. Benson, *The* Tulare *Case: Water Rights, The Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 560 (2002) [hereinafter Benson, *The* Tulare *Case*].

195. *Tulare*, 49 Fed. Cl. at 324.

196. *Id.* at 321.

197. *Id.* at 318.

198. *Id.* at 324.

199. *Id.*

200. O'Neill v. United States, 50 F.3d 677, 684 (9th Cir. 1995).

federal government's.[201] The *Tulare* court therefore concluded that the federal government had no immunity from suit for the limitations imposed under the ESA.[202]

In *Tulare*, the SWP conferred the right to use certain quantities of water to county water districts by contract.[203] The water available to users each year depended on many different natural factors; as a result, the permits included provisions that limited the state's liability for "shortages due to drought or other causes beyond [the state's] control."[204] Although the government claimed that this clause rendered the property interest in the water contingent on the availability of water, the court determined that it merely provided DWR with a defense in certain breach of contract claims.[205] The court otherwise found that the contract rights to the water were fully formed.[206] The contract language in this case insulated DWR—which was sharing a coordinated pumping system with the federal CVP project—from liability for causes beyond its control; however, it did not insulate the federal government.[207] The court distinguished *O'Neill*, pointing to the fact that the contracts in *O'Neill* were between the water districts and the federal government. The federal government in *O'Neill* benefited from language in the contract protecting it from liability for shortages caused by compliance with the ESA.[208] In *Tulare*, although the contract language insulated the DWR from liability for causes beyond its control, it did not insulate the federal government.[209]

Based on the analysis of *Tulare* and prior case law, water users will only be able to bring a takings claim against the federal government when the contract does not absolve the federal government from liability. Because water contracts often include language limiting the government's liability, whether or not the federal government is a party to the contract will be a crucial factor in the analysis. Where the contracts explicitly absolve the federal government from liability, current case law

201. 49 Fed. Cl. at 321.
202. *Id.*
203. *Id.* at 315.
204. *Id.*
205. *Id.* at 321.
206. *Id.*
207. *Id.*
208. O'Neill v. United States, 50 F.3d 677, 689 (9th Cir. 1995).
209. 49 Fed. Cl. at 321.

indicates that a takings claim likely will not be successful. Although not all current contracts may absolve the federal government from liability, the federal government may limit potential takings claims by drafting future water contracts to include the necessary liability-limiting language. In addition, the federal government could work with the states to add language to water contracts absolving the federal government from liability, even where it is not a party to the contract. Such language would insulate the federal government from future takings claims.

C. *An Incorrect Application of Federal Takings Jurisprudence*

In cases where water contracts fail to include the necessary liability-limiting language, or where the state is the water-delivering body rather than the federal government, courts may reach the takings claim, as did the court in *Tulare*. In *Tulare*, the water users sought compensation under the Fifth Amendment for the taking of their contractually conferred water rights as a result of the federal government's imposition of use restrictions under the ESA.[210] The water users argued that a physical taking of property resulted, as opposed to a regulatory taking, based on the theory that their contract rights entitled them to the use of a specific quantity of water.[211] They claimed that "the government deprived them of the entire value of their contract right" by failing to deliver the specified quantity.[212] The court agreed with the water users and determined that the resulting intrusion was "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."[213] The court declared that "[t]o the extent, then, that the federal government, by preventing [the water users] from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking."[214] The court specifically denied the govern-

210. *Id.* at 314.
211. *Id.* at 318.
212. *Id.*
213. *Id.* at 319 (quoting United States v. Causby, 328 U.S. 256, 265 (1946)).
214. *Id.* at 319.

ment's attempts to define its actions as mere regulation of the water users' diversion rather than a physical taking.[215]

As demonstrated below, the *Tulare* court erred in determining that a *physical* taking resulted from the government's restrictions on the plaintiffs' use of their water rights under the ESA. The court incorrectly analyzed the nature of water rights and thus erred in applying a physical taking analysis to the rights in this case. Because of the nature of the rights and the fact that the governmental action in this case was a regulation of their use, the court should have analyzed the takings claim under the Supreme Court's regulatory takings jurisprudence.

1. A Physical Takings Analysis Is Inappropriate

The *Tulare* court held that by limiting plaintiffs' use of an amount of water to which they were entitled under a contract, the government took "complete occupation of [the] property—an exclusive possession of plaintiffs' water-use rights." To the extent use of water was denied under the contracts, the court found that the government had substituted itself as the user and "totally displaced the contract holder." Based on this analysis, the court determined that "deprivation of water amounts to a physical taking."

This analysis ignores the unique nature of water rights. As mentioned above, users do not own the physical water in the stream, and free flowing water is not considered personal property.[216] Rather, users have a usufructuary right to divert and beneficially use a certain quantity of water.[217] The permit also limits the right by time, parcel of land, and amount of use.[218] Based on the usufructuary nature of water rights, it is incorrect for the court to regard the government as having physically taken some of the water from the stream. Under the mandates of the ESA, the government limited the timing and manner of diversion of water so that more water would be left in the streams. Although it is true that the water users were prevented from using some of the water they were entitled to, this was only a fraction of the total water right.[219] Because the

215. *Id.* at 319–20.
216. *See supra* Part IV.A.
217. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 83 (2d ed. 1990).
218. TARLOCK, CORBRIDGE & GETCHES, *supra* note 20, at 300.
219. *Tulare*, 49 Fed. Cl. at 318–19.

right to use water is defined by diversion and use over a period of time, the restriction on use of a certain amount is not a physical taking of an amount of water, but rather a restriction on the pumping of water during certain periods covered by the contract. It is therefore more accurate to say that the water user's ability to use the water was restricted by government regulation rather than physically taken by the government.

The *Tulare* court relied on *International Paper Co. v. United States*[220] to support its determination that the government's limitations on the use of water resulted in a complete physical seizure of the property.[221] *International Paper* supports the idea that water rights, like any other type of property rights, can be taken under the Fifth Amendment, thus requiring compensation.[222] In *International Paper*, the Supreme Court specifically stated that:

> The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use.[223]

The *Tulare* court misconstrued this language and incorrectly used it to support the finding of a physical taking. In *International Paper*, the government was exercising its power of eminent domain.[224] Under its power of eminent domain, the government purposefully and actively diverted the entire quantity of water to which the plaintiff was entitled.[225] This power of eminent domain was not a regulation that had the effect of restricting plaintiff's use. Instead, the government's action was a purposeful physical invasion of the property interest. The government action in *International Paper* is thus distinguishable from that in *Tulare* because the government purposefully engaged in physically taking plaintiff's water and removing it from plaintiff's possession. Unlike the government's active use of the water in *International Paper*, in *Tulare* the government passively required the water users to leave the water in the

220. 282 U.S. 399 (1931).
221. *Tulare*, 49 Fed. Cl. at 319.
222. 282 U.S. at 407.
223. *Id.*
224. *Id.* at 405–06.
225. *Id.*

stream. In *Tulare* the government did not take the water and use it for another purpose; rather, the government passed a regulation that resulted in passive restrictions on the water users' use of their property.

Likewise, the *Tulare* court's reliance on *United States v. Causby*[226] to support its finding of a physical taking was also misplaced.[227] In *Causby*, army and navy aircraft frequently flew at low altitudes directly over the plaintiff's land.[228] The Supreme Court in *Causby* stated that

> If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.[229]

The *Tulare* court stated that this language was instructive in the water rights context, where limitations on the use would result in "exclusive possession of the plaintiffs' water use rights."[230] Based on this analogy, the *Tulare* court held that the occupation by the government resulted in a complete invasion of the property right and thus a physical taking.[231]

This analogy is misplaced because of the dramatically different nature of the government actions in the two cases. In *Causby*, the government was flying army and navy airplanes low to the ground over plaintiff's property.[232] The Court was extending physical invasions of land to physical invasions of the air above the land.[233] According to the Court, these actions constituted a physical invasion of the plaintiff's land by the government.[234] Just as in *Loretto v. Teleprompter Manhattan CATV Corp.*, a physical taking resulted because there was a physical occupation of the plaintiff's domain.[235] The Supreme Court observed that "when the 'character of the governmental action' is a permanent physical occupation of property, our

226. 328 U.S. 256, 265 (1946).
227. *Tulare*, 49 Fed. Cl. at 319.
228. 328 U.S. at 258.
229. *Id.* at 261.
230. 49 Fed. Cl. at 319.
231. *Id* at 319–20.
232. 328 U.S. at 259.
233. *See id.* at 265.
234. *See id.*
235. 458 U.S. 419, 431–32 (1982).

cases uniformly have found a taking to the extent of the occupation."[236] In *Tulare*, the government did not physically seize or occupy the property; the plaintiffs' use of their water rights was merely limited by the ESA, a government regulation. Although it is possible to argue that a regulation can have the *same effect* as if the government had taken exclusive possession of a property right, it is inappropriate to call the result a *physical taking*. In that situation, one must argue that the government regulation has resulted in a *regulatory taking*.

2. Regulatory Taking: A More Appropriate Analysis

The *Tulare* court should have analyzed the facts under the Supreme Court's regulatory takings jurisprudence. The Supreme Court in *Tahoe-Sierra* made it clear that for purposes of the Fifth Amendment takings analysis there is a crucial distinction between a regulation affecting use, such as in this case, and the physical appropriation of property.[237]

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. *"This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," instead the interference with property rights "arises from some public pro-*

236. *Id.* at 434 (quoting Penn Cent. Transp. Corp. v. City of New York, 438 U.S. 104, 124 (1978)) (citation omitted).

237. 122 S. Ct. 1465, at 1479–80 (2002).

> *gram adjusting the benefits and burdens of economic life to promote the common good."*[238]

This language illustrates that the Supreme Court is determined to maintain a strict line between physical and regulatory takings. Although this line may have blurred somewhat with *Lucas*, the Court has reasserted the "longstanding distinction" between the classic case of physical appropriation of property by the government and a case where a government regulation affects the use of an owner's private property.[239] The Court's sharp delineation must therefore inform the takings analysis in cases such as *Tulare*.

The ESA requirements placed on the water users in *Tulare* were restrictions on the *use* of the water. The plaintiffs were restricted in both the rate and timing of pumping water from the project, and therefore the government regulation interfered with the plaintiffs' use of their property.[240] This government regulation is comparable to the regulation at issue in *Penn Central*.[241] In that case, when the government designated Grand Central Terminal in New York City a landmark it had the effect of imposing "restrictions upon the property owner's options concerning use of the landmark site."[242] Because the use of the property was limited by government regulation rather than physically invaded by the government, the Supreme Court analyzed the taking claim as a regulatory taking

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238. *Id.* (quoting Eastern Enters. v. Apfel, 524 U.S. 498, 522 (1998); *Penn Central*, 438 U.S. at 124) (citation omitted) (emphasis added).

239. *Id.* One commentator has aptly pointed out the difficulties that arise in trying to draw the line between physical occupations and regulations of use:

> Why, for example, should an owner be compensated if the government floods one portion of a large tract of land, but the owner be denied compensation if he is barred by regulation from using the same portion for any economically valuable purpose? Likewise, why would it be appropriate for the government to pay when it physically occupies private property for one year, but to deny compensation to an owner denied all use of the property for a longer period?

Echeverria, *supra* note 117, at 11,243. Nevertheless, as Echeverria points out, in *Tahoe-Sierra* the Court has rejected this argument and drew a sharp boundary between physical and regulatory takings, insisting that regulations prohibiting private uses be treated as regulatory takings. *Id.*

240. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318–20 (2001).

241. 438 U.S. 104 (1978).

242. *Id.* at 111.

rather than a physical taking.[243] Similarly, in *Tulare* it was the use of the water that was impacted by the government regulations.

The *Tulare* court thus used the wrong analysis to determine whether a taking resulted from temporary restrictions on the *use* of water. Whether a taking results from temporary restrictions is critical to water users because often only temporary limits on use will result, rather than restrictions that last for the entire permit period. Whether the government's actions result in a taking in this context is more appropriately determined under a regulatory takings analysis.[244]

Under this jurisprudence, some water users may argue that a categorical *Lucas* taking results during those periods when restrictions result in a complete lack of available water for users. However, under the Supreme Court's takings jurisprudence, including the recent *Tahoe-Sierra* holding, this situation is appropriately examined under the *Penn Central* analysis.

The restrictions in *Tulare* only limited water use for a "fraction of the master contract's overall value."[245] Water users may be inclined to argue that a categorical taking resulted under *Lucas* for those periods where water use was completely restricted. Under *Lucas*, where "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[246] One could argue that for those periods where use was completely restricted, the water right was rendered completely valueless. The court in *Tulare* based its determination of a physical taking on this idea, stating that "by preventing users from using the water to

243. *Id.* at 124–25.

244. The conclusion that a regulatory taking analysis is appropriate is supported by the only case that directly addresses a taking of private property under the ESA. Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988). In *Hodel*, a rancher was fined for his "take" of a threatened species after he shot a grizzly bear that was threatening his sheep. *Id.* at 1327. The court rejected the plaintiff's argument that the loss of his sheep constituted a physical taking of his property by the federal government. *Id.* at 1335. In particular, the court stated that the plaintiff's focus on a *physical* taking was incorrect, holding that "defendants properly focus on the regulations." *Id.* at 1334. The court stated that "[t]he losses sustained by the plaintiffs are the incidental, and by no means inevitable, result of reasonable regulation in the public interest." *Id.* at 1335.

245. *Tulare*, 49 Fed. Cl. at 319.

246. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

which they would otherwise have been entitled, the government rendered the usufructuary right to that water valueless."[247] Although a determination as to whether the water right has been rendered valueless is not part of the inquiry in physical takings, it is the appropriate test for determining when a *Lucas* categorical taking has resulted.

Even if the water right is rendered valueless for those periods where temporary restrictions are in place, a categorical *Lucas* taking has not resulted. In *Tahoe-Sierra*, the Court directly addressed temporary restrictions and concluded that the *Penn Central* approach is the correct one in these circumstances.[248] Where government regulations result in temporary restrictions on water use, the property will not be considered valueless because the property rights will regain value as soon as the temporary restrictions are lifted.[249] Although the ESA imposed restrictions on the use of water in *Tulare*, these were nevertheless temporary restrictions on use of the water right. The water users continued to use water at various times throughout the permit season and beyond, at which point the water rights regained their value.

Where property has not been rendered valueless as a whole, there is still a claim for a taking under the traditional *Penn Central* approach,[250] which considers the "economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-

247. 49 Fed. Cl. 313, 319 (2001).

248. 122 S. Ct. 1465, 1489 (2002).

249. *Id.* Although the duration of the restriction was an important factor for the court in *Tahoe*, in that case a moratorium for thirty-two months survived scrutiny.

250. *Lucas*, 505 U.S. at 1019–20 n.8. This is the analysis that would likely apply to ESA restrictions on real property. The *Tulare* court specifically based its determination that a physical taking had occurred on the nature of the water right. The court's holding would not apply to regular restrictions on real property because these regulatory restrictions would clearly not implicate a physical taking argument. In the context of real property, it will be much more difficult to argue that the ESA renders the property completely valueless. Where the property is not rendered valueless, the plaintiff would need to show that a taking results under the test of *Penn Central*. Under this test, it will be difficult for a plaintiff to show that a taking of real property has resulted. Even if the court's analysis in *Tulare* is upheld, difficult hurdles remain for landowners who are seeking compensation for the loss of use of their land as a result of the ESA. *See generally* Meltz, *supra* note 72.

backed expectations."[251] This is the most difficult of takings claims for courts because it is "characterized by 'essentially ad hoc, factual inquiries' designed to allow 'careful examination and weighing of all the relevant circumstances.'"[252]

The argument that a taking has resulted under the *Penn Central* analysis is particularly difficult in the water rights context. The three factor test in *Penn Central* includes "the economic impact of the regulation[,] . . . the extent to which the regulation has interfered with distinct investment-backed expectations[, and] . . . the character of the governmental action."[253] The *Penn Central* Court applied these factors and determined that regulations designating a building a historic landmark, thus limiting the use of the building, did not result in a taking.[254] Under this analysis, it is difficult to show a taking has resulted in those situations where the ESA results in temporary restrictions on the use of water rights.

Particularly in the case of temporary restrictions on water use, the economic impact of the regulation will not likely interfere with the "primary expectation concerning the use of the parcel."[255] Because the parcel is viewed as a whole, one must consider the economic impact on the water right as a whole. Where the restrictions result in only *de minimis* limitations on the total water allocation, likely the economic impact will be slight. This was the case in *Tulare.* The restrictions resulted in reductions of approximately 0.11 percent and 2.92 percent of the water available to the plaintiffs.[256] Under the reasoning of *Tahoe-Sierra*, because water use was not restricted for the entire period defined by permit, plaintiffs were denied only a *de minimis* portion of their entire water rights. In addition, based

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251. Penn Cent. Transp. Corp. v. City of New York, 438 U.S. 104, 124 (1978). Legal scholars have already suggested that the analysis of this scenario as a regulatory taking rather than a physical taking would be more appropriate. According to Professor Tarlock, although "[t]he court applied the per se physical invasion test . . . the *Penn Central* balancing test would have been more appropriate. The relevant issue is the extent of the proven frustration of investment-backed expectations." Tarlock, *supra* note 148, at 783 n.90 (citation omitted); *see also* Benson, *The* Tulare *Case*, *supra* note 194. For arguments supporting a physical taking in this case, see Jesse W. Barton, Tulare Lake Basin Water Storage District v. United States: *Why It Was Correctly Decided And What This Means For Water Rights*, 25 ENVIRONS ENVTL. L. & POL'Y J. 109 (2002).

252. *Tahoe-Sierra*, 122 S. Ct. at 1478 (citation omitted).

253. *Penn Central*, 438 U.S. at 124.

254. *Id.* at 138.

255. *Id.* at 136.

256. Benson, *The* Tulare *Case*, *supra* note 194, at 560.

on some of the language in *Tahoe-Sierra* regarding the length of the restrictions, even if water is unavailable for an entire year it is possible that the economic impacts will not rise to the level of a Fifth Amendment taking requiring compensation.

Just as in *Penn Central*, the restrictions on the use of water in this case "are substantially related to the promotion of the general welfare."[257] Here the character of the government action is similar to that in *Penn Central*, where the law "place[d] special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives."[258] Congress has made a clear pronouncement that the survival of endangered species is critical to the future of our environment. The Supreme Court has affirmed this purpose, stating that species must be protected *whatever the cost*.[259]

Therefore, the focus of the inquiry in applying the *Penn Central* three-part test to the facts in *Tulare* rests in "the extent to which the regulation has interfered with distinct investment-backed expectations."[260] Because of the very nature of water rights, the investment-backed expectations of water users include the recognition that water rights are limited by definition. The regulatory regime regarding water rights implies limits through use, the public trust doctrine, and the permit itself. The unique nature of water rights makes them less certain than rights in other types of property. Because this regulatory regime makes water rights less certain, it also makes investment-backed expectations in water rights less certain. As a result of these inherent limitations on the title, it would be very difficult to prove that a water user's investment-backed expectations have been infringed to the degree that compensation is required.

The Supreme Court in *Tahoe-Sierra* made clear that there is a distinct difference between physical and regulatory takings. Although the court in *Tulare* held that the facts suggested a physical taking, analysis of the government action as a potential regulatory taking is more appropriate. Although it is possible to argue that a regulation can have the *same effect* as if the government had taken exclusive possession of a property right, it is inappropriate to call the result a *physical taking*. In

257. *Penn Central*, 438 U.S. at 138.
258. *Id.* at 110.
259. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).
260. *Penn Central*, 438 U.S. at 124.

Tulare, governmental regulations resulted in restricted water deliveries to the plaintiffs, rather than a physical occupation of their property. Because these restrictions were only temporary, under *Tahoe-Sierra* it is most appropriate to analyze this type of claim under the *Penn Central* multi-factor approach. Because water rights are inherently limited, it should be difficult to argue that the restrictions imposed on the rights rise to the level of a compensable taking. If the court had applied the more appropriate *Penn Central* analysis, therefore, the court likely would not have concluded that a taking resulted under the facts of *Tulare*.

3. A Possible Explanation: The Court of Federal Claims

The holding of *Tulare* may be a unique product of the court that decided it. The Court of Federal Claims has jurisdiction over claims by citizens against the federal government based on "a Constitutional provision, a congressional or executive regulation, a government contract, or a monetary claim in a case not sounding in tort."[261] The Court of Federal Claims is the only forum in which a plaintiff can bring a claim against the United States in excess of ten thousand dollars,[262] and takings cases make up one-fifth of the court's caseload.[263] Although one would expect courts of such specialized jurisdiction to develop a body of sound, well-considered jurisprudence in its realm of expertise, the Court of Federal Claims and the Federal Circuit Court of Appeals[264] are sources of takings jurisprudence that are often criticized and not followed by other courts, including the Supreme Court.

The Court of Federal Claims has been criticized by many, including environmentalists,[265] for being "conservative and

261. Danielle M. Stager, Note, *Takings in the Court of Federal Claims: Does the Court Make Takings Policy in* Hage*?*, 30 U. RICH. L. REV. 1183, 1200 (1996).

262. David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 821 (1999).

263. Stager, *supra* note 261, at 1200.

264. Cases from the Court of Federal Claims are reviewed by the Federal Circuit Court of Appeals.

265. Stager, *supra* note 261, at 1200–01.

ideological"[266] and overly supportive of private property owners.[267] Furthermore, as of 1999 "[t]he Federal Circuit has reversed findings of no taking and entered judgment for plaintiffs in at least half a dozen instances, but has yet to reverse a takings judgment and enter judgment for the government."[268] The Supreme Court unanimously reversed the one Federal Circuit takings case it has reviewed.[269] As one commentator concluded, "the [Court of Federal Claim]'s inherent policy . . . is to *protect* private property rights from governmental takings," and "[t]his idea of protecting private property is a policy created by the judiciary."[270] Clearly the fact that the Court of Federal Claims leans toward protecting property owners does not mean that the *Tulare* case will automatically be overturned. However, it does offer one plausible explanation for the court's questionable takings analysis and subsequent holding.

VI. WHAT REMAINS OF THE ENDANGERED SPECIES ACT AND WESTERN WATER RIGHTS AFTER *TULARE LAKE BASIN WATER STORAGE DISTRICT V. UNITED STATES*?

Despite the fact that the finding of a physical taking will rarely be reached because of the presence of liability limiting language in most reclamation contracts, and the possibility that future courts may not find a physical taking even under these facts, *Tulare* nevertheless is an extremely important case

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266. Coursen, *supra* note 262, at 829. *See generally* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).

267. Stager, *supra* note 261, at 1200–01. For examples of such cases, see *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989); *Florida Rock Industries v. United States*, 8 Cl. Ct. 160 (1985). Commentaries on the Court of Federal Claims's takings decisions include Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171 (1995); Timothy G. Warner, *Recent Decisions by the United States Claims Court and the Need for Greater Supreme Court Direction in Wetlands Taking Cases*, 43 SYRACUSE L. REV. 901 (1992); Patrick Kennedy, Comment, *The United States Claims Court: A Safe "Harbor" From Government Regulation of Privately Owned Wetlands*, 9 PACE ENVTL. L. REV. 723 (1992); George W. Miller & Jonathan L. Abram, *A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit*, 42 CATH. U. L. REV. 863 (1993).

268. Coursen, *supra* note 262, at 830.

269. *Id.* In *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the court unanimously reversed, finding that an unconstitutional taking had not occurred.

270. Stager, *supra* note 261, at 1202–03.

in the continuing conflict between the mandates of the ESA and western water rights.

A. Tulare *Is an Important Decision in Light of the Breadth of Reclamation in the West*

The factual scenario that arose in *Tulare* is one that can and does arise throughout the West, making the decision a key part of the development of western water law. The Bureau has played an integral role in the development of water throughout the West.[271] "No federal agency has likely changed the face of the West as much as the U.S. Bureau of Reclamation."[272] Today the Bureau continues to play a large role in the distribution of developed water via large water projects located throughout the western states.[273] Because the ESA requires compliance by federal agencies, including the Bureau, the ESA affects each of these water projects.[274] The impacts of the ESA are even more pronounced because of the large numbers of endangered or threatened fish that rely on this water.[275] As of 1996, sixty-eight fish species were listed as either endangered or threatened in the seventeen western states; eighty-six species were listed as candidate species.[276] In addition, 184 plant and animal species other than fish whose habitats are affected by federal reclamation projects are either listed or proposed for listing.[277] Finally, water deliveries to irrigators will continue to be limited as shortages occur, especially when the effects of increasing drought are felt throughout the West.[278] These circumstances converge to create numerous situations similar to those in *Tulare*. Thus, irrigators will continue to bring claims that their property rights in water have been "taken" under the Fifth Amendment.

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271. Moore, *supra* note 3, at 320. *See generally* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 219–92 (1992).

272. Michael Milstein, *West Wages 100-Year War over Water*, THE OREGONIAN, June 18, 2002, at A4.

273. Moore, *supra* note 3, at 320.

274. *Id.*

275. *Id.*

276. *Id* (including a complete listing of the species listed).

277. *Id* at 320–21.

278. Tarlock, *supra* note 148, at 774; *see also* Ralph Vartabedian, *West Comes Up Dry on Plans for Drought: Modern Trends Get in the Way of Solutions As Key Reservoirs Fall Below Capacity*, L.A. TIMES, Dec. 9, 2002, The Nation, at 1.

In fact, water users in the Klamath Basin recently brought a similar suit in the United States Court of Claims as a result of limited water deliveries during the summer of 2001.[279] Just as in *Tulare*, the Bureau withheld water from farmers in order to maintain the river at a level necessary to protect threatened and endangered species.[280] The local irrigation districts sued the United States, seeking compensation for the water they failed to receive as a result of the Bureau limiting water deliveries in order to comply with the ESA.[281] Although differences between the water contracts may lead to a different outcome in court,[282] the lawsuit may be the first of many to test the limits of *Tulare*.[283]

B. *How Shall the Balance Be Struck and Who Should Bear the Burden?*

The ESA has always been a source of contention. Some have called the saving of species "asinine."[284] Others have advocated for legislation that protects species despite its costs.[285] According to Professor Houck, "[o]ne argument is based on our long-standing concern for wildlife. The other is based on our long-standing concern for ourselves."[286] As a result of this contention, many question how to balance private property rights and the mandates of the ESA when they come into conflict. One commentator has phrased the question: "Where there is

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279. Milstein, *supra* note 76.

280. *Id.*

281. *Id.*

282. *Id.*

283. Conflict between private rights and the Endangered Species Act have also arisen in New Mexico, where the endangered silvery minnow lies at the center of a debate over the level of water in the Rio Grande. Jehl, *supra* note 5. Environmental groups brought suit seeking an order requiring increased flows in the Rio Grande in accordance with the Endangered Species Act. *Greater Water Flow Is Ordered to Aid Fish*, N.Y. TIMES, Sept. 19, 2002, at A32. The case is unique in that the environmentalists are challenging the city of Albuquerque, arguing that water must be taken from the city's storage in order to protect the endangered species. Jehl, *supra* note 5. Colorado, Idaho, South Dakota, Oklahoma, Nebraska, and Wyoming have joined the city of Albuquerque and New Mexico in arguing against the releases, thus setting the stage for what may prove to be "the most direct confrontation yet" between the ESA and western water rights. *Id.*

284. Houck, *supra* note 3, at 297 (regarding a letter to the editor pertaining to the prohibition of filling the reservoir behind Tellico Dam in order to protect the snail darter). *See generally* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

285. *See* Snodgrass, *supra* note 76, at 278.

286. Houck, *supra* note 3, at 332.

insufficient water for both purposes, how shall the balance be struck?"[287] Even the court in *Tulare* stated that the "intersection of [these] concerns, and the proper balance between them, lie at the heart of this litigation."[288]

However, given the broad interpretation of the ESA, it may be inappropriate to discuss how the balance should be struck. At the heart of the contention over the ESA is the issue of who must bear the burden of the protection of species. Under the ESA, the mandate has been broadly construed to extend to private property owners.[289] In Justice Scalia's dissent in *Sweet Home*,[290] however, he clearly states his belief that the ESA is and should be narrowly tailored so that the burden does not fall on the private property owner: "The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species."[291]

Because the conflict involves such deeply held beliefs about the nature of private property rights and our environment, it is clear that *Tulare* has not settled the conflict. The *Tulare* court attempted to put the burden on the federal government to pay for the protection of species. However, despite the court's holding, *Tulare* has not settled the ultimate question of who shall bear the burden of the ESA's requirements.

CONCLUSION

Although much about western water rights and the ESA remains uncertain, it is clear that this uncertainty arises from the contentiousness that surrounds both the ESA and the Fifth Amendment's guarantees. In *Tulare*, these two legal issues came into direct conflict. Despite the Federal Court of Claims's finding of a taking in *Tulare*, the issues are far from resolved. Although the court found that a physical taking had occurred,

287. Melissa K. Estes, Comment, *The Effect of the Federal Endangered Species Act on State Water Rights*, 22 ENVTL. L. 1027, 1043 (1992).

288. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (2001).

289. Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (1995).

290. *See supra* Part II.

291. *Sweet Home*, 515 U.S. at 735–36.

it is more appropriate to analyze this scenario under the Supreme Court's regulatory takings jurisprudence. If the factual scenario in *Tulare* had been analyzed under a regulatory takings approach, the court likely would have held that the government's regulations in this case did not rise to the level of a compensable taking. The court's decision also turned on the language of the contract, suggesting that contract language can be added to future contracts to limit the liability of the federal government and prevent future takings. Despite these limitations on the applicability of *Tulare*, the case is nevertheless critical for future discussions of takings jurisprudence, of water management in the West, and of future implications of the ESA. Because of the pervasiveness of the Bureau's projects in the West and the frequency of limitations on water deliveries, factual scenarios similar to *Tulare* will continue to arise, and further takings claims will be brought.

One conclusion that may be drawn from the conflict is that the ESA is here to stay, regardless of a finding that its mandates have resulted in a taking. Even the *Tulare* court recognized that the ESA and its burdens on private property owners are permanent fixtures. The conflict now centers on whether the government "must simply pay for the water it takes"[292] to protect endangered species, or whether this cost will be borne by water users. Although the *Tulare* court determined that the federal government should bear this burden, the conflict between the ESA and private property rights remains. It is clear, however, that Congress and the courts agree that species must be protected, whatever the cost. Upon whose shoulders this burden ultimately will be placed must be left for a higher court.

292. *Tulare*, 49 Fed. Cl. at 324.